No. 17-1679

In the Supreme Court of the United States

ROBERT H. GRAY,
Petitioner,
v.
ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE JEREMY C. DOERRE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Jeremy C. Doerre is an attorney who believes that judicial review is an important check on administrative agency action, especially with respect to veterans seeking review of action by the Department of Veterans Affairs (VA). Amicus has no stake in any party or in the outcome of this case.

SUMMARY OF THE ARGUMENT

Petitioner asks "whether the Federal Circuit has jurisdiction under 38 U.S.C. § 502 to review an interpretive rule reflecting VA's definitive interpretation of its own regulation, even if VA chooses to promulgate that rule through its adjudication manual."[2]

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae or amicus curiae's counsel made such a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief. A copy of written consent from the Petitioner and the Respondent was provided to the Clerk upon filing.

[2] Pet. i.

38 U.S.C. § 502 provides for judicial review of "[a]n action of the Secretary to which section 552(a)(1) … of title 5 … refers." Petitioner urges that the Federal Circuit has jurisdiction under 38 U.S.C. § 502 to review "interpretation[s] of general applicability… within the plain language of Section 552(a)(1)(D)"[3] even when such interpretations are promulgated through a VA adjudication manual.

Amicus concurs, but submits this brief to suggest that even assuming *arguendo* that Petitioner's question is not answered broadly in the affirmative, review should still be available where, as here, such an interpretation represents a revision under 5 U.S.C. § 552(a)(1)(E) of a prior "interpretation[] of general applicability formulated and adopted by the agency" that was published in the Federal Register in accordance with 5 U.S.C. § 552(a)(1)(D).[4]

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[3] Pet. 10 (referencing 5 U.S.C. § 552(a)(1)(D)).

[4] Amicus notes that this issue of whether review is available under 38 U.S.C. § 502 because an interpretation represents a revision under 5 U.S.C. § 552(a)(1)(E) was raised in the companion case decided together with the present case below, *Blue Water Navy Vietnam Veterans Association v. Secretary of Veterans Affairs*, no. 2016-1793 (Fed. Cir. Nov. 16, 2017), which case Amicus believes has been vided with the present case. See App. 6a-7a (Excerpt of Brief for Petitioner, *Blue Water Navy Vietnam Veterans Association v. Secretary of Veterans Affairs*, no. 2016-1793 (Fed. Cir. filed Sep. 1, 2016) ("the Court is empowered under this provision to review the final agency action

The present case arises as a result of amendments by VA to its M21-1 Manual. Petitioner urges, in accord with Judge Dyk dissenting in part from the decision below, that VA's February 2016 M21-1 Manual amendments "announce 'interpretations of general applicability' subject to § 552(a)(1)'s publication requirement and, accordingly, to [] review under § 502,"[5] even though VA chose to issue such interpretations through its adjudication manual.

Amicus submits this brief to suggest that these M21-1 Manual amendments should especially be subject to judicial review under 38 U.S.C. § 502 because they also represent a revision under 5 U.S.C. § 552(a)(1)(E) of a prior "interpretation[] of general applicability formulated and adopted by the agency" under 5 U.S.C. § 552(a)(1)(D) that was published in the Federal Register.

In particular, VA previously published in the Federal Register its interpretation that, with respect to the presumption of exposure to a herbicide agent

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because, as stated supra., the regulation is referred to by U.S.C. § 552[1][B] [C][D] and [E]" (brackets in original); "[t]he regulation … is an interpretation of general applicability formulated and adopted by the agency and is a revision and/or amendment of the foregoing."))

[5] Pet. App. 26a (Dyk, J., dissenting in part and concurring in the judgment).

under 38 U.S.C. § 1116, "serv[ice] 'in the Republic of Vietnam' … includes the inland waterways."[6]

The M21-1 Manual amendments represent a revision of this prior interpretation that arbitrarily excludes some inland waterways from qualifying as service in the Republic of Vietnam based on salinity, irrespective of their inland geographic location. Notably, VA's attempt to classify waterways based on salinity is not merely a clarification of the term inland, and excludes from classification as inland, and thus from qualifying as service in the Republic of Vietnam, some waterways which are clearly inland simply because they contain brackish water.

Accordingly, because the M21-1 Manual amendments represent a revision under 5 U.S.C. § 552(a)(1)(E) of a prior "interpretation[] of general applicability formulated and adopted by the agency" under 5 U.S.C. § 552(a)(1)(D) that was published in the Federal Register, they are subject to judicial review under 38 U.S.C. § 502 as "[a]n action of the Secretary to which section 552(a)(1) … of title 5 … refers."[7]

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[6] 66 Fed. Reg. 23,166, 23,166 (May 8, 2001).

[7] 38 U.S.C. § 502.

ARGUMENT

I. VA previously published in the Federal Register its "interpretation[] of general applicability formulated and adopted by the agency"[8] that, with respect to a presumption of exposure to a herbicide agent under 38 U.S.C. § 1116, "serv[ice] 'in the Republic of Vietnam' ... includes the inland waterways."[9]

38 U.S.C. § 1116 provides, "[f]or purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent," a presumption of exposure to a herbicide agent for veterans who "served in the Republic of Vietnam" during a prescribed time period.[10]

VA has periodically published both "substantive rules of general applicability, and … interpretations of general applicability formulated and adopted by the agency"[11] related to this presumption of exposure to a herbicide agent under 38 U.S.C. § 1116.

In a 2001 Federal Register notice for a final rule, VA published its interpretation that, with respect to

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[8] 38 U.S.C. § 552(a)(1)(D).

[9] 66 Fed. Reg. 23,166, 23,166 (May 8, 2001).

[10] 38 U.S.C. § 1116.

[11] 38 U.S.C. § 552(a)(1)(D).

this presumption, "serv[ice] 'in the Republic of Vietnam' … includes the inland waterways."[12]

Over a decade later, in a subsequent 2012 Federal Register notice, VA explicitly acknowledged this longstanding interpretation of general applicability that had been formulated and adopted by the agency, noting that with respect to "a presumption of herbicide exposure for veterans who had served in Vietnam and who developed a disease associated with Agent Orange exposure[,] [t]he presumption applies to those who served in the Republic of Vietnam … on its inland waterways."[13]

Thus, there does not appear to be any dispute that VA has published in the Federal Register, in accordance with 5 U.S.C. § 552(a)(1)(D), its "interpretation[] of general applicability formulated and adopted by the agency" that, with respect to the presumption of exposure to a herbicide agent under 38 U.S.C. § 1116, "serv[ice] 'in the Republic of Vietnam' … includes the inland waterways."[14]

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[12] 66 Fed. Reg. 23,166, 23,166 (May 8, 2001) (In particular, in response to a "commenter urg[ing] VA to use this rulemaking to define service in the Republic of Vietnam to include service in Vietnam's inland waterways or its territorial waters," VA published its interpretation of general applicability formulated and adopted by the agency that "this term includes the inland waterways.")

[13] 66 Fed. Reg. 76,170, 76,171 (Dec. 26, 2012).

[14] 66 Fed. Reg. 23,166, 23,166 (May 8, 2001).

II. VA's amendments to the M21-1 Manual represent a revision of this prior interpretation that arbitrarily excludes some inland waterways from qualifying as service in the Republic of Vietnam based on salinity, irrespective of their inland geographic location.

A. VA's amendments to the M21-1 Manual attempt to classify waterways as inland or not based on salinity, irrespective of geographic location.

Prior to amendments to the M21-1 Manual made in February 2016, VA had explicitly acknowledged in the M21-1 Manual in addressing service in the Republic of Vietnam (RVN) that inland waterways "are those rivers, canals, estuaries, delta areas, and interior or enclosed bays within the land boundaries of RVN itself."[15]

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[15] See App. 2a-3a (Reproduction of excerpt from *Key Change Memo and Manual Change: Revision of M21-1, Part IV, Subpart ii, Chapter 1, Section H, Topic 2, Block a (IV.ii.1.H.2.a)*, effective Feb. 5, 2016 (additions underlined and deletions shown via strike through), previously reproduced in *Gray v. Secretary of Veterans Affairs*, no. 2016-1782, Joint Appendix at Appx14-Appx18 (Fed. Cir. filed Dec. 23, 2016)).

In contrast to this previous good faith attempt to define inland waterways as those waterways "within the land boundaries of RVN itself,"[16] VA amended the M21-1 to arbitrarily and erroneously classify waterways as inland or not based on their salinity, declaring by fiat that inland waterways "are ***fresh water*** rivers, streams, and canals, and similar waterways."[17] VA's scheme to classify waterways based on salinity also involved a complementary move to define offshore waters to include "any coastal or other water feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to regular tidal influence."[18]

B. VA's attempt to classify waterways based on salinity is not merely a clarification of the term "inland waterway," and excludes from classification as inland some waterways which are clearly inland simply because they contain brackish water.

VA's attempt to classify waterways based on salinity cannot be characterized as a mere

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[16] *Id.*

[17] Pet. App. 46a (emphasis added).

[18] Pet. App. 47a-48a.

clarification of the term "inland waterway," as this classification of waterways as inland or not based on salinity is completely divorced from any attempt to determine whether a particular waterway is "inland" under any rational definition of the word, e.g. is completely divorced from an attempt to determine whether a particular waterway is "within the land boundaries of RVN itself."[19]

This can be clearly seen via consideration of the fanciful example of Utah's Great Salt Lake, which would seemingly not meet VA's definition of an "inland waterway" simply because it is not a freshwater body of water.

Another slightly less fanciful example would be the River Thames, as much of the extent which wends through London is actually an estuary containing brackish water that is subject to tidal influence.[20] The

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[19] App. 2a-3a.

[20] See, e.g., Robert A. Francis et al., *Meeting the challenges of urban river habitat restoration: developing a methodology for the River Thames through central London*, Area, Vol. 40, Issue 4, pp. 435-445 (2008), available at https://www.researchgate.net/publication/229902114 ("the upper tidal Thames through central London (the upper estuary) is the brackish ecocline between Teddington Lock and Woolwich."); *River Thames*, *Britannica Online Encyclopedia* (Feb. 9, 2018), available at https://www.britannica.com/place/River-Thames ("The

Thames estuary within London is undoubtedly an inland waterway, but would seemingly fail to meet VA's definition of an inland waterway.[21]

Similarly, substantial extents of Vietnamese waterways which are unquestionably inland actually experience salinity intrusion and are subject to tidal influence.

The Mekong river and its delta offer a great example of such tidal influence and salinity intrusion. In this regard, "Phnom Penh [generally] marks the beginning of the delta system of the Mekong River" where "the mainstream begins to break up into an increasing number of branches."[22] Notably, "[t]he growing influence of tides from the South China Sea and the effects of saltwater intrusion on the water in the river show up more strongly as you move downstream."[23] "The greater part of the delta is tidal

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transition from freshwater to estuarine reaches occurs closer to central London, around Battersea.")

[21] Much of the extent of the Thames passing through London would actually meet VA's definition of "offshore waters" as a "water feature… containing brackish water and subject to regular tidal influence." Pet. App. 46a-47a.

[22] Mekong River Commission, *Overview of the Hydrology of the Mekong Basin*, p. 5 (Nov. 2005), available at http://www.mekonginfo.org/assets/midocs/0001968-inland-waters-overview-of-the-hydrology-of-the-mekong-basin.pdf.

[23] *Id.*

… [and] [h]igh tides combined with deep channels and low hydraulic slope and bed gradients result in extensive salt water intrusion, particularly during the middle and later months of the low-flow season."[24] Indeed, "[t]he brackish water conditions caused by extensive saline intrusion make the water unsuitable for rice irrigation."[25]

C. VA's amendments to the M21-1 Manual represent a revision of its prior interpretation that "serv[ice] 'in the Republic of Vietnam' … includes the inland waterways"[26] in that they revise this interpretation to exclude some inland waterways containing brackish water from qualifying as service in the Republic of Vietnam.

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[24] *Id.* at 55; see also Masaaki Tateishi et al., *Salt water intrusion in the Mekong River estuary, Vietnam: Observation at low flow season in May 2005*, Sci. Rep., Niigata Univ. (Geology), No. 22, 57-78, p. 58 (2007), available at https://www.researchgate.net/publication/37364687 ("It is generally known that the surface salt water intrusion in the Mekong River reaches more than 50 km inland in the low flow season, compared with less than 20 km in the high flow season.")

[25] Mekong River Commission, *supra* at 55.

[26] 66 Fed. Reg. 23,166, 23,166 (May 8, 2001).

As outlined above, VA's attempt to classify waterways as inland or not based on salinity is completely divorced from any attempt to determine whether a particular waterway is "inland" under any rational definition of the word. VA's amendments to the M21-1 represent a revision of its prior interpretation in that rather than being a good faith attempt to clarify or define the term "inland waterway," they attempt to qualify VA's prior interpretation by artificially grafting an additional salinity requirement onto the term which allows for arbitrary exclusion of some inland waterways, e.g. those containing brackish water.[27]

As noted above, VA previously acknowledged that "estuaries … within the land boundaries of RVN

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[27] In a concurring opinion in *Perez v. Mortgage Bankers Assn.*, 135 S.Ct. 1199 (2015), Justice Scalia noted that "there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means." *Perez*, 135 S.Ct. at 1212-13 (Scalia, J., concurring). Here, even assuming *arguendo* that the term "inland waterway" is ambiguous to at least some extent, under the guise of resolving an ambiguity VA is attempting to artificially graft an additional salinity requirement onto the term which has no connection to whether a particular waterway is "inland" under any rational definition of the word.

itself,"[28] such as estuaries of the Mekong, are inland waterways, but its new classification scheme would seemingly exclude these estuaries simply because they contain brackish water.

VA's attempt to classify waterways as inland or not based on salinity thus is not only completely divorced from any attempt to determine whether a particular waterway is "inland" under any rational definition of the word,[29] but also would seemingly exclude some inland waterways that are unquestionably "within the land boundaries of RVN itself"[30] simply because they contain brackish water.

This is true not only of estuaries, but also of "interior or enclosed bays within the land boundaries of RVN."[31] In this regard, VA does not dispute that its revision excludes interior or enclosed bays that it previously acknowledged are inland waterways, including Ganh Rai Bay and Qui Nhon Bay.[32]

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[28] App. 2a-3a.

[29] It is worth noting that because, as discussed above, salt water intrusion is so common in Vietnamese waterways such as those in the Mekong delta, salinity or brackishness is not even a reliable predictor for, or strongly correlated with, whether any particular waterway is inland.

[30] App. 2a-3a.

[31] *Id.*

[32] See, e.g., App. 4a (Reproduction of excerpt from *Department of Veterans Affairs Fact Sheet: Agent Orange and Presumptions of Service Connection: Inland*

Thus, VA's amendments to the M21-1 Manual represent a revision of its prior interpretation that "serv[ice] 'in the Republic of Vietnam' … includes the inland waterways"[33] in that they revise this interpretation to exclude some inland waterways containing brackish water from qualifying as service in the Republic of Vietnam.

Overall, VA's amendments represent a revision of this prior interpretation in that they revise this interpretation to exclude some inland waterways from qualifying as service in the Republic of Vietnam based on salinity, irrespective of their inland geographic location.

Waterways and "Blue Water" Navy Veterans, Feb. 5, 2016, previously reproduced in *Gray v. Secretary of Veterans Affairs*, no. 2016-1782, Joint Appendix at Appx211-Appx215 (Fed. Cir. filed Dec. 23, 2016) ("Although VA had previously considered Qui Nhon Bay and Ganh Rai Bay to be inland waterways, these two offshore bays are no longer considered inland waterways."). Notably, even the inland waterway at issue in Petitioner Gray's case, Da Nang Harbor, was previously determined by a Board of Veterans Appeals panel to be an inland waterway based on "being surrounded by the land on three sides, and … within the territory of Vietnam." See *Gray v. McDonald*, 27 Vet.App. 313, 316-317 (2015) (quoting Board of Veterans Appeals Docket No. 04-00250, Citation Nr: 0941678, at 5 (BVA Nov. 2, 2009)).

[33] 66 Fed. Reg. 23,166, 23,166 (May 8, 2001).

III. Because the prior interpretation was published in the Federal Register and represented an "interpretation[] of general applicability formulated and adopted by the agency" under 5 U.S.C. § 552(a)(1)(D), this revision of the prior interpretation represents a "revision… of the foregoing" under 5 U.S.C. § 552(a)(1)(E).

As noted above, VA published in the Federal Register, in accordance with 5 U.S.C. § 552(a)(1)(D), its "interpretation[] of general applicability formulated and adopted by the agency" that, with respect to the presumption of exposure to a herbicide agent under 38 U.S.C. § 1116, "serv[ice] 'in the Republic of Vietnam' … includes the inland waterways."[34]

As detailed above, VA's amendments to the M21-1 represent a revision of this prior interpretation that arbitrarily excludes some inland waterways from qualifying as service in the Republic of Vietnam based on salinity, irrespective of their inland geographic location.

Thus, because this prior interpretation represented an "interpretation[] of general applicability formulated and adopted by the agency" under 5 U.S.C. § 552(a)(1)(D), VA's amendments to

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[34] 66 Fed. Reg. 23,166, 23,166 (May 8, 2001).

the M21-1 Manual represent a "revision… of the foregoing" under 5 U.S.C. § 552(a)(1)(E).[35]

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[35] Amicus would suggest that the situation here is distinct from that presented in *Perez v. Mortgage Bankers Assn.*, 135 S.Ct. 1199 (2015), where this Court indicated that "an agency [can] 'interpret' a regulation without 'effectively amend[ing]' the underlying source of law." *Perez*, 135 S.Ct. at 1207-1208. First, in contrast to the Respondent's suggestion in *Perez* that "an interpretive rule changes the *regulation* it interprets," *Perez*, 135 S.Ct. at 1208 (emphasis added), Amicus is only suggesting that the M21-1 Manual amendments change a prior *interpretation*. Second, in contrast to consideration in *Perez* of the term "amend," which can be defined as "'[t]o change the wording of' or 'formally alter ... by striking out, inserting, or substituting words'," *Perez*, 135 S.Ct. at 1207, the present situation requires consideration of the term "revision." In this regard, Amicus would suggest that changes may represent a *revision* of a prior interpretation even if they may not actually represent a formal amendment, as reinforced by the specific reference in 5 U.S.C. § 552(a)(1)(E) to both "amendment[s]" and "revision[s]." Overall, Amicus would submit that the situation is distinct from that presented in *Perez*, in that the question of whether an interpretation represents an "amendment" of a *regulation* is very different from the question of whether an interpretation represents a "revision" of a prior *interpretation*.

IV. This revision under 5 U.S.C. § 552(a)(1)(E) is subject to judicial review under 38 U.S.C. § 502 as "[a]n action of the Secretary to which section 552(a)(1) … of title 5 … refers."[36]

As outlined above, because VA's M21-1 Manual amendments represent a revision of a prior "interpretation[] of general applicability formulated and adopted by the agency" under 5 U.S.C. § 552(a)(1)(D), these amendments represent a "revision… of the foregoing" under 5 U.S.C. § 552(a)(1)(E).

Consequently, these amendments should be subject to judicial review under 38 U.S.C. § 502 as "[a]n action of the Secretary to which section 552(a)(1) … of title 5 … refers."[37]

V. Reviewability of this revision should not be defeated by VA's failure to publish the revision in the Federal Register.

Lastly, Amicus posits that reviewability should not be defeated by VA's failure to publish this revision of its prior interpretation in the Federal Register, because 38 U.S.C. § 502 ties reviewability to the mere obligation to publish in the Federal Register under 5

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[36] 38 U.S.C. § 502.

[37] 38 U.S.C. § 502.

U.S.C. § 552(a)(1), and does not require actual publication in the Federal Register to enable review.

Amicus further urges that VA's choice to publish this revision of its prior interpretation in its adjudication manual should not insulate this revision from review when it should have properly been published in the Federal Register.

In this regard, Amicus would respectfully suggest that even assuming *arguendo* that there are instances in which an "interpretation of general applicability" may properly be promulgated in an administrative staff manual without requiring publication in the Federal Register under 5 U.S.C. § 552(a)(1)(D), publication in the Federal Register should always be required under 5 U.S.C. § 552(a)(1)(E) for interpretations which represent a revision of a prior "interpretation[] of general applicability" published in the Federal Register under 5 U.S.C. § 552(a)(1)(D).[38]

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[38] Amicus would suggest that such a conclusion of reviewability is reinforced by "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). Such a conclusion of reviewability may also be supported by the "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," *Henderson ex rel. Henderson v. Shinseki*, 561 U.S. 428, 441 (2011) (quoting *King v. St. Vincent's Hospital*, 502 U. S. 215, 220–221, n. 9 (1991)), in that the review provision of 38 U.S.C. § 502 should be "liberally construed for the benefit of those who

Amicus would respectfully suggest that, otherwise, the public notice function provided by publication in the Federal Register would be undermined, and the public would never be certain if a particular "interpretation[] of general applicability" published in the Federal Register under 5 U.S.C. § 552(a)(1)(D) is still applicable, or has been revised or repealed by a statement in an administrative staff manual without publication in the Federal Register.[39]

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left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

[39] Amicus would suggest that the situation here is again distinct from that in *Perez v. Mortgage Bankers Assn.*, 135 S.Ct. 1199 (2015), where this Court addressed the D.C. Circuit's *Paralyzed Veterans* doctrine which "attempt[ed] to … requir[e] an interpretive rule to go through notice and comment if it revises an earlier definitive interpretation of a regulation." *Perez*, 135 S.Ct. at 1212 (Scalia, J., concurring). This Court found the "exemption of interpretive rules from the notice-and-comment process … fatal to the [*Paralyzed Veterans* doctrine]," *Perez*, 135 S.Ct. at 1206, but this exemption of interpretive rules is inapplicable here because it only applies to notice-and-comment requirements under § 553, and does not apply to publication requirements under § 552(a)(1).

CONCLUSION

As detailed herein, Amicus urges that VA's M21-1 Manual amendments should be subject to judicial review under 38 U.S.C. § 502 at least because they represent a revision under 5 U.S.C. § 552(a)(1)(E) of a prior VA "interpretation[] of general applicability formulated and adopted by the agency" under 5 U.S.C. § 552(a)(1)(D) that was published in the Federal Register.

Respectfully submitted,

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December 2018

APPENDIX

APPENDIX TABLE OF CONTENTS

Department of Veterans Affairs
Veterans Benefits Administration
Washington, DC 20420

M21-1, Part IV, Subpart ii
February 5, 2016

Key Changes

Changes Included in This Revision	The table below describes the changes included in this revision of Veterans Benefits Manual M21-1, Part IV, "Compensation, DIC and Death Compensation Benefits," Subpart ii, "Compensation."

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Reason(s) for the Change	Citation
• To update the definition of Vietnam's inland waterways. • To add references.	M21-1, Part IV, Subpart ii, Chapter 1, Section H, Topic 2, Block a (IV.ii.1.H.2.a)

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2. Developing Claims Based on Service Aboard Ships Offshore of the RVN or on Inland Waterways

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Change Date	~~January 20, 2016~~February 5, 2016
a. Definition of Inland Waterways	The Agent Orange Act of 1991 implemented under 38 C.F.R. 3.307(a)(6)(iii) requires "duty or visitation" within the RVN, ~~or on~~including its inland waterways, between January 9, 1962, and May 7, 1975, to establish a presumption of Agent Orange exposure. ***Important:*** The presumption of exposure to Agent Orange requires evidence establishing duty or visitation within the RVN. Service on offshore waters does not establish a presumption of exposure to Agent Orange. ***Inland waterways*** are fresh water rivers, streams, and canals, and similar waterways. Because these waterways are distinct from ocean

waters and related coastal features, service on these waterways is service in the RVN. VA considers inland waterways to end at their mouth or junction to other offshore water features, as described below. For rivers and other waterways ending on the coastline, the end of the inland waterway will be determined by drawing straight lines across the opening in the landmass leading to the open ocean or other offshore water feature, such as a bay or inlet. For the Mekong and other rivers with prominent deltas, the end of the inland waterway will be determined by drawing a straight line across each opening in the landmass leading to the open ocean. ~~are those rivers, canals, estuaries, delta areas, and interior or enclosed bays within the land boundaries of RVN itself. Agent Orange aerial spraying occurred within the land boundaries and affected the inland waterways.~~

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Office of Public Affairs
Media Relations

Washington, DC 20420
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Department of
Veterans Affairs

Fact Sheet

Agent Orange and Presumptions of Service Connection: Inland Waterways and "Blue Water" Navy Veterans

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I served from 1965 to 1967 aboard the USS Guadalupe (AO-32), an oiler that operated in Ganh Rai Bay during April 1966, but I have never filed a claim for disability benefits. My doctor just diagnosed type II diabetes. Am I still entitled to the presumption of Agent Orange exposure?

As a result of the remand by the Court of Appeals for Veterans Claims in Gray v. McDonald, VA reviewed and clarified its policy concerning inland waterways where exposure to herbicides will be presumed. Although VA had previously considered Qui Nhon Bay and Ganh Rai Bay to be inland waterways, these two offshore bays are no longer considered inland waterways under VA's policy clarification.

Although VA will no longer add new ships or new dates of service to the ships list based on their presence in Qui Nhon Bay or Ganh Rai Bay, VA has already established a presumption of Agent Orange exposure for a number of ships entering those bays, including the Guadalupe's April 1966 service. VA will therefore continue to extend that presumption to crewmembers who were aboard the Guadalupe at that time. If you were actually aboard the Guadalupe when it operated in Ganh Rai Bay in April 1966, you will be entitled to the presumption of Agent Orange exposure.

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CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2016-1793

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION,

Petitioner,

v.

Secretary of Veterans Affairs

Respondent.

PETITION FOR REVIEW OF VETERANS AFFAIRS RULE MAKING PURSUANT TO 38 U.S.C. § 502

ORIGINAL BRIEF OF PETITIONER BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION

***

Statement of Related Cases

A case reviewing the same regulation and with many similar issues is pending in this Court entitled *Gray v. Robert McDonald*, 16-1783.

Statement of Jurisdiction

Jurisdiction is alleged under 38 U.S.C. § 502 for judicial review pursuant to Chapter 7 of Title 5 of the United States Code, specifically 5 U.S.C. § 706. This Court has jurisdiction because the VA failed to publish the regulation in the Federal Register as required by 5 U.S.C. § 552[1][B] [C][D] and [E]. The regulation is a statement of the general course and method by which its functions are channeled and determined, constitutes a rule of procedure, is an interpretation of general applicability formulated and adopted by the agency and is a revision and/or amendment of the foregoing. This regulation is not a precedential General Counsel Opinion, a decisional letter or Federal Register informational notice, all of which are exempt from review under 38 U.S.C. § 502.

The regulation does constitute final agency action for purposes of judicial review under Chapter 7 of Title 5 United States Code review. Review under 5 U.S.C. § 706 is appropriate since the failure to publish the regulation in the Federal Register triggers this Court's jurisdiction. Review is further proper under 5 U.S.C. § 704 since there is no other remedy at law. Although not issued under the rule making provisions of 5 U.S.C. § 553, the Court is empowered under this provision to review the final agency action because, as stated supra., the regulation is referred to by U.S.C. § 552[1][B] [C][D] and [E].

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