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# Updating VA Adjudication Regulations for Disability or Death Benefit Claims Related to Exposure to Certain Herbicide Agents

A Proposed Rule by the Veterans Affairs Department on 02/12/2024

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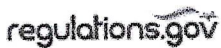
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ENHANCED CONTENT



**AR10-Proposed Rule-Adjudication Regulations for Disability or Death Benefit Claims Related to Exposure to Certain Herbicide Agents**

VA-2024-VBA-0006 (<https://www.regulations.gov/docket/VA-2024-VBA-0006>)

Supporting Documents:

- Thailand 2-10-20 (Wells) (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0022>)
- AFPMB Criteria for What Constitutes a Location Where Tactical Herbicides were... (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0021>)
- AFPMB Process for Updating DoD List of Locations Where Tactical Herbicides... (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0020>)
- Phu Quoc 3-19-21 (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0019>)
- Da Nang 5-24-17 (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0018>)
- Panama 1-10-21 (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0017>)
- Da Nang 11-20-17 (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0016>)
- Da Nang 10-2-16 (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0015>)
- Phu Quoc polygon Attachment 7.6.22 (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0014>)
- Panama 1-10-22 (<https://www.regulations.gov/document?D=VA-2024-VBA-0006-0013>)

See all 21 supporting documents (<https://www.regulations.gov/docket/VA-2024-VBA-0006/document?documentTypes=Supporting%20%26%20Related%20Material>)

ENHANCED CONTENT

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PUBLISHED DOCUMENT

**AGENCY:**

Department of Veterans Affairs.

**ACTION:**

Proposed rule.

**SUMMARY:**

The Department of Veterans Affairs (VA) proposes to amend its adjudication regulations relating to exposure to certain herbicide agents to incorporate the provisions of the Blue Water Navy Vietnam Veterans Act of 2019 (the BWN Act), specifically by extending the presumed area of exposure to the offshore waters of the Republic of Vietnam, defining the boundaries of the offshore waters, expanding the date ranges for presumption of exposure in the Korean Demilitarized Zone (DMZ) and establishing entitlement to spina



bifida benefits for children of certain Veterans who served in Thailand. This rule also proposes to codify a presumption of exposure to certain herbicide agents for locations published on the Department of Defense's (DoD) record of locations where certain herbicide agents were used, tested or stored outside of Vietnam. In addition, this rule also proposes to codify longstanding procedures for searching for payees entitled to class action settlement payments aligned with *Nehmer v. U.S. Department of Veterans Affairs* and proposes to apply the definition of the Republic of Vietnam's offshore waters to claims for presumptive service connection for non-Hodgkin's lymphoma. VA is also proposing to amend its adjudication regulations concerning presumptive service connection for diseases associated with exposure to certain herbicide agents. This amendment implements provisions of the Fiscal Year (FY) 2021 National Defense Authorization Act (NDAA), which added bladder cancer, hypothyroidism and Parkinsonism as medical conditions eligible for presumptive service connection. Finally, this rulemaking proposes to implement certain provisions of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 (PACT Act), specifically by recognizing hypertension and monoclonal gammopathy of undetermined significance (MGUS) as diseases eligible for a presumption of exposure to certain herbicides and adding new locations as eligible for a presumption of exposure to certain herbicides during specific timeframes.

## **DATES:**

Comments must be received on or before [insert date 60 days after date of publication in the **Federal Register** ].

## **ADDRESSES:**

Comments must be submitted through *www.regulations.gov* (<http://www.regulations.gov>). Except as provided below, comments received before the close of the comment period will be available at *www.regulations.gov* (<http://www.regulations.gov>) for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on *www.regulations.gov* (<http://www.regulations.gov>) as soon as possible after they have been received. VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments; however, we will post comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking. In accordance with the Providing Accountability Through Transparency Act of 2023, a 100 word Plain-Language Summary of this proposed rule is available at *Regulations.gov*, under RIN 2900-AR10.

## **FOR FURTHER INFORMATION CONTACT:**

Jane Allen, Regulations Analyst; Robert Parks, Chief, Regulations Staff (211C), Compensation Service (21C), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.)

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The spraying of herbicides as tactical defoliant during the Vietnam War began in 1962 and continued until 1971. Public concern over the military's use of herbicides began to grow following requests by scientists to evaluate possible toxic effects of widespread herbicide spraying. To respond to public concern about possible

long-term health effects of exposure to herbicides, Congress passed the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Public Law 98–542. The Act required VA to create guidelines and criteria for deciding claims for benefits based on a Veteran's exposure to herbicides during service in the Republic of Vietnam and established the first presumptions of service connection based on exposure to certain herbicides. The Act also established the Veterans' Advisory Committee on Environmental Hazards to provide findings and evaluations regarding the scientific evidence related to possible adverse health hazards due to exposure to herbicides.

The results of these studies prompted the Agent Orange Act of 1991, Public Law 102–4, codified in part at 38 U.S.C. 1116 (<https://www.govinfo.gov/link/uscode/38/1116>). This Act established presumptive service connection for non-Hodgkins lymphoma, soft-tissue sarcoma (with certain exceptions) and chloracne or other consistent acneform diseases. In addition, the Act directed the VA to enter into an agreement with the National Academy of Sciences to review and evaluate the scientific evidence concerning the association between exposure to certain herbicide agents during service in the Republic of Vietnam and each disease suspected to be associated with such exposure. The Act further established guidelines for the evidentiary support needed to create new presumptions of service connection. The Act required that “Whenever the Secretary determines, on the basis of sound medical and scientific evidence, that a positive association exists between (A) the exposure of humans to an herbicide agent, and (B) the occurrence of a disease in humans, the Secretary shall prescribe regulations providing that a □ presumption of service connection is warranted for that disease for the purposes of this section.” Public Law 102–4, § 2(a). Since passage of the Act, Congress and VA have established 13 additional presumptions of service connection based on exposure to certain herbicides.

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#### **a. The BWN Act of 2019**

Prior to the BWN Act, VA interpreted the presumption of exposure to certain herbicide agents for service connection purposes under the Agent Orange Act of 1991, codified in relevant part at 38 U.S.C. 1116(a)(1) (<https://www.govinfo.gov/link/uscode/38/1116>), to require service within the borders of the Republic of Vietnam, either “boots on the ground” land-based service or service within the inland waterways. If there was evidence that a Veteran went ashore or docked in the Republic of Vietnam, however briefly, the Veteran would be entitled to the presumption of exposure. VA's interpretation was upheld in court until 2019. *See Haas v. Peake*, 525 F.3d 1168, 1197 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 1149 (2009), *overruled by Procopio v. Wilkie*, 913 F.3d 1371, 1380 (Fed. Cir. 2019) (en banc). In 2019, the U.S. Court of Appeals for the Federal Circuit held that Congress intended the term “Republic of Vietnam” to include the “territorial sea” of the Republic of Vietnam. The court ruled that by using the formal name of the country, “the Republic of Vietnam,” Congress referred to both its landmass and its 12 nautical mile territorial sea. *Procopio*, 913 F.3d at 1375. Vietnam's offshore waters were not defined by statute, and the Federal Circuit rejected the distinction between service within the landmass and in the territorial waters when it invalidated the foot-on-land requirement for the Agent Orange presumptions. *Id.* at 1378. The court cited international legal authorities to support its holding but did not further attempt to define where the boundaries of the territorial sea of the Republic of Vietnam must be drawn beyond its holding regarding the 12 nautical mile territorial sea. *See id.* at 1375–76. While VA was working to implement the *Procopio* ruling, Congress enacted the BWN Act. The BWN Act provides a description and table of coordinates to define the Republic of Vietnam's offshore waters.



## **b. The NDAA of 2021**

On January 1, 2021, Congress enacted Public Law 116–283 (<https://www.govinfo.gov/link/plaw/116/public/283>), the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA). In relevant part, this law amended 38 U.S.C. 1116(a)(2) (<https://www.govinfo.gov/link/uscode/38/1116>) by adding bladder cancer, hypothyroidism and Parkinsonism to the list of conditions presumptively associated with exposure to certain herbicide agents. The amendment to 38 U.S.C. 1116(a) (<https://www.govinfo.gov/link/uscode/38/1116>) was based on the 2018 National Academies of Sciences, Engineering, and Medicine report, Veterans and Agent Orange: Update 11, which found limited or suggestive evidence of an association between exposure to certain herbicide agents and bladder cancer, hypothyroidism and Parkinsonism.<sup>[1]</sup>

## **c. The PACT Act**

On August 10, 2022, Congress enacted the PACT Act, Public Law 117–168 (<https://www.govinfo.gov/link/plaw/117/public/168>), to improve access to VA benefits and health care for Veterans who were exposed to toxic substances during military service. Section 403 of the PACT Act amended section 1116 of title 38, United States Code (<https://www.govinfo.gov/link/uscode/38/1116>) by adding new locations as eligible for a presumption of exposure to certain herbicide agents: Thailand (at any United States or Royal Thai base), Laos, Cambodia at Mimot or Krek, Kampong Cham Province, Johnston Atoll, Guam, and American Samoa, during certain timeframes. Prior to the PACT Act, the only location subject to a statutory presumption of exposure to certain herbicides was the Republic of Vietnam. Therefore, VA is proposing to add these additional locations to VA's Part 3 Regulations at 38 CFR 3.307 (<https://www.ecfr.gov/current/title-38/section-3.307>).

Section 404 of the PACT Act added hypertension and MGUS as diseases associated with exposure to certain herbicide agents under 38 U.S.C. 1116(a)(2) (<https://www.govinfo.gov/link/uscode/38/1116>). Therefore, VA is proposing to add these diseases to 38 CFR 3.309 (<https://www.ecfr.gov/current/title-38/section-3.309>), disease subject to presumptive service connection.

## **II. Proposed Changes to § 3.307 Diseases Associated With Exposure to Certain Herbicide Agents**

### **a. Amendments to § 3.307(a)(6) Based on the BWN Act of 2019**

38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) outlines the service requirements and other circumstances required for the presumption of exposure to certain herbicide agents to apply. 38 CFR 3.307(a)(6)(iii) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)\(iii\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6)(iii))) establishes a presumption of exposure to certain herbicide agents for Vietnam Veterans with active-duty service during a specific period. Prior to *Procopio* and the BWN Act, Veterans who served in the “offshore waters” were only presumed to have been exposed to certain herbicide agents if there was evidence that the conditions of their service involved duty or visitation in the Republic of Vietnam. VA proposes to amend 38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) to clarify that service in the offshore waters of the Republic of Vietnam—without an additional foot-on-land requirement—is considered service in Vietnam for the purpose of establishing presumption of in-service exposure to certain herbicide agents. Service in other locations will continue to constitute service in Vietnam if the conditions of service involved duty or visitation in the Republic of Vietnam.

VA also proposes to amend 38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) by adding the parameters of what constitutes “offshore waters” from the BWN Act. *See* 38 U.S.C. 1116A(d) (<https://www.govinfo.gov/link/uscode/38/1116A>). The Act includes a list of geographic points with their names and coordinates of latitude and longitude which, when connected by a series of lines, create the baseline from which the 12 nautical miles that define the offshore waters of the Republic of Vietnam are measured.

The BWN Act does not direct how the southwestern-most and northern-most points of the offshore waters are to be connected to land, which would be necessary to create a fully defined geographic area. To define the offshore water of the Republic of Vietnam, the law provides 11 geographic points located 12 miles seaward from the coast of the Republic of Vietnam. The law does not dictate how the end points connect to land. Initially, VA considered using straight lines to define where the end points connect to land. However, using a straight line to connect the westernmost point to land would bisect the southern tip of Vietnam's Phu Quoc Island. VA now proposes to have this line include the entire island. This Veteran-centric approach would help avoid denials of service connection for Veterans who may have been exposed in the coastal and inland waters of Phu Quoc. Further, VA views the inclusion of the offshore waters of Phu Quoc island to be consistent with Congress's intent that VA extend the presumption of in-service exposure to certain herbicide agents to all applicable BWN veterans in a “broad and comprehensive” manner. *See* H.R. Rep. No. 116–58, at 11 (2019) (discussing purpose of BWN Act vis-à-vis *Procopio*). As such, VA proposes to include the offshore areas of Phu Quoc Island to ensure that veterans who served in the offshore waters surrounding Phu Quoc Island are entitled to the same presumption.

VA proposes to define the southwest demarcation of the offshore waters as a line extending from where the border of Cambodia and the Republic of Vietnam meet the shoreline (10°30'54.42" N, □ 104°35'48.10" E), to the points described as Phu Quoc Extension points A through E and on to Hon Nhan Island, Tho Chu Archipelago Kien Giang Province. The northern demarcation is proposed to be described as a line from the mid-point of the Ben Hai River, which denotes the demilitarized zone between the former North Vietnam and the Republic of Vietnam (17°0'42.19" N, 107°6'35.47" E), to the point described as Con Co Island, Binh Tri Thien Province.

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The proposed area that comprises the offshore waters of the Republic of Vietnam is designated solely for the purpose of determining presumption of in-service exposure to certain herbicide agents in order to establish entitlement to benefits under title 38 of the United States Code. The proposed rulemaking is not an endorsement of any state's sovereignty rights or jurisdiction under international law. The status of some of the waters in and around the area addressed in the proposed regulation was in dispute during the Vietnam Era and may still be in dispute. Because of this, the proposed rule includes a note in 38 CFR 3.307 (<https://www.ecfr.gov/current/title-38/section-3.307>) that clarifies that the purpose of the regulation is for claim adjudication purposes and is not a statement or endorsement of international boundaries.

VA also proposes to amend 38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) for exposures related to service in the Korean demilitarized zone (DMZ) by proposing to expand the date range for presumption of exposure to certain herbicide agents for Veterans who served in units operating in or near the Korean DMZ. Currently, the date range contained in section 3.307(a)(6)(iv) is April 1, 1968, through August 31, 1971. The BWN Act expanded the date range to September 1, 1967, through August 31, 1971. 38 U.S.C. 1116B(a)(2) (<https://www.govinfo.gov/link/uscode/38/1116B>).



Over the past few years, VA has received several requests to engage in rulemaking with regard to presumptive exposure to certain herbicide agents. Some of the requests have pertained to the Republic of Vietnam and its surrounds, such as Da Nang Harbor and Phu Quoc Island, and seem to be resolved by the BWN Act and this rulemaking, with the proposed changes to 38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) described above. That said, VA still welcomes any and all comments on these issues.

There have also been requests to extend a presumption of exposure to certain herbicide agents to Veterans who served at additional locations outside Vietnam, such as Panama and Okinawa. In response to some of these requests, VA committed to open a rulemaking that would consider extending the presumption of exposure to certain herbicide agents beyond the categories of Veterans currently listed in 38 CFR 3.307(a)(6)(iii) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)\(iii\)-\(v\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6)(iii)-(v))). This is that rulemaking and, after serious consideration, VA is proposing to extend a presumption of exposure to certain herbicide agents by adding new paragraph 38 CFR 3.307(a)(6)(xi) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)\(xi\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6)(xi))), which would presume exposure to certain herbicide agents for Veterans who served in locations not otherwise listed under section 3.307(a)(6) where certain herbicides and their chemical components were tested, used or stored, based on information received from DoD.

From 2018 to 2019, DoD reviewed thousands of government documents from a variety of sources to include the National Archives and Records Administration, Air Force Historical Research Agency, United States Department of Agriculture National Agricultural Library and Defense Technical Information Center. Information obtained from these documents was assessed against criteria developed jointly by VA and DoD to identify specific locations inside and outside the United States where certain herbicide agents and their chemical components were tested, used, or stored. The record of locations is a “living document,” and the Armed Forces Pest Management Board (AFPMB) has been assigned responsibility by the Under Secretary of Defense for Acquisition and Sustainment to maintain and update this list and ensure that it is current and accurate. The AFPMB conducts a review of the DoD list of locations annually and accepts submissions from members of the public in furtherance of updating the list.

Because DoD's list is premised on a comprehensive review of thousands of government documents, and the list will continue to be informed and updated through the submission of evidence by members of the public as well as internal research, VA utilizes the list as the most reliable source of information informing the question of where to establish regulatory presumptions of exposure to certain herbicide agents. VA believes that the list's acknowledgment of certain herbicide agent usage, testing or storage at particular sites on particular dates warrants a presumption of exposure to certain herbicide agents that lessens the ordinary burden of proof for Veterans who reasonably would have visited those sites on those dates. *See* 38 U.S.C. 5107(a) (<https://www.govinfo.gov/link/uscode/38/5107>); 38 U.S.C. 501(a)(1) (<https://www.govinfo.gov/link/uscode/38/501>).

In August 2019, DoD conveyed to VA its updated list of locations where certain herbicide agents were used, tested or stored. The list references (1) each location where certain herbicide agents were present, (2) the specific site of that presence, (3) the dates of that presence, (4) the purpose of that presence, (5) the personnel involved, and (6) the name of the herbicide agent or component involved. The list (and links to the criteria informing its creation) can be found at: <https://www.publichealth.va.gov/exposures/agentorange/locations/tests-storage/index.asp> (<https://www.publichealth.va.gov/exposures/agentorange/locations/tests-storage/index.asp>). While DoD is the lead agency for producing and updating the list of locations where certain herbicide agents were used,

tested or stored, VA is the lead agency responsible for making this information easily accessible to Veterans and keeping them informed of the benefits to which they may be entitled based on their service. VA keeps the public informed by publishing the list on the VA public health website and updating the published list as locations are added or removed. In addition, VA will provide notice in the **Federal Register** whenever updates are made to the DoD list.

Given that DoD will continue to maintain and update the list of locations where certain herbicide agents were used, tested or stored, VA proposes to implement a regulatory presumption of exposure that can evolve with the most current DoD list. Thus, VA proposes an additional paragraph to 38 CFR 3.307 (<https://www.ecfr.gov/current/title-38/section-3.307>) that would presume exposure to certain herbicide agents for Veterans (who do not qualify for the presumption under paragraphs (a)(6)(iii)–(v) or new paragraphs (a)(6)(vi)–(x) discussed below in Section II.b.) whose circumstances of service reasonably would have placed them at a site of certain herbicide agent testing, use or storage on a date of certain herbicide testing, use or storage. The authoritative source regarding where and when certain herbicide agents were tested, used or stored, for purposes of this additional paragraph, would be the information provided by DoD that is publicly available on VA's website and through VA's notices in the **Federal Register**.

This presumption would alleviate the need for a Veteran to have to prove actual involvement with certain herbicide agents, so long as that Veteran's circumstances of service would reasonably have placed the Veteran at certain sites on certain dates. For veterans who do not qualify for the presumption, VA will continue to consider and decide claims on a case-by-case basis considering all the evidence of record. Such Veterans will have the opportunity to present  evidence that they were exposed to certain herbicide agents, VA will consider all evidence of record (including lay statements) in rendering a determination on exposure, and VA will give the benefit of the doubt to the Veteran; but a presumption that lessens the ordinary burden of proof under 38 U.S.C. 5107 (<https://www.govinfo.gov/link/uscode/38/5107>) will not apply. Otherwise stated, Veterans in such a position will have the opportunity to establish in-service exposure to certain herbicide agents on a direct basis, but not a presumptive basis.

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The purpose of this regulatory change is to ensure consistency across VA adjudications, in accord with the most up-to-date information garnered by DoD. Structuring the regulation in this way will also eliminate the need for adjudicators to continually rely on sub-regulatory guidance or the need for VA to amend its regulations every time DoD updates its list.

For several reasons, VA decided not to propose to extend a regulatory presumption beyond the statutory requirements and the DoD list at this time. First, any official declaration by VA that a certain herbicide agent was presumably present in a particular location should be based on a comprehensive review of all available records, not based on speculation, assumption or limited evidence. While individual Veteran recollections, photographs and soil samples decades after the fact can provide relevant evidence in support of an individual's pursuit of direct service connection, it is most appropriate to rely on the most comprehensive review—from the agency that has access to the most relevant documents—when establishing a regulatory presumption. Second, as noted above, direct service connection remains available for any Veteran who alleges exposure to certain herbicide agents (no matter the Veteran's location of service), and due consideration will be given to all the evidence that veteran submits, with the benefit of the doubt given to the Veteran. Tailoring the presumption in this way does not at all foreclose any Veteran alleging exposure to certain herbicide agents from obtaining benefits. Third, there is reason for VA to be cautious in presuming or making declarations about herbicide agent presence when DoD has superior access to relevant records and superior knowledge of its own operations. While some inconsistency in government positions, statements



and decisions is inevitable given the size and complexity of Federal operations, it is confusing and illogical for one agency to create a rule that will have the force and effect of law that by its very premise depends upon a factual proposition that another agency with superior expertise or authority does not credit. Otherwise stated, for VA to presume an herbicide agent presence that DoD steadfastly denies after exhaustive research could implicate issues beyond VA benefits and result in widespread confusion about what the government believes to be fact. The better resolution is for VA and members of the public to submit all relevant evidence to DoD, so that the DoD list continues to evolve with the most up-to-date information, and for veterans to continue to submit evidence along with their individual claims.

VA recognizes that locations like Panama and Okinawa, Japan, are not on DoD's current list of locations where certain herbicide agents were used, tested or stored, and therefore would not warrant a presumption at this time. Ultimately, VA believes that linking its presumption with DoD's current herbicide agent list (which, as noted above, is a living document and therefore may evolve, upon the review of additional submitted evidence, to include locations like Panama and Okinawa) is the best course of action, but VA nevertheless welcomes all comments on this approach, or comments on Panama and Okinawa specifically, during the comment period for this rulemaking.

#### **b. Amendments to § 3.307 Based on the PACT Act**

As explained above, 38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) outlines the service requirements and other circumstances required for the presumption of exposure to certain herbicide agents. Currently, 38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) lists two locations as eligible for a presumption of exposure: the Republic of Vietnam and units that operated in or near the Korean DMZ in an area in which herbicides are known to have been applied. Based on section 403 of the PACT Act, VA is proposing to add the following locations to 38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) with corresponding eligible timeframes: (1) service in Thailand at any United States or Royal Thai base during the period beginning on January 9, 1962, and ending on June 30, 1976; (2) service in Laos during the period beginning on December 1, 1965, and ending on September 30, 1969; (3) service in Cambodia at Mimot or Krek, Kampong Cham Province during the period beginning on April 16, 1969, and ending on April 30, 1969; (4) service in Guam or American Samoa, or in the territorial waters thereof, during the period beginning on January 9, 1962, and ending on July 31, 1980; and (5) service on Johnston Atoll or on a ship that called at Johnston Atoll during the period beginning on January 1, 1972, and ending on September 30, 1977. These new locations will be added to 38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) by creating new paragraphs (a)(6)(vi-x).

To determine the territorial waters of Guam and American Samoa, VA relied on coordinates from the National Oceanic and Atmospheric Administration. The electronic charts can be found here:

<https://charts.noaa.gov/InteractiveCatalog/nrnc.shtml#mapTabs-2>  
(<https://charts.noaa.gov/InteractiveCatalog/nrnc.shtml#mapTabs-2>).

For claims based on service in Thailand, VA interprets the language of section 403 to include service on a ship that called to a coastal Thailand base. Section 403 provides a presumption of exposure to Veterans who served in Thailand at any United States or Royal Thai base during the period beginning on January 9, 1962, and ending on June 30, 1976. As the PACT Act definition of covered service in Thailand includes *any* United States or Royal Thai bases in Thailand, VA finds it reasonable to include service aboard a ship at any coastal Thailand base. Under this interpretation, any Veteran who served on a ship that called to a coastal base in Thailand is eligible for a presumption of exposure to certain herbicides.

VA's current policy regarding claims based on Thailand service is contained in sub-regulatory guidance and considers exposure on a case-by-case direct basis for security personnel, security patrol dog handlers, or other Service members whose daily activities placed them near the security perimeters of Thailand military bases during the Vietnam Era. Proposed 38 CFR 3.307(a)(6)(vi) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)\(vi\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6)(vi))) would supplant that sub-regulatory guidance, as this new paragraph would presume exposure to certain herbicides for all veterans who served in Thailand at any U.S. or Royal Thai base between January 9, 1962, and June 30, 1976, without regard to where on the base the veteran was located or what military job specialty the Veteran performed.

For claims based on service in Johnston Atoll or on a ship that called to Johnston Atoll, 38 U.S.C. 1116(d)(5) (<https://www.govinfo.gov/link/uscode/38/1116>) defines covered service to include service “on Johnston Atoll or on a ship that called at Johnston Atoll during the period beginning on January 1, 1972, and ending on September 30, 1977.” Section 1116(d)(5) specifies two categories of service related to Johnston Atoll that constitute covered service: (1) service on Johnston Atoll and (2) service on a ship that called at Johnston Atoll. VA understands 38 U.S.C. 1116(d)(5) (<https://www.govinfo.gov/link/uscode/38/1116>)'s date range to refer to the dates of the veteran's service in the location (the □ Atoll itself or on a ship), and that the date range provided in the statute applies to both categories. VA thus proposes to amend 38 CFR 3.307(a)(6) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6))) to make clear that the presumption of exposure to certain herbicides applies when the veteran was present on Johnston Atoll, to include presence on the the ship when it called at Johnston Atoll, even if the veteran did not disembark, during the qualifying period.

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### **III. Proposed Changes to § 3.309 Diseases Subject to Presumptive Service Connection**

Based on the FY 2021 NDAA and section 404 of the PACT Act, VA proposes to amend its adjudication regulations by revising section 3.309 to add bladder cancer, Parkinsonism, hypothyroidism, hypertension and MGUS to the list of diseases subject to presumptive service connection based on exposure to certain herbicide agents. VA proposes to add the five new conditions to the end of section 3.309(e), directly after soft tissue sarcoma.

VA also proposes to include parenthetical language for Parkinsonism that identifies the most common forms of Parkinsonism known as Parkinson-plus syndromes (also referred to as atypical Parkinsonism). The most common Parkinson-plus syndromes are progressive supranuclear palsy (PSP), multiple system atrophy (MSA) (also referred to as Shy-Drager syndrome), corticobasal degeneration (CBD), vascular Parkinsonism, and dementia with Lewy bodies (DLB).<sup>[2]</sup> The purpose of this parenthetical language is to ensure that disorders that fall under the umbrella term Parkinsonism are not overlooked by claims processors, resulting in examinations not being requested when warranted.

Drug-induced Parkinsonism will not be included as a presumptive condition as its etiology stems from drug side effects, not exposure to certain herbicide agents. Furthermore, drug-induced Parkinsonism is a condition that usually subsides over time once the relevant drug is discontinued.<sup>[3]</sup> Claims for service connection of drug-induced Parkinsonism will continue to be considered, as warranted, on a direct basis or on a secondary basis per 38 CFR 3.310(a) ([https://www.ecfr.gov/current/title-38/section-3.310#p-3.310\(a\)](https://www.ecfr.gov/current/title-38/section-3.310#p-3.310(a))), which states that service connection will be granted when a disability is determined to be proximately due to or the result of a service-connected disease or injury. If a Veteran has a diagnosis of drug-induced Parkinsonism and a medical examiner opines that the disease is due to medication required for a service-connected condition, the claim for service connection for drug-induced Parkinsonism may be granted



on a secondary basis. To provide clarity, VA further proposes to add a new note to 38 CFR 3.309(e) ([https://www.ecfr.gov/current/title-38/section-3.309#p-3.309\(e\)](https://www.ecfr.gov/current/title-38/section-3.309#p-3.309(e))) to explain that drug-induced Parkinsonism is not recognized as a disease associated with exposure to certain herbicide agents.

#### **IV. Proposed Changes to § 3.313 Claims Based on Service in Vietnam**

38 CFR 3.313 (<https://www.ecfr.gov/current/title-38/section-3.313>) provides regulatory guidance for establishing service connection for non-Hodgkin's lymphoma (NHL) based on service in "Vietnam." Currently, service connection for NHL requires a medical diagnosis and evidence showing service on land in Vietnam or service in Vietnam's offshore waters. (The current regulatory provision does not distinguish between "Vietnam" and the "Republic of Vietnam.") Before the *Procopio* decision, service solely in the offshore waters was not sufficient to grant service connection for any condition except NHL.

Based on the definition of Vietnam's offshore waters in the BWN Act, claims for NHL will no longer be held to a separate standard of service connection than other conditions listed under 38 CFR 3.309(e) ([https://www.ecfr.gov/current/title-38/section-3.309#p-3.309\(e\)](https://www.ecfr.gov/current/title-38/section-3.309#p-3.309(e))). Furthermore, because the current regulatory guidance does not distinguish between "Vietnam" and the "Republic of Vietnam," VA is proposing to amend its adjudication regulations to specify that in order to establish presumptive service connection for NHL, service must have been in the "Republic of Vietnam," to ensure that the regulation is consistent with the statutory definition of Vietnam's offshore waters. VA notes that, in light of *Procopio* and the BWN Act, the scope and effect of section 3.313 are essentially coextensive with section 3.309(e) as the latter applies to NHL. However, VA proposes to revise, rather than rescind, section 3.313 because this provision could have an independent effect in rare cases, as it does not depend on a rebuttable presumption of herbicide agent exposure.

#### **V. Proposed Changes to § 3.114 Change of Law or Department of Veterans Affairs Issue**

38 CFR 3.114(a) ([https://www.ecfr.gov/current/title-38/section-3.114#p-3.114\(a\)](https://www.ecfr.gov/current/title-38/section-3.114#p-3.114(a))), which provides effective date provisions in situations where there has been a change in law or VA issue, applies, in relevant part, to benefits awards to an individual suffering from spina bifida whose biological father or mother is or was a Vietnam Veteran or a Veteran with covered service in Korea. Since the BWN Act authorizes VA to extend these benefits to children of Veterans with covered service in Thailand, VA proposes to add individuals with spina bifida born to Veterans with covered service in Thailand as a category of claimants who are entitled to consideration for an effective date as specified in this regulation.

Furthermore, VA proposes a clerical amendment to section 3.114(a) by replacing the word "child" with the phrase "natural child" wherever it occurs in the regulation. This is not a substantive regulatory change; it is merely a clerical amendment that reflects the statutory definition of "child" for purposes of benefits for children of certain veterans born with spina bifida. See 38 U.S.C. 1831(1) (<https://www.govinfo.gov/link/uscode/38/1831>).

#### **VI. Proposed Changes to § 3.814 Monetary Allowance Under 38 U.S.C. Chapter 18 for An Individual Suffering From Spina Bifida Whose Biological Father or Mother Is or Was a Vietnam Veteran or a Veteran With Covered Service in Korea**

Individuals born with spina bifida whose biological father or mother was determined to be exposed to certain herbicide agents in Vietnam or Korea have long been eligible for a monthly monetary allowance under 38 U.S.C. chapter 18, based on the severity of their spina bifida symptoms. However, this eligibility did not

extend to natural children of Thailand Veterans for whom certain herbicide agent exposure has been conceded, nor did it extend to natural children of Veterans who served in the offshore waters of the Republic of Vietnam. 38 CFR 3.814 (<https://www.ecfr.gov/current/title-38/section-3.814>) is the regulation that provides for entitlement to this monetary allowance under 38 U.S.C. chapter 18 and sets forth the criteria that must be met in order to establish such entitlement. The BWN Act expanded eligibility for spina bifida benefits to natural children of certain Thailand Veterans, as well as natural children of Veterans who served in the offshore waters of the Republic of Vietnam. This proposed rulemaking updates the criteria accordingly.

For purposes of spina bifida benefits for natural children of Thailand Veterans, the BWN Act, in 38 U.S.C. 1822 (<https://www.govinfo.gov/link/uscode/38/1822>), defined a Veteran of covered service in Thailand as “any individual, without regard to the characterization of that individual's service, who—(1)  served in the active military, naval, or air service in Thailand, as determined by the Secretary in consultation with the Secretary of Defense, during the period beginning on January 9, 1962, and ending on May 7, 1975; and (2) is determined by the Secretary, in consultation with the Secretary of Defense, to have been exposed to a herbicide agent during such service in Thailand”

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As discussed above in Section II.b., the PACT Act expanded the list of locations eligible for a presumption of exposure to certain herbicides to include Thailand. The PACT Act defined covered service in Thailand, in 38 U.S.C. 1116(d)(2) (<https://www.govinfo.gov/link/uscode/38/1116>), as “active military, naval, air, or space service-performed in Thailand at any United States or Royal Thai base during the period beginning on January 9, 1962, and ending on June 30, 1976, without regard to where on the base the Veteran was located or what military job specialty the Veteran performed.” Prior to the PACT Act, 38 U.S.C. 1822 (<https://www.govinfo.gov/link/uscode/38/1822>) provided benefits to children born with spina bifida whose parent served in Thailand any time between January 9, 1962, and May 7, 1975. The PACT Act did not amend 38 U.S.C. 1822 (<https://www.govinfo.gov/link/uscode/38/1822>). For purposes of establishing entitlement to monetary benefits for spina bifida under 38 U.S.C. Chapter 18, VA proposes to define covered service in Thailand as “service at any United States or Royal Thai base during the period beginning on January 9, 1962, and ending on May 7, 1975, without regard to where on the base the Veteran was located or what military job specialty the Veteran performed.” This definition includes the description of covered service from 38 U.S.C. 1116 (<https://www.govinfo.gov/link/uscode/38/1116>) but maintains the eligible time frame from 38 U.S.C. 1822 (<https://www.govinfo.gov/link/uscode/38/1822>). VA has determined that aligning the definitions of what characterizes Thailand service will improve the consistency of decisions for Thailand Veterans and their survivors.

For the purposes of establishing entitlement to monetary benefits for spina bifida under 38 U.S.C. chapter 18, VA is proposing to include the offshore waters of the Republic of Vietnam in the definition of service in the Republic of Vietnam. In accordance with the BWN Act, VA further proposes to amend 38 CFR 3.814(c)(1) ([https://www.ecfr.gov/current/title-38/section-3.814#p-3.814\(c\)\(1\)](https://www.ecfr.gov/current/title-38/section-3.814#p-3.814(c)(1))) to align with the definition of “service in the Republic of Vietnam” set forth in the proposed amendment to 38 CFR 3.307(a)(6)(iii) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)\(iii\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6)(iii))).

Further, in accordance with the BWN Act, VA is extending the date range for establishing presumption of exposure along the Korean DMZ from April 1, 1968, through August 31, 1971, to September 1, 1967, through August 31, 1971. *See* 38 U.S.C. 1116B(a)(2) (<https://www.govinfo.gov/link/uscode/38/1116B>). VA proposes to amend the start date in 38 CFR 3.814(c)(2) ([https://www.ecfr.gov/current/title-38/section-3.814#p-3.814\(c\)\(2\)](https://www.ecfr.gov/current/title-38/section-3.814#p-3.814(c)(2))) to reflect the date mandated by the new statute.



VA also proposes replacing the phrase “biological son or daughter” in 38 CFR 3.814(c)(4) ([https://www.ecfr.gov/current/title-38/section-3.814#p-3.814\(c\)\(4\)](https://www.ecfr.gov/current/title-38/section-3.814#p-3.814(c)(4))) with “natural child” consistent with the clerical amendment proposed for 38 CFR 3.114(a) ([https://www.ecfr.gov/current/title-38/section-3.114#p-3.114\(a\)](https://www.ecfr.gov/current/title-38/section-3.114#p-3.114(a))).

## **VII. Proposed Changes to § 3.815 Monetary Allowance Under 38 U.S.C. Chapter 18 for an Individual With Disability From Covered Birth Defects Whose Biological Mother Is or Was a Vietnam Veteran; Identification of Covered Birth Defects**

Prior to the BWN Act, if a Veteran mother only had service in the offshore waters of the Republic of Vietnam and did not go ashore or serve in the inland waterways, that service did not qualify for entitlement to a monthly monetary award for any natural children born with qualifying birth defects. The Act expanded the definition of “Vietnam Veteran” to include Veterans who served in the offshore waters of the Republic of Vietnam. Therefore, VA proposes to amend 38 CFR 3.815 (<https://www.ecfr.gov/current/title-38/section-3.815>) accordingly.

38 CFR 3.815 (<https://www.ecfr.gov/current/title-38/section-3.815>) provides for a monetary allowance under 38 U.S.C. 1812 (<https://www.govinfo.gov/link/uscode/38/1812>) for individuals with disability due to covered birth defects whose biological mother is or was a Vietnam Veteran. Covered birth defects include any birth defect other than familial disorders, birth-related injuries, or fetal or neonatal infirmity with well-established causes. All birth defects not excluded under these categories are covered birth defects. However, if an individual’s only birth defect is spina bifida, their monthly monetary allowance will be paid under the provisions of 38 U.S.C. 1803 (<https://www.govinfo.gov/link/uscode/38/1803>), 1821 (<https://www.govinfo.gov/link/uscode/38/1821>), and 1822 (<https://www.govinfo.gov/link/uscode/38/1822>), which provide a monthly monetary award for children of certain herbicide agent-exposed Veteran parents who served in Vietnam, Thailand or near the Korean DMZ.

In accordance with the BWN Act, VA proposes to amend 38 CFR 3.815(c)(1) ([https://www.ecfr.gov/current/title-38/section-3.815#p-3.815\(c\)\(1\)](https://www.ecfr.gov/current/title-38/section-3.815#p-3.815(c)(1))) to align the definition of “service in the Republic of Vietnam” with the definition set forth in the proposed amendment to 38 CFR 3.307(a)(6)(iii) ([https://www.ecfr.gov/current/title-38/section-3.307#p-3.307\(a\)\(6\)\(iii\)](https://www.ecfr.gov/current/title-38/section-3.307#p-3.307(a)(6)(iii))).

## **VIII. Proposed Changes to § 3.105 Revision of Decisions**

38 CFR 3.105(g) ([https://www.ecfr.gov/current/title-38/section-3.105#p-3.105\(g\)](https://www.ecfr.gov/current/title-38/section-3.105#p-3.105(g))), which describes procedural requirements for reductions in evaluations under 38 U.S.C. chapter 18 for children of certain herbicide agent-exposed Veterans, currently only applies to children of Vietnam Veterans born with spina bifida or children of Veterans with covered service in Korea born with spina bifida who were entitled to benefits. Because the BWN Act authorized VA to extend those benefits under 38 U.S.C. chapter 18 to children of certain Veterans who served in Thailand born with spina bifida, VA proposes to add these children to the category of claimants who are covered by the procedural provisions specified in this regulation. Since natural children of Veterans with covered service in Thailand are a newly covered type of claimant, it is necessary to add them as a category of claimants who are covered by the procedural provisions of 38 CFR 3.105 (<https://www.ecfr.gov/current/title-38/section-3.105>). This ensures that benefits awarded to these claimants cannot be severed or reduced until the claimant has been afforded time to present evidence in support of maintaining their benefits.