

time frame specified in the Agent Orange Act of 1991, Public Law 102–4.

The Agent Orange Act of 1991, Public Law 102–4, added section 1116 to title 38, United States Code. Section 1116(b) authorized the Secretary of Veterans Affairs to issue regulatory presumptions of service connection for diseases associated with herbicide exposure. Section 1116(e), as added by the Act, stated that section 1116(b) would cease 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, Public Law 107–103 are beyond the scope of the *Nehmer* stipulation and order, the effective-date provisions of the stipulation and order would not apply to benefit awards based on those presumptions.

The United States District Court for the Northern District of California and the United States 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). 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).

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). The terms of a contract “do not change with the enactment of subsequent legislation, absent a specific contractual provision providing for such a change.” *Winstar Corp. v. United States*, 64 F.3d 1531, 1547 (Fed. Cir. 1995), *aff'd*, 518 U.S. 839 (1996). 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 cannot expand the Government's authority under the May 1991 stipulation and order.

VA is required to give effect to the clear statutory requirements in 38 U.S.C. 1116(c)(2) and 5110(g), in the absence of authority to the contrary. To the extent the *Nehmer* court orders require action seemingly at odds with those statutes, we believe they are most reasonably viewed as creating a non-statutory exception to the requirements of 38 U.S.C. 1116(c)(2) and 5110(g). We believe it would be inappropriate, however, to disregard the clear requirements of section 1116(c)(2) and 5110(g) in cases that are not within the scope of the *Nehmer* court orders. The United States Court of Appeals for the Federal Circuit and the United States Court of Appeals for Veterans Claims have held that 38 U.S.C. 5110(g) governs the effective date of awards made pursuant to regulatory presumptions of service connection for diseases associated with herbicide exposure, at least in cases that are not clearly within the scope of the *Nehmer* court orders. See *Williams v. Principi*, 15 Vet. App. 189 (2001) (en banc); *aff'd*, 310 F.3d 1374 (Fed. Cir. 2002). Accordingly, the district court orders in the *Nehmer* case do not permit VA to ignore the clear requirements of 38 U.S.C. 1116(c)(2) and 5110(g) as they apply to this final rule or to grant retroactive benefits in a manner prohibited by those statutes. We therefore make no change based on this comment.

Eligibility of Widows

The commenter urged that the final rule state that widows of in-country Vietnam veterans who died as a result of CLL are eligible for dependency and indemnity compensation (DIC). This

rule is not intended to define the criteria governing eligibility for DIC or any other benefit. Several existing statutes and regulations already provide that veterans and their survivors are entitled to benefits for disability or death due to a service-connected disease or injury. This rule would establish a presumption that CLL is service connected in veterans who were exposed to certain herbicide agents used in Vietnam and who subsequently developed that disease. That presumption will assist claimants in establishing entitlement to specific benefits under the statutes and regulations authorizing such benefits, and will apply whether the claimant is a veteran seeking compensation or a survivor seeking service-connected death benefits. We therefore make no change based on this comment, because the suggested change is beyond the scope of this rule and is unnecessary.

Extend Eligibility to Those Who Served on Naval Vessels

The commenter urged that we extend eligibility to service connection for CLL to all Vietnam veterans who served within the geographical boundaries of the Republic of Vietnam and those who served on naval vessels within the territorial waters of the Republic of Vietnam. As revised by this final rule, 38 CFR 3.309(e) will expressly provide that CLL will be presumed service connected in any veteran who was exposed to certain herbicide agents during service. Veterans who served in the Republic of Vietnam between January 9, 1962, and May 7, 1975, are presumed to have been exposed to such herbicide agents. Veterans who served only in other locations or at other times, including those who served on naval vessels in the territorial waters of Vietnam but never set foot within the Republic of Vietnam, would need to establish that they were exposed to herbicide agents during service.

Title 38 U.S.C. 1116 requires that a veteran have served “in the Republic of Vietnam” to be eligible for the presumption of exposure to herbicides. 38 CFR 3.307(a)(6)(iii) provides that “Service in the Republic of Vietnam” includes service in offshore waters or other locations only if the conditions of service involved duty or visitation within the Republic of Vietnam. In interpreting similar language in 38 U.S.C. 101(29)(A), VA's General Counsel has concluded that service in 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