

to be effective 10 years after the first day of the fiscal year in which the NAS transmitted its first report to VA. The first NAS report was transmitted in June 1993, during the fiscal year that began on October 1, 1992. Accordingly, under the Act, VA's authority to issue regulatory presumptions as specified in section 1116(b) would have expired on September 30, 2002.

In December 2001, Congress enacted the Veterans Education and Benefits Expansion Act of 2001 (Benefits Expansion Act), Public Law 107–103, section 201(d) of which extended VA's authority under section 1116(b) through September 30, 2015. Pursuant to this statute, VA may issue new regulations between October 1, 2002 and September 30, 2015 establishing additional presumptions of service connection for diseases that are found to be associated with herbicide exposure based on evidence contained in future NAS reports. Because presumptions established pursuant to the authority of the Benefits Expansion Act would be beyond the scope of the *Nehmer* stipulation and order, the effective-date provisions of the stipulation and order, as stated in this proposed rule, would not apply to claims based on diseases service-connected pursuant to the Benefits Expansion Act of 2001.

Both the district court and the Court of Appeals for the Ninth Circuit stated that the *Nehmer* stipulation and order applies only to awards based on presumptions issued within the time period established by the Agent Orange Act of 1991, Public Law 102–4. The district court noted that the retroactive payment provisions of the stipulation and order are “expressly tied” to the Agent Orange Act of 1991, Public Law 102–4, and that “the Stip. & Order is not therefore boundless.” *Nehmer v. United States Department of Veterans Affairs*, No. CV–86–6160 TEH (N.D. Cal. Dec. 12, 2000). In a decision issued April 1, 2002, the Ninth Circuit stated that, “the district court was careful to prescribe temporal limits on the effect of the consent decree, with which we agree.” *Nehmer v. Veterans’ Administration*, 284 F.3d 1158, 1162 n.3. (9th Cir. 2002), *reh’g denied*.

In its December 12, 2000, order, the district court held that the 1991 stipulation and order must be interpreted in accordance with general principles of contract law. It is well established that, unless the parties provide otherwise, a contract is presumed to incorporate the law that existed at the time the contract was made. See *Norfolk & Western Ry. Co. v. American Train Dispatchers’ Ass’n*, 499 U.S. 117, 129–30 (1991). A subsequent

change in the law cannot retrospectively alter the terms of the agreement. See *Florida East Coast Ry. Co. v. CSX Transportation, Inc.*, 42 F.3d 1125, 1129–30 (7th Cir. 1994). Accordingly, the enactment of the Benefits Expansion Act of 2001 does not alter the scope of the 1991 stipulation and order.

Because the Benefits Expansion Act of 2001, Public Law 107–103, established rights and duties that did not exist under the Agent Orange Act of 1991, Public Law 102–4, any regulations issued pursuant to the authority of the Benefits Expansion Act of 2001 are beyond the express scope of the *Nehmer* stipulation and order. Accordingly, the stipulation and order provides no authority for VA to pay retroactive benefits under such regulations in a manner contrary to the governing statutes and regulations concerning the effective dates of awards. Proposed paragraph 3.406(g) would reflect this fact. This provision would make clear that awards based on regulations issued pursuant to the Benefits Expansion Act of 2001 would be governed by the generally applicable provisions governing the effective dates of benefit awards.

Executive Order 12866

This regulatory amendment has been reviewed by the Office of Management and Budget under the provisions of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993.

Paperwork Reduction Act

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

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 rule would have no consequential effect on State, local, or tribal governments.

Regulatory Flexibility Act

The Secretary hereby certifies that this 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 (RFA), 5 U.S.C. 601–612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA

beneficiaries and their survivors could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

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

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Herbicides, Veterans, Vietnam.

Approved: November 4, 2002.

Anthony J. Principi,
Secretary of Veterans Affairs.

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

PART 3—ADJUDICATION

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

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

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

2. Section 3.816 is added to read as follows:

§ 3.816 Awards under the *Nehmer* Court Orders for disability or death caused by a condition presumptively associated with herbicide exposure.

(a) *Purpose.* This section states effective-date rules required by orders of a United States district court in the class-action case of *Nehmer v. United States Department of Veterans Affairs*, No. CV–86–6160 TEH (N.D. Cal.).

(b) *Definitions.* For purposes of this section:

(1) *Nehmer class member* means:

(i) A Vietnam veteran who has a covered herbicide disease; or
(ii) A surviving spouse, child, or parent of a deceased Vietnam veteran who died from a covered herbicide disease.

(2) *Covered herbicide disease* means a disease for which the Secretary of Veterans Affairs has established a presumption of service connection before October 1, 2002 pursuant to the Agent Orange Act of 1991, Public Law 102–4, other than chloracne. Those diseases are:

(i) Type 2 Diabetes (Also known as type II diabetes mellitus or adult-onset diabetes).
(ii) Hodgkin's disease.
(iii) Multiple myeloma.
(iv) Non-Hodgkin's lymphoma.