

**§ 165.T05–153 Safety and Security Zone;
Cove Point Liquefied Natural Gas Terminal,
Chesapeake Bay, Maryland.**

(a) *Location.* The following area is a safety and security zone: All waters of the Chesapeake Bay, from surface to bottom, encompassed by lines connecting the following points, beginning at 38°24'27" N, 076°23'42" W, thence to 38°24'44" N, 076°23'11" W, thence to 38°22'55" N, 076°22'27" W, thence to 38°23'37" N, 076°22'58" W, thence to beginning at 38°24'27" N, 076°23'42" W. These coordinates are based upon North American Datum (NAD) 1983. This area is 500 yards in all directions from the Cove Point LNG terminal structure.

(b) *Regulations.* (1) In accordance with the general regulations in §§ 165.23 and 165.33 of this part, entry into or movement within this zone is prohibited unless authorized by the Coast Guard Captain of the Port, Baltimore, Maryland or his designated representative. Designated representatives include any Coast Guard commissioned, warrant, or petty officer.

(2) Persons desiring to transit the area of the zone may contact the Captain of the Port at telephone number (410) 576–2693 or via VHF Marine Band Radio channel 16 (156.8 MHz) to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his designated representative.

(c) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, local, and private agencies.

Dated: September 26, 2003.

Curtis A. Springer,

Captain, U.S. Coast Guard, Captain of the Port, Baltimore, Maryland.

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DEPARTMENT OF VETERAN AFFAIRS

38 CFR Part 3

RIN 2900–AL55

Disease Associated With Exposure to Certain Herbicide Agents: Chronic Lymphocytic Leukemia

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations concerning presumptive service connection for certain diseases for which there is no record during service. This amendment

is necessary to implement the decision of the Secretary of Veterans Affairs that there is a positive association between exposure to herbicides used in the Republic of Vietnam during the Vietnam era and the subsequent development of chronic lymphocytic leukemia (CLL). The effect of this amendment is to establish presumptive service connection for that condition based on herbicide exposure.

DATES: *Effective Date:* October 16, 2003.

FOR FURTHER INFORMATION CONTACT:

Cheryl Konieczny, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273–6779.

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on March 26, 2003 (68 FR 14567–14570), VA proposed to amend its adjudication regulations to provide for a presumption of service connection for CLL based on herbicide exposure. VA provided a 60-day comment period which ended on May 27, 2003. We received a written comment from Vietnam Veterans of America (VVA) and a joint written comment from two individuals.

Comments Supporting the Proposed Rule

The joint comment from two individuals expressed support for the proposed rule.

Outreach Mechanisms

One commenter urged that the final rule specifically state that VA will develop and implement outreach mechanisms by which attempts will be made to contact all in-country Vietnam veterans who are eligible for this benefit.

VA has already initiated a number of outreach activities. In January 2003, VA issued a news release concerning the Secretary's decision regarding CLL. This news release has also been distributed at health fairs, health care conferences, and on the National Mall in conjunction with Public Service Recognition Week. An article conveying this information can currently be found on VA's Web site. The lead article of the July issue of the Agent Orange Review, which will be sent to hundreds of thousands of Vietnam veterans, is about the Secretary's decision regarding CLL. Further, outreach efforts are procedural in nature, and are outside the scope of this rulemaking; therefore, no change is made based on this comment.

Establish a Retroactive Effective Date

The same commenter urged that the final rule state that compensation for

CLL will be retroactive for those eligible in-country Vietnam veterans who had previously applied for benefits based on CLL and were denied. We will make no change based on this comment because VA does not have authority to award such retroactive benefits. As explained below, existing statutes make clear that VA may not award retroactive benefits based on this final rule for any period before the date this final rule is published in the **Federal Register**.

Those statutes prohibit VA from granting benefits retroactive to the date of a previously denied claim. No statute or judicial decision authorizes VA to ignore those statutory requirements for purposes of this final rule.

Title 38 U.S.C. 1116(c)(2) clearly and unambiguously requires that regulations promulgated as a result of a decision of the Secretary of Veterans Affairs that a positive association exists between exposure to herbicides and a specified condition or disease "shall be effective on the date of issuance." The effective date established by this rule is in accordance with 38 U.S.C. 1116(c)(2). Under 38 U.S.C. 5110(g), when benefits are awarded based on a new regulation, the effective date of the award may not be earlier than the effective date of the regulation. In view of 38 U.S.C. 1116(c)(2) and 5110(g), VA does not have authority to provide in this rule for assignment of an effective date earlier than the date on which this rule is issued.

We note that a series of orders from the United States District Court for the Northern District of California in the class-action litigation in *Nehmer v. U.S. Veterans' Administration* requires VA to pay retroactive benefits for certain diseases associated with herbicide exposure, in certain circumstances, in a manner that would otherwise be prohibited by 38 U.S.C. 1116(c)(2) and 5110(g). We conclude, however, that those orders do not apply to benefits based on a disease for which the Secretary of Veterans Affairs establishes a presumption of service connection after September 30, 2002.

The *Nehmer* court orders rely upon a May 1991 Final Stipulation and Order between the parties to that litigation. The 1991 stipulation and order required VA to accord retroactive effect to presumptions of service connection established by VA pursuant to the Agent Orange Act of 1991, Public Law 102–4. The Agent Orange Act of 1991, Public Law 102–4, established a sunset date of September 30, 2002, for the Secretary to establish such presumptions. Accordingly, the *Nehmer* stipulation and order applies only to awards based on presumptions established within the