

from artillery, M1A2 Abrams Tanks, Bradley Fighting Vehicles, helicopters, and other weapons systems occur approximately 320 days of each year. Otter Creek runs through the installation. Otter Creek travels through Training Areas 8, 9 and 10. These areas are used to train soldiers for combat operation training on M1A2 Abrams Tanks and Bradley Fighting Vehicles. Artillery simulators and other explosive devices are used for these training activities, presenting a risk to civilians entering the area. These regulations are necessary to protect the public from potentially hazardous conditions that may exist as a result of Army use and security of the area. The regulations will also safeguard government personnel and property from sabotage and other subversive acts, accidents, or incidents of similar nature.

DATES: Written comments must be submitted on or before August 26, 2004.

ADDRESSES: U.S. Army Corps of Engineers, ATTN: CECW-CO, 441 G Street, NW., Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Miller, Headquarters Regulatory Branch, Washington, DC at (202) 761-7763, or Ms. Amy S. Babey, Corps of Engineers, Louisville District, at (502) 315-6691.

SUPPLEMENTARY INFORMATION: Pursuant to its authorities in section 7 of the Rivers and Harbors Act of 1917 (40 Stat 266; 33 U.S.C. 1) and Chapter XIX, of the Army Appropriations Act of 1919 (40 Stat 892; 33 U.S.C. 3) the Corps proposes to amend the danger zone regulations in 33 CFR part 334 by adding § 334.855 which establishes a danger zone in the navigable portions of Salt River and Rolling Fork River, and non-navigable portions of Otter Creek within the Ft. Knox Military Reservation installation boundaries. To better protect the Army personnel stationed at the facility and the general public, the Army has requested the Corps of Engineers establish a Danger Zone. This would enable the Army to keep persons and vessels out of the area at all times, except with the permission of the *Commanding General*, U.S. Army Garrison, Ft. Knox Military Reservation, Fort Knox, Kentucky, or his/her authorized representative.

Procedural Requirements

a. Review under Executive Order 12866.

This proposed rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

b. Review under the Regulatory Flexibility Act.

These proposed rules have been reviewed under the Regulatory Flexibility Act (Pub. L. 96-354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (*i.e.*, small businesses and small Governments). The Corps expects that the economic impact of the establishment of this danger zone would have minimal impact on the public, no anticipated navigational hazard or interference with existing waterway traffic and accordingly, certifies that this proposal if adopted, would have no significant economic impact on small entities.

c. Review under the National Environmental Policy Act.

A preliminary environmental assessment has been prepared for this action. The District expects, due to the minor nature of the proposed additional restricted area regulations, that this action, if adopted, would not have a significant impact on the quality of the human environment, and preparation of an environmental impact statement is not required. The environmental assessment may be reviewed at the District office listed at the end of **FOR FURTHER INFORMATION CONTACT**, above.

d. Unfunded Mandates Act.

This proposed rule does not impose an enforceable duty among the private sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of Section 202 or 205 of the Unfunded Mandates Act. We have also found under Section 203 of the Act, that small Governments would not be significantly and uniquely affected by this rulemaking.

List of Subjects in 33 CFR Part 334

Danger zones, Marine safety, Restricted areas, Navigation (water), Restricted areas, Waterways.

For the reasons set out in the preamble, the Corps proposes to amend 33 CFR part 334, as follows:

PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

1. The authority citation for part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3)

2. Section 334.855 would be added to read as follows:

§ 334.855 Salt River, Rolling Fork River, Otter Creek; U.S. Army Garrison, Fort Knox Military Reservation; Fort Knox, Kentucky; Danger Zone.

(a) *The area.* Salt River from Point A (37°59'31.72"N; 85°55'32.98"W) located approximately 1.2 miles southeast of West Point, Kentucky; southward to its confluence with the Rolling Fork River. Salt River from Point B (37°57'51.32"N; 85°45'37.14"W) located approximately 2.8 miles southwest of Shepherdsville, Kentucky; southward to its confluence with the Rolling Fork River. Rolling Fork River from Point C (37°49'59.27"N; 85°45'37.74"W) located approximately 1.6 miles southwest of Lebanon Junction, Kentucky northward to its confluence with the Salt River. Otter Creek from Point D (37°51'31.77"N; 86°00'03.79"W) located approximately 3.4 miles north of Vine Grove, Kentucky to Point E (37°55'21.95"N; 86°01'47.38"W) located approximately 2.3 miles southwest of Muldraugh.

(b) *The regulation.* All persons, swimmers, vessels and other craft, except those vessels under the supervision or contract to local military or Army authority, vessels of the United States Coast Guard, and federal, local or state law enforcement vessels, are prohibited from entering the danger zones without permission from the Commanding General, U.S. Army Garrison, Fort Knox Military Reservation, Fort Knox, Kentucky or his/her authorized representative.

(c) *Enforcement.* The regulation in this section, promulgated by the United States Army Corps of Engineers, shall be enforced by the Commanding General, U.S. Army Garrison, Fort Knox Military Reservation, Fort Knox, Kentucky and/or other persons or agencies as he/she may designate.

Dated: July 19, 2004.

Michael B. White,

Chief, Operations, Directorate of Civil Works.

[FR Doc. 04-16922 Filed 7-26-04; 8:45 am]

BILLING CODE 3710-92-P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 5

RIN 2900-AL70

Presumptions of Service Connection for Certain Disabilities, and Related Matters

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and

rewrite in plain language its regulations on presumptions of service connection for certain disabilities, and related matters. These revisions are proposed as part of VA's rewrite and reorganization of all of its adjudication regulations in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants and VA personnel in locating and understanding these general provisions.

DATES: Comments must be received by VA on or before September 27, 2004.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (OOREG1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; fax to (202) 273-9026; e-mail to VAregulations@mail.va.gov; or, through <http://www.Regulations.gov>. Comments should indicate that they are submitted in response to "RIN 2900-AL70." All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273-9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Bill Russo, Chief, Regulations Rewrite Project (OOREG2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-9515.

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has established an Office of Regulation Policy and Management (ORPM) to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulation Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project responds to a recommendation made in the October 2001 Report to the Secretary of Veterans Affairs by the VA Claims Processing Task Force. The Task Force recommended that the Compensation and Pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing and redrafting the regulations in 38 CFR part 3 governing the Compensation and Pension (C&P) program of the Veterans Benefits Administration (VBA). These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several

portions for public review and comment. This is one such portion. It includes proposed rules regarding presumptions of service connection and related matters.

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Overview of New Part 5 Organization

We plan to remove the compensation and pension benefit regulations from 38 CFR part 3 and relocate them in new part 5. We also plan to reorganize the regulations so that all provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this reorganization will allow claimants and their representatives, as well as VA personnel, to find information relating to a specific benefit more quickly.

The first major subdivision would be "Subpart A—General Provisions." It would include information regarding

the scope of the regulations in new part 5, delegations of authority, general definitions, and general policy provisions for this part.

Subpart B—Service Requirements for Veterans" would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. See 69 FR 4820.

Subpart C—Adjudicative Process, General" would inform readers about types of claims and filing procedures, VA's duties, rights and responsibilities of claimants, general evidence requirements, and general effective dates for new awards, as well as revision of decisions and protection of VA ratings.

"Subpart D—Dependents of Veterans" would provide information about how VA determines whether an individual is a dependent and the evidence requirements for such determinations.

"Subpart E—Claims for Service Connection and Disability Compensation" would define service-connected compensation, including direct and secondary service connection. This proposed subpart would inform readers how VA determines entitlement to service connection. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. Because of its size, proposed regulations in subpart E will be published in three separate NPRMs. This NPRM, which includes provisions governing presumptions related to service connection, is one such NPRM.

"Subpart F—Nonservice-Connected Disability Pensions and Death Pensions" would include information regarding the three types of nonservice-connected pension: Improved pension, Old-Law pension, and Section 306 pension. This subpart would also include those provisions that state how to establish entitlement to each pension, and the effective dates governing each pension.

"Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary" would contain regulations governing claims for dependency and indemnity compensation (DIC); death compensation; accrued benefits; benefits awarded, but unpaid, at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies.

This subpart would also include related definitions, effective date rules, and rate of payment rules.

“Subpart H—Special Benefits for Veterans, Dependents, and Survivors” would pertain to ancillary and special benefits available, including benefits for children with various birth defects.

“Subpart I—Benefits For Certain Filipino Veterans and Survivors” would pertain to the various benefits available to Filipino veterans.

“Subpart J—Burial Benefits” would pertain to burial allowances.

“Subpart K—Matters Affecting Receipt of Benefits” would contain those provisions regarding determinations of willful misconduct, competency, and insanity, which may affect claimants’ entitlement to benefits. This subpart would also contain information about forfeiture and renouncement of benefits.

“Subpart L—Payments and Adjustments to Payments” would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules.

The final subpart, “Subpart M—Apportionments and Payments to Fiduciaries or Incarcerated Beneficiaries” would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship.

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs, we cite the proposed part 5 section. We also cite the **Federal Register** page where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite to the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 replacement in some respects, but we believe this method will assist readers in understanding these proposed regulations where no part 5 replacement has yet been published. If there is no part 3 counterpart to a proposed part 5 regulation that has not yet been published, we have inserted “[regulation that will be published in a future Notice of Proposed Rulemaking]” where the part 5 regulation citation would be placed.

In connection with this rulemaking, VA will accept comments relating to a

prior rulemaking issued as a part of the Project, if the matter being commented on relates to both NPRMs. VA will provide a separate opportunity for public comment on each segment of the proposed part 5 regulations before adopting a final version of part 5.

Overview of Proposed Subpart E Organization

This NPRM pertains to those regulations governing presumptions of service connection for certain disabilities, and related matters or conditions. These regulations would be contained in proposed subpart E of new 38 CFR part 5. While these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, a few substantive changes are proposed.

In 38 U.S.C. 1112, 1116, 1117, 1118, and 1133, Congress established presumptions that certain diseases or disabilities are service connected under the circumstances described in those statutes. The diseases fall into the following categories: Chronic diseases; diseases associated with exposure to certain herbicide agents; diseases specific to former prisoners of war; tropical diseases; diseases associated with exposure to ionizing radiation; and certain disabilities or undiagnosed illnesses associated with service during the Gulf War. Although Congress has established other statutory presumptions, such as the presumption of sound condition stated in 38 U.S.C. 1111, this notice does not affect the regulations implementing those other statutory presumptions. When we refer to presumptions in this notice we are referring to the presumptions of service connection for specific types of diseases or illnesses stated in 38 U.S.C. 1112, 1116, 1117, 1118, and 1133. We are also referring to the presumption of service connection associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite, in 38 CFR 3.316.

In most situations, Congress limited the applicability of the presumptions by the provisions of 38 U.S.C. 1113, which states that the presumptions are rebuttable “[w]here there is affirmative evidence to the contrary, or evidence to establish that an intercurrent injury or disease which is a recognized cause of any of the diseases or disabilities * * * has been suffered between the date of separation from service and the onset of any such diseases or disabilities, or the

disability is due to the veteran’s own willful misconduct * * *”

The regulations implementing the statutory presumptions and the limitations presented by 38 U.S.C. 1113 are scattered throughout part 3 of title 38, United States Code of Federal Regulations. All of the paragraphs of the initial implementing regulation, 38 CFR 3.307, contain general principles that apply to all of the presumptions of service connection, as well as specific rules that apply only to particular presumptions. For example, current § 3.307(a) sets forth general rules but its subparagraphs contain specific rules that apply only to particular presumptions, such as the rules in § 3.307(a)(3)–(6) that each apply, in turn, to the presumption of service connection for chronic, tropical, and prisoner-of-war-related diseases or disabilities, and diseases or disabilities associated with exposure to certain herbicide agents. There are also presumption-specific rules included in other parts of § 3.307. For example, § 3.307(b) states the conditions under which VA considers certain diseases to be chronic diseases. On the other hand, current § 3.309 consists of five paragraphs, each of which articulates specific rules that govern grants of service connection based on a specific presumption.

Other rules that apply to grants of presumptive service connection are contained in §§ 3.303 (principles relating to service connection), 3.308 (presumptive service connection; peacetime service before January 1, 1947), 3.316 (claims based on exposure to mustard gas and other agents), 3.317 (compensation for certain disabilities due to undiagnosed illness), and 3.379 (anterior poliomyelitis).

We propose to establish a general rule, which would include the rules that are applicable to all presumptions, followed by several rules that would each contain the current rules specific to certain presumptions. We propose to codify these regulations in part 5 of title 38, Code of Federal Regulations, at §§ 5.260 through 5.269. Most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

The following table shows the correspondence between the current regulations in part 3 and those proposed or redesignated regulations contained in this NPRM:

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or, if not based on any current provision, then "New")
5.260(a)	New.
5.260(b)	3.307(b)–(c).
5.260(c)	3.307(d); 3.309(a)–(e); 3.316(b); 3.317(c).
5.261(a)	3.307(a), (a)(3).
5.261(b)	3.307(a)(1), (2).
5.261(c)	3.307(a)(2).
5.261(d)	3.303(b); 3.307(a)(3), (b), (c).
5.261(d) (table)	3.309(a).
5.261(e)	3.309(a).
5.261(f)	New.
5.262(a)(1)	3.307(a)(6)(iii).
5.262(a)(2)	3.307(a)(6)(ii).
5.262(b)	3.307(a)(6)(i).
5.262(c)	3.307(a)(1).
5.262(d)	3.307(a)(6)(iii).
5.262(e)	3.307(a)(6)(ii); 3.309(e).
5.262(e) Note 1	3.309(e) Note 2.
5.262(e) Note 2	3.309(e) Note 1.
5.263	3.313.
5.264(a)	3.307(a)(1) (third sentence).
5.264(a)	3.1(y); 3.307(a)(5); 3.309(c).
5.264(c)	3.309(c).
5.265(a)	3.307(a)(4), 3.308(b), 3.309(b).
5.265(b)	3.307(a)(1).
5.265(c)	3.307(a)(2).
5.265(d)	3.309(b).
5.265(e)	3.307(d)(1).
5.265(f)	3.308(b).
5.266	3.317 (redesignated as described at the end of this rulemaking).
5.267	3.316 (redesignated as described at the end of this rulemaking).
5.268(a)	3.309 (d)(3)(i).
5.268(b)	3.309(d)(1)–(2).
5.268(c)	3.309(d)(3)(ii), (iv), (vi), (vii).
5.268(d)	3.309(d)(3)(iii).
5.268(e)	3.309(d)(3)(v).
5.268 Note	New (cross reference).
5.269(a)	3.311(a)(1)(b)(1).
5.269(b) (introductory text)	3.311(b)(2).
5.269(b)(1)	3.311(b)(2), (5).
5.269(b)(2)	3.311(b)(3).
5.269(b)(3)	3.311(b)(4).
5.269(c)(1)	3.311(a)(1), (2).
5.269(c)(2)	3.311(a)(1) (last sentence).
5.269(c)(3)	3.311(a)(4)(ii).
5.269(c)(4)	3.311(a)(4)(i).
5.269(c)(5)	3.311(b)(1).
5.269(d)(1)	3.311(a)(2)(iii), (c).
5.269(d)(2)	3.311(a)(3).
5.269(e)(1)–(3)	3.311(c).
5.269(e)(4)	3.311(c)(2), (d).
5.269(e)(5)–(6)	3.311(d)(3).
5.269(f)	3.311(f).
5.269(g)	3.311(g).

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section affected by these proposed regulations is accounted for in the table. In some instances other portions of the part 3 sections that are contained in these proposed regulations appear in subparts of part 5 that will be published for public comment at a later

time. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a future NPRM. The table also does not include material from the current sections that will be removed from part 3 and not carried forward to part 5. A listing of material VA proposes to remove from part 3 appears later in this document.

Content of Proposed Rules

Presumptions of Service Connection for Certain Disabilities, and Related Matters

Section 5.260 General Rules and Definitions

Current 38 CFR 3.307 sets forth general rules that govern most adjudications of service connection based on presumptions established by 38 U.S.C. 1112 and 1116. Proposed § 5.260 contains those general rules, as described in the paragraphs that follow. We propose to move rules in current § 3.307 that are specific to particular

presumptions to the proposed rules that govern those particular presumptions.

Proposed paragraph (a) of § 5.260 would define how a “presumption of service connection” operates for the purposes of the rules contained in this notice, as follows:

A presumption of service connection establishes a material fact (or facts) necessary to establish service connection, even when there is no evidence that directly establishes that material fact (or facts). Examples of material facts include whether a disease or disability had its onset during a veteran’s military service, or whether a veteran was exposed to certain herbicide agents during such service. The evidence must prove that the presumption applies to the claimant, but after such a showing there is no need for additional evidence of the material fact(s) established by the presumption.

We believe that the proposed language reflects the intent of Congress and the historical application of presumptions in VA regulations and case law. For example, 38 U.S.C. 1112(a) states that a presumption establishes that a particular disease “shall be considered to have been incurred in or aggravated by * * * service, notwithstanding that there is no record of evidence of such disease during the period of service.” Our current rule, § 3.303(a), recognizes that proof of the “factors” of service connection described by the regulation “may be accomplished * * * through the application of statutory presumptions.” Both of these descriptions discuss presumptions in terms of their effect on the burden of producing evidence. These descriptions are in accord with the seminal decision by the United States Court of Appeals for the Federal Circuit on the subject, which defined a presumption as follows: “The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption.” *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998).

Proposed paragraph (b) clarifies the current requirement that certain presumptive diseases that must become manifest within a specific period need not be diagnosed within that period. We propose to clarify the following language from current § 3.307(c), which states: “This will not be interpreted as requiring that the disease be diagnosed in the presumptive period, but only that there be then shown by acceptable medical or lay evidence characteristic manifestations of the disease to the

required degree, *followed without unreasonable time lapse by definite diagnosis.*” 38 CFR 3.307(c) (emphasis added). The emphasized language must be considered in connection with the rule in current § 3.307(b) that requires VA to consider “[t]he chronicity and continuity factors outlined in § 3.303(b)” as evidence in support of a claim for presumptive service connection for a disease. In the context of presumptions, evidence of continuity of symptoms may be used to relate symptoms that manifested during a presumptive period to a current diagnosis made after that presumptive period ended. Section 3.307(b) is helpful to veterans who had symptoms that manifested during a presumptive period but did not obtain a diagnosis within that presumptive period.

A presumption relieves the party benefiting from the presumption of the obligation to prove the presumed facts. See *Routen v. West*, 142 F.3d 1434, 1439 (Fed. Cir. 1998). For example, 38 CFR 3.309, “Diseases subject to presumptive service connection,” contains a list of diseases and disabilities for which incurrence or aggravation during service is presumed, so long as certain conditions are met. See also 38 CFR 3.307, “Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.” Some regulations include presumptions that benefit the claimant, such as §§ 3.307 and 3.309. Other regulations include presumptions that may have an adverse impact on a claimant such as 38 CFR 3.23(d)(6), which presumes that a child’s income is “reasonably available” to a veteran or a surviving spouse if certain other facts are shown. In such cases, the child’s income would be included for purposes of determining whether a veteran or surviving spouse met the income limits for entitlement to Improved pension.

In 38 U.S.C. 1113, “Presumptions rebuttable,” Congress has established that presumptions of service connection for certain disabilities may be rebutted by “affirmative evidence” to the contrary or evidence of an intercurrent disease or injury capable of causing the veteran’s disability. The phrase “affirmative evidence” does not correspond to any of the three generally recognized standards of proof—*i.e.*, the “preponderance of the evidence” standard, the “clear and convincing evidence” standard, or the “beyond a reasonable doubt” standard. See *Addington v. Texas*, 441 U.S. 418, 423–24 (1979), *Gilbert v. Derwinski*, 1 Vet. App. 49, 53–54 (1990). The term

“affirmative” is commonly defined to mean “asserting the truth or validity of a statement” or “declaratory of what exists.” Webster’s Third New Int’l Dictionary 36 (1979). Accordingly, the term “affirmative evidence” clearly requires evidence supporting the facts to be proven, but implies no particular standard of proof to specify how convincing the evidence must be.

Neither the statutes nor current VA regulations state what the standard of proof for rebuttal will be in such cases. Pursuant to his general authority under 38 U.S.C. 501(a), to establish regulations “necessary or appropriate to carry out the laws administered by the Department,” the Secretary will, as part of this rewrite project, propose a regulation to establish and explain a general standard of proof for rebutting presumptions of service connection. This new provision will be published in a separate NPRM. We believe that the addition of this new provision to fill this gap will provide helpful guidance to claimants and VA adjudicators.

Additionally, section 1113 is implemented in current §§ 3.307(d), 3.309(a)–(c), (e), 3.316(b), which describe what evidence may be used to rebut presumptions related to incurrence or aggravation, *i.e.*, (1) affirmative evidence to the contrary; (2) evidence of intercurrent (intervening) injury or disease which is a recognized cause of the disease or disability; and (3) evidence the disability is due to the veteran’s own willful misconduct. We believe it is not helpful to have the criteria stated in multiple rules, especially because the criteria are stated slightly differently in each rule, which may lead users of the rules to conclude, mistakenly, that a different substantive rule applies in each situation. In order to clarify that one set of general rules on rebutting presumptions applies in all cases (except where specifically provided otherwise), we propose to place all of the generally applicable rebuttal rules in § 5.260(c), and therefore not to republish the general language in current §§ 3.307(d), 3.309(a)–(c), (e), or 3.316(b).

The presumption that a cancer was caused by exposure to ionizing radiation or herbicide agents (see 38 U.S.C. 1112(c) and 1116) may be rebutted by evidence that the cancer developed as a result of metastasis of a cancer which is not associated with exposure to ionizing radiation or herbicide agents. (See VA General Counsel Opinion VAOPGCPREC 18–97). We have therefore added Language to explain that if evidence establishes that a cancer (for which service connection is claimed under § 5.262 or § 5.268) originated in

another area of the body and then spread to one of the specific areas listed in § 5.262(e) or § 5.268(b), then the presumption of service connection will be rebutted.

The proposed rules would not use the phrase "affirmative evidence," which appears in 38 U.S.C. 1113 and current regulations. As stated above, we intend to adopt a generally applicable rebuttal standard of proof in a separate NPRM, which will apply to matters governed by section 1113. We believe that retaining the term "affirmative evidence" may cause unnecessary confusion as to whether it implies a different standard that may be less favorable to claimants. Further, inasmuch as the term "affirmative evidence" does not clearly impose any requirement other than that the evidence tend to prove a fact, we believe it is unnecessary to use the term. We believe that evidence sufficient to meet the generally applicable rebuttal standard we intend to propose will necessarily be affirmative of the relevant fact.

We propose not to include in § 5.260 the current regulatory requirement of 38 CFR 3.307(d) that "medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease." We believe that this language could be read to imply that a VA employee making an adjudicative decision in such a case would use his or her own medical judgment. This would be a violation of the holding by the U.S. Court of Appeals for Veterans Claims in *Colvin v. Derwinski*, 1 Vet. App. 171, 172 (Vet. App. 1991), *overruled in part on other grounds, Hodge v. West*, 155 F3d 1356, 1360 (Fed. Cir. 1998), that in making decisions, VA must consider only "medical evidence to support [its] findings rather than provide [its] own medical judgment." Moreover, we believe the language in § 3.307(d) quoted above is now unnecessary in light of the fact that cases described by § 5.260(c) are subject to VA's duty to assist requirements. These are reflected in 38 U.S.C. 5103A(d) and 38 CFR 3.159(c)(4), which states, in pertinent part, "In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim."

The proposed regulation pertaining to presumptions of service connection for certain tropical diseases, § 5.265, incorporates the material in current § 3.307(d) on rebutting these presumptions. The material is not in the proposed general regulation, § 5.260,

because the material is specific to the tropical-disease presumptions.

The statutory authority for the current 38 CFR 3.307(a), (c), and (d), as well as the proposed rule, is 38 U.S.C. 501(a), 1112, and 1113. We propose to add 38 U.S.C. 1137 as the statutory authority enabling VA to extend the presumptions to persons with peacetime service after December 31, 1946.

Section 5.261 Certain Chronic Diseases VA Presumes Are Service Connected

Currently, §§ 3.303(b), 3.307(a), 3.308(a), and 3.309(a) all contain rules that are specific to service connection for chronic diseases on a presumptive basis. VA proposes to consolidate these provisions into one new regulation, designated as § 5.261. The proposed regulation would neither enlarge nor diminish the existing rules.

Proposed § 5.261(a) restates the presumption of service connection for chronic diseases set forth in current §§ 3.307(a) and (a)(3). Proposed § 5.261(a) states that VA will presume service connection for a disease listed in paragraph (d) of this section, although not otherwise established as incurred or aggravated in service, if it first became manifest to a degree of 10 percent or more within a year of separation from a qualifying period of service or within such other time as provided in paragraph (d) of this section, called the presumptive period.

Proposed paragraphs (b) and (c) restate the identification of qualifying periods of service and the presumptive period set forth in current § 3.307(a)(1) and (a)(2). Current § 3.307(a)(2) states that for certain veterans, their date of separation will be the end of the wartime period in which they served. We believe it is important to note that this provision only applies to veterans who had a combination of wartime and peacetime service prior to World War II. We have therefore proposed to clarify that this rule applies only to "claims based on service ending before December 7, 1941."

Proposed § 5.261(d) lists what diseases are chronic for the purposes of the presumption of service connection. Although there is no statutory or regulatory definition of a chronic disease, section 1101(3) of title 38, U.S. Code, provides a list of diseases that Congress has determined to be chronic for the purposes of granting presumptive service connection. Current § 3.307(b) states "The diseases listed in § 3.309(a) will be accepted as chronic, even though diagnosed as acute because of insidious inception and chronic development * * * unless the clinical picture is clear otherwise,

consideration will be given as to whether an acute condition is an exacerbation of a chronic disease." Proposed paragraph (d) restates this concept, but substitutes the phrase "slow onset and persistent progress" for the phrase "insidious inception and chronic development." We believe these words better explain the nature and character of the diseases listed in 38 U.S.C. 1101(3) and 1112(a)(1). We also propose to delete the examples of disabilities which might result from "intercurrent causes" because we believe they are not very helpful to the understanding of the concept.

The introductory text to proposed paragraph (d) states that "VA will not apply the presumption of service connection where there is evidence that the disease preceded service to a degree of 10 percent or more. However, VA will apply the presumption where there is evidence that the disease preceded service to a degree of less than 10 percent." This language is new and conforms to section 1112(a) of title 38, U.S. Code, and codifies the holding of the U.S. Court of Appeals for the Federal Circuit in *Splane v. West*, 216 F.3d 1058, 1069 (Fed. Cir. 2000).

Proposed paragraph (d) lists the diseases that currently appear in § 3.309(a), with the changes described below. We propose to alphabetize the listed diseases in a chart designating the appropriate presumptive period for each disease. Some additional explanatory material concerning cardiovascular-renal disease has been moved to a separate paragraph designated (e). We propose to add the terms "acute or chronic" in a parenthetical to modify "Leukemia." In doing so, we are able to remove the sixth sentence of current § 3.307(b), which is redundant of the parenthetical language.

Current § 3.309(a) contains the following parenthetical explanation regarding "Ulcers, peptic (gastric or duodenal)":

(A proper diagnosis of gastric or duodenal ulcer (peptic ulcer) is to be considered established if it represents a medically sound interpretation of sufficient clinical findings warranting such diagnosis and provides an adequate basis for a differential diagnosis from other conditions with like symptomatology; in short, where the preponderance of evidence indicates gastric or duodenal ulcer (peptic ulcer). Whenever possible, of course, laboratory findings should be used in corroboration of the clinical data.

We believe that the principles stated in this parenthetical apply equally to any evidence of a diagnosis, not just a diagnosis of an ulcer. The current parenthetical might cause confusion by

leading readers to believe that these principles apply only regarding ulcers, and we therefore propose to remove this language.

Proposed paragraph (f) restates the holding of VA General Counsel Precedent Opinion 1-90 (Mar. 16, 1990), that service connection is available for hereditary or familial diseases listed in proposed paragraph (b) if the disease first manifested to a degree of 10 percent or more within the applicable presumptive period following discharge or release from service, subject to the rebuttable presumption provisions of § 3.307(d).

The statutory authority for this section is 38 U.S.C. 501 and 1101(3), which lists chronic diseases; 38 U.S.C. 1112(a)(1), which establishes the presumption of service connection for chronic diseases; and 38 U.S.C. 1137, which governs presumptions for peacetime veterans.

Section 5.262 Presumption of Service Connection for Diseases Associated With Exposure to Certain Herbicide Agents

Proposed § 5.262 contains the rules established by 38 U.S.C. 1116 and subject to 38 U.S.C. 1113 relating to the presumption of service connection for certain diseases associated with exposure to certain herbicide agents.

Current § 3.307(a)(6)(iii) states, in pertinent part: "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." The current rule is based on 38 U.S.C. 1116(f), which requires that a veteran have served "in the Republic of Vietnam" to be eligible for the presumption of exposure to herbicides. As stated in the preamble to the final rule on Type 2 diabetes (66 FR 23166, May 8, 2001) in interpreting similar language in 38 U.S.C. 101(29)(A), VA's General Counsel has concluded that service aboard a deep-water vessel in waters offshore the Republic of Vietnam does not constitute service "in the Republic of Vietnam." (See VAOPGCPREC 27-97). VA's regulatory definition of "Service in the Republic of Vietnam" predates the enactment of what is now section 1116(f) (see former 38 CFR 3.311a(a)(1) (1990)), and we find no basis to conclude that Congress intended to broaden that definition.

We are not aware of any valid scientific evidence showing that individuals who served in the waters offshore of the Republic of Vietnam or in other locations were subject to the same risk of herbicide exposure as those

who served within the geographic land boundaries of the Republic of Vietnam. Furthermore, we are not aware of any legislative history suggesting that offshore service or service in other locations are within the meaning of the statutory phrase, "Service in the Republic of Vietnam."

Based on the foregoing, proposed § 5.262(a)(1) would more clearly state the limits of the presumption of exposure and the presumption of service connection based on exposure to certain herbicide agents. We propose to revise this language to make it clear that veterans who served in waters offshore but did not enter Vietnam, either on its land mass or in its inland waterways cannot benefit from this presumption. It would state: "For purposes of this section, 'Service in the Republic of Vietnam' does not include service in the waters offshore or service in other locations, but does include any service in which the veteran had duty in or visited in the Republic of Vietnam."

It has previously been suggested that VA should define "Service in the Republic of Vietnam" to include service in inland waterways, because veterans who served there were sometimes exposed to herbicides. (See *Disease Associated With Exposure to Certain Herbicide Agents: Type 2 Diabetes* (final rule at 66 FR 23166, May 8, 2001)). We agree that veterans who served in the inland waterways may have been exposed to herbicides (see "Characterizing Exposure of Veterans to Agent Orange and Other Herbicides Used in Vietnam: Final Report", page 1 (2003, National Academies Press)). Further, we believe that service on inland waterways constitutes service in the Republic of Vietnam within the meaning of 38 U.S.C. 1116(f), and believe it would be helpful to clarify that in our regulations. We therefore propose to include such a provision in proposed paragraph (a)(1) that would state: "* * * which includes service on the inland waterways."

Proposed paragraph (b) is derived from current § 3.307(a)(6)(i), except that we propose not to include the following phrase from that rule: "* * * in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." We believe that that language is unnecessary, because the regulation specifies which agents are considered herbicide agents.

We have also added text to implement *Splane v. West*, 216 F.3d 1058 (Fed. Cir. 2000), in which the Federal Circuit interpreted the following language from 38 U.S.C. 1112(a):

[Multiple sclerosis developing a 10 percent degree of disability or more within seven years from the date of separation from such service * * * shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disease during the period of service.

The Federal Circuit held that the words "or aggravated by" indicate that Congress meant section 1112(a) to apply to those situations where multiple sclerosis predated entry into the service and became disabling to a compensable degree within the presumptive period following service. The "or aggravated by" language also appears in 38 U.S.C. 1116(a)(1)(B), which provides the authority for the presumptions based on herbicide exposure. Therefore, we propose to add language to clarify that presumptions may apply to a listed disease that preexisted service but first became manifest to a degree of 10 percent or more within the presumptive period following service. We note that if the condition preexisted service to a degree of 10 percent, for example, and after service the condition was 20 percent disabling, the veteran may be able to establish service connection using the presumption of aggravation in 38 U.S.C. 1153.

Section 5.263 Presumption of Service Connection for Non-Hodgkin's Lymphoma Based on Service in Vietnam

Proposed § 5.263 is based on current § 3.313, "Claims based on service in Vietnam." The only change we propose is the addition of the phrase, "For purposes of this section," at the beginning of paragraph (a). We believe this change will help clarify to readers that the definition of *service in Vietnam* in this rule is distinct from the definition of *service in the Republic of Vietnam* in current § 3.307(a)(6)(iii) and proposed § 5.262(a)(1).

Section 5.264 Diseases VA Presumes Are Service Connected in Former Prisoners of War

Proposed § 5.264 restates current §§ 3.307(a)(5) and 3.309(c) pertaining to presumptive service connection for diseases specific to former prisoners of war.

Prior to December 16, 2003, 38 U.S.C. 1112(b) provided that "a veteran who is a former prisoner of war and who was detained or interned for not less than thirty days" was entitled to a rebuttable presumption of service connection for certain diseases that became manifest to a degree of 10 percent or more after service. The statute listed 15 disabilities that qualified for that presumption.

VA's current implementing regulation, 38 CFR 3.309(c), incorporates the requirement for 30 days of detention or internment in order to qualify for the presumption of service connection for any of the listed diseases.

Section 201 of the Veterans Benefits Act of 2003, Pub. L. 108-183, 117 Stat. 2651 (Dec. 16, 2003), amended 38 U.S.C. 1112(b) to eliminate the 30-day requirement for psychosis, any anxiety states, dysthymic disorders, organic residuals of frostbite and post-traumatic arthritis. Section 201 of the Act also codifies cirrhosis of the liver as a disability which is presumptively service connected for a former POW who was interned for at least 30 days. (On July 18, 2003, VA published a final regulation adding cirrhosis of the liver to the list of conditions presumptively service connected for former POWs. (68 FR 42602)) We propose to incorporate these statutory amendments in § 5.264.

In addition, we propose to amend the phrase "any of the anxiety states" on the list of diseases presumed to be service connected under this section to specify that any mental disorder classified as an anxiety disorder by 38 CFR 4.130, the rating schedule for mental disorders, including post-traumatic stress disorder, will be presumed service connected. As amended, proposed paragraph (b) would include "[a]ny of the anxiety disorders, as listed in § 4.130, including post-traumatic stress disorder."

5.265 Tropical Diseases VA Presumes Are Service Connected

Proposed § 5.265 restates current §§ 3.307(a)(2), (a)(4), (d)(1), 3.308(b), and 3.309(b) pertaining to presumptive service connection for tropical diseases. Current § 3.307(a)(2) states that for certain veterans, their date of separation will be the end of the wartime period in which they served. We believe it is important to note that this provision only applies to veterans who had a combination of wartime and peacetime service prior to World War II. We have therefore proposed to clarify that this rule applies only to "claims based on service ending before December 7, 1941."

Proposed paragraph (e) would include the material in the last two sentences of current § 3.307(d)(1) specifically regarding the rebuttal of the tropical-disease presumption.

We propose to insert the word "presumptive" before the word "period" in the first of these sentences, to clarify the period to which the regulation refers. The statutory authority for paragraphs (a)-(d) is 38 U.S.C. 1101(4), which lists tropical diseases, and 38 U.S.C. 1112(a)(2), which

establishes the presumption of service connection for a tropical disease.

Section 5.266 Compensation for Certain Disabilities Due to Undiagnosed Illnesses

We propose to redesignate without substantive change current § 3.317 relating to compensation for certain disabilities due to undiagnosed illnesses as § 5.266.

We propose to make the following nonsubstantive changes to the provisions redesignated as § 5.266. First, we propose to replace the term "active military, naval, and air service," as used throughout the regulation, with the shorter term "active military service." As part of the Regulations Rewrite Project, we have proposed regulations defining "active military service" to include qualifying duty in any of the Armed Forces. See 69 FR 4820. This will eliminate the need to repeat the cumbersome phrase "active military, naval, or air service" throughout the regulations in part 5 of title 38 of the CFR. Second, we propose to remove the adjective "affirmative" as used in the provisions of current § 3.317(c)(1)-(3) to describe the evidence that may defeat a claim for benefits for certain undiagnosed illnesses. As explained in the portion of this notice discussing proposed § 5.260(c), we believe that term is unnecessary and may improperly imply that evidence need only be "affirmative" in order to bar a claim for benefits under this section. As stated in this notice, VA will propose separate regulations specifying the standard of proof evidence must meet in order to justify the denial of a claim for benefits. Third, we propose to rearrange alphabetically the list of signs or symptoms in current § 3.317(b), to make it easier to locate each item.

Currently, § 3.500(y) specifies the effective date for a reduction or discontinuance of compensation for certain disabilities due to undiagnosed illnesses. Because this provision is simply a restatement of the general effective date rule for reductions and discontinuances (as found in 38 U.S.C. 5112 and 38 CFR 3.500(a)), this might cause a reader to mistakenly believe that the rule in § 3.500(y) somehow differs from the general rule. To avoid this confusion, we propose to remove § 3.500(y).

Section 5.267 Presumption of Service Connection for Conditions Associated With Full-Body Exposure to Nitrogen Mustard, Sulfur Mustard, or Lewisite

Proposed § 5.267 would reorganize and clarify the current presumption of service connection for conditions

associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite. We propose to change the title of the regulation to specify the mustard agents to which it is applicable.

The general rules on rebuttal of the presumption of service connection contained in § 3.316(b), would not be contained in § 5.267 because such rules are set forth in proposed § 5.260, as discussed above.

Currently, there is no statutory authority listed for § 3.316. The Secretary determined in 1992, when this regulation was first proposed by VA, that special circumstances surrounding the World War II programs in which these mustard agents were tested placed veterans who participated in the tests at a disadvantage when attempting to establish service connection based on exposure to these agents. 57 FR 1699 (1992). Consistent with the authority of 38 U.S.C. 501(a), the Secretary of Veterans Affairs created a presumption of service connection for veterans exposed to certain mustard agents who contracted specified diseases. We therefore propose to add 38 U.S.C. 501(a), establishing VA's general authority to establish rules and regulations to implement the law, as the authority citation for this regulation.

Service Connection for Diseases Due to Exposure to Ionizing Radiation

Current §§ 3.309(d) and 3.311 contain the rules for adjudicating claims based on exposure to ionizing radiation in service. We propose in §§ 5.268 and 5.269 to rewrite and reorganize those existing rules in order to improve their clarity and to organize them in a way that will make them easier for claimants to understand and for VA to implement.

Under the provisions of current § 3.309(d), a presumption of service connection arises when the evidence establishes that a veteran participated in a radiation-risk activity, as defined in the regulation, and either has one of the diseases listed in that regulation, or died as a result of one of them. If these criteria are not met in a particular case, VA then considers the claim under the alternate provisions in current § 3.311 to determine if service connection can be granted.

The alternative method in current § 3.311 consists of an extensive evidentiary-development process, including reviews by the Under Secretary for Benefits (USB) and the Under Secretary for Health (USH), or their representatives. Furthermore, § 3.311(b)(2) contains a list of radiogenic diseases applicable to adjudications under that provision, and § 3.311(b)(5) contains specific time-frames in which

those diseases must have manifested. Some of the diseases on this list are also on the list in § 3.309(d). However, the manifestation periods and rules for claims development contained within § 3.311 are applied only when service connection cannot be presumed under § 3.309(d).

Additionally, under current § 3.311(b)(4), VA will consider any disease to be a radiogenic disease—regardless of whether it is listed in § 3.311—if the claimant has cited or submitted competent medical or scientific evidence that the disease is radiogenic. Again, this provision is independent of § 3.309(d) and applies only in claims that do not meet the requirements for the presumption of service connection under that rule.

In our view, the current regulatory framework—consisting of two regulations with three distinct sets of criteria for establishing service connection for a disease claimed to be caused by exposure to ionizing radiation “is difficult for the reader to understand, particularly in light of the multiple cross references in the regulations. We propose a regulatory framework that clearly differentiates between the different methods available for establishing service connection.

Section 5.268 Service Connection for Diseases Presumed To Be Due to Exposure to Ionizing Radiation

We propose in § 5.268 to state the rules applicable to the presumption of service connection for diseases associated with ionizing radiation exposure established under 38 U.S.C. 1112(c).

Proposed paragraph (a) states the service requirements that are unique to claims for service connection for diseases presumptively associated with ionizing radiation exposure under this section.

Proposed paragraphs (c) through (e) contain definitions of terms used in this section. We recognize that it is unusual to provide separate paragraphs for definitions; however, in this case, the definitions do more than simply clarify the meaning of a particular term. For example, the definition of “operational period” essentially sets forth a list of operations to which the presumption applies. Currently, these key terms are listed without headings. We believe that providing the definitions in separate paragraphs will make it easier to locate the definitions of these terms.

We propose to add guidance in a “Note” at the end of § 5.268 that states: “If this section does not apply in a particular case, VA will consider service connection under § 5.269 of this part.”

We believe this guidance will assist readers in determining which rule and criteria apply in select circumstances.

Section 5.269 Direct Service Connection for Diseases Associated With Exposure to Ionizing Radiation

Proposed § 5.269 is based on current § 3.311, containing the rules for establishing service connection for diseases caused by ionizing radiation when the presumption of service connection does not apply. Although these regulatory provisions do not pertain to establishing a presumption of service connection, we believe that it is helpful to place them directly after proposed § 5.268 because VA considers the claim under these provisions when it cannot establish service connection on a presumptive basis. In order to clarify that proposed § 5.269 does not describe a presumption of service connection, we propose to have the title of the rule read, “Direct service connection for diseases associated with exposure to ionizing radiation.”

Proposed § 5.269(a) states that this section does not establish a presumption of service connection and in paragraphs (a)(1) through (3), states the basic elements of a claim adjudicated under current § 3.311. If the provisions of paragraphs (a)(1) through (3) are not met, then the claim cannot be granted under this section.

Proposed paragraph (b) lists the diseases recognized as associated with exposure to ionizing radiation, and would include the provision in current § 3.311(b)(4) permitting claimants to show that a disease not listed is nevertheless associated with such exposure based on competent scientific or medical evidence that the claimed condition is a radiogenic disease.

Proposed paragraph (c)(1)(iii), based on current § 3.311(a)(2), states the types and sources of records which VA will attempt to obtain concerning a veteran’s exposure to ionizing radiation. We also propose to add the following new sentence: “If neither the Department of Defense nor any other source provides VA with records adequate to permit the Under Secretary to prepare a dose estimate, then VA will ask the Department of Defense to provide a dose estimate.” This would reflect the fact that it is impossible to estimate the likelihood that ionizing radiation exposure caused a claimed condition in the absence of a numerical ionizing radiation dose estimate and that VA would be unable to prepare a dose estimate if it has not received any records on which to base such an estimate. Proposed paragraph (c)(1) also clarifies, consistent with existing

statutes and regulations regarding delegations of authority, that as used in this section, “the Under Secretary for Health” includes his or her designees.

Proposed paragraph (c)(4) restates current § 3.311(a)(4)(i), which states that VA will concede a veteran’s presence at a site at which exposure to ionizing radiation is claimed to have occurred when military records neither confirm presence at nor absence from the claimed site. This concession is for the purposes of proposed § 5.269 only and does not confer entitlement to the presumptive provisions of proposed § 5.268.

Proposed paragraph (c)(5), based on 3.311(b)(1), describes the circumstances for forwarding dose data and any other evidence, along with the claims folder, to the Under Secretary for Benefits for review. The U.S. Court of Appeals for Veterans Claims held in *Wandel v. West*, 11 Vet. App. 200, 205 (1998), that referral to the Under Secretary for Benefits is not required absent competent evidence that a veteran was exposed to radiation. In *Wandel*, the dose estimate was reported as “zero.” Therefore, we propose to add to the regulation a provision that states that the claims file will not be referred by the agency of original jurisdiction to the Under Secretary for Benefits for review if VA determines that the claimed disability or disease is not radiogenic, that the veteran was not exposed to ionizing radiation in service as claimed, or if the actual or estimated dose is reported to be zero rem gamma.

Proposed paragraph (d) states the procedures for review by the Under Secretary for Benefits. Proposed paragraph (d)(1) states that “[t]he Under Secretary for Benefits will review all the evidence of record and may request an advisory medical opinion from the appropriate office of the Under Secretary for Health as to whether the veteran’s disease resulted from exposure to ionizing radiation in service.”

Proposed paragraph (e) restates the process, described in current § 3.311(c) and (d), for the Under Secretary for Benefits to review ionizing radiation claims and, if necessary, refer the case to an outside consultant for an expert opinion on whether veteran’s radiation exposure caused his disability. Current § 3.311(d)(3) states that, “The consultant shall evaluate the claim under the factors specified in paragraph (e) of this section and respond in writing, stating whether it is either likely, unlikely, or approximately as likely as not the veteran’s disease resulted from exposure to ionizing radiation in service.” We propose to change this to require the consultant to opine whether it is “likely,

unlikely, or at least as likely as not * * * This will make the provision consistent with the terminology in current § 3.311(c)(1) and (c)(2) and proposed § 5.269(e)(1) and (e)(4).

Proposed paragraph (f) restates the content of current § 3.311(f), which states that decisions under that section will be made based on standard principles of adjudication. Because current § 3.311(f) does not clearly state what entity within VA actually makes the determination of service connection under this section, proposed paragraph (f) clarifies that the “agency of original jurisdiction will adjudicate the claim.”

Proposed paragraph (g) restates current § 3.311(g), which provides that service connection will not be established if a disease is due to the veteran’s own willful misconduct, or if evidence establishes that a supervening, nonservice-related condition or event is more likely the cause of the disease. We propose to also state that service connection is barred if the disease is due to the veteran’s “abuse of alcohol or drugs.” This information may be relevant to readers and makes the regulation consistent with § 5.266.

The statutory authority for this rule continues to be Pub. L. 98–542 and 38 U.S.C. 501, the authority for current § 3.311.

Summary and Explanation for Removals

38 CFR 3.379

Current § 3.379 concerns service connection of the disease anterior poliomyelitis. It states:

If the first manifestations of acute anterior poliomyelitis present themselves in a veteran within 35 days of termination of active military service, it is probable that the infection occurred during service. If they first appear after this period, it is probable that the infection was incurred after service.

We believe the need for § 3.379 is eliminated by the operation of proposed § 5.261 relating to the presumption of service connection for chronic diseases. Congress identified “myelitis” as a category of chronic diseases in 38 U.S.C. 1101(3). “Myelitis” is part of the presumptive service connection provisions under 38 CFR 3.309(a). Anterior poliomyelitis, is a subcategory of “Myelitis”.

Pursuant to 38 U.S.C. 1112(a)(1), 38 CFR 3.307(a) and § 3.309(a) provide a presumption of service connection for chronic diseases (including myelitis) manifested to a compensable degree within one year of separation from service. According to 38 CFR 4.124a, the schedule of ratings for neurological conditions and convulsive disorders,

anterior poliomyelitis manifested as active febrile disease warrants a 100 percent rating under Diagnostic Code 8011. Moreover, minimum residuals of anterior poliomyelitis warrant a 10 percent rating under Diagnostic Code 8011. There is no zero percent rating under Diagnostic Code 8011. Therefore, a veteran with any manifestations of acute anterior poliomyelitis within the one-year presumptive period (whether or not within 35 days of termination of active military service), would qualify for the presumption under § 3.309(a). Based on the above provisions, we believe that any veteran who would benefit from the requirements of current § 3.379 would also meet the requirements of current § 3.309(a). Therefore, we propose to remove § 3.379.

38 CFR 3.813

Currently, 38 CFR 3.813 provides for interim benefits for disability/death due to chloracne or porphyria cutanea tarda. These provisions were established pending a determination as to whether or not the conditions were related to herbicide exposure in the Republic of Vietnam. Subsequently, these conditions were recognized as related to such herbicide exposure and the Secretary revised the list of presumptive conditions listed in current § 3.309 to include these two conditions. However, as noted in § 3.813(e), interim disability benefits were payable only for the period October 1, 1984 through September 30, 1986. Because this regulation is no longer pertinent to the adjudication of claims, we propose to remove it from part 3.

Endnote Regarding Removals From Part 3

For the reasons shown in the preceding supplementary information, the amendments proposed in this document would, if adopted, result in removal of current §§ 3.307, 3.308, 3.309, 3.311, 3.316, 3.317, 3.379, and 3.813. This would be the case because those part 3 sections, or portions of sections, would be replaced by new part 5 sections or they would be removed entirely. Readers are invited to comment both on these part 3 removals and on the proposed new part 5 rules at this time.

NPRMs frequently include formal “amendatory language” listing the sections, or portions of sections, that would be removed if the proposed amendments are adopted. However, we have not included such “amendatory language” in this NPRM because of the nature of this Project. Because of the very large scope of the Project, we are

publishing proposed amendments in several NPRMs. In the last NPRM, VA will propose to remove all of part 3, concurrent with the implementation of part 5.

Endnote Regarding Redesignation From Part 3

We propose to redesignate current § 3.313 “Claims based on service in Vietnam” as new § 5.263 “Presumption of service connection for non-Hodgkin’s lymphoma based on service in Vietnam.”

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed amendment would not affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

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

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any given year. This proposed amendment would have no such effect on State, local, or tribal governments, or the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers for this proposal are 64.100–102, 64.104–110, 64.115, and 64.127.

List of Subjects in 38 CFR Parts 3 and 5

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: April 20, 2004.

Anthony J. Principi,
Secretary of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR chapter I as set forth below:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

1. Part 5, as proposed to be added at 69 FR 4820, January 30, 2004, is further amended by adding subpart E to read as follows:

Subpart E—Claims for Service Connection and Disability Compensation

Presumptions of Service Connection for Certain Disabilities, and Related Matters

Sec.

- 5.260 General rules and definitions.
- 5.261 Certain chronic diseases VA presumes are service connected.
- 5.262 Presumption of service connection for diseases associated with exposure to certain herbicide agents.
- 5.263 [Reserved]
- 5.264 Diseases VA presumes are service connected in former prisoners of war.
- 5.265 Tropical diseases VA presumes are service connected.
- 5.266 [Reserved]
- 5.267 Presumption of service connection for conditions associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.

Service Connection for Diseases Due to Exposure to Ionizing Radiation

- 5.268 Service connection for diseases presumed to be due to exposure to ionizing radiation.
- 5.269 Direct service connection for diseases associated with exposure to ionizing radiation.

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

Subpart E—Claims for Service Connection and Disability Compensation

Presumptions of Service Connection for Certain Disabilities, and Related Matters

§ 5.260 General rules and definitions.

(a) *The purpose of presumptions of service connection.* A presumption of service connection establishes a material fact (or facts) necessary to establish service connection, even when there is no evidence that directly establishes that material fact (or facts). Examples of material facts include whether a disease or disability had its onset during a veteran's military service, or whether a veteran was exposed to certain herbicide agents during such service. The evidence must prove that the presumption applies to the claimant, but after such a showing there is no

need for additional evidence of the material fact(s) established by the presumption. Presumptions of service connection are set forth in §§ 5.261 through 5.268, and the general rules in this section apply to those sections, except as otherwise provided.

(b) *Diseases that must manifest within a specified period need not be diagnosed within that period.* (1) Certain presumptions apply only when a disease becomes manifest to a degree of 10 percent or more (as defined by the rating criteria in 38 CFR part 4, Schedule for Rating Disabilities) within a prescribed time period, called the "presumptive period." This does not mean that the disease must have actually been diagnosed during that period. Symptoms shown during the presumptive period may reflect the existence of a disease during that period. Therefore, a presumption of service connection applies when the evidence shows symptoms during the presumptive period sufficient to support a finding that a later-diagnosed disease or disability was actually present to the required degree during the presumptive period. This includes instances where the principles of continuity of symptomatology in § 3.303(b) establish a link between symptoms during the presumptive period and a subsequent diagnosis. It also includes instances where manifestations during the presumptive period are followed by a medical diagnosis within a reasonable time. What constitutes a reasonable time depends on the nature and course of the disease and any other relevant factors. (Simply because a disease is far advanced when diagnosed does not mean that it was at least 10 percent disabling during the presumptive period).

(2) Whether a disease became manifest during a presumptive period may be established by medical evidence, competent lay evidence or both. Medical evidence should set forth the physical findings and symptomatology shown by examination within the presumptive period. Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion.

(c) *Rebutting a presumption of service connection for a disease.* VA cannot grant service connection under this section when the presumption has been rebutted by the evidence of record.

(1) Except as otherwise provided, the presumption of service connection for a disease will be rebutted when any one or more of the following conditions occurs:

(i) Evidence establishes that the disease or disability was caused by an intervening or nonservice-related injury or disease; or

(ii) Evidence establishes that the disease or injury was caused by the veteran's own willful misconduct (see §§ 3.1(n) and 3.301(b)); or

(iii) Evidence establishes that the disease or disability was not incurred in service or, in the case of a preexisting disease, was not aggravated in service; or

(iv) Evidence establishes that a cancer (for which service connection is claimed under § 5.262 or § 5.268) originated in another area of the body and then spread to one of the specific areas listed in § 5.262(e) or § 5.268(b).

(2) Any evidence competent to indicate the time a disease existed or started may rebut a presumption of service connection that would otherwise apply. For a discussion of the standards of proof for rebutting a presumption, see § 5.4(e).

(Authority: 38 U.S.C. 501(a), 1112, 1113, 1137)

§ 5.261 Certain chronic diseases VA presumes are service connected.

(a) *Eligibility.* VA will presume service connection for a disease listed in paragraph (d) of this section, although not otherwise established as incurred or aggravated in service, if it first became manifest to a degree of 10 percent or more:

(1) Within a year of separation from a qualifying period of service; or

(2) Within such other time as provided in paragraph (d) of this section.

(b) *Qualifying period of service.* A qualifying period of service is:

(1) A period of 90 days or more of active, continuous service that began before December 31, 1946 and included service during a period of war; or

(2) Any period of 90 days or more of active, continuous service after December 31, 1946.

(c) *Service ending before December 7, 1941.* In claims based on service ending before December 7, 1941, for the purpose of determining whether a chronic disease manifested within a presumptive period under this section, the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period.

(d) *Diseases presumed service connected.* VA will grant service connection on a presumptive basis for any chronic disease listed in this paragraph where a symptom becomes manifest to a degree of disability of 10

percent or more within the applicable presumptive period for the disease. For the purposes of this section, VA will consider the diseases listed in the table at the end of this paragraph to be chronic because of slow onset and persistent progress, even if they are initially diagnosed as acute. Unless the

clinical picture clearly shows the condition was only acute, VA will consider whether an acute condition was an exacerbation of a chronic disease. VA cannot apply the presumption of service connection when the evidence shows that the disease existed prior to military service

to a degree of 10 percent or more disabling (as defined by the rating criteria in 38 CFR part 4, Schedule for Rating Disabilities). However, VA will apply the presumption where there is evidence that the disease existed prior to entry into service to a degree of less than 10 percent disabling.

Disease	Disease must manifest to a degree of 10 percent or more within this period following either discharge or release from service under paragraph (a) or end of the war period under paragraph (c) of this section
Anemia, primary	Within 1 year.
Arteriosclerosis	Within 1 year.
Arthritis	Within 1 year.
Atrophy, progressive muscular	Within 1 year.
Brain hemorrhage	Within 1 year.
Brain thrombosis	Within 1 year.
Bronchiectasis	Within 1 year.
Calculi of the kidney, bladder, or gallbladder	Within 1 year.
Cardiovascular-renal disease, including hypertension. See paragraph (e) of this section	Within 1 year.
Cirrhosis of the liver	Within 1 year.
Coccidioidomycosis	Within 1 year.
Diabetes mellitus	Within 1 year.
Encephalitis lethargica residuals	Within 1 year.
Endocarditis (this term covers all forms of valvular heart disease)	Within 1 year.
Endocrinopathies	Within 1 year.
Epilepsies	Within 1 year.
Hansen's disease	Within 3 years.
Hodgkin's disease	Within 1 year.
Leukemia (acute or chronic)	Within 1 year.
Lupus erythematosus, systemic	Within 1 year.
Multiple sclerosis	Within 7 years.
Myasthenia gravis	Within 1 year.
Myelitis	Within 1 year.
Myocarditis	Within 1 year.
Nephritis	Within 1 year.
Organic diseases of the nervous system	Within 1 year.
Osteitis deformans (Paget's disease)	Within 1 year.
Osteomalacia	Within 1 year.
Palsy, bulbar	Within 1 year.
Paralysis agitans	Within 1 year.
Psychoses (see § 3.384 of this part)	Within 1 year.
Purpura idiopathic, hemorrhagic	Within 1 year.
Raynaud's disease	Within 1 year.
Sarcoidosis	Within 1 year.
Scleroderma	Within 1 year.
Sclerosis, amyotrophic lateral	Within 1 year.
Syringomyelia	Within 1 year.
Thromboangiitis obliterans (Buerger's disease)	Within 1 year.
Tuberculosis, active (see § 3.371 of this part)	Within 3 years.
Tumors, malignant	Within 1 year.
Tumors, of the brain or spinal cord or peripheral nerves	Within 1 year.
Ulcers, peptic (gastric or duodenal)	Within 1 year.

(e) *Cardiovascular-renal disease, including hypertension.* The term "cardiovascular-renal disease" applies to combination involvement of arteriosclerosis, nephritis, and organic heart disease. VA will consider hypertension which was 10 percent or more disabling within the 1-year presumptive period as a chronic disease.

(f) *Hereditary disease.* For the purposes of granting service connection of a chronic disease on a presumptive basis, VA will presume that an inherited or familial disease listed in paragraph (d) of this section was incurred in or aggravated by service, if the disease first became manifest to a degree of 10 percent or more within the applicable presumptive period following discharge or release from active military service.

(Authority: 38 U.S.C. 501, 1101(3), 1112(a), 1137)

§ 5.262 Presumption of service connection for diseases associated with exposure to certain herbicide agents.

(a) *General*—(1) *Presumption of exposure.* VA will presume that a veteran who served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7,

1975, was exposed to an herbicide agent. VA will presume that the last date on which such a veteran was exposed to an herbicide agent is the last date on which that veteran served in the Republic of Vietnam during that period. For purposes of this section, "Service in the Republic of Vietnam" does not include active military service in the waters offshore and service in other locations, but does include any such service in which the veteran had duty in or visited in the Republic of Vietnam, which includes service on the inland waterways.

(2) *Presumption of service connection.* VA will presume service connection where a veteran who was exposed to an herbicide agent during active military service is diagnosed with a disease listed in paragraph (e) of this section that becomes manifest to a degree of 10

percent or more within the time period described in paragraph (e) of this section.

(b) *Definition of herbicide agent.* For the purposes of this section, the term "herbicide agent" means 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; or picloram.

(c) *No minimum period of service required.* Any period of active military service involving presumed or established exposure to an herbicide agent is sufficient for the purpose of establishing presumptive service connection of a specified disease under this section.

(d) *Rebutting the presumption of exposure.* Unlike the presumption of service connection described in paragraph (a)(2) of this section, the presumption of exposure under paragraph (a)(1) is not subject to rebuttal

under § 5.260(c) (general rule describing rebuttal of presumptions of service connection). The presumption of exposure applies unless evidence establishes that the veteran was not exposed to an herbicide agent during active military service.

(e) *Diseases presumed service connected.* The following table lists the diseases that VA will presume to be service connected based on this section. VA will not apply the presumption of service connection where the evidence shows that the disease existed prior to active military service to a degree of 10 percent or more disabling (as defined by the rating criteria in 38 CFR part 4, Schedule of Rating Disabilities). VA will apply the presumption where there is evidence that the disease existed prior to entry into such service to a degree of less than 10 percent disabling.

Disease	Disease must manifest to a degree of 10 percent or more
Chloracne or other acneform disease consistent with chloracne	Within one year after the last day of exposure.
Chronic lymphocytic leukemia	Any time after exposure.
Hodgkin's disease	Any time after exposure.
Multiple myeloma	Any time after exposure.
Non-Hodgkin's lymphoma	Any time after exposure.
Peripheral neuropathy, acute and subacute. ¹	Within 1 year after the last day of exposure.
Porphyria cutanea tarda	Within 1 year after the last day of exposure.
Prostate cancer	Any time after exposure.
Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea)	Any time after exposure.
Soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma). ²	Any time after exposure.
Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes)	Any time after exposure.

¹ For purposes of this section, the term "acute and subacute peripheral neuropathy" means transient peripheral neuropathy that appears within weeks or months of exposure to an herbicide agent and resolves within two years of the date of onset.

² The term "soft-tissue sarcoma" includes the following:

- Adult fibrosarcoma.
- Alveolar soft part sarcoma.
- Angiosarcoma (hemangiosarcoma and lymphangiosarcoma).
- Clear cell sarcoma of tendons and aponeuroses.
- Congenital and infantile fibrosarcoma.
- Dermatofibrosarcoma protuberans.
- Ectomesenchymoma.
- Epithelioid leiomyosarcoma (malignant leiomyoblastoma).
- Epithelioid sarcoma.
- Extraskeletal Ewing's sarcoma.
- Leiomyosarcoma.
- Liposarcoma.
- Malignant fibrous histiocytoma.
- Malignant ganglioneuroma.
- Malignant giant cell tumor of tendon sheath.
- Malignant glomus tumor.
- Malignant granular cell tumor.
- Malignant hemangiopericytoma.
- Malignant mesenchymoma.
- Malignant schwannoma, including malignant schwannoma with rhabdomyoblastic differentiation (malignant Triton tumor), glandular and epithelioid malignant schwannomas.
- Proliferating (systemic) angioendotheliomatosis.
- Rhabdomyosarcoma.
- Synovial sarcoma (malignant synovioma).

(Authority: 38 U.S.C. 501(a), 1116)

§ 5.263 [Reserved]

§ 5.264 Diseases VA presumes are service connected in former prisoners of war.

(a) *Eligibility.* Any period of active military service is sufficient for

establishing presumptive service connection for a specified disease under this section. There are certain requirements for the length of internment as a prisoner of war (POW). A veteran is eligible for the presumption if the veteran:

- (1) Is a former POW under § 3.1(y); and
- (2) Is diagnosed as having a disease listed in paragraph (b) or (c) of this section that first became manifest to a degree of 10 percent or more at any time after discharge or release from active military service, even if there is no

record of such disease during such service.

(b) *Diseases presumed service connected following any period of internment.* VA will presume service connection for the following diseases if the criteria of paragraph (a) of this section are met:

Any of the anxiety disorders as listed in § 4.130, including post-traumatic stress disorder.

Dysthymic disorder (or depressive neurosis).

Organic residuals of frostbite, if the Secretary determines that the veteran was detained or interned in climatic conditions consistent with the occurrence of frostbite.

- Post-traumatic osteoarthritis.
- Psychosis.

(c) *Presumption of service connection following not less than 30 days of internment.* VA will presume service connection for the following diseases if the veteran was interned for 30 days or more and the criteria of paragraph (a) of this section are met:

- Beriberi.
- Beriberi heart disease, including ischemic heart disease if localized edema experienced during captivity.
- Chronic dysentery.
- Cirrhosis of the liver.
- Helminthiasis.
- Irritable bowel syndrome.
- Nutritional deficiency, including avitaminosis and malnutrition.
- Optic atrophy associated with malnutrition.
- Pellagra.
- Peptic ulcer disease.
- Peripheral neuropathy except where directly related to infectious causes.

§ 5.265 Tropical diseases VA presumes are service connected.

(a) *Eligibility.* VA will presume service connection for any disease listed in paragraph (d) of this section, although not otherwise established as incurred in or aggravated by service, if it first became manifest to a degree of 10 percent or more:

- (1) Within 1 year from separation from a qualifying period of service; or
- (2) Within a period that indicates (based on accepted medical treatises) that the incubation period began during such service.

(b) *Qualifying period of service.* A qualifying period of service is:

- (1) A period of 90 days or more of active, continuous service that began before December 31, 1946 and included service during a period of war; or
- (2) Any period of 90 days or more of active, continuous service after December 31, 1946.

(c) *Claims based on service ending before December 7, 1941.* In claims based on service ending before December 7, 1941, for the purpose of determining whether a tropical disease manifested within a presumptive period under this section, the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period.

(d) *Tropical diseases presumed service connected.* VA will presume service connection for the following diseases if the criteria of paragraphs (a) through (c) of this section are met. For any disease service connected under this section, VA will also service connect the resultant disorders or diseases originating because of therapy administered in connection with such a disease or as a preventative measure against such a disease.

- Amebiasis.
- Blackwater fever.
- Cholera.
- Dracontiasis.
- Dysentery.
- Filariasis.
- Leishmaniasis, including kala-azar.
- Loiasis.
- Malaria.
- Onchocerciasis.
- Oroya fever.
- Pinta.
- Plague.
- Schistosomiasis.
- Yaws.
- Yellow fever.

(e) *Rebuttal of presumption.* The fact that the veteran had no active military service in a locality having a high incidence of the disease may be considered evidence to rebut the presumption. Residence during the applicable presumptive period in a region where the particular disease is endemic may also be considered evidence to rebut the presumption. VA will consider the known incubation

periods of tropical diseases in determining whether the presumption of service connection has been rebutted.

(Authority: 38 U.S.C. 1101(4), 1112(a)(2), 1137).

(f) *Claims for service connection of tropical diseases based on peacetime service before January 1, 1947.* This paragraph applies to veterans with peacetime service before January 1, 1947, who served 6 months or more. The requirement of 6 months or more of service means active, continuous service, during one or more enlistment periods. Any such veteran who develops a tropical disease listed in paragraph (d) of this section, or a disorder or disease resulting from therapy administered in connection with a tropical disease or as a preventative, will be considered to have incurred such disability in active military service if it is shown to exist to the degree of 10 percent or more:

- (1) Within 1 year after discharge or release from active military service; or
- (2) At a time when accepted medical treatises indicate that the incubation period commenced during active military service unless shown by clear and unmistakable evidence that the tropical disease was not contracted as the result of active military service.

(Authority: 38 U.S.C. 1133)

§ 5.266 [Reserved]

§ 5.267 Presumption of service connection for conditions associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.

(a) VA will presume service connection for a disease or disability when the evidence of record establishes that the veteran:

- (1) Underwent full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite during active military service; and
- (2) Subsequently developed a condition associated with that specific agent, as shown in paragraph (b) of this section.

(b) *List of conditions associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.*

Disease or disability	Associated with nitrogen mustard?	Associated with sulfur mustard?	Associated with Lewisite?
Acute nonlymphocytic leukemia	Yes	No	No.
Asthma	Yes	Yes	Yes.
Chronic bronchitis	Yes	Yes	Yes.
Chronic conjunctivitis	Yes	Yes	No.
Chronic laryngitis	Yes	Yes	Yes.
Chronic obstructive pulmonary disease	Yes	Yes	Yes.
Corneal opacities	Yes	Yes	No.

Disease or disability	Associated with nitrogen mustard?	Associated with sulfur mustard?	Associated with Lewisite?
Emphysema	Yes	Yes	Yes.
Keratitis	Yes	Yes	No.
Laryngeal cancer	Yes	Yes	No.
Lung cancer (except mesothelioma)	Yes	Yes	No.
Nasopharyngeal cancer	Yes	Yes	No.
Scar formation	Yes	Yes	No.
Squamous cell carcinoma of the skin	Yes	Yes	No.

(Authority: 38 U.S.C. 501(a))

Service Connection for Diseases Due to Exposure to Ionizing Radiation

§ 5.268 Service connection for diseases presumed to be due to exposure to ionizing radiation.

(a) *Eligibility.* This section applies to a “radiation-exposed veteran,” who is any individual who, while serving on active duty or as a member of a reserve component of the Armed Forces during a period of active duty for training or inactive duty training, participated in a radiation-risk activity.

(b) Diseases presumed service connected. VA will presume service connection under this section for the following diseases becoming manifest in a radiation-exposed veteran at any time after service.

- Bronchiolo-alveolar carcinoma.
- Cancer of the bile ducts.
- Cancer of the bone.
- Cancer of the brain.
- Cancer of the breast.
- Cancer of the colon.
- Cancer of the esophagus.
- Cancer of the gall bladder.
- Cancer of the lung.
- Cancer of the ovary.
- Cancer of the pancreas.
- Cancer of the pharynx.
- Cancer of the salivary gland.
- Cancer of the small intestine.
- Cancer of the stomach.
- Cancer of the thyroid.
- Cancer of the urinary tract (for the purposes of this section, the term “urinary tract” means the kidneys, renal pelves, ureters, urinary bladder, and urethra).
- Leukemia (other than chronic lymphocytic leukemia).
- Lymphomas (except Hodgkin’s disease).
- Multiple myeloma.
- Primary liver cancer (except if cirrhosis or hepatitis B is indicated).

(c) *Radiation-risk activity.* For the purposes of this section, “radiation-risk activity” means:

(1) Onsite participation in a test involving the atmospheric detonation of a nuclear device. For purposes of this section, “onsite participation” means:

(i) During the official operational period of a nuclear test, (defined in paragraph (e) of this section), presence

at the test site, or performance of official military duties in connection with ships, aircraft or other equipment used in direct support of the nuclear test.

(ii) During the six month period following the official operational period of a nuclear test, presence at the test site or other test staging area to perform official military duties in connection with completion of projects related to the nuclear test including decontamination of equipment used during the nuclear test.

(iii) Service as a member of the garrison or maintenance forces on Eniwetok during the periods June 21, 1951 through July 1, 1952; August 7, 1956 through August 7, 1957; or November 1, 1958 through April 30, 1959.

(iv) Assignment to official military duties at Naval Shipyards involving the decontamination of ships that participated in Operation Crossroads.

(2) Service during the occupation of Hiroshima or Nagasaki, Japan, by United States forces during the period beginning on August 6, 1945, and ending on July 1, 1946. This includes official military duties within 10 miles of the city limits of either Hiroshima or Nagasaki, Japan, which were required to perform or support military occupation functions such as occupation of territory, control of the population, stabilization of the government, demilitarization of the Japanese military, rehabilitation of the infrastructure or deactivation and conversion of war plants or materials.

(3) Internment as a prisoner of war in Japan (or service on active duty in Japan immediately following such internment) during World War II that resulted in an opportunity for exposure to ionizing radiation comparable to that of the United States occupation forces in Hiroshima or Nagasaki, Japan, during the period beginning on August 6, 1945, and ending on July 1, 1946. This includes former prisoners of war who at any time during the period August 6, 1945, through July 1, 1946:

(i) Were interned within 75 miles of the city limits of Hiroshima or within

150 miles of the city limits of Nagasaki; or

(ii) Can affirmatively show that they worked within the areas set forth in paragraph (c)(3)(i) of this section although not interned within those areas; or

(iii) Immediately following internment, performed official military duties described in paragraph (c)(2) of this section; or

(iv) Were repatriated through the port of Nagasaki.

(4) Service in which the veteran was, as part of his or her official military duties, present during a total of at least 250 days before February 1, 1992, on the grounds of a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, if, during such service the veteran:

(i) Was monitored for each of the 250 days of such service through the use of dosimetry badges for radiation exposure at the plant to the external parts of the veteran’s body; or

(ii) Served for each of the 250 days of such service in a position that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

Note to paragraph (c)(4): For the purposes of this paragraph (paragraph (c)(4)), the term “day” refers to all or any portion of a calendar day.

(5) Service before January 1, 1974, on Amchitka Island, Alaska, if, during such service, the veteran was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests.

(d) *Atmospheric detonation.* For the purposes of this section, the term “atmospheric detonation” includes underwater nuclear detonations.

(e) *Operational period.* For the purposes of this section, for tests conducted by the United States, the term “operational period” means:

(1) For Operation *TRINITY* the period July 16, 1945 through August 6, 1945.

(2) For Operation *CROSSROADS* the period July 1, 1946 through August 31, 1946.

(3) For Operation *SANDSTONE* the period April 15, 1948 through May 20, 1948.

(4) For Operation *RANGER* the period January 27, 1951 through February 6, 1951.

(5) For Operation *GREENHOUSE* the period April 8, 1951 through June 20, 1951.

(6) For Operation *BUSTER-JANGLE* the period October 22, 1951 through December 20, 1951.

(7) For Operation *TUMBLER-SNAPPER* the period April 1, 1952 through June 20, 1952.

(8) For Operation *IVY* the period November 1, 1952 through December 31, 1952.

(9) For Operation *UPSHOT-KNOTHOLE* the period March 17, 1953 through June 20, 1953.

(10) For Operation *CASTLE* the period March 1, 1954 through May 31, 1954.

(11) For Operation *TEAPOT* the period February 18, 1955 through June 10, 1955.

(12) For Operation *WIGWAM* the period May 14, 1955 through May 15, 1955.

(13) For Operation *REDWING* the period May 5, 1956 through August 6, 1956.

(14) For Operation *PLUMBBOB* the period May 28, 1957 through October 22, 1957.

(15) For Operation *HARDTACK I* the period April 28, 1958 through October 31, 1958.

(16) For Operation *ARGUS* the period August 27, 1958 through September 10, 1958.

(17) For Operation *HARDTACK II* the period September 19, 1958 through October 31, 1958.

(18) For Operation *DOMINIC I* the period April 25, 1962 through December 31, 1962.

(19) For Operation *DOMINIC II/PLOWSHARE* the period July 6, 1962 through August 15, 1962.

Note to § 5.268: If this section does not apply in a particular case, VA will consider service connection under § 5.269.

(Authority: 38 U.S.C. 1112(c), 1137)

§ 5.269 Direct service connection for diseases associated with exposure to ionizing radiation.

(a) *General.* This section does not establish a presumption of service connection. It establishes standards and procedures VA will apply when a claim for service connection for a disease based on in-service exposure to ionizing

radiation cannot be granted using the presumption of service connection under § 5.268. Under this section, if:

(1) The veteran was exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, Japan, from September 1945 until July 1946 or any other claimed in-service event;

(2) The veteran subsequently developed a radiogenic disease; and

(3) Such disease first became manifest within the period specified in paragraph (b) of this section, then the VA agency of original jurisdiction will refer the claim, before adjudication, to the Under Secretary for Benefits for further consideration in accordance with paragraph (d) of this section. If any of the requirements of this paragraph have not been met, service connection will not be granted under this section.

(b) *Radiogenic disease.* For the purposes of this section, “radiogenic disease” means a disease that may be induced by ionizing radiation.

(1) *Listed diseases.* The following table lists diseases that VA will consider radiogenic when they manifest within the associated manifestation period.

Disease	Manifestation period
Bone cancer	Within 30 years after exposure.
Cancer (any other not listed)	5 years or more after last exposure.
Leukemia (all forms except chronic lymphatic (lymphocytic))	At any time after exposure.
Lymphomas other than Hodgkin's disease	5 years or more after last exposure.
Non-malignant thyroid nodular disease	5 years or more after last exposure.
Parathyroid adenoma	5 years or more after last exposure.
Posterior subcapsular cataracts	6 months or more after exposure.
Tumors of the brain and central nervous system	5 years or more after last exposure.

(2) *Polycythemia vera.* Public Law 98-542 requires VA to determine whether sound medical and scientific evidence supports establishing a rule identifying polycythemia vera as a radiogenic disease. VA has determined that sound medical and scientific evidence does not establish that polycythemia vera is a radiogenic diseases under this regulation. Even so, VA will consider a claim based on the assertion that polycythemia vera is a radiogenic disease under the provisions of paragraph (b)(3) of this section.

(3) *Other diseases.* If a claimant claims compensation for a disease based on ionizing radiation exposure and that disease is other than one of those listed in paragraph (b)(1) of this section, VA will consider the claim under the provisions of this section provided that the claimant has cited or submitted competent scientific or medical

evidence that the claimed condition is a radiogenic disease.

(c) *Development of dose data by a VA agency of original jurisdiction.* (1) In all claims for service connection based on a radiogenic disease under this section, VA will request dose data to determine the likelihood that in-service ionizing radiation exposure caused the veteran's disease. The agency of original jurisdiction will request dose data as follows:

(i) *Atmospheric nuclear weapons test participation claims.* In all claims based upon participation in atmospheric nuclear testing, dose data will be requested from the appropriate office of the Department of Defense.

(ii) *Hiroshima and Nagasaki occupation claims.* In all claims based on participation in the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, dose data

will be requested from the appropriate office of the Department of Defense.

(iii) *Other exposure claims.* In all other claims involving ionizing radiation exposure, a request will be made for any available records concerning the veteran's exposure to ionizing radiation. These records normally include, but are not limited to, the veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained; service medical records; dose records from the radiation dosimetry office of the specific military service; and other records which may contain information pertaining to the veteran's ionizing radiation dose in service. All such records will be forwarded to the Under Secretary for Health, who will be responsible for preparation of a dose estimate, to the extent feasible, based on available methodologies. As used in this section, “the Under Secretary for

Health" includes his or her designees. If neither the Department of Defense nor any other source provides VA with records adequate to permit the Under Secretary to prepare a dose estimate, then VA will ask the Department of Defense to provide a dose estimate.

(2) When dose estimates obtained under paragraph (c)(1) of this section are reported as a range of doses to which a veteran may have been exposed, VA will presume exposure at the highest level of the range reported.

(3) Neither the veteran nor the veteran's survivors may be required to produce evidence substantiating exposure if the information in the veteran's service records or other records maintained by the Department of Defense is consistent with the claim that the veteran was present where and when the claimed exposure occurred.

(4) Presence at a nuclear site. For purposes of paragraph (c)(1)(i) (Atmospheric nuclear weapons test participation) and paragraph (c)(1)(ii) (Hiroshima and Nagasaki occupation), if military records do not establish presence at or absence from a site at which exposure to ionizing radiation is claimed to have occurred, VA will concede the veteran's presence at the site. Conceding presence under this section does not confer entitlement to the presumptive provisions of § 5.268.

(5) Submission to the Under Secretary for Benefits. After the development in paragraphs (c)(1) through (c)(4) has been completed, the agency of original jurisdiction will forward dose data and any other evidence, along with the veteran's claims file, to the Under Secretary for Benefits for review. The claims file will not be submitted for review when development establishes that the claimed disability or disease is not radiogenic (as provided in paragraphs (b)(1) through (b)(3) of this part), that the disease did not become manifest during the time period specified in paragraph (b)(1), or that the veteran was either not exposed to ionizing radiation in active military service as claimed or that the actual or estimated dose exposure was reported to be zero rem gamma. In such cases, the agency of original jurisdiction will decide the claim based on general principles of service connection.

(d) *Review and action by the Under Secretary for Benefits.* (1) The Under Secretary for Benefits will review all the evidence of record and may request an advisory medical opinion from the appropriate office of the Under Secretary for Health as to whether the veteran's disease resulted from exposure to ionizing radiation in service. In claims subject to paragraph (c)(1)(iii) of

this section, the Under Secretary for Health will also be responsible for reviewing any records obtained as a result of the development procedures in that paragraph and preparing a dose estimate, to the extent feasible, based on available methodologies.

(2) Prior to referral to the Under Secretary for Health, the Under Secretary for Benefits will reconcile any material difference between dose data obtained through the development process in paragraph (c)(1) of this section and dose data submitted by or on behalf of the claimant.

(i) The Under Secretary for Benefits will request an opinion from an independent expert when it is necessary to reconcile a material difference between dose data from a credible source submitted by or on behalf of a claimant and dose data derived from official military records. The Director of the National Institutes of Health is responsible for selecting the independent expert. The estimates and supporting documentation of record will be forwarded to the independent expert who will prepare a separate radiation dose estimate for consideration in adjudicating the claim. For purposes of this paragraph:

(A) The difference between the claimant's estimate and dose data derived from official military records shall ordinarily be considered material if one estimate is at least double the other estimate.

(B) A dose estimate shall be considered from a "credible source" if prepared by a person or persons certified by an appropriate professional body in the field of health physics, nuclear medicine or radiology and if based on analysis of the facts and circumstances of the particular claim.

(ii) *[Reserved]*

(e) *Opinion of the Under Secretary for Benefits.* (1) Upon receipt of a medical opinion by the Under Secretary for Health, the Under Secretary for Benefits will review it, along with all the evidence of record. If the Under Secretary for Benefits is convinced that sound scientific and medical evidence supports the determination that it is at least as likely as not that the veteran's disease resulted from ionizing radiation in service, the agency of original jurisdiction will be informed of this determination in writing. The Under Secretary for Benefits will set forth the rationale for the determination, including an evaluation of the claim based on the following factors:

(i) The probable dose, in terms of dose type, rate, and duration as a factor in inducing the disease, taking into account any known limitations in the

dosimetry devices employed in its measurement or the methodologies employed in its estimation;

(ii) The relative sensitivity of the involved tissue to induction, by ionizing radiation, of the specific pathology;

(iii) The veteran's gender and pertinent family history;

(iv) The veteran's age at time of exposure;

(v) The time-lapse between exposure and onset of the disease; and

(vi) The extent to which exposure to ionizing radiation, or other carcinogens, outside of service may have contributed to development of the disease.

(2) For purposes of paragraph (e)(1) of this section, the term "sound scientific evidence" means observations, findings, or conclusions that are statistically and epidemiologically valid, are statistically significant, are capable of replication, and are capable of withstanding peer review. The term "sound medical evidence" means observations, findings, or conclusions that are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

(3) If the Under Secretary for Benefits determines there is no reasonable possibility that the veteran's disease resulted from ionizing radiation exposure in service, the agency of original jurisdiction will be informed in writing, setting forth the rationale for this conclusion.

(4) The Under Secretary for Benefits will request an opinion from an outside consultant when, after review of all the evidence, including the opinion of the Under Secretary for Health, the Under Secretary for Benefits is unable to determine whether it is at least as likely as not, or whether there is no reasonable possibility, that the veteran's disease resulted from ionizing radiation exposure in service. The consultant will be selected by the Under Secretary for Health from outside the VA, upon recommendation of the Director of the National Cancer Institute. The written request to the consultant will include copies of pertinent medical records and, where available, dose assessments from official sources, credible sources and independent experts. The request will identify the following:

(i) The disease, including the specific cell type and stage, if known, and when the disease first became manifest;

(ii) The circumstances, including date, of the veteran's exposure;

(iii) The veteran's age, gender, and pertinent family history;

(iv) The veteran's history of exposure to known carcinogens, occupationally or otherwise;

(v) Evidence of any other effects ionizing radiation exposure may have had on the veteran; and

(vi) Any other information relevant to determination of causation of the veteran's disease.

(5) The consultant will evaluate the claim based on the factors specified in paragraph (e)(1) of this section. The consultant will provide his or her opinion in writing and state whether it is either likely, unlikely, or at least as likely as not that the veteran's disease resulted from exposure to ionizing radiation in service. The rationale supporting the opinion is required.

(6) The consultant will send the opinion to the Under Secretary for Benefits who will review it and transmit it with any comments to the agency of original jurisdiction for use in adjudication of the claim.

(f) *Adjudication of claim.* The agency of original jurisdiction will adjudicate the claim under the generally applicable provisions of this part, giving due consideration to all evidence of record, including any opinions provided by the Under Secretary for Benefits, the Under Secretary for Health, or any outside consultants, and the evaluations published pursuant to 38 CFR 1.17, "Evaluation of studies relating to health effects of dioxin and radiation exposure." With regard to any issue material to consideration of a claim, the provisions of § 3.102 of this title apply (any reasonable doubt on any issue will be resolved in favor of the claimant).

(g) *Willful misconduct and supervening cause in claims based on exposure to ionizing radiation.* In no case will service connection be established if the disease is due to the veteran's own willful misconduct or the abuse of alcohol or drugs, or if evidence establishes that a supervening, nonservice-related condition or event is more likely the cause of the disease.

(Authority: 38 U.S.C. 501; Pub. L. 98-542)

PART 3—ADJUDICATION

2. The authority citation of part 3, subpart A, continues to read as follows:

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

3. Section 3.313 is redesignated as § 5.263.

4. Newly designated § 5.263 is amended by:

a. Revising the section heading; and
b. In paragraph (a), removing "Service in Vietnam includes" and adding, in its place, "For purposes of this section, service in Vietnam includes".

The revision reads as follows:

§ 5.263 Presumption of service connection for non-Hodgkin's lymphoma based on service in Vietnam.

* * * * *

5. Section 3.317 is redesignated as § 5.266.

6. Newly designated § 5.266 is amended by:

a. In paragraph (a)(1)(i), removing "military, naval, or air service" and adding, in its place "military service";

b. In paragraph (a)(5), removing "part 4 of this chapter" and adding, in its place, "38 CFR part 4, Schedule for Rating Disabilities";

c. Revising paragraph (b);

d. In paragraph (c), removing "affirmative" each time it appears; and by removing "military, naval, or air service" and adding, in its place "military service"; and

e. In paragraph (d)(1), removing "military, naval, or air service" and adding, in its place "military service".

The revision reads as follows:

§ 5.266 Compensation for certain disabilities due to undiagnosed illnesses.

* * * * *

(b) For the purposes of paragraph (a)(1) of this section, signs or symptoms which may be manifestations of undiagnosed illness or medically unexplained chronic multisymptom illness include, but are not limited to:

Abnormal weight loss.
Cardiovascular signs or symptoms.
Fatigue.
Gastrointestinal signs or symptoms.
Headache.
Joint pain.
Menstrual disorders.
Muscle pain.
Neurologic signs and symptoms.
Neuropsychological signs or symptoms.
Signs or symptoms involving the respiratory system (upper or lower).
Signs or symptoms involving skin.
Sleep disturbances.

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[FR Doc. 04-16758 Filed 7-26-04; 8:45 am]

BILLING CODE 8320-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 298-0459b; FRL-7784-2]

Revisions to the California State Implementation Plan, South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the South Coast Air Quality

Management District portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from solvent cleaning operations. We are proposing to approve a local rule to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by August 26, 2004.

ADDRESSES: Send comments to Andy Steckel, Rulemaking Office Chief (AIR-4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901, or e-mail to steckel.andrew@epa.gov, or submit comments at <http://www.regulations.gov>.

You can inspect copies of the submitted SIP revisions, EPA's technical support document (TSD), and public comments at our Region IX office during normal business hours by appointment.

You may also see copies of the submitted SIP revisions by appointment at the following locations:

California Air Resources Board,
Stationary Source Division, Rule
Evaluation Section, 1001 "I" Street,
Sacramento, CA 95814.

South Coast Air Quality Management
District, 21865 East Copley Drive,
Diamond Bar, CA 91765.

A copy of the rule may also be available via the Internet at <http://www.arb.ca.gov/drdb/drdbltx.htm>. Please be advised that this is not an EPA website and may not contain the same version of the rule that was submitted to EPA.

FOR FURTHER INFORMATION CONTACT: Francisco Dóñez, EPA Region IX, (415) 972-3956, Donez.Francisco@epa.gov.

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rule: SCAQMD 1171. In the Rules and Regulations section of this **Federal Register**, we are approving this local rule in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.