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United States Court of Appeals, Federal Circuit.
Robert H. GRAY, Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent
Blue Water Navy Vietnam Veterans Association,
Petitioner

v.

Secretary of Veterans Affairs, Respondent
2016-1782 2016-1793

Decided: November 16, 2017

Attorneys and Law Firms

Michael E. Wildhaber, Veterans Law Office of Michael E. Wildhaber, Washington, DC, argued for petitioner in 16-1782. Also represented by Shannon Lynne Brewer, Hill & Ponton, P.A., Deland, FL.

John B. Wells, Law Office of John B. Wells, Slidell, LA, argued for petitioner in 16-1793.

Eric Peter Bruskin, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by Benjamin C. Mizer, Robert E. Kirschman, Jr., Martin F. Hockey, Jr.; Brian D. Griffin, Martin James Sendek, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before Prost, Chief Judge, Dyk, and O'Malley, Circuit Judges.

Opinion

Opinion dissenting in part and concurring in the judgment filed by Circuit Judge DYK.

O'Malley, Circuit Judge.

Robert H. Gray (“Gray”) and Blue Water Navy Vietnam Veterans Association (“Blue Water”) (collectively, “Petitioners”) petition this court under 38 U.S.C. § 502 to review certain revisions the Department of Veterans Affairs (“VA”) made to its Adjudication Procedures Manual M21-1 (“M21-1 Manual”) in February 2016. These revisions pertain to the VA's interpretation of provisions of the Agent Orange Act of 1991 (the “Agent Orange Act”), Pub. L. No. 102-4, 105 Stat. 11, codified as amended at 38 U.S.C. § 1116, as implemented via regulations at 38 C.F.R. §§ 3.307(a)(6), 3.309(e). Because the VA's revisions are not agency actions reviewable under § 502, we dismiss for lack of jurisdiction.

I. Background

A. The Agent Orange Act

To receive disability compensation based on service, a veteran must demonstrate that his or her disability was service-connected, meaning that it was “incurred or aggravated ... in line of duty in the active military, naval, or air service.” 38 U.S.C. § 101(16). Establishing service connection generally requires three elements: “ ‘(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service’—the so-called ‘nexus’

requirement.” *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)). The claimant has the responsibility to support a claim for service connection. 38 U.S.C. § 5107(a).

Congress has enacted presumptive service connection laws to protect certain veterans who faced exposure to chemical toxins during service, but would find it difficult or impossible to satisfy the obligation to prove a “nexus” between their exposure to toxins and their disease or injury. Among these laws is the Agent Orange Act, which established a framework for the adjudication of disability compensation claims for Vietnam War veterans with diseases medically linked to herbicide exposure in the Republic of Vietnam during the Vietnam War. Under the Agent Orange Act, any veteran who “served in the Republic of Vietnam” during the Vietnam era and who suffers from any of certain designated diseases “shall be presumed to have been exposed during such service” to herbicides “unless there is affirmative evidence to establish that the veteran was not exposed.” *Id.* § 1116(f). The Agent Orange Act also established several statutory presumptions and a methodology for the VA to create additional regulatory presumptions that certain diseases were “incurred in or aggravated by” a veteran's service in Vietnam. *Id.* § 1116(a). The VA then proceeded to determine which diseases would qualify for presumptive service connection and to define what service “in the Republic of Vietnam” encompasses.

In May 1993, the VA issued regulations establishing presumptive service connection for certain diseases associated with exposure to herbicides in Vietnam. The relevant regulation conditions application

of the presumption on the claimant having “served in the Republic of Vietnam,” including “service in the waters offshore and service in other locations *if* the conditions of service involved duty or visitation in the Republic of Vietnam.” 38 C.F.R. § 3.307(a)(6)(iii) (1993) (emphasis added); *see* Diseases Associated with Service in the Republic of Vietnam, 58 Fed. Reg. 29,107, 29,109 (May 19, 1993). Absent on-land service, the VA concluded that the statute and regulation do not authorize presumptive service connection for those veterans serving in the open waters surrounding Vietnam—known as “Blue Water” veterans. We considered the VA's position in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), and concluded that it was neither an unreasonable interpretation of the congressionally mandated presumption nor of the VA's own regulations relating thereto. *Id.* at 1190–95.

The dispute now before us arises from the VA's decision not just to exclude open water service from the definition of service in the “Republic of Vietnam,” but to also exclude those veterans who served in bays, harbors, and ports of Vietnam from presumptive service connection. In other words, absent documented service on the land mass of Vietnam or in its “inland waterways”—defined as rivers and streams ending at the mouth of the river or stream, and excluding any larger bodies of water into which those inland waters flow—the VA has concluded that no presumptive service connection is to be applied. The VA did not implement this additional restriction by way of notice and comment regulation as it did its open waters restriction, and it has not published its view on this issue in the Federal Register. Instead, the VA has incorporated this new restriction into the M21-1 Manual, which directs VA adjudicators regarding the

proper handling of disability claims from Vietnam-era veterans. It is this Manual revision which Gray challenges and asks us to declare invalid.

B. The M21-1 Manual and the 2016 Revision

As we explained recently, “[t]he VA consolidates its [internal] policy and procedures into one resource known as the M21-1 Manual.” *Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017) (“*DAV*”). The M21-1 Manual “is an internal manual used to convey guidance to VA adjudicators.” VA Adjudications Manual, M21-1; Rescission of Manual M21-1 Provisions Related To Exposure to Herbicides Based on Receipt of the Vietnam Service Medal, 72 Fed. Reg. 66,218, 66,219 (Nov. 27, 2007) [hereinafter 2007 M21-1 Manual Revisions]. “The M21-1 Manual provides guidance to Veterans Benefits Administration (‘VBA’) employees and stakeholders to allow the VBA to process claims benefits quicker and with higher accuracy.” *DAV*, 859 F.3d at 1074 (internal quotation marks omitted). The M21-1 Manual is available to the public through the KnowVA website. See http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/55440000001018/topic/55440000004049/M21-1-Adjudication-Procedures-Manual.

The M21-1 Manual provisions are not binding on anyone other than the VBA employees, however; notably, the Board of Veterans' Appeals (“Board”) is not bound by any directives in the M21-1 Manual and need not defer to any administrator's adherence to those guidelines. See 38 C.F.R. § 19.5.

In 2007, Gray filed a claim for disability compensation for a number of medical conditions allegedly arising out of his naval service in Da Nang

Harbor. *Gray v. McDonald*, 27 Vet.App. 313, 316 (2015). At the time, the M21-1 Manual defined “service in the Republic of Vietnam (RVN)” as “service in the RVN or its inland waterways.” M21-1 Manual, part IV, ch. 1, ¶ H.28.a (2005). In a February 2009 letter, the VA further explained that it interpreted “inland waterways” to mean “rivers, estuaries, canals, and delta areas inside the country, but ... not ... open deep-water coastal ports and harbors where there is no evidence of herbicide use.” *Gray*, 27 Vet.App. at 321–22 (alterations in original) (quoting Letter from the Director of VA C & P Service, February 2009, and December 2008 C & P Service Bulletin).

After the VA denied Gray's claim under this interpretation, he appealed to the U.S. Court of Appeals for Veterans Claims (“the Veterans Court”). *Id.* at 318. The Veterans Court concluded that the VA's definition of “inland waterway” was “both inconsistent with the regulatory purpose and irrational,” in part because the VA had offered no meaningful explanation for why it classified some bays as inland waterways but not others. *Id.* at 322–25. The Veterans Court remanded the matter to the VA with instructions to reevaluate its definition of “inland waterway” to be consistent with § 3.307(a)(6)(iii). *Id.* at 326–27.

Following the remand, the VA surveyed the available scientific evidence, including documents submitted in July 2015 by counsel for Blue Water, an organization representing a number of Blue Water veterans. In a draft document it issued on January 15, 2016, the VA acknowledged that it had failed to “clearly explain the basis” for its previous classifications. J.A. 203. The VA concluded that, because “Agent Orange was not sprayed over Vietnam's offshore waters,” the VA did “not have medical or scientific evidence to

support a presumption of exposure for service on the offshore open waters,” which it defined as “the high seas and any coastal or other water feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to regular tidal influence.” J.A. 203–04.

Accordingly, in February 2016, the VA published a “Memorandum of Changes” announcing a change in policy and an accompanying revision of the M21-1 Manual. J.A. 207. The revised M21-1 Manual defines “inland waterways” as follows:

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 in these waterways is service in the [Republic of Vietnam]. 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 feature, such as a bay or inlet. For the Mekong and other rivers with prominent deltas, the end of the inland waterways will be determined by drawing a line across each opening in the landmass leading to the open ocean.

Note: Inland waterway service is also referred to as *brown-water Navy service*.

M21-1 Manual, part IV, subpart ii, ch. 1, ¶ H.2.a (2016) (emphasis in original). By virtue of this manual change,

the VA instructed all claims processors in its 56 regional offices to exclude all Navy personnel who served outside the now-defined “inland waterways” of Vietnam—i.e., in its ports, harbors, and open waters—from presumptive service connection for diseases or illnesses connected with exposure to Agent Orange. Thus, the VA instructed its adjudicators to exclude all service in ports, harbors, and bays from presumptive service connection, rather than service in only some of those waterways. Petitioners seek review of this revision pursuant to 38 U.S.C. § 502.

II. Discussion

“A party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists.” *DAV*, 859 F.3d at 1075 (quoting *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)). Under 38 U.S.C. § 502, we have jurisdiction to review only those agency actions that are subject to 5 U.S.C. §§ 552(a)(1) and 553. We *do not* have jurisdiction to review actions that fall under § 552(a)(2). “Section 553 refers to agency rulemaking that must comply with notice-and-comment procedures under the Administrative Procedure Act.” *DAV*, 859 F.3d at 1075. The parties agree that § 553 is not at issue in this proceeding. The parties instead focus on § 552; their debate is whether the manual provisions challenged in this action fall under § 552(a)(1), giving us authority to consider them in the context of this action, or § 552(a)(2), prohibiting our review here.

In relevant part, § 552(a)(1) provides:

Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

....

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

§ 552(a)(2) provides that:

Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—

....

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; [and]

(C) administrative staff manuals and instructions to staff that affect a member of the public;

....

The government contends that, because M21-1 Manual provisions are expressly governed by § 552(a)(2), this court may not review them unless and until they are applied in and govern the resolution of an individual action. This is so, according to the government, regardless of how interpretive or policy-laden the judgments are that resulted in the formulation of those manual provisions. Gray contends that the government's view of § 552 is too myopic. He contends that a manual provision can fall under § 552(a)(1) where, regardless of its designation, it constitutes an interpretive rule of general applicability

that adversely affects the rights of an entire class of Vietnam veterans. In other words, Gray contends that it is not the way in which the VA chooses to implement its policies and statutory interpretations that implicates our jurisdiction, it is the impact of what the VA is doing that matters. While Gray's points are not without force—and the VA even concedes that the impact of its manual changes is both real and far reaching—we conclude that we may not review Gray's challenge in the context of this action.

We recently considered a challenge under § 502 to another revision to the M21-1 Manual. *DAV*, 859 F.3d at 1074–75. The Manual revision at issue in *DAV* provided guidance regarding the term “medically unexplained chronic multisymptom illness,” which appeared in a statute and regulation related to presumptive service connection for Persian Gulf War veterans. *Id.* (citing 38 U.S.C. § 1117(a)(2); 38 C.F.R. § 3.317(a)(2)(ii)). In determining whether § 502 granted this court jurisdiction to consider a direct challenge to the Manual revision, we identified “three relevant factors to whether an agency action constitutes substantive rulemaking under the APA: ‘(1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency.’ ” *Id.* at 1077 (alteration in original) (quoting *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)). We noted that “the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law.” *Id.* (quoting *Molycorp*, 197 F.3d at 545). Applying these factors, we found that the

challenged Manual revisions “d[id] not amount to a § 553 rulemaking and d[id] not carry the force of law.” *Id.*

We then held that the revisions “clearly f[ell] under” § 552(a)(2) and not § 552(a)(1). *Id.* at 1078. We explained that “[w]here, as here, manual provisions are interpretations adopted by the agency, not published in the Federal Register, not binding on the Board itself, and contained within an administrative staff manual, they fall within § 552(a)(2)—not § 552(a)(1).” *Id.* We concluded that this was so, regardless of the extent to which the manual provision might be considered interpretive or a statement of policy. *Id.* On these grounds, we dismissed the challenge for lack of jurisdiction. *Id.*

Our holding in *DAV* compels the same result here. Like that in *DAV*, the manual provision at issue here is an interpretation adopted by the agency; the M21-1 Manual “convey[s] guidance to VA adjudicators,” but “[i]t is not intended to establish substantive rules.” 2007 M21-1 Manual Revisions, 72 Fed. Reg. at 66,219. The revisions at issue were not published in the Federal Register or the Code of Federal Regulations. The Board remains “bound only by ‘regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department’ ”—and not the M21-1 Manual. *DAV*, 859 F.3d at 1077 (quoting 38 U.S.C. § 7104(c)). And, of course, the provisions in question are contained within an administrative staff manual: the M21-1 Manual. While it is admittedly true that compliance with this Manual revision by all internal VA adjudicators will affect the concerned veterans, at least initially, it also remains true that the Board is not bound to accept adjudications premised on that compliance. As we found in *DAV*, where the action is not binding on

private parties or the agency itself, we have no jurisdiction to review it.

To be clear, it is not the moniker applied to this VA policy statement that is controlling. There are circumstances where we have found agency actions reviewable under § 552(a)(1) precisely because they had a binding effect on parties or entities other than internal VA adjudicators. *See, e.g., Lefevre v. Sec'y, Dept of Veterans Affairs*, 66 F.3d 1191, 1196–98 (Fed. Cir. 1995). We addressed several of those cases in *DAV* and explained why they differed from the circumstances at issue there. 859 F.3d at 1075–77. While the Manual provisions here differ from those at issue in *DAV*, their scope and binding effect are identical. We, accordingly, must reach the same conclusion regarding the scope of our jurisdiction here as we did in *DAV*.

As we also explained in *DAV*, this disposition does not leave Petitioners without recourse. For example, “[a] veteran adversely affected by a M21-1 Manual provision can contest the validity of that provision as applied to the facts of his case under 38 U.S.C. § 7292.” *DAV*, 859 F.3d at 1078; *see, e.g., Haas*, 525 F.3d at 1187–90 (reviewing a provision of the M21-1 Manual interpreting § 3.307(a)(6)(iii) as part of an appeal from the Veterans Court). Individual veterans and organizations such as Blue Water also may petition the VA for rulemaking. *See* 5 U.S.C. § 553(e). We have held that “§ 502 vests us with jurisdiction to review the Secretary's denial of a request for rulemaking made pursuant to § 553(e).” *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011).¹ Because the February 2016 revision to the M21-1 Manual falls under § 552(a)(2) and not § 552(a)(1) or § 553, however,

we lack jurisdiction under § 502 to hear Petitioners' direct challenge to the revision.

We recognize the costs that today's outcome imposes on Petitioners and the veterans they represent. Petitioners sought direct review in this court to bypass yet another years-long course of individual adjudications or petitions for rulemaking. Given the health risks that many of these veterans face, Petitioners' urgency is understandable. But we are constrained by the narrow scope of the jurisdiction that Congress has granted to us.

We also note that, although the VA has delayed review of its interpretation by revising its manual instead of pursuing formal rulemaking, “that convenience comes at a price.” *Perez v. Mortg. Bankers Ass'n*, — U.S. —, 135 S.Ct. 1199, 1204, 191 L.Ed.2d 186 (2015). As the VA admits, an interpretive rule in an administrative manual “lack[s] the ‘force and effect of law,’ and thus receive[s] different ‘weight in the adjudicatory process.’ ” *Gray* Resp. Br. at 30 (quoting *Perez*, 135 S.Ct. at 1204). And, agencies' “interpretations contained in ... agency manuals ... do not warrant *Chevron*-style deference.” *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (citations omitted). We must await an individual action to assess the propriety of the VA's interpretation of the Agent Orange Act and attendant regulations.

III. Conclusion

For these reasons, we dismiss the petition for lack of jurisdiction.²

DISMISSED

Footnotes

1Indeed, the parties advised us at oral argument that Gray and several other veterans have filed appeals to the Veterans Court from the VA's denials of their claims for disability compensation under the revised provision of the M21-1 Manual. Oral Argument at 6:53–8:13, *Gray v. Sec'y of Veterans Affairs*, 2016-1782, *available at* <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2016-1782.mp3>. Counsel for Gray and Blue Water also informed us that a petition for rulemaking regarding the definition of “inland waterways” is pending before the VA. *Id.* at 13:05–13:34.

2Also before us are two motions by Blue Water to supplement the index of record. No. 16-1793, ECF Nos. 22, 30. Because we lack jurisdiction to consider the merits of the VA's action, we deny both motions as moot.

DYK, Circuit Judge, dissenting in part and concurring in the judgment.

The majority holds that we lack jurisdiction to review revisions to a Department of Veterans Affairs (“VA”) manual used by the agency to adjudicate veterans benefits. The majority concludes it is bound to reach this result by the recent decision of another panel in *Disabled American Veterans v. Secretary of Veterans Affairs (DAV)*, 859 F.3d 1072 (Fed. Cir. 2017). There, the panel categorically held that “[w]here, as here, manual provisions are interpretations adopted by the agency, not published in the Federal Register, not binding on the Board [of Veterans' Appeals], and contained within an administrative staff manual, they fall” outside the scope of 5 U.S.C. §§ 552(a)(1) and 553. *DAV*, 859 F.3d at 1078. It follows that there is no jurisdiction under 38 U.S.C. § 502. *Id.*

I agree we are bound by *DAV* to hold that the manual revisions are not reviewable. But I respectfully suggest that *DAV* was wrongly decided. The analysis of 5 U.S.C. § 552(a)(1) in *DAV*—rendered without substantial briefing on that statutory provision—conflicts with our prior decisions applying that subsection to VA actions. The rule established by *DAV* also departs from the approach of other courts of appeals, which have held that analogous agency pronouncements are reviewable. Nothing in § 502 suggests that we should be less generous in our review with respect to VA than other courts have been with respect to other agencies. And *DAV* imposes a substantial and unnecessary burden on individual veterans, requiring that they undergo protracted agency adjudication in order to obtain preenforcement

judicial review of a purely legal question that is already ripe for our review.

I

Pursuant to the Agent Orange Act of 1991, 38 U.S.C. § 1116, and VA regulations, veterans who “served in the Republic of Vietnam ... shall be presumed to have been exposed” to Agent Orange, 38 C.F.R. § 3.307(a)(6)(iii). The regulations further define “[s]ervice in the Republic of Vietnam” to “include[] service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.” *Id.* For those veterans covered by the presumption, certain specified diseases “shall be considered to have been incurred or aggravated by such service, notwithstanding that there is no record evidence of such disease during the period of such service.” § 1116(a)(1). This presumed service connection was established because, as Congress realized, in the absence of adequate contemporaneous records and testing, “it was too difficult to determine who was exposed and who was not.” *Haas v. Peake*, 525 F.3d 1168, 1185 (Fed. Cir. 2008); *see also LeFevre v. Sec’y, Dep’t of Veterans Affairs*, 66 F.3d 1191, 1197 (Fed. Cir. 1995) (“Congress ... recognized that ordinarily it would be impossible for an individual veteran to establish that his disease resulted from exposure to herbicides in Vietnam.”).

Many of the rules that govern whether and how to apply the presumption of service connection are set forth in a VA document known as the Adjudications Procedures Manual M21-1 (the “Manual”), “an internal manual used to convey guidance to VA adjudicators” in dealing with veterans’ benefits claims. Maj. Op. 1105

(quoting *VA Adjudications Manual, M21-1; Rescission of Manual M21-1 Provisions Related to Exposure to Herbicides Based on Receipt of the Vietnam Service Medal*, 72 Fed. Reg. 66,218, 66,219 (Nov. 27, 2007)). As described by the majority, the Manual has for at least a decade included service in the “inland waterways” of Vietnam as sufficient to warrant the presumption. *Id.* at 1106. In a 2009 letter, VA supplemented this provision by defining “inland waterways” to include rivers and deltas but not harbors and bays. *Id.* Petitioner Gray challenged that definition before the Court of Appeals for Veterans Claims, which found it to be both irrational and inconsistent with VA's own regulations. *Id.* (citing *Gray v. McDonald*, 27 Vet.App. 313, 322-25 (2015)). The matter was remanded for further action by the Secretary. *Id.* (citing *Gray*, 27 Vet.App. at 326-27).

In February 2016, following the remand by the Court of Appeals for Veterans Claims, VA revised the portion of the Manual concerning its interpretation of the Agent Orange Act's requirement that the veteran have “served in the Republic of Vietnam.” These revisions for the first time established a detailed test for determining whether service aboard a vessel in the vicinity of Vietnam suffices to establish a presumption of service connection. First, mirroring its 2009 letter, VA inserted a new instruction that “[s]ervice on offshore waters does not establish a presumption.” Manual § IV.ii.1.H.2.a. In other words, while service in inland waterways qualifies, service in the offshore waters of Vietnam does not constitute service in the Republic of Vietnam. The revised Manual then goes on to narrowly define “inland waterways”¹ at the same time it broadly defines “offshore waters”: “**Offshore waters** are the high seas and any coastal or other water

feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to regular tidal influence. This includes salty and brackish waters situated between rivers and the open ocean.” *Id.* § IV.ii.1.H.2.b. Finally, the Manual notes that these revisions change the treatment of Qui Nhon Bay Harbor and Ganh Rai Bay: service in these bays previously entitled a veteran to the presumption, but they now fall outside the Manual's definition of inland waterways. *Id.* § IV.ii.1.H.2.c. The Manual revisions significantly restrict the right to the presumptive service connection. The question before us is whether the revisions are subject to preenforcement judicial review.

II

Our jurisdiction here rests on 38 U.S.C. § 502, which provides, “An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review.” Section 553 defines the requirements for notice-and-comment rulemaking. Section 552(a)(1) defines the circumstances when publication in the Federal Register is required and covers, among other things, “statements of general policy or interpretations of general applicability formulated and adopted by the agency.” 5 U.S.C. § 552(a)(1)(D). While I agree with *DAV* that the Manual is not the type of document that is reviewable because it is subject to the notice-and-comment rulemaking provisions of § 553, it is nevertheless an interpretation of general applicability under § 552(a)(1).

Other circuits have held that agency pronouncements such as those involved here are subject to preenforcement review. Thus, for example, the District of Columbia Circuit has found agency

guidance documents reviewable where, as here, the petitioners present purely legal claims. In *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1020-23 (D.C. Cir. 2000), the District of Columbia Circuit determined it had jurisdiction to review a Clean Air Act guidance document published on an Environmental Protection Agency (“EPA”) website. Although informally published and not subject to notice and comment, the guidance was found to be a “final agency action, reflecting a settled agency position which has legal consequences” for the parties. *Id.* at 1023. The court's decision rested in part on its observation that, as with the VA Manual revisions at issue here, “officials in the field [we]re bound to apply” the rules set forth in the guidance. *Id.* at 1022. In 2011, yet another Clean Air Act guidance was found reviewable where it bound EPA regional directors. *See Nat. Res. Def. Council v. Env'tl. Prot. Agency*, 643 F.3d 311, 320 (D.C. Cir. 2011). In the transportation context, the District of Columbia Circuit found jurisdiction to review a Federal Highway Administration investigative training manual. *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 163-65 (D.C. Cir. 1997); *see also W. Coal Traffic League v. United States*, 719 F.2d 772, 780 (5th Cir. 1983) (en banc) (reviewing guidelines of the Interstate Commerce Commission for regulating railroad rates). Thus the circuit found agency guidance, binding on agency subordinates, to be reviewable.

Nothing in § 502 suggests that we should be less generous in our review of actions taken by VA. There is, of course, a “well-settled presumption that agency actions are reviewable,” unless Congress clearly precludes such review. *LeFevre*, 66 F.3d at 1198. There is no such clear preclusion in the VA statute. To the

contrary, here—as in the other circuit cases discussed above—in the relevant jurisdictional provision, “Congress has declared its preference for preenforcement review of agency rules.” *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 330 F.3d 1345, 1347 (Fed. Cir. 2003).

III

Preenforcement review of manual provisions is entirely consistent with the language of § 502. In that statute, as noted earlier, Congress chose to define our jurisdiction with reference to the Administrative Procedure Act’s provisions concerning the requirements for public notice of agency actions. *See* 38 U.S.C. § 502. Agency actions requiring notice-and-comment rulemaking were made reviewable by reference to § 553. In addition, Congress made reviewable other agency actions described in § 552(a)(1). Section 552(a) establishes a hierarchy of government records.² Several categories of records most directly affecting members of the public must be published in the Federal Register, *see* § 552(a)(1); many routine or internal agency records must be publicly available, *see* § 552(a)(2); and still others need only be available by request, *see* § 552(a)(3). With respect to interpretive rules, § 552(a)(2)(B) directs that if they are “of general applicability,” the Federal Register publication requirement of § 552(a)(1)(D) applies. In short, “statements of general policy or interpretations of general applicability formulated and adopted by the agency,” 5 U.S.C. § 552(a)(1)(D), must be published in the Federal Register and are thus reviewable under § 502. The relevant question for jurisdictional purposes, then, is whether the Manual revisions here are properly

characterized as “statements of general policy or interpretations of general applicability.” If so, we have jurisdiction under § 502.

DAV never directly addressed this question of the scope of “interpretations of general applicability.” *DAV*’s analytical omission is not surprising given that the petitioners in that case focused their jurisdictional argument primarily on whether the Manual revisions at issue were substantive rules requiring notice and comment under § 553. The panel nonetheless rejected the applicability of § 552(a)(1). Latching onto the undisputed fact that the Manual is an “administrative staff manual” under § 552(a)(2)—a provision not referenced in § 502—the *DAV* court held that we lack jurisdiction “[w]here, as here, manual provisions are interpretations adopted by the agency, [1] not published in the Federal Register, [2] not binding on the Board itself, and [3] contained within an administrative staff manual, they fall within § 552(a)(2)—not § 552(a)(1).” 859 F.3d at 1078.

None of these three theories is supportable. First, the fact that the Manual revisions were not in fact published in the Federal Register does not support the majority’s result. As the majority in this case and the panel opinion in *DAV* acknowledge, Maj. Op. 1108–09; *DAV*, 859 F.3d at 1077, an agency’s choice of whether and where to publish a rule are not controlling, see, e.g., *Preminger v. Sec’y of Veterans Affairs*, 632 F.3d 1345, 1351 (Fed. Cir. 2011) (per curiam); *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977). Indeed, neither the majority here nor *DAV* cites any case in which the decision not to publish was even relevant in deciding the scope of § 552(a)(1). A contrary rule would permit the agency to defeat judicial review by the

simple expedient of failing to fulfill its obligation to publish the document in the Federal Register.

Second, the fact that the Manual is not binding on the Board is equally irrelevant.³ We have previously rejected this very theory. In *LeFevre*, the Secretary argued that his refusal to establish a presumption of service connection for certain cancers was not subject to review because it was nonbinding—veterans were still permitted to prove service connection on a case-by-case basis. 66 F.3d at 1197. We rejected that contention, noting that such an action “ ‘has an immediate and practical impact’ on Vietnam veterans and their survivors ..., was not ‘abstract, theoretical, or academic,’ ‘touches vital interests of’ veterans and their survivors, and ‘sets the standard for shaping the manner in which an important segment’ of the Department's activities ‘will be done.’ ” *Id.* at 1198 (quoting *Frozen Food Express v. United States*, 351 U.S. 40, 44, 76 S.Ct. 569, 100 L.Ed. 910 (1956)). The same is true of the Manual revisions at issue here. Also, as noted earlier, other circuits have held agency actions that were binding on subordinate agency officials to be reviewable. *See Appalachian Power*, 208 F.3d at 1022 (reviewing a policy issued in a guidance document that “EPA officials in the field are bound to apply”); *Nat. Res. Def. Council*, 643 F.3d at 321 (reviewing a guidance document that “binds EPA regional directors”).

As recognized by the majority, the Manual revisions' impact is extensive: “the VA instructed all claims processors in its 56 regional offices to exclude all Navy personnel who served outside the now-defined ‘inland waterways’ of Vietnam ... from presumptive service connection for diseases or illnesses connected with exposure to Agent Orange.” Maj. Op. 1107. VA,

too, “concedes that the impact of its manual changes is both real and far reaching.” *Id.* at 1107–08. Even though not binding on the Board, the Manual does bind the front-line benefits adjudicators located in each VA Regional Office (“RO”). *See, e.g., Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009). Over 1.3 million claims were decided by the ROs in 2015, yet during that same period only 52,509 appeals of those decisions were filed before the Board. *Compare* Office of Mgmt., U.S. Dep’t of Veterans Affairs, *FY 2016 Agency Financial Report* 18 (Nov. 15, 2016), <https://www.va.gov/finance/docs/afr/2016VAafrFullWeb.pdf>, *with* Bd. of Veterans Appeals, U.S. Dep’t of Veterans Affairs, *Annual Report Fiscal Year 2015* (2016) [hereinafter *BVA Report*], https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf. Those few veterans who do seek Board review can expect to wait an additional three years between the filing of their appeal and a Board decision. *See BVA Report* 21. With roughly 96% of cases finally decided by VBA employees bound by the Manual, its provisions constitute the last word for the vast majority of veterans. To say that the Manual does not bind the Board is to dramatically understate its impact on our nation's veterans. Review of the Manual revisions is essential given the significant “hardship [that] would be incurred ... if we were to forego judicial review.” *Coal. for Common Sense in Gov’t Procurement v. Sec’y of Veterans Affairs*, 464 F.3d 1306, 1316 (Fed. Cir. 2006).

Finally, as the majority here appears to agree, *see* Maj. Op. 1108–09, *DAV*'s reliance on the form of the Manual cannot defeat jurisdiction. Nothing about the statute suggests that a document described in subsection (a)(2) could not also be subject to subsection

(a)(1)'s more demanding requirements. Given the statute's "goal of broad disclosure" and the Supreme Court's instructions to construe its exemptions narrowly and exclusively, *U.S. Dept of Justice v. Tax Analysts*, 492 U.S. 136, 151, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989), we should not read new limitations into § 552.

Implicit to *DAV*'s reasoning, in this respect, is the notion that § 552(a)(1) and § 552(a)(2) are mutually exclusive. In other words, *DAV* instructs that provisions of agency manuals, because described in subsection (a)(2), are therefore not rules of general applicability for purposes of subsection (a)(1). *See id.* at 1077-78 ("Congress expressly exempted from § 502 challenges to agency actions which fall under § 552(a)(2)."). There is no support for this view. Congress did not in fact "expressly exempt" actions described in § 552(a)(1) from § 552(a)(2). To the contrary, a range of content commonly found in staff manuals—such as descriptions of an agency's organization, rules of procedure, and, importantly, generally applicable policies and interpretations—is expressly described in subsection (a)(1) despite also arguably being covered by the reference to manuals in subsection (a)(2)(C). Even if subsections (a)(1) and (a)(2) could be regarded as mutually exclusive, the Manual at issue here is not merely an "administrative staff manual": the Manual provides the rules of decision to be applied by agency adjudicators in responding to veterans' benefits claims. The revisions challenged here go well beyond "administrative" directions. They announce "interpretations of general applicability" subject to § 552(a)(1)'s publication requirement and, accordingly, to our review under § 502.

Cases from the Supreme Court, other courts of appeals, and our own court have held that similar agency pronouncements fall within the scope of § 552(a)(1) despite appearing within agency manuals. For example, in *Morton v. Ruiz*, 415 U.S. 199, 232-36, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), the Supreme Court held that provisions of the Indian Affairs Manual should have been published in the Federal Register pursuant to § 552(a)(1)(D) and the agency's own internal publication rules. Likewise, in *NI Industries, Inc. v. United States*, 841 F.2d 1104, 1107 (Fed. Cir. 1988), this Court held that contracting provisions located in an Army Standard Operating Procedures document were subject to § 552(a)(1)(D)'s publication requirement. *See also Linoz v. Heckler*, 800 F.2d 871, 878 n.11 (9th Cir. 1986) (finding a provision of the Medicare Carrier's Manual to be a generally applicable interpretation subject to § 552(a)(1)(D) publication); *Anderson*, 550 F.2d at 461-63 (same with respect to the Food Stamp Certification Handbook).

The majority's approach is also inconsistent with our own prior cases finding similar agency actions within the scope of § 502 and thus reviewable. Unlike *DAV*, each of these cases analyzed the substance and effect of the agency action, rather than its form. Most recently, in *Snyder v. Secretary of Veterans Affairs*, 858 F.3d 1410, 1413 (Fed. Cir. 2017), we found reviewable an opinion of the VA General Counsel relating to attorney's fees because it “announces a rule that readily falls within the broad category of rules and interpretations encompassed by § 552(a)(1)(B).” In *Military Order of the Purple Heart v. Secretary of Veterans Affairs*, 580 F.3d 1293, 1296 (Fed. Cir. 2009), we found jurisdiction to review a VA letter changing the procedures for reviewing certain benefits awards.

Our determination turned not on the form of the letter but on the fact that it “affects the veteran's substantive as well as procedural rights, and is ‘a change in existing law or policy which affects individual rights and obligations.’ ” *Id.* (quoting *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991)). We found another VA letter reviewable in *Coalition for Common Sense*, 464 F.3d at 1316-18, by focusing on its effect within the agency and on outside parties and tribunals, not on its form. Finally, as described above, in *LeFevre*, 66 F.3d at 1196-98, we found jurisdiction to review the Secretary's decision to exclude certain cancers from the presumption of service connection by looking to its effects on the veterans suffering from those diseases.

* * *

The provisions of agency manuals and similar documents have been previously held subject to preenforcement review. The *DAV* decision and the majority decision here represent an unwarranted narrowing of our jurisdiction. I respectfully suggest the *DAV* case was wrongly decided.

Footnotes

1“*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 [Vietnam]. 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

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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.” *Id.*

2Section 552(a) provides, in relevant part:

Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

...

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;

....

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—

...

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

....

(3)

(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any

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request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

3As the majority notes, the Manual is “not binding on anyone other than the VBA [Veterans Benefits Administration] employees” and, in particular, does not bind the Board of Veterans Appeals (“Board”). Maj. Op. 1105; *see also Carter v. Cleland*, 643 F.2d 1, 5 (D.C. Cir. 1980) (noting the Manual's binding effect on VA adjudicators); Office of Gen. Counsel, U.S. Dep't of Veterans Affairs, Op. Prec. 7-92, *Applicability of VA Manual M21-1, Part 1, Paragraph 50.45*, 1992 WL 1200482, at *2 cmt. 4 (Mar. 17, 1992) (same).

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United States Court of Appeals, Federal Circuit.

Robert H. GRAY, Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

Blue Water Navy Vietnam Veterans Association,
Petitioner

v.

Secretary of Veterans Affairs, Respondent

2016-1782 2016-1793

March 21, 2018

Petition for review pursuant to 38 U.S.C. Section 502.

**ON PETITIONS FOR PANEL REHEARING AND
REHEARING EN BANC**

Attorneys and Law Firms

Roman Martinez, Latham & Watkins LLP, Washington, DC, filed a combined petition for panel rehearing and rehearing en banc for petitioner Robert H. Gray in 2016-1782. Also represented by Graham Phillips, Benjamin Snyder, Blake Stafford; Shannon Lynne Brewer, Hill & Ponton, P.A., Deland, FL; Michael E. Wildhaber, Veterans Law Office of Michael E. Wildhaber, Washington, DC.

John B. Wells, Law Office of John B. Wells, Slidell, LA, filed a combined petition for panel rehearing and

rehearing en banc for petitioner Blue Water Navy Vietnam Veterans Association in 2016-1793.

Eric Peter Bruskin, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, filed a response to the petition for respondent Secretary of Veterans Affairs in 2016-1782 and 2016-1793. Also represented by Chad A. Readler, Robert E. Kirschman, Jr., Martin F. Hockey, Jr.; Brian D. Griffin, Brandon A. Jonas, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Zachary Stolz, Chisholm Chisholm & Kilpatrick, Providence, RI, for amicus curiae Disabled American Veterans in 2016-1782. Also represented by Megan Marie Ellis; Christopher J. Clay, Disabled American Veterans, Cold Spring, KY.

Christine Khalili-Borna Clemens, Finkelstein & Partners, LLP, Newburgh, NY, for amici curiae National Organization of Veterans Advocates, Inc., National Veterans Legal Services Program, Military Officers Association of America, National Law School Veterans Clinic Consortium, Veterans of Foreign Wars of the United States, Vietnam Veterans of America in 2016-1782. Also represented by Kenneth M. Carpenter, Law Offices of Carpenter Chartered, Topeka, KS.

Before Prost, Chief Judge, Newman, Lourie, Dyk, O'Malley, Reyna, Wallach, Taranto, Chen, and Stoll, Circuit Judges.*

Taranto, Circuit Judge, concurs in the denial of the petitions for rehearing en banc.

Dyk, Circuit Judge, with whom Newman and Wallach, Circuit Judges, join, dissent from the denial of the petitions for rehearing en banc.

ORDER

Petitioners Robert H. Gray and Blue Water Navy Vietnam Veterans Association each filed separate petitions for panel rehearing and rehearing en banc. Responses to the petitions were invited by the court and filed by the Secretary of Veterans Affairs. The petitions were first referred to the panel that heard the appeals, and thereafter the petitions and responses were referred to the circuit judges who are in regular active service. Polls were requested, taken, and failed.

Upon consideration thereof,

It Is Ordered That:

The petitions for panel rehearing are denied.

The petitions for rehearing en banc are denied.

The mandate of the court will issue on March 28, 2018 in both cases.

Taranto, Circuit Judge, concurs in the denial of the petitions for rehearing en banc.

I believe that petitioners have read too much into the panel decisions in the present cases and in *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017). Unlike petitioners, I do not read those decisions, in their rulings about the scope of 38 U.S.C. § 502, as treating the key Administrative Procedure Act provisions at

issue—5 U.S.C. § 552(a)(1) and § 552(a)(2)—as mutually exclusive in what they cover. Specifically, I do not read those decisions as standing for the proposition that, if an agency pronouncement is within § 552(a)(2)(C) (“administrative staff manuals and instructions to staff that affect a member of the public”), and so must be made available to the public in an electronic format, the pronouncement cannot also be within § 552(a)(1)(D) (“substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency”), and so must be published in the Federal Register.

The differences in language between § 552(a)(1) and § 552(a)(2) may well inform how to read each provision. But neither the language of the provisions nor the § 552 structure defining a hierarchy of publication methods that are not inconsistent with each other (the same pronouncement can be published electronically and in the Federal Register) facially precludes some subset of what falls under § 552(a)(2) from also falling under § 552(a)(1). The decisions that petitioners challenge do not declare otherwise. Instead, in holding § 552(a)(1) inapplicable, the decisions rely on particular features of the Department of Veterans Affairs pronouncement at issue, not merely the conclusion that it is an “administrative staff manual” under § 552(a)(2)(C).

The petitions for rehearing en banc rest almost entirely on the asserted need for this court to repudiate the premise of mutual exclusivity. I see no present need for en banc review to do so, because I do not think that our decisions stand for that premise. Nor, at least now, does the Government so read our decisions. If future panels adopt the premise that petitioners challenge,

whether based on our precedents or based on additional statutory analyses, en banc review can be considered at that time.

For those reasons, I do not think that the question of mutual exclusivity warrants en banc review. And I see no other justification for en banc review in these cases.

The particular Department pronouncement at issue here, stated in the Department's Adjudication Procedures Manual M21-1, is currently under consideration in cases involving individual benefits claims in the Court of Appeals for Veterans Claims. *See* Combined Pet. for Panel Rehr'g and Rehr'g En Banc at 18 n.3, *Gray v. Sec'y of Veterans Affairs*, No. 16-1782 (Fed. Cir. Dec. 13, 2017), Dkt. No. 66. That court may adopt petitioners' view of the matter or, in any event, issue a decision that, in the ordinary course, will bring the matter to this court relatively soon through an appeal under 38 U.S.C. § 7292. Accordingly, this court may consider the particular Manual pronouncement through an individual benefits case at roughly the same time as it would consider the pronouncement through the present cases if the court heard the § 502 jurisdictional question en banc, found jurisdiction, and then, as is common for an issue not yet addressed by a panel, returned the case to the panel to address the merits. Thus, the importance of the particular Department pronouncement at issue here does not justify en banc review.

Nor is en banc review warranted to answer the more general question of § 502's application to pronouncements of the sort at issue. No urgency in that regard has been shown. Few challenges to Manual pronouncements have been brought through § 502.

Denying en banc review in the present cases may have benefits. As already noted, petitioners and amici have focused almost entirely on the question of mutual exclusivity. They have not gone much past that question to present detailed analyses of why § 552(a)(1), properly interpreted, does or does not apply to the particular kind of agency pronouncement at issue here. Such analyses, covering at least text and history and case law, appear necessary to a sound interpretation of § 552(a)(1) and, therefore, of 38 U.S.C. § 502.

As presented by the parties, this case, like *Disabled American Veterans*, involves an agency pronouncement with at the following characteristics: (1) It is not a substantive rule and does not purport to have the force of law. (2) It is directed only to first-level agency decisionmakers, *i.e.*, the regional offices of the Department of Veterans Affairs. (3) It does not purport to state how the issue should or will be decided by the final agency decisionmaker on an individual claim, *i.e.*, the Board of Veterans Appeals, *see* 38 U.S.C. §§ 7104, 7252, which we have recognized “conducts de novo review of regional office proceedings based on the record.” *Disabled American Veterans v. Sec’y of Veterans Affairs*, 419 F.3d 1317, 1319 (Fed. Cir. 2005).

We have little meaningful analysis of the full range of judicial decisions that are potentially relevant to determining § 552(a)(1)'s application to the type of agency pronouncement at issue here. Most relevant would be decisions, if any exist, that involved or addressed an agency pronouncement having the three characteristics just identified. Also relevant would be judicial opinions that bear indirectly on deciding whether such a pronouncement falls within § 552(a)(1)—specifically, within § 552(a)(1)(D)'s coverage of “statements of general policy or interpretations of

general applicability formulated and adopted by the agency.” Focusing almost entirely on the issue of mutual exclusivity of various portions of § 552, the parties and amici have not furnished much analysis of case law bearing on whether pronouncements of the sort at issue here come within § 552(a)(1).

Nor have the parties and amici provided much meaningful analysis of the relevant statutory texts, contexts, and backgrounds. The statutes at issue are 38 U.S.C. § 502 and the referenced APA provisions, 5 U.S.C. §§ 552(a)(1) and 553. As to the latter, full understanding would require analysis of text and context and might be aided by scrutiny of the original 1946 APA § 3 and its later amendments (notably in 1966), as well as relevant legislative history and important commentary. *See, e.g.*, Pub. L. No. 89-487, 80 Stat. 250, 250–51 (1966) (amending APA § 3); APA § 3, Pub. L. No. 79-404, 60 Stat. 237, 238 (1946); H.R. Rep. 89-1497 at 28–30 (1966); S. Rep. 89-813 at 41–43 (1965); Attorney General's Manual on the Administrative Procedure Act 19–25 (1947). At present, we lack thorough analysis of whether and why the three characteristics of the pronouncement at issue identified just above, or other characteristics, should or should not matter under a proper legal interpretation.

In future cases, parties and amici will have the opportunity to develop and present such analyses. Panels will have the opportunity to examine them. The results would provide the court a fuller basis for assessing a petition for en banc review than we now have. I therefore concur in the denial of the present en banc petitions.

Dyk, Circuit Judge, with whom Newman and Wallach, Circuit Judges, join, dissenting from the denial of the petitions for rehearing en banc.

These cases present a question of exceptional importance concerning this court's jurisdiction in veterans' cases. As the government concedes, the M21-1 Adjudication Procedures Manual “consolidated all of the [Department of Veterans Affairs] policies and procedures for adjudicating claims for VA benefits into one resource.” Resp't Resp. Opp'n Reh'g 2.

For the reasons set forth in the panel dissent, I think that Congress has made these Manual provisions reviewable. We should consider this issue of reviewability en banc because of the widespread impact on the efficient adjudication of veterans' claims.

**Text of Pertinent Constitutional Provisions,
Treaties, Statutes, Ordinances and Regulations**

**5 U.S.C. Sec 552. Public information; agency rules,
opinions, orders, records, and proceedings**

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the

Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format--

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of

personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

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(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C Sec 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

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(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

38 U.S.C. Sec 502. Judicial review of rules and regulations

An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial

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review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

Article ID: 554400000014940

M21-1, Part IV, Subpart ii, Chapter 1, Section H - Developing Claims for Service Connection (SC) Based on Herbicide Exposure

- Previous Section Next Section -->

Overview

This section contains the following topics:

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Topic	Topic Name
1	Developing Claims Based on Herbicide Exposure in the Republic of Vietnam (RVN)
2	Developing Claims Based on Service Aboard Ships Offshore of the RVN or on Inland Waterways

In this Section

3	Developing Claims Based on Exposure to Agent Orange for Select Air Force Personnel Through Contact With Contaminated C-123 Aircraft Used in the RVN as Part of Operation Ranch Hand (ORH)
4	Developing Claims Based on Herbicide Exposure on the Korean Demilitarized Zone (DMZ)
5	Developing Claims Based on Herbicide Exposure in Thailand During the Vietnam Era
6	Developing Claims Based on Herbicide Exposure on Johnston Island
7	Developing Claims Based on Herbicide Exposure in Other Locations
8	Claims for Benefits Based on Birth Defects Due to Herbicide Exposure

9	Other Development Procedures for Claims Under the Nehmer Stipulation for Disabilities Resulting From Exposure to Herbicides
10	U.S. Army and Joint Services Records Research Center (JSRRC) Formal Findings Based on Thailand Service

1. Developing Claims Based on Herbicide Exposure in the RVN

Introduction

This topic contains information on developing claims based on herbicide exposure in the RVN, including

- requirement for service in the RVN
- time period during which herbicide exposure may be presumed considering qualifying length of service in the RVN
- overview of RVN service development procedures when to verify service in the RVN
- when to request additional evidence from the claimant in herbicide claims reviewing the claims folder for proof of RVN

-
- service
- requesting Federal records of RVN service when to submit a request to JSRRC researching Marine Corps RVN service documenting herbicide exposure
 - action to take when the claimed disability is not recognized under 38 CFR 3.309(e)
 - informing the Veteran about the Agent Orange Registry program, and action to take when the Veteran claims herbicide exposure but does not claim a disability.

March 27, 2018

Change Date

IV.ii.1.H.1.a.
Requirement
for Service in
the RVN

For the purposes of establishing service connection (SC) under 38 CFR 3.307(a)(6) and 38 CFR 3.309(e), service in the Republic of Vietnam (RVN) must be shown.

Reference: For more information on the definition of service in the RVN, see

- M21-1, Part IV, Subpart ii, 2.C.3.e, and
 - 38 CFR 3.313.
-

IV.ii.1.H.1.b.
 Time Period
 During Which
 Herbicide
 Exposure May
 Be Presumed

Herbicide exposure in the RVN may be presumed for the period beginning on January 9, 1962, and ending on May 7, 1975.

Reference: For more information on the definition of herbicide agent, see M21-1, Part IV, Subpart ii, 2.C.3.b.

IV.ii.1.H.1.c.
 Considering
 Qualifying
 Length of
 Service in the
 RVN

There is no requirement for a specified length of service, duty, or visitation in the RVN under 38 CFR 3.307(a)(6)(iii). Any length of time in the RVN during the Vietnam era may be sufficient to establish SC for subsequently-developed diseases based on a presumption of exposure to herbicides.

The table below describes the general development procedures for verifying service when the claimant alleges service in the RVN.

Step	Action
------	--------

IV.ii.1.H.1.d.

**Overview of
RVN
Service
Development
Procedures**

1	<p>Review the claim for the specific contention of exposure.</p> <p>Important: If the claimant has provided specifics about service in a location other than RVN, such as Thailand or Korea, follow the procedures specific to that location.</p>
2	<p>Review the claims folder for proof of RVN service as detailed in M21-1, Part IV, Subpart ii, 1.H.1.g.</p> <p>Note: If the Veteran served aboard a ship, follow the procedures outlined in M21-1, Part IV, Subpart ii, 1.H.2.</p>
Step	Action
3	<p>If RVN service is not established based on available records, request any necessary military records as detailed in M21-1, Part IV, Subpart ii, 1.H.1.h.</p>
4	<p>Take one of the actions in the following table.</p>

	<p>If ...</p> <p>military records establish service in the RVN</p>	<p>Then ...</p> <ul style="list-style-type: none"> • concede exposure • document exposure in accordance with the procedures in M21-1, Part IV, Subpart ii, 1.H.1.k • proceed with all other required development • when development is complete, refer the claim to the rating activity, and • proceed no further.
<p>Step</p>	<p>Action</p>	
	<p>If ...</p> <ul style="list-style-type: none"> • the claimant provides specific dates and locations 	<p>Then ...</p> <p>submit a request to U.S. Army and Joint Services Records Research Center (JSRRC) or</p>

	<p>of exposure (unrelated to temporary duty (TDY)), but</p> <ul style="list-style-type: none"> • military records do <i>not</i> establish service in the RVN or other area associated with herbicide exposure 	<p>research Marine Corps unit records.</p> <p>References: For more information on</p> <ul style="list-style-type: none"> • submitting a JSRRC request, see M21-1, Part IV, Subpart ii, 1.H.1.i, and • Marine Corps records research, see M21-1, Part IV, Subpart ii, 1.H.1.j.
Step	Action	
	If ...	Then ...

	<ul style="list-style-type: none"> • the claimant alleges specific dates of TDY service in the RVN, and • service records do not support the allegation <p>Exception: If the claimant has <i>not</i> provided specific dates of TDY service, follow the development procedures outlined in M21-1, Part IV, Subpart ii, 1.H.1.f.</p>	<ul style="list-style-type: none"> • proceed with all other required development • when development is complete, refer the claim to the rating activity, and • proceed no further. <p>Reference: For more information on developing for service records for TDY RVN service, see M21-1, Part IV, Subpart ii, 1.H.1.h.</p>
Step	Action	

	<p>If ...</p> <ul style="list-style-type: none"> • the claimant alleges service in the RVN, but neither the claim nor the service records detail specific dates of RVN service • military records do not establish service in the RVN or other location where herbicide exposure can be established, and the claimant has <i>not</i> provided specifics about how or when exposure occurred 	<p>Then ...</p> <ul style="list-style-type: none"> • send a subsequent development letter as specified in M21-1, Part IV, Subpart ii, 1.H.1.f, and • proceed to Step 5.
--	--	--

Step	Action								
5	<p data-bbox="285 233 358 1129">After sending the necessary development letter, take one of the actions in the table below.</p> <table border="1" data-bbox="378 233 776 1129"> <thead> <tr> <th data-bbox="378 772 451 1129">If the claimant ...</th> <th data-bbox="378 233 451 772">Then ...</th> </tr> </thead> <tbody> <tr> <td data-bbox="451 772 565 1129">provides details of service in the RVN</td> <td data-bbox="451 233 565 772">return to Step 4.</td> </tr> <tr> <td data-bbox="565 772 638 1129">If the claimant ...</td> <td data-bbox="565 233 638 772">Then ...</td> </tr> <tr> <td data-bbox="638 772 776 1129"> <ul data-bbox="659 793 760 1115" style="list-style-type: none"> • does not respond, or • fails to provide sufficient details </td> <td data-bbox="638 233 776 772">refer the case to the rating activity.</td> </tr> </tbody> </table>	If the claimant ...	Then ...	provides details of service in the RVN	return to Step 4.	If the claimant ...	Then ...	<ul data-bbox="659 793 760 1115" style="list-style-type: none"> • does not respond, or • fails to provide sufficient details 	refer the case to the rating activity.
If the claimant ...	Then ...								
provides details of service in the RVN	return to Step 4.								
If the claimant ...	Then ...								
<ul data-bbox="659 793 760 1115" style="list-style-type: none"> • does not respond, or • fails to provide sufficient details 	refer the case to the rating activity.								

	Action	
Step	<p>If the claimant ...</p> <p>provides details of service in a location other than the RVN</p>	<p>Then ...</p> <p>follow the procedures specific to that location.</p> <p>Reference: For more information on additional development procedures based on service</p> <ul style="list-style-type: none"> • aboard ships in the waters of the RVN, see M21-1, Part IV, Subpart ii, 1.H.2 • in Korea, see M21-1, Part IV, Subpart ii, 1.H.4 • in Thailand, see M21-1, Part IV, Subpart ii, 1.H.5, and • in other locations, see M21-1,

Important: If at any time during the procedures above, exposure to herbicides can be verified, cease further exposure development and determine if an exam is needed or if the claim is ready for decision.

**IV.ii.1.H.1.e.
When to Verify
Service in the
RVN**

Verify service in the RVN upon receipt of a claim for SC for a disability the claimant asserts is related to his/her (or a Veteran's) exposure to herbicides during service in the RVN.

A Veteran must have had actual duty or visitation in the RVN or on its inland waterways to qualify for the presumption of exposure to herbicides under 38 CFR 3.307(a)(6).

Note: It is unnecessary to attempt to verify service in the RVN if a claimant specifically states he/she (or the Veteran) neither went ashore nor served on board a ship as it operated on the inland waterways of the RVN.

Reference: For more information on verifying a Veteran's exposure to herbicides in locations *other than* the RVN, see M21-1, Part IV,

Subpart ii, 1.H.2-7.

**IV.ii.1.H.1.f.
When to
Request
Additional
Evidence in
Herbicide
Claims**

For herbicide exposure claims, a Section 5103 notice is generally not warranted as the evidence requirements are covered under the *Disability Service Connection* evidence table of the *VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits*.

Exception: Send a standard Section 5103 notice if the claimant files a substantially complete application on a non-EZ form.

The table below describes situations that require a subsequent development letter in claims of herbicide exposure.

If the ...	Then send a subsequent Veterans Benefits Management System (VBMS) development letter using the ...
------------	--

<p>claimed disability is not covered under 38 CFR 3.309(e)</p>	<p><i>AO-not a recognized condition</i> paragraph.</p>
<p>claimant fails to provide specifics of how or where exposure occurred</p>	<p><i>AO-Exposure General Notice</i> paragraph.</p>
<ul style="list-style-type: none"> • claimant alleges service in the RVN, but • service records do not support RVN service <p>Exception: If the claimant has already provided specific dates of TDY or other service in the RVN,</p>	<p><i>AO-submit evidence of Vietnam service</i> paragraph.</p>

do not send a subsequent development letter.	
--	--

**IV.ii.1.H.1.g.
 Reviewing
 the Claims
 Folder for
 Proof of RVN
 Service**

Certain documents within the claims folder may show proof of RVN service. See the table below for guidance on reviewing documents that may show RVN service or TDY service in the RVN between January 9, 1962, and May 7, 1975.

Review ...	For ...
all certified <i>DD Forms 214, Certificate of Release or Discharge from Active Duty</i>	<ul style="list-style-type: none"> • entries such as <i>Foreign Service: Republic of Vietnam</i>, or • a separating station/last duty assignment in the RVN.

<p>military personnel records, including the <i>DA Form 20, Enlisted Qualification Record</i></p>	<ul style="list-style-type: none"> • verification of service locations • any travel or flight orders • any statements in performance evaluations related to travel or flights, and • any TDY orders.
<p>Review ...</p> <p>service treatment records (STRs) and dental records</p>	<p>For ...</p> <p>treatment in the RVN with particular attention to Army Post Office (APO) numbers, which may be associated with a location in which the presumption of herbicide exposure applies. Reference: For a list of APO address numbers for the Asian Pacific Theater during the Vietnam Era, see the General 1942-2002 APO-FPO Files document on the Compensation Service Stressor</p>

Verification web site. Note: The listing of APO-FPO addresses begins on page 4998.	
--	--

Important: Receipt of the Vietnam Service Medal, Vietnam Campaign Medal, Armed Forces Expeditionary Medal and/or the Vietnam Cross of Gallantry is *not* acceptable proof of RVN service for the purpose of proving herbicide exposure.

- The Vietnam Service Medal was given to service members who were stationed on ships offshore or flew high altitude missions over the RVN as well as those who served in Thailand.
- The Armed Forces Expeditionary Medal was awarded by all branches of the service during the years before 1965 and *may* indicate duty or visitation in Vietnam. If a Veteran was awarded this medal, carefully review the records for documentation of travel or TDY orders to Vietnam.
- The Vietnam Cross of Gallantry was awarded by the Vietnamese Government to all units subordinate to Military Assistance Command (MACV) and the Army Vietnam, regardless of their

physical presence in the RVN. Since this is a unit-level citation and not an individual citation, receipt of this medal alone is not acceptable proof of service in the RVN.

References: For more information on

- RVN service in regards to Veterans who flew military missions over the RVN but never actually landed in country, see VAOPGCPREC 7-1993, and
- select Air Force personnel who had contact with contaminated C-123 aircraft used in the RVN, see M21-1, Part IV, Subpart ii, 1.H.3.

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**IV.ii.1.H.1.h.
Requesting**

If RVN service cannot be verified based on initial review of the materials in the claims folder, develop for Federal records containing

**Federal
Records of
RVN Service**

proof of service in the RVN. Use the table below to develop for Federal records containing proof of RVN service.

If the Veteran claims ...	And the claims folder is ...	Then ...
to have been stationed in the RVN	an electronic claims folder (eFolder)	submit a request through the Personnel Information Exchange System (PIES), using request code O50. Note: Do <i>not</i> resubmit a PIES O50 request if already submitted and received under prior claims development.
	a paper claims folder	submit a request through PIES, using request code

		<p>O34.</p> <p>Note: If the response to the PIES O34 request is negative, request the entire personnel record using the PIES O18 code.</p>
<p>TDY service in the RVN</p>	<p>an eFolder</p>	<p>submit a request through PIES, using request code O50.</p> <p>Note: Do <i>not</i> resubmit a PIES O50 request if already submitted and received under prior claims development.</p>
	<p>a paper claims folder</p>	<p>submit a request through PIES, using request code O39.</p>

Important: A claim may not be denied solely because service in the RVN cannot be verified

- until the end of the initial 30-day and 15-day follow-up response periods, and/or
- all requested Federal records needed to verify service in the RVN have been received *or* a formal response has been received indicating the records are unavailable.

References: For more information on

- Federal records requests, see M21-1, Part III, Subpart iii, 1.C.1.b, and
- requesting records through PIES, see
 - the *PIES Participant Guide*, and
 - M21-1, Part III, Subpart iii, 2.D.

IV.ii.1.H.1.i.
When to
Submit a

Regional offices (ROs) must submit a request for verification of herbicide exposure to JSRRC using the Defense Personnel Records

Request to JSRRC

Information Retrieval System (DPRIS) web application when

- a Veteran provides, or military records contain, the information JSRRC requires, but
- service records do not confirm the Veteran served in an area associated with herbicide exposure.

Exception: For Veterans who served with a Marine Corps unit, follow the procedures in M21-1, Part IV, Subpart ii, 1.H.1.j.

Note: Prior to submitting a request to JSRRC for verification of herbicide exposure, the development activity must ensure all other possible avenues of verifying exposure to herbicides have been exhausted by following the development guidance in M21-1, Part IV, Subpart ii, 1.H.1.d-g.

References: For more information on

- submitting a request to JSRRC, see the *DPRIS User Guide*
- requesting JSRRC verification of
 - RVN service based on service aboard ships, see M21-1, Part IV, Subpart ii, 1.H.2.k
 - Korean Demilitarized Zone (DMZ) service, see M21-1, Part IV,

Subpart ii, 1.H.4.c

- o Thailand service, see M21-1, Part IV, Subpart ii, 1.H.5.b, and
- o service in other locations, see M21-1, Part IV, Subpart ii, 1.H.7.a.

**IV.ii.1.H.1.j.
Researching
Marine Corps
RVN Service**

JSRRC does not research Marine Corps unit records of Marine Corps Veterans or other personnel assigned to a Marine Corps unit.

Follow the steps in the table below in order to verify RVN service for a Veteran who had service with a Marine Corps unit during the Vietnam era.

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Step	Action
1	Research Marine Corps unit records covering the Vietnam Era through the Stressor Verification page.
2	Was service in Vietnam confirmed based on the research performed in Step 1? <ul style="list-style-type: none">• If <i>yes</i>, document the service in accordance with M21-1, Part IV, Subpart ii, 1.H.1.k.

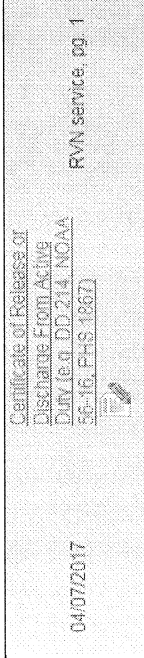
	<ul style="list-style-type: none"> If <i>no</i>, proceed to Step 3.
Step	Action
3	<p>Submit a request to National Archives and Records Administration (NARA) for Vietnam era Marine Corps unit records to the following address:</p> <p>National Archives and Records Administration Attention: Modern Military Records 8601 Adelphi Road College Park, MD 20740-6001</p> <p>Note: In the request, provide</p> <ul style="list-style-type: none"> a point of contact adequate identifying information, to include the Veteran's full name and Social Security number the most specific date(s), at minimum the month and year, during which the RVN service occurred, and the designation of the Veteran's unit of assignment at the time of the RVN service down to the lowest

	possible level. Example: Charlie Company, 1st Battalion, 6th Marines, 2nd Marine Division
4	<p>Establish a VBMS custom tracked item, <i>CONFIRM RVN SVC, TO NARA</i>, with a 30 day suspense time.</p> <p>Reference: For more information on establishing tracked items and special issues in VBMS, see</p> <ul style="list-style-type: none"> • M21-1, Part III, Subpart iii, 1.F the <i>VBMS User Guide</i>, and M21-4, Appendices C and D.

**IV.ii.1.H.1.k.
Documenting
Herbicide
Exposure**

When herbicide exposure is established, claims processors must access the Veteran's VBMS eFolder, and edit the subject line of the relevant document(s) used to verify herbicide exposure using the following format: [**Location of exposure**], pg. [number]

Example:



Reference: For more information on editing document properties, see the *VBMS User Guide*.

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**IV.ii.1.H.1.1.
Action to
Take When
the Claimed
Disability Is
Not
Recognized**

The Agent Orange Act of 1991, *Public Law (PL) 102-4*, established a presumption of SC for Veterans with service in the RVN during the Vietnam Era who subsequently develop specific diseases to a degree of 10 percent or more.

In herbicide-related claims, if the claimed disability is not recognized as a presumptive condition under 38 CFR 3.309(e), then the development activity must send the claimant a letter using the VBMS development

**Under 38
CFR 3.309(e)**

paragraph, *AO-not a recognized condition*, requesting scientific or medical evidence showing that the claimed condition is medically associated with dioxin exposures.

Exception: Do not send the letter if the claimant previously submitted the evidence requested in the letter.

Reference: For a list of diseases and the date they became subject to presumptive SC under 38 CFR 3.309(e), see M21-1, Part IV, Subpart ii, 2.C.3.i.

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**IV.ii.1.H.1.m.
Informing the
Veteran
About the
Agent Orange
Registry**

If the development activity determines further development is necessary per M21-1, Part IV, Subpart ii, 1.H.1.f, the development activity should also

- inform the Veteran of the availability of hospital examinations and treatment as part of the Agent Orange Registry program,

Program

and

- if the Veteran has already had the herbicide examination or been treated for herbicide exposure, request that the Veteran submit
 - a copy of the examination or treatment report, or
 - the name of the Department of Veterans Affairs (VA) facility performing the examination or treatment so that a copy of the report may be associated with the claims folder.

IV.ii.1.H.1.n.

**Action to
Take When
the Veteran
Claims
Herbicide
Exposure but
Does Not
Claim a
Disability**

A claim is not substantially complete if a Veteran alleges exposure to herbicides during service, but does not claim SC for a specific disability.

In cases such as these, follow the procedures for handling an incomplete application at M21-1, Part I, 1.B.1.g and h.

Reference: For more information on what constitutes a substantially complete application for benefits, see

- 38 CFR 3.159(a)(3)
- M21-1, Part I, 1.A.3.f, and
- M21-1, Part I, 1.B.1.b.

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

Introduction

This topic contains information on developing claims based on service aboard ships offshore of the RVN or on inland waterways, including

- definition of
 - inland waterways
 - offshore waters
- specific geographic locations determined to be
 - offshore waters
 - inland waterways
- tracking claims based on service aboard ships in the RVN's offshore waters
- review of military service personnel records to verify duty or visitation in the RVN while serving aboard ships on the RVN's offshore waters or on inland waterways

-
- presumption of exposure to herbicides with verified service aboard ships operating on inland waterways
 - developing claims based on exposure to herbicides during service aboard ships operating on the RVN's offshore waters
 - requesting National Personnel Records Center (NPRC) verification of duty or visitation in the RVN while serving aboard ships on the RVN's offshore waters or on inland waterways
 - researching Vietnam Naval service through approved military sites
 - requesting JSRRC verification of duty or visitation in the RVN while serving aboard ships on the RVN's offshore waters or on inland waterways
 - processing claims based on storage of Agent Orange aboard Navy and Coast Guard ships, and
 - mandatory claims folder documentation for Veterans claiming herbicide exposure aboard a ship in offshore waters.
-

Change Date

March 27, 2018

IV.ii.1.H.2.a.
Definition of
Inland
Waterways

The Agent Orange Act of 1991 implemented under 38 CFR 3.307(a)(6)(iii) requires “duty or visitation” within the RVN, 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 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.

Note: Inland waterway service is also referred to as ***brown-water Navy service***.

References: For more information on

- criteria for inland waterway service, see the Vietnam Era Navy Ship Agent Orange Exposure Development Site, and
- inland waterway locations, see M21-1, Part IV, Subpart ii, 1.H.2.d.

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IV.ii.1.H.2.b. Definition of Offshore Waters

Offshore waters are the high seas and any coastal or other water feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to regular tidal influence. This includes salty and brackish waters situated between rivers and the open ocean.

Note: Service in offshore waters is also referred to as *blue-water Navy service*. *Reference:* For more information on offshore waters locations, see M21-1, Part IV, Subpart ii, 1.H.2.c.

**IV.ii.1.H.2.c.
Specific
Geographic
Locations
Determined
to Be
Offshore
Waters**

The following locations are considered to be offshore waters of the RVN:

- Da Nang Harbor
- Nha Trang Harbor
- Qui Nhon Bay Harbor
- Cam Ranh Bay Harbor
- Vung Tau Harbor, and
- Ganh Rai Bay.

Important:

- RO staff are not authorized to independently determine that any particular coastal feature, such as bay, harbor, or inlet, is an inland waterway. RO staff unclear on the status of a particular
-

body of water may, in accordance with established procedures, submit the claim to Compensation Service for administrative review.

- VA previously extended the presumption of exposure to herbicides to Veterans serving aboard Navy and other vessels that entered Qui Nhon Bay Harbor or Ganh Rai Bay. In the interest of maintaining equitable claim outcomes among shipmates, VA will continue to extend the presumption of exposure to Veterans who served aboard vessels that entered Qui Nhon Bay Harbor or Ganh Rai Bay during specified periods that are already on VA's "ships list." VA will no longer add new vessels to the ships list, or new dates for vessels currently on the list, based on entering Qui Nhon Bay Harbor or Ganh Rai Bay or any other offshore waters.

Reference: For more information on requesting an administrative review, see M21-1, Part III, Subpart vi, 1.A.3.

IV.ii.1.H.2.d.

The following locations meet the criteria for inland waterways of the

**Specific
Geographic
Locations
Determined
to Be Inland
Waterways**

RVN:

- all rivers, from their mouth on the coast, or junction with adjoining coastal water feature, and throughout upstream channels and passages within Vietnam
 - Rivers ending in bays or other offshore water features on the coastline end at a notional boundary line drawn across the junction between the river and the offshore water feature.
 - The Mekong River and other rivers with prominent deltas begin at a line drawn across the mouth of each inlet on the outer perimeter of the landmass of the delta.
 - all streams
 - all canals, and
 - all navigable waterways inside the perimeter of land-type vegetation (e.g., trees and grasses, but not seaweed or kelp).
- This is particularly applicable to marshes found in the Rung Sat Special Zone and other Vietnam coastal areas.

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IV.ii.1.H.2.e.

For all initial claims based on service aboard ships on the RVN's

Tracking Claims Based on Service Aboard Ships on the RVN's Offshore Waters

offshore waters or inland waterways establish the *Blue Water Navy* flash.

Reference: For more information on the use of flashes, see

- M21-1, Part III, Subpart iii, 1.F.1, and
- M21-4, Appendix C, Section II.

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IV.ii.1.H.2.f. Review of Military Service

Follow the guidance in the table below to verify service on a ship in the offshore waters or inland waterways of the RVN.

	Step		Action

<p>Personnel Records to Verify Duty or Visitation in the RVN While Serving Aboard Ships on the RVN's Offshore Waters or on Inland Waterways</p>	<p>1</p>	<p>Review military service personnel records for</p> <ul style="list-style-type: none"> • the ship on which the Veteran served in the waters offshore of the RVN, and/or • any service involving duty or visitation on land in the RVN.
	<p>2</p>	<p>Search the Vietnam Era Navy Ship Agent Orange Exposure Development Site to verify whether the ship on which the claimant served</p> <ul style="list-style-type: none"> • traveled on inland waterways • docked to a pier or the shore of the RVN, or • sent crew ashore. <p>Reference: For more information on using the resources available on this site, see M21-1, Part IV, Subpart ii, 1.H.2.j.</p>
	<p>3</p>	<p>Accept the Veteran's statement that he/she went ashore from a ship as evidence of presumptive exposure to herbicides <i>if</i> there is evidence that the Veteran's ship</p>

<ul style="list-style-type: none"> • docked to the shore of the RVN, or • sent crew members ashore, <i>and</i> • the claimant was stationed aboard the ship at that time. <p>Important: The presumption of herbicide exposure extends to any Veteran who served aboard a ship that entered <i>inland</i> waterways.</p>	<p>4</p> <p>Can duty or visitation in the RVN be conceded based on the above steps?</p> <ul style="list-style-type: none"> • If <i>yes</i>, concede exposure as discussed in M21-1, Part IV, Subpart ii, 1.H.2.g. • If <i>no</i>, <ul style="list-style-type: none"> ○ ensure the development procedures in M21-1, Part IV, Subpart ii, 1.H.2.h-j have been properly completed, and ○ follow the JSRRC procedures outlined in M21-1, Part IV, Subpart ii, 1.H.2.k. <p>Important: Service on a ship operating on the RVN's</p>
---	---

inland waterways constitutes duty or visitation in the RVN.

**IV.ii.1.H.2.g.
Presumption
of Exposure
to Herbicides
With Verified
Service
Aboard Ships
Operating on
Inland
Waterways**

Veterans with verified service aboard ships operating on the RVN *inland* waterways qualify for presumption of Agent Orange exposure according to the Agent Orange Act of 1991 implemented under 38 CFR 3.307(a)(6)(iii).

Note: Veterans are *not* required to state that they went ashore if the service aboard ships during the time the ships were operating on inland waterways is verified.

Reference: For more information on the definition of inland waterway, see M21-1, Part IV, Subpart ii, 1.H.2.a.

**IV.ii.1.H.2.h.
Developing
Claims Based
on Exposure
to Herbicides
During**

When the evidence of record is not sufficient to verify a Veteran's claim of exposure to herbicides while serving aboard a ship that operated on the offshore waters of the RVN, then develop for

- evidence showing the ship
- operated temporarily on the RVN inland waterways

Service
Aboard Ships
Operating on
the RVN's
Offshore
Waters

- docked on the shores or piers of the RVN, or
- sent crew ashore
- evidence placing the Veteran onboard the ship at the time the ship
 - operated on inland waterways
 - docked to the shore or pier, or
 - sent crew ashore, *and*
- the Veteran's statement as to whether he/she went ashore, if the evidence shows the ship docked to the shore or pier or that crew members were sent ashore.

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References:

- See the Vietnam Era Navy Ship Agent Orange Exposure Development Site for information on
 - ships associated with service in the RVN and exposure to herbicides
 - American Naval fighting ships, and
 - U.S. Naval bases and support activities in Vietnam.
 - See M21-1, Part IV, Subpart ii, 2.C.3.m for information on
 - blue-water versus brown-water Veterans, and
-

- o presumption of herbicide exposure for brown-water Navy and Coast Guard Veterans.

IV.ii.1.H.2.i.
Requesting
NPRC
Verification
of Duty or
Visitation in
the RVN
While
Serving
Aboard Ships
on the RVN's
Offshore
Waters or on

If the claimant's military service personnel records are not currently in the claims folder and there is an assertion of a disability resulting from RVN duty or visitation while serving on a ship in the RVN's offshore waters or inland waterways, follow the procedures in the table below to develop for service personnel records from the National Personnel Records Center (NPRC).

If the claims folder is ...	Then ...
If the claims folder is ...	Then ...

**Inland
Waterways**

an eFolder	submit a request through PIES, using request code O50. Note: Do <i>not</i> resubmit a PIES O50 request if already submitted and a response has been received under prior claims development.
a paper claims folder	submit a request through PIES, using request code O18.

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References: For more information on

- Federal records requests, see M21-1, Part III, Subpart iii, 1.C.2.b, and
- requesting records through PIES, see
 - the *PIES Participant Guide*, and
 - M21-1, Part III, Subpart iii, 2.D.

IV.ii.1.H.2.j.

The following table describes the approved sites ROs must use to

Researching
 Vietnam
 Naval
 Service
 Through
 Approved
 Military Sites

<p>attempt to verify whether the ship on which the claimant served traveled on inland waterways docked to a pier or the shore of the RVN, or sent crew ashore.</p>	
Website	Information Available
<p><i>Dictionary of American Naval Fighting Ships</i></p>	<p>Includes summary histories of U.S. Navy ships, including any deployments in support of operations in the RVN. These histories sometimes show inland waterway service. Important: If a ship was deployed to Vietnam, ROs must follow procedures as discussed in M21-1, Part IV, Subpart ii, 1.H.2.f to determine if herbicide exposure can be conceded.</p>

Website	Information Available
<ul style="list-style-type: none"> • <i>Dictionary of American Naval Aviation Squadrons, Volume 1, and</i> • <i>Dictionary of American Naval Aviation Squadrons, Volume 2</i> 	<p>Contains the histories of all attack squadrons (“VA” prefix) and strike fighter squadrons (“VFA” prefix), for Navy flight personnel who state they served with a unit in the RVN.</p> <p>Important: If evidence shows a detachment of the squadron deployed to the RVN while the Veteran was assigned to the squadron, and the Veteran provides a lay statement of RVN service with the squadron, then concede service in the RVN.</p>
<p><i>U.S. Naval Bases & Support Activities Vietnam</i></p>	<p>A list of naval bases and support activities located in the RVN.</p> <p>Important: In addition to service aboard ships, Naval personnel were</p>

<p>assigned to bases in the RVN. If a Veteran's military records show service at one of these locations, the service qualifies as in- country service.</p>	
<p>An ongoing project by the National Archives and Records Administration to digitize deck logs. Contains a partial list of log books for Navy ships from the Vietnam era.</p> <p>Important:</p> <ul style="list-style-type: none"> • This site has limited functionality to assist with narrowing a search for relevant records. If a search of the deck logs on this site cannot be completed efficiently, such as when only a limited date range of potential exposure is known, 	<p><i>US Navy Deck Logs from the Vietnam Era</i></p>

	<p>proceed with sending a request to JSRRC as described in M21-1, Part IV, Subpart ii, 1.H.2.k.</p> <ul style="list-style-type: none"> • Concede herbicide exposure if the deck logs note a ship's operations included inland waterway service as defined in M21-1, Part IV, Subpart ii, 1.H.2.a.
--	--

Note: Claims processors must ensure any records used to concede exposure are uploaded to the Veteran's eFolder and documented as described in M21-1, Part IV, Subpart ii, 1.H.1.k.

IV.ii.1.H.2.k.
 Requesting
 JSRRC
 Verification of
 Duty or
 Visitation in

If a Veteran provides, or military records contain, the information JSRRC requires to determine whether a Veteran served in an area associated with herbicide exposure, the RO must submit a request for verification of herbicide exposure to JSRRC using DPRIS.

Prior to submitting a DPRIS O43 request to JSRRC for verification of

the RVN
While Serving
Aboard Ships
on the RVN's
Offshore
Waters or on
Inland
Waterways

herbicide exposure, or prior to determining that there is not sufficient information to obtain the assistance of JSRRC, the development activity must ensure

- all other possible avenues of verifying exposure to herbicides have been exhausted by following the development guidance in M21-1, Part IV, Subpart ii, 1.H.2.f-j
- the Veteran has identified a cumulative 60-day time frame for docking or inland waterway travel which may include different dates as long as the cumulative number of days does not exceed 60 days, and
- the service department has been unable to provide verification that the Veteran went ashore or traveled on inland waterways.

Important:

- In conducting the development above, review *all* evidence relating to the Veteran's service (not just what he/she may provide in response to VA requests) and glean dates of service in Vietnam waters from the records to the extent possible.
 - The DPRIS O43 request to JSRRC *must* include the following
-

information

- the name and hull number of the ship, such as U.S. Ship (USS) Galveston (CLG-3), and
- the dates during which the ship
 - traveled on inland waterways
 - docked to shore or pier, or
 - sent crew members ashore.
- If a JSRRC response, or other documentation, shows that the Veteran's ship may meet the criteria for addition to the VA Ships List, forward that evidence to VAVBAWAS/CO/211/AGENTORANGE for consideration.

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Notes:

- Concede exposure to herbicides on a presumptive basis if the
 - Veteran's unit history shows RVN in-country service, consistent with the Veteran's dates of assignment to that unit, and
 - Veteran provides a lay statement of personal in-country service.
 - If there is not sufficient information to request the assistance of
-

JSRRC, proceed with all other required development, and once complete, refer the claim to the rating activity.

Reference: For more information on submitting a request to JSRRC, see the *DPRIS User Guide*.

IV.ii.1.H.2.1.

Processing

Claims Based
on Storage of
Agent

Orange

Aboard Navy
and Coast
Guard Ships

Agent Orange was *not* transported, stored, or used aboard Navy or Coast Guard ships.

If a Veteran claims exposure to herbicides due to transport, storage, or use aboard a Navy or Coast Guard ship, associate a copy of the JSRRC memorandum shown in M21-1, Part IV, Subpart ii, 1.H.2.m with the Veteran's claims folder.

IV.ii.1.H.2.m.

When a Veteran claims exposure to herbicides during service aboard a

Mandatory
Claims Folder
Documentation
for Veterans
Claiming
Herbicide
Exposure
Aboard a Ship
in Offshore
Waters

ship in offshore waters based on shipboard herbicide transportation, storage, or use, associate a copy of the JSRRC memorandum provided below with the Veteran's claim folder.

**DEPARTMENT OF THE ARMY
U.S. ARMY & JOINT SERVICES RECORDS RESEARCH
CENTER**

**7701 TELEGRAPH ROAD
KINGMAN BUILDING, ROOM 2C08
ALEXANDRIA, VA 22315-3828**

AAHS-RDC

01 May 09

MEMORANDUM FOR RECORD

**SUBJECT: Joint Services Records Research Center Statement on
Research Findings Regarding Navy and Coast Guard Ships During the
Vietnam Era**

1. In the course of its research efforts, JSRRC has reviewed numerous official military documents, ships histories, deck logs, and other sources of information related to Navy and Coast Guard ships and the use of tactical herbicide agents, such as Agent Orange, during the Vietnam Era.
2. To date, JSRRC has found no evidence that indicates Navy or Coast Guard ships transported tactical herbicides from the U.S. to the Republic of Vietnam or that ships operating off the coast of Vietnam used, stored, tested, or transported tactical herbicides. Additionally, JSRRC cannot document or verify that a shipboard Veteran was exposed to tactical herbicides based on contact with aircraft that flew over Vietnam or equipment that was used in Vietnam.
3. Therefore, JSRRC can provide no evidence to support a Veteran's claim of exposure to tactical herbicide agents while serving aboard a Navy or Coast Guard ship during the Vietnam era.

/s/
Domenic A. Baldini
Director

	<p>Note: Association of the JSRRC memorandum with the claims folder will</p> <ul style="list-style-type: none">• substitute for individual inquiries to the Compensation Service Agent Orange mailbox and to JSRRC, and• establish that JSRRC has no evidence to support a claim of herbicide exposure during shipboard service.
--	--

3. Developing Claims Based on Exposure to Agent Orange for Select Air Force Personnel Through Contact With Contaminated C-123 Aircraft Used in the RVN as Part of ORH

Change Date	June 23, 2017
IV.ii.1.H.3.a.	The St. Paul RO generally has jurisdiction of all claims for

RO Procedure
for Claims
Based on
Exposure to
Agent Orange
Through
Contaminated
C-123 Aircraft
as Part of
ORH

service-connected (SC) disability or death associated with Agent Orange exposure through regular and repeated duties flying on, or maintaining, contaminated former Operation Ranch Hand (ORH) C-123 aircraft, which were used to spray Agent Orange in Vietnam. The St. Paul RO will be responsible to address all outstanding issues claimed.

Exception: For jurisdiction of claims from residents of foreign countries, see M21-1, Part III, Subpart ii, 5.A.

The Claims Assistant or Intake Analyst should follow the steps in the table below when a claim based on regular and repeated C-123 exposure is received at the RO.

Step	Action
1	Review the claim for Agent Orange and/or C-123 annotation.
2	Establish the proper end product (EP) with the <i>C-123 Agent Orange</i> flash.

3	Attach the <i>C-123 Agent Orange</i> special issue contention for each of the presumptive disabilities claimed.
4	Forward the claim to the St. Paul RO for processing.

Reference: For more information on processing claims based on contaminated C-123 aircraft, see the C-123 Aircraft Agent Orange Exposure website.

4. Developing Claims Based on Herbicide Exposure on the Korean DMZ

Introduction

This topic contains information on developing claims based on herbicide exposure in the Korean DMZ, including

- requirements for presumptive SC based on herbicide exposure in the Korean DMZ
 - units or other military entities identified by the Department of
-

Defense (DoD) as operating in the Korean DMZ during the qualifying time period, and

- requesting records from JSRRC in support of a Korean DMZ herbicide claim.

Change Date

March 27, 2018

IV.ii.1.H.4.a.
Requirements
for
Presumptive
SC Based on
Herbicide
Exposure in
the Korean
DMZ

Under 38 CFR 3.307(a)(6)(iv) and effective February 24, 2011, extend the presumption of herbicide exposure to any Veteran who served

- in a unit determined by VA or the Department of Defense (DoD) to have operated in the Korean DMZ, and
- between April 1, 1968, and August 31, 1971.

Note: Before the amendment of 38 CFR 3.307(a)(6)(iv) which became effective February 24, 2011, VA conceded exposure to herbicides on a direct basis for Veterans who served between April 1968 and July 1969 in one of the groups listed under M21-1, Part IV, Subpart ii, 1.H.4.b.

IV.ii.1.H.4.b.
 Units or Other
 Military
 Entities
 Identified by
 DoD as
 Operating in
 the Korean
 DMZ During
 the Qualifying
 Time Period

The table below shows the units or other military entities that DoD has identified as operating in the Korean DMZ during the qualifying time period of April 1, 1968, to August 31, 1971.

Major Command Assignment	Unit/Military Entity

<p>IV.ii.1.H.4.c. Requesting Records From JSRRC in Support of a Korean DMZ Herbicide Claim</p>	<p>Send a request to JSRRC for verification of exposure to herbicides when a Veteran claims exposure in Korea, and the service was not</p> <ul style="list-style-type: none"> • between April 1, 1968, and August 31, 1971, or • in a unit or entity listed in M21-1, Part IV, Subpart ii, 1.H.4.b. <p><i>Notes:</i></p> <ul style="list-style-type: none"> • If the claim and available records do not provide sufficient details of the Veteran's Korean DMZ service, send a subsequent development letter to the claimant and allow 30 days for a response. • Request and review all available military records prior to submitting a request to JSRRC for verification of herbicide exposure. • If the Veteran fails to provide sufficient information to complete
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a JSRRC request, refer the claim to the rating activity.
Reference: For more information on submitting a request to JSRRC, see the *DPRIS User Guide*.

5. Developing Claims Based on Herbicide Exposure in Thailand During the Vietnam Era

Introduction

This topic contains information on developing claims based on herbicide exposure in Thailand during the Vietnam Era, including

- special consideration for claims based on herbicide exposure in Thailand during the Vietnam Era, and
- verifying exposure to herbicides in Thailand during the Vietnam Era.

Change Date	November 12, 2015
IV.ii.1.H.5.a. Special Consideration for Claims Based on Herbicide Exposure in Thailand During the Vietnam Era	<p>Compensation Service has determined that a special consideration of herbicide exposure on a factual basis should be extended to Veterans whose duties placed them on or near the perimeters of Thailand military bases.</p> <p><i>Reference:</i> For more information on verifying exposure to herbicides in Thailand, see M21-1, Part IV, Subpart ii, 1.H.5.b.</p>
IV.ii.1.H.5.b. Verifying Exposure to Herbicides in Thailand	<p>When a Veteran with service in Thailand during the Vietnam Era claims SC for disability based on herbicide exposure, follow the steps in the table below to verify exposure to herbicides.</p>
	Step
	Action

<p>During the Vietnam Era</p>	<p>1</p>	<p>Did the Veteran serve in the Air Force in Thailand during the Vietnam Era</p> <ul style="list-style-type: none"> • at one of the following Royal Thai Air Force Bases (RTAFBs) <ul style="list-style-type: none"> ○ U-Tapao ○ Ubon ○ Nakhon Phanom ○ Udorn ○ Takhli ○ Korat, or ○ Don Muang, <i>and</i> • as an Air Force <ul style="list-style-type: none"> ○ security policeman ○ security patrol dog handler ○ member of the security police squadron, or ○ otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence? • If <i>yes</i>, concede herbicide exposure on a
--------------------------------------	----------	---

	<p>direct/facts-found basis. If <i>no</i>, proceed to Step 2.</p> <p>Notes:</p> <ul style="list-style-type: none"> • Concede herbicide exposure on a direct or facts-found basis for Army Veterans who served on RTAFBs in Thailand if the Veteran <ul style="list-style-type: none"> ○ provides a statement that he was involved in perimeter security duty, <i>and</i> ○ there is additional credible evidence supporting this statement. • Army personnel may have provided RTAFB security early in the war before the base was fully operational.
<p>Step</p>	<p>Action</p>
<p>2</p>	<p>Did the Veteran serve at a U.S. Army Base in Thailand during the Vietnam Era</p>

	<ul style="list-style-type: none"> • as a member of a military police unit, or • with a military police occupational specialty? • If <i>yes</i>, concede exposure to herbicides on a facts-found or direct basis <i>if</i> the Veteran states his duty placed him at or near the base perimeter. • If <i>no</i>, go to Step 3.
3	<p>Ask the Veteran for the</p> <ul style="list-style-type: none"> • approximate dates • location, and • nature of the alleged exposure.
4	<p>Did the Veteran furnish this information within 30 days?</p> <ul style="list-style-type: none"> • If <i>yes</i>, proceed to Step 5. • If <i>no</i>, <ul style="list-style-type: none"> ○ refer the case to the JSRRC coordinator to make a formal finding that sufficient information required to verify herbicide exposure does not exist (Note: For a sample of a formal finding, see M21-1, Part

	<p>IV, Subpart ii, 1.H.10.c.), and</p> <ul style="list-style-type: none"> o decide the claim based on the evidence of record, ensuring the rating decision and decision notice adequately explain the basis of the decision.
5	Review the information provided by the Veteran and proceed to Step 6.
6	<p>Can exposure to herbicides be acknowledged on a direct or facts-found basis as a result of this review?</p> <ul style="list-style-type: none"> • If <i>yes</i>, proceed with any other necessary development before referring the claim to the rating activity. • If <i>no</i>, proceed to Step 7.
7	<p>Has the Veteran provided sufficient information to permit a search by JSRRC?</p> <ul style="list-style-type: none"> • If <i>yes</i>, send a request to JSRRC for verification of exposure to herbicides. • If <i>no</i>,

- refer the case to the JSRRC coordinator to make a formal finding that sufficient information required to verify herbicide exposure does not exist (**Note:** For a sample of a formal finding, see M21-1, Part IV, Subpart ii, 1.H.10.c), and
- decide the claim based on the evidence of record, ensuring the rating decision and decision notice adequately explain the basis of the decision.

References: For more information on

- submitting requests to JSRRC, see M21-1, Part III, Subpart iii, 2.I.4.b, and
- referring a claim to the JSRRC Coordinator, see the *National Work Queue Playbook*.

Reference: For more information on Thailand military bases and herbicide exposure, see the VA Public Health site.

6. Developing Claims Based on Herbicide Exposure on Johnston Island

Introduction

This topic contains information on developing claims based on herbicide exposure on Johnston Island, including

- an overview of herbicide storage on Johnston Island, and
- a Fact Sheet on herbicide storage on Johnston Island.

Change Date

August 7, 2015

IV.ii.1.H.6.a.
Overview of
Herbicide
Storage on
Johnston
Island

Herbicides were stored in drums on Johnston Island in the North Pacific between April 1972 and September 1977. Because military contractors were responsible for the inventory, few military personnel who served on Johnston Island had duties involving the direct handling of herbicides.

If a Veteran alleges exposure to herbicides during service on Johnston Island, obtain verification of exposure on a factual basis.

Reference: For more information on verifying exposure to herbicides on a factual basis, see M21-1, Part IV, Subpart ii, 1.H.7.

IV.ii.1.H.6.b.
Fact Sheet:
Herbicide
Storage on
Johnston
Island

Below is a *Fact Sheet* on the storage of the herbicide Agent Orange on Johnston Island.

FACT SHEET: STORAGE OF AGENT ORANGE ON JOHNSTON ISLAND

- Approximately 1.5 million gallons of Agent Orange (AO) were stored on Johnston Island (JI) between April 1972 and September 1977, when it was incinerated at sea.
- There were approximately 25 thousand 55-gallon drums stored in rows stacked three high on about 3.5 acres on the NW corner of the island. The storage location was selected because the east-to-west trade winds would rapidly disburse any airborne AO into the Pacific.
- Military contractors (and not U.S. military personnel) were solely responsible for site monitoring and redrumming and dedrumming activities. The storage area was fenced and off limits from a distance.
- The entire inventory of AO was screened for leaks daily. Leaking drums were re-drummed on a weekly basis. Fresh spillage was

absorbed, and surface soil was scraped and sealed.

- Leakage of drums began in 1974. Between 1974 and 1977, the equivalent of the contents of 405 drums was leaked.
- The floor of the storage site was comprised of dense coral. Because of the composition and properties of coral, leaked AO was literally bound to the coral, providing little opportunity for AO to become airborne.
- A 1974 Air Force report found that the condition of the storage area provided evidence of the rapid identification of leaking drums, as few spill areas were observed.
- Soil samples in 1974 revealed that herbicide contamination was not detected outside of the storage yard except in close proximity to the redrums operation.
- Water samples were collected and analyzed twice per month from 10 different locations.
- A 1978 Air Force Land Based Environmental Monitoring study concluded that no adverse consequences of the minimal release of

AO into the JI environment during the dedrumming operation were observed. The report further stated that “exposure to (land-based operations) workers to airborne 2,4-D and 2,4,5-T were well below permissible levels.”

7. Developing Claims Based on Herbicide Exposure in Other Locations

Change Date March 27, 2018

IV.ii.1.H.7.a. Verifying Herbicide Exposure on a Factual Basis in Other Locations
 Follow the steps in the table below to verify potential herbicide exposure on a factual basis when the Veteran alleges exposure in locations other than the RVN, Korean DMZ, or Thailand.

Step	Action
1	If the claimant did not provide approximate dates, location(s), and nature of the alleged exposure to herbicides, send a subsequent development letter and include the <i>VBMS AO - Exposure General Notice</i> paragraph. Allow the

	<p>Veteran 30 days to submit the requested information.</p>
<p>2</p>	<p>After 30 days, did VA receive this information?</p> <ul style="list-style-type: none"> • If <i>yes</i>, go to Step 3. • If <i>no</i>, <ul style="list-style-type: none"> ○ refer the case to the rating activity, and ○ proceed no further.
<p>3</p>	<ul style="list-style-type: none"> • Send an e-mail with the dates, location, and circumstances of claimed herbicide exposure to Compensation Service at VAVBAWAS/CO/211/AGENTORANGE, and • request a review of DoD's inventory of herbicide operations to determine whether herbicides were used as claimed. <p>Important:</p> <ul style="list-style-type: none"> • Do not include the Veteran's personally identifiable

	<p>information (PII) in the e-mail.</p> <ul style="list-style-type: none"> If there are special circumstances where PII may be needed, note this in the e-mail inquiry, and you will be contacted for details. <p>Exception: If in response to the letter sent in Step 1 above, the Veteran provided an allegation of service in the RVN, Korean DMZ, or Thailand, follow the procedures relevant to those claims.</p>
4	<p>Did Compensation Service confirm that herbicides were used as claimed?</p> <ul style="list-style-type: none"> If <i>yes</i>, determine whether SC is otherwise in order. If <i>no</i>, go to Step 5.
5	<p>Has the Veteran provided sufficient information to permit a search by JSRRC?</p> <ul style="list-style-type: none"> If <i>yes</i>, send a request to JSRRC for verification of exposure to herbicides.

	<ul style="list-style-type: none"> • If <i>no</i>, refer the claim to the rating activity. <p>Reference: For more information on the specific information required to submit a JSRRC request, see M21-1, Part III, Subpart III, 2.I.4.b.</p>
--	--

8. **Claims for Benefits Based on Birth Defects Due to Herbicide Exposure**

<p>Change Date</p> <p>IV.ii.1.H.8.a. Considering Claims for Benefits Based on Birth</p>	<p>August 7, 2015</p> <p>Claims for</p> <ul style="list-style-type: none"> • benefits for a child with spina bifida and other birth defects, to include development procedures, are discussed in M21-1, Part VI, and
--	---

Defects

- additional benefits for natural children born with certain birth defects to female Vietnam Veterans have been authorized under *PL 106-419*.

Important: The law limits the birth defects for which VA may pay benefits. Do not award compensation for the following conditions on the basis that SC for these conditions is not authorized by law:

- birth defects resulting from a familial disorder
- a birth-related injury, or
- a fetal or neonatal infirmity, with well-established, unrelated causes.

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Reference: For more information on claims for benefits for birth defects from children of Vietnam Veterans, see

- M21-1, Part VI 38 CFR 3.814
 - 38 CFR 3.815, and
 - 38 U.S.C. Chapter 18.
-

9. Other Development Procedures for Claims Under the Nehmer Stipulation for Disabilities Resulting From Exposure to Herbicides

Introduction	<p>This topic contains information on developing claims under the <i>Nehmer</i> stipulation for disabilities resulting from exposure to herbicides, including</p> <ul style="list-style-type: none"> • development actions following claims folder review • EP control of claims under the <i>Nehmer</i> stipulation • information to include in <i>Nehmer</i> development letters to the Veteran scheduling an examination for a <i>Nehmer</i> claim, and • returned mail procedures for claims based on the <i>Nehmer</i> stipulation.
Change Date	August 26, 2016
IV.ii.1.H.9.a. Development	Development actions following a <i>Nehmer</i> claims folder review may include development for

**Actions
Following
Claims
Folder
Review**

- medical evidence
- verification of service
- dependency
- payee status
- military pay, and/or
- burial information.

**IV.ii.1.H.9.b.
EP Control
of Claims
Under the
Nehmer
Stipulation**

Control all *Nehmer* claims as instructed in the table below.

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If ...	Then ...
<ul style="list-style-type: none"> • the claim is received prior to the Secretary's announcement to add new presumptive conditions, <i>and</i> • requires readjudication based on a prior claim and 	<p>control with EP 681.</p> <p>Note: Historically, these claims were controlled under EP 687. Use of the EP 687 for adjudications under Nehmer was discontinued effective September</p>

	<p>decision for the benefit</p>	<p>7, 2011.</p>
<ul style="list-style-type: none"> • the claim is a new claim that requires adjudication, <i>and</i> • it is received on or after the date of the Secretary's announcement 	<ul style="list-style-type: none"> • the claim is a new claim that requires adjudication, <i>and</i> • it is received on or after the date of the Secretary's announcement 	<p>control with EP 681.</p>
<p>If ...</p>	<p>the claimed benefit is peripheral neuropathy</p>	<p>Then ...</p>
	<p>the claimed benefit is peripheral neuropathy</p>	<ul style="list-style-type: none"> • conduct a one-time clear of EP 686 when the <ul style="list-style-type: none"> ○ claims folder is sent to QTC Medical Services for initial checklist review of eligibility for SC of peripheral neuropathy under the <i>Nehmer</i> stipulation ○ RO completes the initial

checklist review of eligibility for SC of peripheral neuropathy under the <i>Nehmer</i> stipulation, and	<ul style="list-style-type: none">• control the adjudication of positive checklist cases with EP 020 and special issue indicator of <i>Nehmer AO Peripheral Neuropathy</i>.
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Important: Any subsequent claims received after establishment of the appropriate *Nehmer* EP will be worked under a separate, appropriate EP, whether rating or non-rating.

Reference: For more information on peripheral neuropathy for *Nehmer* purposes, see M21-1, Part IV, Subpart ii, 2.C.3.j.

**IV.ii.1.H.9.c.
Information
to Include in
Nehmer
Development
Letters to
the Veteran**

When readjudication of a claim under the *Nehmer* stipulation requires development to the Veteran, letters to the Veteran should include notification that

- the claim will be readjudicated with all of the procedural rights normally applicable to VA decisions
- the Veteran will be afforded a reasonable time to present evidence or reasons why the claim should be considered under the new regulations, and
- if the VA does not receive such evidence or reasons, VA will make a decision based on the evidence considered in the previously decided claim.

**IV.ii.1.H.9.d.
Scheduling
an**

The mere passage of time since a VA examination was completed does not automatically require VA to provide a new medical examination, as stated in *Palczewski v. Nicholson*, 21 Vet.App. 174, 182 (2007). The

**Examination
for a Nehmer
Claim**

determination of whether an examination is warranted is made on a case-by-case basis primarily focused on whether the evidence of record is adequate for rating purposes and accurately reflects the overall disability picture.

Important: When entering an examination request, notify the VA medical facility in the *Remarks* section that the claim is a *Nehmer* case and should not be canceled due to incorrect jurisdiction.

Reference: For more information on requesting examinations, see M21-1, Part III, Subpart iv, 3.A.

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**IV.ii.1.H.9.e.
Returned
Mail
Procedures
for Claims
Based on the
Nehmer**

Upon receipt of mail that has been returned as undeliverable pertaining to a *Nehmer* claim

- review the returned mail for any forwarding address indicated by the U.S. Postal Service
- review the claims folder
- review Share, Compensation and Pension Record Interchange, and other systems, as applicable, to verify the validity of the

Stipulation

address utilized in the development letter

- if a valid address still cannot be verified, attempt to make telephone contact with the payee, and
- if there is evidence of a previous electronic funds transfer with complete bank information, send a letter to the bank.

Important: Document all efforts to locate a payee on *VA Form 27-0820, Report of General Information* summarizing each action taken to identify a current address. If VA attempted to locate multiple payees, a separate *VA Form 27-0820* shall be completed for each payee with a summary for each individual. After completion, the claim shall be forwarded to the rating activity for a decision based on the evidence of record, if one is not yet completed.

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10. JSRRC Formal Findings Based on Thailand Service

Introduction

This topic contains information on completing the JSRRC formal

finding in Thailand cases, including

- formal findings that VA lacks the information JSRRC requires to verify herbicide exposure in Thailand
- completing a Thailand herbicide formal finding, and
- template for documenting a Thailand herbicide formal finding.

Change Date

March 27, 2018

IV.ii.1.H.10.a.

Formal Findings That VA Lacks the Information JSRRC Requires to Verify Herbicide

If a claimant fails to provide the information the JSRRC requires to determine whether a Veteran served in Thailand and was exposed to herbicides, the RO's JSRRC Coordinator must prepare a formal finding that documents this fact. *Before* preparing the formal finding, the JSRRC Coordinator must review the Veteran's claims folder to confirm the RO

- gave the claimant an opportunity to provide the information JSRRC requires as stated in M21-1, Part IV, Subpart ii, 1.H.1.f
- properly followed established procedures for
 - verifying the Veteran's claimed route of exposure, and

Exposure in Thailand

-
- obtaining the information JSRRC requires, and
 - reviewed and considered all relevant evidence of record, to include service records, in an attempt to
 - verify the Veteran’s claimed route of exposure, and
 - obtain the information JSRRC requires.

Note: When herbicide exposure is claimed based on locations other than Thailand, a JSRRC formal finding is not required.

References: For more information on the

- definition of herbicide agent, see M21-1, Part IV, Subpart ii, 2.C.3.b , and
- information JSRRC requires, see M21-1, Part III, Subpart iii, 2.I.4.b.

**IV.ii.1.H.10.b
Completing a Thailand**

The formal finding referenced in M21-1, Part IV, Subpart ii, 1.H.10.a must

- state that VA does not possess the information JSRRC requires to research a claim that a Veteran served in Thailand and was
-

Herbicide Formal Finding

-
- exposed to herbicides
 - confirm the RO properly followed established procedures for obtaining the information
 - describe the actions the RO took to obtain the information
 - state that evidence of the RO's efforts to obtain the information is of record in the claims folder, and
 - be signed by
 - the JSRRC Coordinator that prepared the formal finding, and
 - the RO's Veterans Service Center Manager (VSCM) or his/her designee.

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When preparation of the formal finding is complete, add it to the Veteran's claims folder.

Note: It is *not* necessary to contact the Veteran by telephone to

- advise him/her of the formal finding, or
- allow additional time to submit the required information.

Reference: For more information on electronically signing a formal

finding; see M21-1, Part III, Subpart v, 1.A.3.b.

**IV.ii.1.H.10.c.
Template for
Documenting
a Thailand
Herbicide
Formal
Finding**

Use the template below to document a formal finding that VA lacks the information the JSRRC requires to determine a Veteran's service in Thailand.

Department of Veterans Affairs Memorandum

Date:

From:

RE: Private, John Q.

CSS 999 99 9999

Subj: Formal finding that the Department of Veterans Affairs (VA) lacks the information the U.S. Army and Joint Services Records Research Center (JSRRC) requires to verify herbicide exposure in Thailand.

To: File

1. We have determined that the VA lacks the information the JSRRC requires to verify herbicide exposure in Thailand.
 2. The RO has given the claimant the opportunity to provide the missing information and has properly followed all other established procedures for obtaining it.
 3. The following efforts were made to obtain the information the JSRRC requires:
 - a.
 - b.
 - c.
 4. Evidence of efforts the RO made to obtain the information is contained in the claims folder.
-

Signature of the JSRRC Coordinator

Signature of the VSCM or Designee

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You can view this article at:

https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/local/en-US/portal/5544000001018/content/55440000014940/M21-1-1-Part-IV-Subpart-ii-Chapter-1-Section-H-Developing-Claims-for-Service-Connection-SC-Based-on-Herbicide-Exposure?query=M21-1