IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JACK L. STOVER, Petitioner	)	
v.	)	Vet. App. No. 20-5580
DENIS MCDONOUGH, Secretary of Veterans Affairs, Respondent.	)	

TABLE OF CONTENTS FOR APPELLEE'S RESPONSE TO THE COURT'S NOVEMBER 2, 2021 ORDER

Pursuant to U.S. Vet. App. E-Rule 7, the Secretary hereby provides a table of contents for the attachments to his response to the Court's order.

TABLE OF CONTENTS

Pdf

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JACK L. STOVER,	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 20-5580
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

APPELLEE'S RESPONSE TO THE COURT'S NOVEMBER 2, 2021, ORDER

On November 2, 2021, the Court order the Secretary, within 60 days, to respond to 18 enumerated questions. The Secretary responds to the Court's order.

1. **What does the word "on" mean where the Board states: "Special consideration of herbicide exposure on a factual basis should be extended to Veterans whose duties place them on or near the perimeters of Thailand military bases?"**

The parties agree that the Board was referencing the Thailand M21 provision in this portion of its decision. (App. Br. at 10 (arguing that the Board "chose to include" language from the M21 in its decision), Sec'y Br. at 8 (acknowledging that the Board "applied" the M21)). Thus, determining what "on" meant as the Board used it requires determining what the word means as used in the Thailand M21 provision. Though the M21 is neither a statute nor a regulation, the Secretary will approach the question as if it were. The Secretary does not, however, change his position as articulated in his brief that the M21 is non-binding authority. (*See* Sec'y Br. at 24).

When interpreting a term in a statute or regulation, the starting point is with its ordinary meaning. *Mattox v. McDonough*, 34 Vet.App. 61, 67 (2021); *see also Atencio v. O'Rourke*, 30 Vet.App. 74, 81 n.4 (2018) (holding that the rules of statutory construction apply when interpreting a regulation). Some words, however, like the word "on," may have more than one ordinary meaning. "On" can mean "in a position above, but in contact with and supported by; upon." *Webster's New World Dictionary* 946 (3rd Coll. ed. 1994). "On" can also mean "near to," as in, "a cottage *on* the lake." *Id*. "Words that can have more than one meaning are given content . . . by their surroundings." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 466 (2001); *see also Mattox*, 34 Vet.App. at 67 (recognizing that the ordinary-meaning rule is guided by "the specific context in which the word or provision at issue is used") (citation omitted).

Pertinent here, the word "on" is used in the Thailand M21 provision to describe a person's proximity to an air base perimeter. M21-1, Part IV, Subpart ii, Chapter, 1, Section H, Topic 4 (Dec. 31, 2019) (M21-1, Pt. IV, Subpt. ii, Chpt. 1, Sec. H, Top. 4) (M21 or Manual). The evidence in this case confirms that these base perimeters were marked by physical structures, such as fences and barbed wire for defense and security. (Record (R.) at 49). When read in this context, "on" means "near" the physical structure making up the base perimeter. If "on" took on its more restrictive meaning, it would mean that a service member would need to climb atop, and be supported by, a fence, often covered in barbed wire, as part of

one's duties to have served "on" the perimeter. A more natural reading is that "on" is used to mean "near to." *Webster's* at 946; *Mattox*, 34 Vet.App. at 67.

To be sure, the M21 separates the terms "on" and "near" with the word "or," which is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *United States v. Woods*, 571 U.S. 31, 45 (2013) (quotation omitted). Still, a word following "or" can be synonymous with the word preceding it. *Id.* In this M21 provision, "on" and "near" are synonymous. In addition to the unnatural reading flowing from the more restrictive use of the word "on" (requiring one to imagine a service member perched atop a fence covered in barbed wire), reading the M21 provision in its entirety supports the Secretary's interpretation.

The introductory portion of the Thailand M21 provision refers to those who served "on or near" the perimeters. But the next portion, which includes the specific instructions for Veterans Benefits Administration (VBA) adjudicators, identifies those who served as security personnel or "otherwise near the base perimeter," without referencing those who served "on" the perimeter. "When assessing the meaning of a regulation, words should not be read in isolation but rather in the context of the regulatory structure and scheme." *Huerta v. McDonough*, 34 Vet.App. 76, 79-80 (2021). Because the specific instructions refer only to those who served "near" the perimeters, and because the introductory paragraph confirms that the provision is intended to cover those who served "on or near" the perimeters, the most natural reading of the M21 provision, in its entirely, is that the words "on" and "near" are synonymous.

It therefore becomes necessary to determine the meaning of the word "near." "Near" means "at or to a relatively short distance in space or time." *Webster's* at 905. Because "near" is a relative term, context is especially important. *See Mattox*, 34 Vet.App. at 67 (recognizing that the ordinary-meaning rule is guided by "the specific context in which the word or provision at issue is used"). The word "near" is used here to describe a service member's proximity to the base perimeter. But the perimeter is just one part of the entire base. Because the bases mentioned in the Thailand M21 provision are air bases, they all have runways and flight lines. See *Webster's* at 517 (defining flight line as the portion of an airfield where planes are parked and serviced). A map of the Takhli Air Base, where Appellant served, confirms that the base also had a salvage yard, supply compound, motor pool, areas for living quarters, places to eat (snack bar, dining hall), and places for recreation (athletic fields, a bowling alley). (R. at 137).

The M21 provision, however, does not instruct RO personnel to concede exposure for those who served on or near the flight lines, runways, salvage yards, supply compounds, or any area other than the perimeter. Under the negative-implication canon, also known as *expression unius est exclusion alterius*, the expression of one thing implies the exclusion of others. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012); *see also, e.g., Youngblood v. Wilkie*, 31 Vet.App. 412, 417 (2019) (relying on the canon *expression unius est exclusion alterius* to hold that the Secretary's inclusion of a single purpose for a particular portion of a regulation meant that all other purposes

were excluded). Because the M21 provision includes only the perimeter, by implication, all other parts of the base, such as the salvage yard, the flight line, and so on, are excluded.

Because "near" is a relative term, and because the M21 excludes every part of the base except the perimeter, the term "near" the perimeter must be interpreted as excluding service in a salvage yard or on the flight line, even if, when used in another context, those locations might qualify as being "near" the perimeter. *See American Trucking Assns., Inc.*, 531 U.S. at 466 (holding that words in a statute or regulation must be read in the context in which they are used). In summary, "on the flight line" does not qualify as near the perimeter.

But that is not all. The three listed occupations give meaning to the phrase "or otherwise near the base perimeter" that immediately follows. Under the e*jusdem generis* canon, "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned." Scalia & Garner, *supra*, at 199; *see also Adams v. Dept. of Homeland Sec.*, 3 F.4th 1375, 1380 (Fed. Cir. 2021) (applying the *ejusdem generis* canon). The M21 provision identifies three specific occupations—security policeman, security patrol dog handler, and member of the security police squadron—after which appears the phrase "otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence." Under the *ejusdem generis* canon, service "otherwise near" the base perimeter therefore means duties performed just as close to the

perimeter as that of a security policeman, security patrol dog handler, or member of the security police squadron.

Both the plain meaning of the term "security" and agency documents discussing the history of the current M21 policy confirm that those occupations entailed close contact with the base perimeter. "Security" means, *inter alia*, "an organization or department whose task is protection or safety, esp. a private police force hired to patrol a building, park, or other area." *Webster's* at 1214. "Patrol" means "to make a regular and repeated circuit of (an area, town, camp, etc.) in guarding or inspecting." *Id*. at 991. Thus, under the plain meaning of the word "security," the "security" personnel referenced in the M21 would regularly and repeatedly guard or inspect the perimeter. "Inspect" means to "look at carefully; examine critically, esp. in order to detect flaws, errors, etc." *Id*. at 699.

Based on the plain meaning of the terms "security" and the terms used to define that term ("patrol" and "inspect"), the security personnel identified in the M21 would have regularly, repeatedly, and carefully examined the base-perimeter structures for breaches, which would require close contact with those structures. Thus, the best reading of the word "near," when read in the context in which it is used in the M21, means close enough to physically touch the perimeter structure.

A VBA Memorandum for the Record also supports the Secretary's interpretation. In May 2009, the Director of Compensation sent a Fast Letter to all VA regional offices announcing the VBA Thailand policy, now found in the M21. Appendix (Appx.) at 1-2. The Director attached to the Fast Letter a "Memorandum

for the Record," to be placed in files of all veterans claiming herbicide exposure in Thailand. Appx. at 3-5. The Memorandum for the Record explains, "if a veteran's MOS (military occupational specialty) or unit is one that regularly had *contact* with the base perimeter, there was a greater likelihood of exposure to commercial pesticides, including herbicides. Security police units were known to have walked the perimeters, especially dog handlers." Appx. at 4 (emphasis added). This letter confirms that the VBA understood security personnel as those having "contact with" the perimeter. "Contact" means "the act or state of touching or meeting." *Webster's* at 300. Thus, the Memorandum for the Record confirms that VBA's Thailand policy, as currently found in the M21, was intended to include those whose duties placed them close enough to the base perimeter to physically touch (contact) the perimeter structure.

In summary, "on or near the perimeter" means close enough to physically touch the perimeter structure.

2. Are veterans that served as Air Force security policemen, security patrol dog handlers, or members of the security police squadron entitled to a finding of presumptive exposure to herbicides in Thailand because these jobs required them to be "on" or "near" the perimeter?

No, but they should receive an analysis under a direct theory that functions very similarly to a presumption.[1] The M21 provision lists three occupations that

[1] As explained below, the Manual provision does not qualify as a true presumption because it instructs adjudicators to concede exposure on a "direct/facts-found" basis.

qualify for a finding of herbicide exposure. These occupations are followed by the words "otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence." "Otherwise" means "[i]n another manner, differently." *Webster's* at 959. This means that the three occupations appearing before the word "otherwise" are examples of those that would require the service member to be "on" or "near" the perimeter, and that the clause following the word "otherwise" identifies alternative evidence to establish the same fact: service on or near the perimeter.

The Fast Letter and Memorandum for the Record, generated when VBA created the policy in 2009, also support this view. The Memorandum for the Record, which the Director explains "contains input from" the Department of Defense, cited several documents, including Barnette BH, Jr., Barrow JR, *Project Contemporary Historical Examination of Current Operations Report*, *Base Defense in Thailand – 1968-1972* (*CHECO Report*). The Memorandum also states:

> While the Thailand CHECO Report does not report the use of tactical herbicides on allied bases in Thailand, it does indicate sporadic use of non-tactical (commercial) herbicides within fenced perimeters. Therefore, if a veteran's MOS (occupational specialty) or unit is one that regularly had contact with the base perimeter, there was a greater likelihood of exposure to commercial pesticides, including herbicides. Security police units were known to have walked the perimeters, especially dog handlers.

Appx. at 4 (emphasis added). This Memorandum confirms that VBA's Thailand policy, currently found in the M21, identified security occupations because they entailed duties on or near the perimeter.

3. Similarly, does the phrase "or otherwise near the air base perimeter" imply that the listed MOS's are being compensated because their duties took them "near," but not "on" the perimeter?

No. As explained above, when read in context, "on" and "near" are synonymous. *See Webster's* at 946 (confirming that "on" can mean "near to"). The phrase "or otherwise near the air base perimeter" implies that the three listed occupations are those that would require service in close proximity to the perimeter (on or near), but that those three occupations are not the exclusive means of establishing such service.

4. Does the word "daily" mean that a claimant must establish that he or she was "on or near" the perimeter everyday he or she worked at the base?

The M21 instructs VBA adjudicators to concede herbicide exposure on a direct/facts-found basis if the veteran served near the base perimeter as shown by "evidence of daily work duties, performance evaluation reports, or other credible evidence." "Daily," when used as an adjective, can mean "[h]appening or done every day." *American Heritage Dictionary* 456 (5th ed. 2018). It can also mean "done, happening, published, etc., every day or every weekday." *Webster's* at 347. Thus, "daily work duties" means duties performed every day or, at a minimum,

every weekday. This means that daily work duties include those performed every day on which the person worked.

5. Similarly, if a claimant can establish that he was "on or near" the perimeter weekly based on a review of his "daily" duties, is this sufficient for a finding of presumptive exposure to herbicides.

No. Because "daily" means every day or, at the very least, every weekday, establishing presence "on or near" the perimeter only weekly would not qualify as "daily." But evidence of "daily" work duties near the perimeter is not the only way to establish herbicide exposure on a direct/facts-found basis under the Manual. RO adjudicators are also instructed to accept performance evaluation reports showing service "near" (which, as explained above, includes "on") the perimeter as sufficient to establish herbicide exposure on a facts found/direct basis. The M21 does not require these reports to show "daily" service, as in, every day or every weekday, on or near the perimeters. Performance evaluation reports showing regular duties near the perimeter will suffice, even if those reports do not show that such duties were performed every day the person worked ("daily"). This is how the Director articulated the policy in the Memorandum for the Record, when he stated that if a veteran's occupation or unit regularly had contact with the perimeter, there was a greater likely of exposure to the commercial herbicides. Appx. at 4.

Appellant's performance evaluation reports, however, do not show that he served near the perimeter. They show that he served "on the EB-66 flightline." (R.

at 898, 900). As explained above, on the flight line does not constitute "near" the perimeter because, under the negative-implication canon, the flight line is excluded from the areas subject to the special consideration.

6. Stated differently, the Board decision citing VA's guidance does not say that a Thailand veteran had to be "on or near" the air base perimeter on a daily basis. To the contrary, special consideration is given to those veterans "whose duties place[d] them on or near the perimeters of Thailand military bases." The word "daily" is merely a descriptor of credible evidence a claimant may use to establish his proximity to the perimeter. Given that a claimant is trying to establish mere exposure, and nothing more, to herbicides, why could a claimant not meet his burden by showing that he was "on or near" the perimeter on a weekly, or even monthly, basis?

The Manual provision incorporates both a proximity and frequency requirement. The proximity requirement is established by the terms "on or near," the meanings of which are addressed above.

The frequency requirement is established by the term "duties" and the specific occupational examples identified. As explained above, those occupations were known to have regular, close contact with the base perimeter, where foliage control was needed for base security. (R. at 49). Also, as explained above, under the *ejusdem generis* canon, the clause "otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence" must be interpreted in light of the three specific occupations mentioned before the clause. Because those occupations are among those known to have regular contact with the perimeter, the "otherwise near" clause necessarily also entails duties regularly having contact with perimeter.

A frequency requirement is also consistent with the intent of the policy. *See Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (holding that "'rules of grammar govern' statutory interpretation 'unless they contradict legislative intent or purpose'") (quoting Scalia & Garner, *supra*, at 140). As the VBA Memorandum for the Record explains, those who "regularly" had contact with the base perimeter had a "greater likelihood of exposure." Appx. at 4. This confirms that the intent of the policy is to resolve the factual issue of exposure favorably to the claimant when that claimant regularly, as opposed to sporadically, came on or near the base perimeter.

Though evidence of "daily work duties" will satisfy the frequency requirement, the M21 also provides that performance evaluation reports will satisfy the standard if they show regular contact similar to that of the duties of the listed occupations. A performance evaluation report from that era will include a description of the duties the service member regularly and repeatedly performed during the evaluation period. In this case, for example, Appellant's performance evaluation from May 1, 1969, to October 30, 1969, shows that he "[p]erforms" aircraft maintenance and inspections," and "[u]tilizes and maintains complicated test equipment and technical data." (R. at 899). Though this performance evaluation report does not specify how often he performed these duties (daily, weekly, monthly), the use of present tense verbs "performs" and "utilizes" implies that he regularly performed them. *See The Chicago Manual of Style* § 5.129 (17th ed. 2017) (stating that the presence tense is used to "express a habitual action").

The M21 therefore accepts that duties documented in a performance evaluation report will satisfy the frequency requirement, even if the report does not specify how often the duties were performed (daily, weekly, monthly, etc.). That is, the M21 accepts that, when a performance evaluation report documents a person's duties, then those duties will have been performed regularly, thus justifying a concession of exposure on a facts-found/direct basis.

Turning again to the e*jusdem generis* canon, the "other credible evidence" must be of the same general kind or class as that specifically mentioned before it. Scalia & Garner, *supra*, at 199; *see also Adams*, 3 F.4th at 1380. That evidence includes evidence of "daily work duties" and "performance evaluation reports," the latter of which document a person's regularly performed duties. (R. at 898-904). Thus, simply showing that a person was on or near the perimeter daily, weekly, or monthly will not qualify under the M21. The person must show with credible evidence that his or her official duties placed him on or near the perimeter with the requisite frequency.

7. What is the scientific basis that is guiding VA's understanding of exposure to herbicides in Thailand? In answering this question, VA should be mindful that the Court is asking this question having already reviewed everything submitted by the Secretary in this case.

When VBA announced its current policy in 2009, it identified: (1) the *CHECO Report*; (2) Buckingham WA (1982): *The Air Force and Herbicides in Southeast Asia, 1961-1971*, Office of Air Force History, United States Air Force, Washington DC; (3) Cecil PF (1986): *Herbicide Warfare – The RANCH HAND Project in*

Vietnam, Praeger Special Studies, Praeger Scientific, New York NY; and (4) Cecil PF, Young AL (2008): *Operation FLYSWATTER: A War Within A War*, Env Sci Pollut Res 15(1): 3-7. (Appx. at 5). Other than a small excerpt from the CHECO and Buckingham reports, those documents were not in the record before the Board in this case. (R. at 23-27, 92-96).

The Memorandum for the Record also mentions a list, provided by the Department of Defense, of 71 sites where tactical herbicides, such as Agent Orange, were used, tested, or stored. Appx. at 3. That list was also not in the record before the Board in this case.

The Secretary is unable to offer a more thorough explanation because the record in this case was not developed for the purpose of justifying the scientific basis of VBA's current policy for claims based on herbicide exposure in Thailand. The record was instead developed to allow the agency of original jurisdiction (VBA) and the Board to resolve the factual and legal issues raised in Appellant's claim. *See* 38 U.S.C. § 7104(a) (providing that Board decisions must be based on "the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation"); *see also* 38 C.F.R. § 3.103(a) ("[I]t is the obligation of VA to assist a claimant in developing the facts pertinent to the claim . . . .").

The Court's review is limited to the record before the Board. 38 U.S.C. § 7252; *see also Kyhn v. Shinseki*, 716 F.3d 527, 576 (2013) (holding that this Court exceeds its jurisdiction when it relies on evidence not in the record before

the Board). Indeed, this Courts' review is "similar to that of an Article III court reviewing agency action under the Administration Procedure Act [APA], 5 U.S.C. § 706." *Henderson v. Shinseki*, 562 U.S. 428, 432 n.2 (2011); *see also* 38 U.S.C. § 7261(a). When reviewing agency action under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973) (per curiam). Thus, "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985).

If the record is not sufficiently developed to address the Court's question on this matter, then the proper remedy would be remand so that the record can be more thoroughly developed. The Secretary cautions, however, that additional information concerning VBA's current policy may not exist. This policy was announced in a VBA Fast Letter in 2009; it is not found in any regulation. If the policy were found in an agency regulation, the Secretary would have developed a significant record for that rulemaking. For example, under Executive Order 12866, the agency would have been required to base its decision on the "best obtaining scientific . . . information concerning the need for, and consequences of, the intended regulation." Exec. Order No. 12866, § 1(b)(7). If "economically significant," the agency would have been required to conduct a regulatory analysis.

Exec. Order 12866, § 3(f)(1). The Secretary would have compiled a record of that information in the event of a direct challenge to that rule in the Federal Circuit under 38 U.S.C. § 502. But the current policy, which was announced in a letter from the Director of Compensation to VA ROs in 2009, rather than in a binding regulation, was not developed with those mandates in mind.

8. Why did VBA include the phrase "near" the perimeter when it only has conceded that tactical herbicides may have been used "on" the fenced in perimeter?

As explained above, the words "on" and "near" are used synonymously in the relevant M21 provision. *See Webster's* at 946 (providing that "on" can also mean "near to"); *see also American Heritage Dictionary* at 1230 (defining "on" as, *inter alia*, "used to indicate proximity").

When VBA said in a May 2010 Compensation Bulletin that herbicides were used "on the fenced in perimeters," it was using the term in the same way as it is currently used in the M21. As the bulletin explains, the purpose of using herbicides "on" the perimeters was to "eliminate vegetation and ground cover for base security purposes." (R. at 30 (citing *CHECO Report*)). The targeted vegetation would have grown out of the ground it covered, meaning that it would have been on the perimeter in the "near" sense of the term rather than "in a position above, but in contact with and supported by" the perimeter. *See Webster's* at 946.

Also, VA has not conceded that tactical herbicides were used, tested or stored at the Royal Thai Air Force Bases (RTAFB's) with two exceptions. In 2010,

shortly after the policy was implemented, Compensation Service issued a bulletin to its ROs, acknowledging only that herbicides used at RTAFBs "may have been either tactical, procured from Vietnam, or a commercial variant of much greater strength and with characteristics of tactical herbicides." (R. at 30). In 2019, after a Government Accountability Office (GAO) report criticized the Department of Defenses' and VA's failure to maintain a complete and accurate list of locations in Thailand where tactical herbicides were used or stored, *see* U.S. Gov't Accountability Off., 19-24, *Agent Orange: Actions Needed to Improve Accuracy and Communication of Information on Testing and Storage Locations* (2018) (available at https://www.gao.gov/products/gao-19-24 (last visited January 4, 2022)), the two agencies updated the list.[2] That list is available to the public at https://www.publichealth.va.gov/docs/agentorange/dod_herbicides_outside_vietnam.pdf# (last visited January 4, 2021). The Takhli RTAFB, where Appellant served (R. at 959), is not on that list.

9. What role does wind play in determining what "near" the perimeter means for purposes of exposure?

Wind plays no role in the policy articulated in the M21. As explained above, relying on the plain meaning of the terms "on" and "near," and when read in the context in which they are used, those terms are synonymous and require the

[2] Because this report is 121 pages, the Secretary is appending only excerpts from it to this response.

person to have been close enough to touch the perimeter and to have done so on a regular basis.

The Secretary's position here is consistent with how the Director articulated the policy more than a decade ago in the Memorandum for the Record. In that document, the Director explained that a person who "regularly had contact with the base perimeter" had a greater likelihood of exposure. Appx. at 4. This confirms that the policy was meant to resolve the exposure issue favorably for those who physically contacted the perimeter. The policy was not meant to factor in wind when determining what it meant to be near the perimeter.

10. The Secretary cites no authority for the following post-hoc rationalization: "Given these circumstances, one might expect security personnel to have regularly and repeatedly come much closer to the base perimeter than what the appellant described. Security personnel might, for example, regularly inspect the physical security structures for a breach, which might include touching them or coming within a few feet of them. They also might perform these inspections as part of a daily routine." Secretary's Brief at 10. What authority did the Secretary intend to cite for this statement? The Secretary should be mindful that the portions of the Project CHECO Report included in the Record of Proceedings do not say this.

The Secretary was relying on the plain meaning of the word "security" in the context of how it is used in the M21. The M21 refers to "security policeman," "security patrol dog handler," and "member of the security police squadron." M21-1, Pt. IV, Subpt. ii, Chpt. 1, Sec. H, Top. 4. "Security" means, *inter alia*, "an organization or department whose task is protection or safety, esp. a private police force hired to patrol a building, park, or other area." *Webster's* at 1214. "Patrol"

means “to make a regular and repeated circuit of (an area, town, camp, etc.) in guarding or inspecting.” *Id*. at 991. Thus, under the plain meaning of the word “security,” the “security” personnel referenced in the M21 would regularly and repeatedly guard or inspect the perimeter. “Inspect” means to “look at carefully; examine critically, esp. in order to detect flaws, errors, etc.” *Webster’s* at 699. Thus, based on the plain meaning of the terms “security,” “patrol,” and “inspect,” the security personnel identified in the M21 would have regularly, repeatedly, and carefully examined the base-perimeter structures for breaches, which would entail close or physical contact with those structures.

To the extent the Court interprets the Secretary’s analysis as a post-hoc rationalization, the Secretary points to the VBA memorandum for the Record, issued more than a decade ago, which is consistent with the Secretary’s position in this case. In that document, the Director explained that the policy was intended to cover occupational specialties that “regularly had contact with” the base perimeter, which included security police units. Appx. at 4.

11. Why is it inconsistent with VA policy to concede herbicide exposure to everyone who worked on the flightline? VA’s policy instructs adjudicators to concede herbicide exposure when a claimant establishes that their duties took them near the base perimeter. It does not say that those that worked on the flightline were not close enough to the perimeter.

As explained above, under the negative-implication canon, by including only service on or near the perimeter, VBA excluded all other locations on the base, including the flight line, runway, or dining hall. Deeming the flight line to be “close

enough" to the perimeter erodes the distinction the policy makes between the perimeter and all other areas of the base.

12. VA announced this policy 11 years ago and has provided no further guidance. Why has VA not further defined the terms "on" or "near"?

The Secretary has chosen to initiate notice-and-comment rulemaking to address concerns that he lacks a clear, binding policy for claims based on herbicide exposure in Thailand. In September 2017, he granted a petition for rulemaking "on the issue of herbicide exposure in Thailand during the Vietnam era." Appx. at 6. While that rulemaking was pending, the GAO, in November 2018, issued its report describing the Department of Defense's official list of herbicide testing and storge locations outside of Vietnam, which was posted on VA's website at the time, as "inaccurate and incomplete." Appx. at 8. As a result of that report, the Department of Defense updated its list on December 18, 2019. That list is currently available to the public at https://www.publichealth.va.gov/docs/agentorange/dod_herbicides_outside_vietnam.pdf# (last visited Dec. 30, 2021). The Secretary therefore continues to study this issue as he formulates a proposed rule.

Unfortunately, rulemaking is a time-consuming process. The Secretary must ensure that the rule complies with numerous statutes and Executive Orders, such as the Regulatory Flexibility Act (codified at 5 U.S.C. §§ 601-12), the Unfunded Mandates Reform Act of 1995 (codified at 2 U.S.C. § 1532), the Congressional Review Act (codified at 5 U.S.C. § 808(2)), and Executive Orders

12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs). The rule, once proposed, will go through the public notice-and-comment process. 5 U.S.C. § 553(c). As the Supreme Court has observed, this process makes rulemaking more difficult than issuing non-binding interpretive rules. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015).

Though an interpretive rule, such as clarifying guidance, can be issued much faster than a regulation issued through notice-and-comment rulemaking, that convenience, the Supreme Court has explained, "comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Mortg. Bankers Ass'n*, 575 U.S. at 97 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). On the other hand, a regulation issued through notice-and-comment rulemaking, known as a "legislative rule," will have the force and effect of law. *Mortg. Bankers Ass'n*, 575 U.S. at 95.

Rather than issuing non-binding, internal agency guidance, the Secretary has chosen to initiate a proper rulemaking. A rulemaking will benefit from the thorough analysis required by the various applicable statutes and executive orders and the public notice-and-comment process. *See, e.g.,* 2 U.S.C. § 1532; 5 U.S.C. §§ 553(c), 601-12, 808(2); Executive Orders 12866, 13563, 13771. A legislative rule, unlike agency guidance, will also have the force and effect of law. *See also Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d

621 (2000) (holding that agency interpretations contained in "policy statements, agency manuals, and enforcement guidelines[] all . . . lack the force of law").

Less than six months ago, the Secretary, in a brief filed in the United States Court of Appeals for the Federal Circuit (Federal Circuit), reaffirmed his commitment to this rulemaking. *See* Brief for Respondent at 31, n.14, *Military-Veterans Advocacy, Inc. v. Sec'y of Veterans Affairs*, No. 20-1537 (Jul. 19, 2021) (Appendix at 49). The Secretary makes that same commitment here. The Secretary urges the Court to respect his decision to approach this important policy issue through rulemaking rather than a guidance document. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978) (holding that courts should not "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good").

13. How is the decision on appeal capable of judicial review where the Board and the Secretary appear to not know what the phrase "near the perimeter" means? The obvious issue in this case is that the runway at Takhli RTAFB was next to the perimeter.

As explained above, the meaning of the words "near the perimeter" can be determined by relying on their plain meanings when read in the context in which they are used.

The Secretary's analysis here is not post-hoc rationalization. The Board said,

> The Board has considered [Appellant's] statements and testimony that he performed work duties and activities near the perimeter of the Takhli RTAFB and that his assigned living quarters were near the perimeter. However, the Board concludes that the preponderance of the evidence is against finding that [Appellant's] daily work activities placed him near the perimeter or that [he] was exposed to herbicide agents during his active service.
>
> The Board acknowledges the Veteran's statements that he worked on the flight line near the perimeter and was exposed to herbicides as a result. However, based on this explanation, everyone who worked on the flight line would have been exposed to herbicide agents. This view would create a line of reasoning that is not supported by VA law. The herbicide agent presumption has not been extended to veterans who served on the flight line at RTAFB bases.

(R. at 11).

A court does not rely on a post-hoc rationalization if the agency's path to a decision can be "reasonably discerned." *Garland v. Ming-Dai*,__U.S.__, 141 S. Ct. 1669, 1679 (2021) (quotation omitted). The Board's path here is reasonably discernable. The Board's analysis confirms that it distinguished the perimeter from other areas of the base, such as living quarters and the flight line, and that because the M21 includes only the perimeter, it necessarily excludes the flight line. The Board's analysis is consistent with the Secretary's explanation above and the Board did not need to "follow a particular formula or recant magic words" to provide the proper analysis. *Ming-Dai*, 141 S. Ct. at 1679. The Secretary's explanation is not a post-hoc rationalization.

Also, just because "near" is not defined in the Manual does not mean the Board's application of that provision is incapable of judicial review. The Supreme Court has, for example, found that a statute prohibiting conduct "near" a courthouse was not unconstitutionally vague simply because Congress did not define the word "near." *Cox v. Louisiana*, 379 U.S. 559, 568 (1965). Thus, even if the Court disagrees with how the Board in its decision and the Secretary in this appeal interpret the word "near," it does not necessarily follow that the Board's application of that manual provision to the facts of this case is incapable of review.

14. Why won't VA provide a distance from the perimeter to define the word "near?"

As explained above, the meaning of the term "near" can be discerned from reviewing the terms "on" and "near" in the context in which they are used. Near means close enough to physically touch the perimeter structure.

In any event, the Secretary has chosen to issue a legislative rule in lieu of further internal agency guidance. A rule will be based on sound science and the best available information. A legislative rule will benefit from the public notice-and-comment process. Completing the rule will, however, take some time.

15. How close was the closest part of the flightline from the perimeter during the period where VA has conceded that tactical exposures were used? How close was the nearest point of the runway at Takhli RTAFB to the perimeter? The Court recognizes that the appellant has alleged that the flightline was 100 yards from the perimeter and that his work during "red ball" events brought him within 20 to 30 feet of the perimeter multiple times per week. Given that maps of the base have been submitted, why can't VA provide precise information regarding the proximity of the flightline and the rest of the runway to the perimeter?

The Secretary is mindful that "any answer deemed incomplete by the Court will result in further responses being sought from the Secretary." (Ct. Order at 7). The Secretary has therefore endeavored to respond to the Court's questions fully. The Secretary, however, cannot answer the first two parts of this question. The distances between the closest part of either the flight line or the runway to the perimeter are factual questions. The Board made no factual findings as to those distances. The Federal Circuit has repeatedly held that this Court may not make those factual findings in the first instance. *See Tadlock v. McDonough*, 5 F.4th 1327, 1334 (Fed. Cir. 2021) (citing cases); *see also* 38 U.S.C. § 7261(c). And the Secretary's counsel cannot provide that information here because "[a]ttorney argument is not evidence." *Icon Health & Fitness, Inc. v. Strava, Inc*., 849 F.3d 1034, 1043 (Fed. Cir. 2017). If the Court deems this information necessary to resolve this appeal, then the appropriate remedy is remand so that the record can be adequately developed to resolve those questions. *See Pitts*, 411 U.S. at 142.

As for the third part of this question, the Secretary does not maintain that VA cannot provide precise information. The Secretary does, however, maintain that that information would have to come from a person with authority to review

evidence and make factual findings on behalf of the Secretary. That would include RO adjudicators or, in the event of an appeal, as in this case, a member of the Board. *See Darrow v. Derwinski*, 2 Vet.App. 303, 304 (1992) (observing that the Secretary has delegated authority to RO personnel to decide benefits claims); *see also* 38 U.S.C. § 512(a) (granting Secretary authority to delegate adjudicative functions); 38 C.F.R. § 3.100(a) (delegating authority to the Under Secretary for Benefits and supervisory or adjudicative personnel with VBA to make findings as to entitlement to benefits); *see also* 38 U.S.C. § 7104(d) (granting Board authority to make findings in benefits claims). If the Court determines that quantifying the distance between either the closest part of the flight line or the runway at Takhli RTAFB and the perimeter is necessary to resolve the parties' dispute, then the case must be remanded for proper evidentiary development. *See Pitts*, 411 U.S. at 142.

16. Is it VA's position that the Board is not bound by the M21-1 provisions where they adopt the provision, but do not actually cite the manual?

Whether the Board cites the M21-1 in its decision or, as here, relies on it without citing to it, does not determine whether the M21-1 is binding on the Board. By regulation (a binding one), the Board "is not bound by" Department manuals, such as the M21-1. 38 C.F.R. § 20.105 (2021).

In its order, the Court referenced its recent decision in *Andrews v. McDonough*, 34 Vet.App. 216 (2021). (Ct. Order at 7). In that case, the Court recognized that the M21 "is not binding on either the Board or this Court." *Id*. at

223. The Court did, however, hold that the Board's "citation to a manual provision amounts to a tacit recognition that the provision constitutes authority in the case." 34 Vet.App. at 224. In that case, the Board incorporated a Manual provision into a remand order, which rendered the provision "binding on the regional office in terms of how it developed the claim and how the Board would readjudicate the matter if the matter returned there." *Id.* at 224. *Andrews* therefore holds that when the Board, in a remand, orders the agency of original jurisdiction to take action pursuant to a non-binding policy, the remand, rather than the binding or non-binding nature of the policy, makes that policy the authority applicable to that case. The *Andrews* holding applies the Court's long-held rule of law that a remand by the Board "confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand order.[]" *See Stegall v. West*, 11 Vet.App. 268, 271 (1998). Here, though, the Board did not previously remand this case and order the agency of original jurisdiction to follow the non-binding M21. *Andrews* therefore does not control the outcome of this case.

As this Court has acknowledged, "everyone dealing with the Government is charged with knowledge of federal statutes and lawfully promulgated agency regulations." *Morris v. Derwinski*, 1 Vet.App. 260, 265 (1991) (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85, 68 S. Ct. 1, 92 L. Ed. 10 (1947)). That means knowing that the M21-1 is not binding authority in adjudications at the Board. *See* 38 C.F.R. § 20.105 (2021). Appellant, who was represented by

counsel below, is charged with knowing that the M21 would not be binding when the Board adjudicated his appeal.

17. What other sources can the Board rely on to adjudicate whether a Thailand veteran was presumptively exposed to herbicides?

If by "sources" the Court is referring to legal authorities, the Board may rely on any binding authorities such as regulations of the Department, instructions of the Secretary, and precedent opinions of the agency's General Counsel, 38 U.S.C. § 7104(c), applicable statutes, 38 U.S.C. § 20.105 (2021), and precedential opinions from this Court. *Tobler v. Derwinski*, 2 Vet.App. 8, 14 (1991). None of these authorities specifically address claims for compensation based on alleged herbicide exposure in Thailand. Thus, the general compensation statute and the Secretary's implementing regulations apply. *See* 38 U.S.C. § 1110; 38 C.F.R. §§ 3.303, 3.304.

If by "sources" the Court is referring to evidentiary documents, the Board's review is limited to those of which the claimant has been notified. *See generally Thurber v. Brown*, 5 Vet.App. 119, 123 (1993) ("The entire thrust of [ ] VA's nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process."). In a legacy appeal, such as this, a claimant will have been notified of all evidence in the file as of the date on which the agency of original jurisdiction certifies the case to the Board by way of either a statement of the case or supplemental statement of the case. *See* 38 C.F.R. §§ 19.29(a), 19.31(a), 19.37, 19.38 (2021). If the Board

obtains additional evidence, 38 C.F.R. § 20.908 (2021) requires the Board to notify the claimant of that evidence and afford him or her the opportunity to respond. Thus, the Board cannot rely on evidentiary documents not in the record because the claimant will not have been properly notified of those documents.

The Board may, of course, order the agency of original jurisdiction to further develop the record. *See Douglas v. Shinseki*, 23 Vet.App. 19, 22-23 (2009) ("Although not explicitly stated in statute, the duty to properly develop a claim is inherent in the responsibilities of the Secretary to execute and administer the laws applicable to the Department of Veterans Affairs."); *see also* 38 U.S.C. § 5103A(g) (2018) (confirming that the Secretary may provide assistance in substantiating a claim as the Secretary considers appropriate); *see also* 38 C.F.R. § 20.904(a) (2021) (requiring Board to remand to the agency of original jurisdiction when further evidence is "essential for a proper decision"). But the Board generally cannot rely on evidence not already in the record. *See Thurber*, 5 Vet.App. at 123; *but see* 38 C.F.R. § 20.908(b)(2) (permitting the Board to rely on recognized medical treatises and medical dictionaries not previously disclosed to the claimant in limited circumstances).

18. Is it the Secretary's position that a claimant must establish actual exposure to herbicides in order to receive a finding of presumptive exposure to herbicides? The appellant's usage of the Army Field Manual is for the purpose of trying to determine what "near" the perimeter means. The Court does not understand the Secretary's discussion regarding of the Army Field Manual.

The Secretary does not view the Thailand M21 provision as a true legal presumption. VA's presumptions of exposure to herbicides are the factual scenarios listed in 38 C.F.R. § 3.307(a)(6).[3] Most fundamentally, a presumption is binding on VA and the public. It would be improper for VA to create a such a rule by simply inserting it into the M21. This action would circumvent all the authorities and requirements we identify in response to question 12.

Putting these core concerns aside, the M21 provision at issue here does not function as a presumption even on its own terms. It instead identifies an evidentiary path RO adjudicators "should" take to support a finding of actual exposure. M21-1, Pt. IV, Subpt. ii, Chpt. 1, Sec. H, Top. 4. The M21 provision does not use the word "presumption" or "presume." Rather, it provides that, if certain criteria are met, the RO adjudicator should "concede herbicide exposure on a direct/facts-found basis." M21-1, Pt. IV, Subpt. ii, Chpt. 1, Sec. H, Top. 4. "Direct evidence" means "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Black's Law Dictionary* 675 (Deluxe 10th ed. 2014). Thus, by instructing RO

[3] As well as, of course, service offshore the Republic of Vietnam. 38 U.S.C. § 1116A.

adjudicators to concede exposure on a "direct/facts-found" basis, the M21 tells them what type of evidence will be sufficient to make a finding of actual, rather than presumptive, exposure.

"Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary." 38 U.S.C. § 5107(a). Thus, when a statutory presumption does not apply, "evidence must be presented to support service-connection." *Skoczen v. Shinseki*, 564 F.3d 1319, 1325 (Fed. Cir. 2009). The M21 does not relieve claimants of that burden, but rather specifies evidence that may be deemed to satisfy it. As the Prologue to the M21-1 states, relevant statutes and regulations "take precedence over procedural guidance in the M21-1." M21-1, Prologue. That includes, obviously, 38 U.S.C. § 5107(a). Thus, the ultimate inquiry for the Board in this case, regardless of whether the M21 applied to the Board, was whether the veteran was actually exposed to an herbicide agent.

As for the Secretary's discussion of the Army Field Manual in his brief, the Secretary appreciates the opportunity to clarify. Appellant relied on that document in an attempt to demonstrate that anywhere within 500 meters of the perimeter qualified as being "near" it under the M21. (App. Br. at 19). The Board, however, rejected Appellant's expansive definition of the term "near" because it would effectively extend the special consideration to everybody on base, even though it was limited to only one part of the base, namely, the perimeter. (R. at 11).

The Secretary relied on that same reasoning when discussing the Army Field Manual. Though the Field Manual recommended a 500-meter "buffer distance" to avoid damage to desirable vegetation (R. at 69), that does not mean that "near," as the term is used in the M21, includes all points within 500 meters of the perimeter. That expansive definition, the Secretary argued, would extend the special consideration to parts on base other than the perimeter, such as the flight line. (Sec'y Br. at 22). However, under the negative-implication canon, the M21 excludes any part of the base other than the perimeter.

The Board's decision, however, was not limited to rejecting Appellant's reliance on the term "near" as found in the M21; it also rejected Appellant's argument as it related to direct exposure. In its decision, the Board said, "evidence in [Appellant's] personnel file does not show that his work duties placed him at or near the perimeter at the Takhli RTAFB or that he was actually exposed to herbicide agents, such as Agent Orange, while working there." (R. at 12 (emphasis added)). The Board therefore recognized, correctly, that the evidentiary path identified in the M21 was not the exclusive means of establishing exposure on a facts-found/direct basis. *Cf. e.g., Combee v. Brown*, 34 F.3d 1039, 1045 (Fed. Cir. 1994) (holding that, when a claimant cannot establish a fact through an existing legal presumption, the claimant may nonetheless support the claim with direct evidence).

The Board here rejected, as insufficient to establish actual exposure, Appellant's statement in which he described seeing a fog-like substance sprayed

on base. (R. at 12, 167). Thus, in his brief, the Secretary argued that, "[a]t best, the Field Manual may support a finding that an herbicide agent *could* drift up to 500 meters." (Sec'y Br. at 22). But, the Secretary argued, the Board cannot make a factual finding based on mere speculation. *Id.* The portion of Secretary's brief the Court cites in its order was defending the Board's rejection of Appellant's claim that was based on actual exposure without necessarily being near the perimeter. The Secretary appreciates the opportunity to clarify his discussion on these points.

WHEREFORE, the Secretary responds to the Court's order.

Respectfully submitted,

RICHARD A. SAUBER
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Megan C. Kral
MEGAN C. KRAL
Deputy Chief Counsel

/s/ Mark D. Vichich
MARK D. VICHICH
Senior Appellate Counsel
Office of General Counsel (027L)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-5985

Attorneys for Appellee,
Secretary of Veterans Affairs

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

FL 09-20 was rescinded due to its incorporation into the M21-1MR.
May 6, 2009

Director (00/21)
All VA Regional Offices and Centers

Fast Letter 09-20

SUBJ: Developing for Evidence of Herbicide Exposure in *Haas*-Related Claims from Veterans with Thailand Service during the Vietnam Era

Purpose

The enclosed document will serve as a substitute for an individual response from the Agent Orange Mailbox (VAVBAWAS/CO/211/AGENTORANGE). When regional office personnel receive claims based on herbicide exposure from veterans who served in Thailand during the Vietnam era, they should place the enclosed document in the claims folder rather than sending an inquiry to the Agent Orange Mailbox.

Background

While the *Haas* case was pending, the Court of Appeals for Veterans Claims stayed the processing of certain disability claims based on herbicide exposure. The stay affected a large number of veteran claimants with service in Thailand during the Vietnam era. Thailand was a staging area for aircraft missions over Vietnam, and many veterans who assisted with these missions received the Vietnam Service Medal (VSM) for their support of the war effort. Disability claims from those veterans who received the VSM for Thailand service, but who did not set foot in the country of Vietnam, were placed under the *Haas* stay. With the lifting of the stay, these claims require development and adjudication.

M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, Topic10, Block n, specifies that claims based on herbicide exposure outside Vietnam require sending an e-mail inquiry to the Agent Orange Mailbox for review of the Department of Defense (DoD) inventory listing the herbicide use, testing, and storage sites. The inquiry may lead to evidence supporting the claimed exposure. If the Agent Orange Mailbox inquiry cannot provide probative evidence, the next step is sending an inquiry to the Army and Joint Services Records Research Center (JSRRC). To facilitate a timely resolution of claims from veterans with Thailand service, the Compensation and Pension Service, in conjunction with DoD, has developed a document for inclusion in the claims file that will substitute for an individual response from the Agent Orange Mailbox.

Director (00/21)

Regional Office Action

When developing herbicide-related disability claims from veterans with Thailand service during the Vietnam era, regional offices will no longer send inquiries to the Agent Orange Mailbox. Instead, a copy of the enclosed response document is placed in the veteran's file. This response document contains input from DoD and is intended to cover general claims of exposure as well as a number of specific exposure claims. If the herbicide exposure issue can be resolved based on this document, then no further development action is necessary. If not, and sufficient information has been obtained from the veteran, send an inquiry directly to JSRRC following its guidelines. If sufficient information cannot be obtained from the veteran to meet JSRRC guidelines, produce a formal memo for the file documenting efforts to obtain information, then forward the claim to the rating activity.

Questions

Questions about this fast letter should be e-mailed to:
VAVBAWAS/CO/211/AGENTORANGE

/S/
Bradley G. Mayes
Director
Compensation and Pension Service

Enclosure:
1. Memorandum for the Record: Herbicide use in Thailand during the Vietnam Era

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

Memorandum for the Record

Subject: Herbicide use in Thailand during the Vietnam Era

The Compensation and Pension Service has reviewed a listing of herbicide use and test sites outside Vietnam provided to our office by the Department of Defense (DoD). This list contains 71 sites within the U.S. and in foreign countries where tactical herbicides, such as Agent Orange, were used, tested, or stored. Testing and evaluations of these tactical herbicides were conducted by or under the direction of the U.S. Army Chemical Corps, Fort Detrick, Maryland. The list does not contain names of individuals. Additionally, it does not contain any references to routine base maintenance activities such as range management, brush clearing, weed killing, etc., because these vegetation control activities were conducted by the Base Civil Engineer and involved the use of commercial herbicides approved by the Armed Forces Pest Control Board. The application of commercial herbicides on military installations was conducted by certified applicators. DoD has advised us that commercial herbicides were routinely purchased by the Base Civil Engineer under federal guidelines and that records of these procurements were generally kept no longer than two years. We have also reviewed a series of official DoD monographs describing in detail the use, testing, and storage of herbicides at various foreign and domestic locations. In addition, the *Project CHECO Southeast Asia Report: Base Defense in Thailand*, produced during the Vietnam era, has been reviewed.

Regarding your veteran claimant with Thailand service, the DoD list indicates only that limited testing of tactical herbicides was conducted in Thailand from 2 April through 8 September 1964. Specifically, the location identified was the Pranburi Military Reservation associated with the Replacement Training Center of the Royal Thai Army, near Pranburi, Thailand. The Report of these tests noted that 5 civilian and 5 military personnel from Fort Detrick, Maryland conducted the spray operations and subsequent research. This location was not near any U.S. military installation or Royal Thai Air Force Base.

Tactical herbicides, such as Agent Orange, were used and stored in Vietnam, not Thailand. We received a letter from the Department of the Air Force stating that, other than the 1964 tests on the Pranburi Military Reservation, there are no records of tactical herbicide storage or use in Thailand. There are records indicating that commercial herbicides were frequently used for vegetation control within the perimeters of air bases during the Vietnam era, but all such use required approval of both the Armed Forces Pest Control Board and the Base Civil Engineer. In Vietnam, tactical herbicides were aerially

applied by UC-123 aircraft in Operation RANCH HAND or by helicopters under the control of the U.S. Army Chemical Corps. Base Civil Engineers were not permitted to purchase or apply tactical herbicides. There are no records of tactical herbicide spraying by RANCH HAND or Army Chemical Corps aircraft in Thailand after 1964, and RANCH HAND aircraft that sprayed herbicides in Vietnam were stationed in Vietnam, not in Thailand. However, there are records indicating that modified RANCH HAND aircraft flew 17 insecticide missions in Thailand from 30 August through 16 September 1963 and from 14 –17 October 1966. The 1966 missions involved the spraying of malathion insecticide for the "control of malaria carrying mosquitoes." These facts are not sufficient to establish tactical herbicide exposure for any veteran based solely on service in Thailand.

While the Thailand CHECO Report does not report the use of tactical herbicides on allied bases in Thailand, it does indicate sporadic use of non-tactical (commercial) herbicides within fenced perimeters. Therefore, if a veteran's MOS (military occupational specialty) or unit is one that regularly had contact with the base perimeter, there was a greater likelihood of exposure to commercial pesticides, including herbicides. Security police units were known to have walked the perimeters, especially dog handlers. However, as noted above, there are no records to show that the same tactical herbicides used in Vietnam were used in Thailand. Please consider this information when you evaluate the veteran's claim.

If the veteran's claim is based on servicing or working on aircraft that flew bombing missions over Vietnam, please be advised that there is no presumption of "secondary exposure" based on being near or working on aircraft that flew over Vietnam or handling equipment once used in Vietnam. Aerial spraying of tactical herbicides in Vietnam did not occur everywhere, and it is inaccurate to think that herbicides covered every aircraft and piece of equipment associated with Vietnam. Additionally, the high altitude jet aircraft stationed in Thailand generally flew far above the low and slow flying UC-123 aircraft that sprayed tactical herbicides over Vietnam during Operation RANCH HAND. Also, there are no studies that we are aware of showing harmful health effects for any such secondary or remote herbicide contact that may have occurred.

If the veteran's claim is based on general herbicide use within the base, such as small-scale brush or weed clearing activity along the flight line or around living quarters, there are no records of such activity involving tactical herbicides, only the commercial herbicides that would have been approved by the Armed Forces Pest Control Board and sprayed under the control of the Base Civil Engineer. Since 1957, the Armed Forces Pest Control Board (now the Armed Forces Pest Management Board) has routinely provided listings of all approved herbicides and other pesticides used on U.S. Military Installations worldwide. The Compensation and Pension Service cannot provide any additional evidence beyond that described above to support the veteran's claim. Therefore, unless the claim is inherently incredible, clearly lacks merit, or there is no reasonable possibility that further VA assistance would substantiate the claim [see 38 CFR 3.159(d)], regional offices should

send a request to JSRRC for any information that this organization can provide to corroborate the veteran's claimed exposure.

References

Buckingham WA (1982): The Air Force and Herbicides in Southeast Asia, 1961-1971. Office of Air Force History, United States Air Force, Washington DC

Barnette BH, Jr., Barrow JR (1973): *Base Defense in Thailand - 1968-1972.* Project CHECO Report. Air Force Historical Research Center, Maxwell AFB, AL

Cecil PF (1986): Herbicide Warfare – The RANCH HAND Project in Vietnam. Praeger Special Studies, Praeger Scientific, New York NY

Cecil PF, Young AL (2008): Operation FLYSWATTER: A War Within A War. Env Sci Pollut Res 15(1): 3-7

VA | U.S. Department of Veterans Affairs

Office of the General Counsel
Washington DC 20420

In Reply Refer To:

SEP 2 2 2017

Mr. Robert V. Chisholm
Chisholm, Chisholm & Kilpatrick
One Turks Head Place, Suite 1100
Providence, RI 02903

Dear Mr. Chisholm:

I am writing to respond to a document you sent in December 2015, entitled *Petition to the Department of Veterans Affairs to Initiate Rule Making: A Request for Examination and Codification of the Department of Veterans Affairs Herbicide Exposure Policy for Thailand Military Bases*. You submitted this petition on behalf of your clients. The petition asks the United States Department of Veterans Affairs (VA) to (1) codify current policy regarding herbicide exposure in Thailand during the Vietnam era, and (2) further expand the scenarios in which VA considers a veteran to have been exposed to herbicides while serving in Thailand.

VA grants your petition to the extent that VA will initiate rulemaking on the issue of herbicide exposure in Thailand during the Vietnam era. My office forwarded the petition to the Compensation Service of the Veterans Benefits Administration (VBA) and VA's Office of Regulation Policy and Management shortly after it was received. VBA has been working to reexamine its current policy and consider potential modifications and to prepare a proposed rule that will be based on VA's analysis of the historical record. VA will publish a proposed rule in the Federal Register within the coming months.

We encourage you to submit comments after VBA publishes the proposed rule. If you or your colleagues have any questions, please contact Mr. Brandon Jonas, the VA staff attorney assigned responsibility for this case, at (202) 461-5528.

Sincerely yours,

Richard J. Hipolit

Richard J. Hipolit
Deputy General Counsel
For Legal Policy

United States Government Accountability Office

Report to Congressional Addressees

November 2018

AGENT ORANGE

Actions Needed to Improve Accuracy and Communication of Information on Testing and Storage Locations

Accessible Version

DOD's List of Herbicide Testing and Storage Locations Is Incomplete, and Veterans Have Expressed Confusion about How to Obtain Information on Potential Exposure

DOD's official compilation of herbicide testing and storage locations outside of Vietnam, which is posted on the VA's website, is inaccurate and incomplete, and DOD does not have a process for managing the list. Further, while DOD and VA each have methods for communicating information to veterans and the public about Agent Orange, they do not have a formal process for communicating the most accurate available information to veterans about potential locations where they could have been exposed to Agent Orange or other tactical herbicides.

DOD's List of Locations Where Herbicides Were Tested and Stored Is Inaccurate and Incomplete

DOD developed a list that identifies locations and dates where herbicides, including Agent Orange, are thought to have been tested and stored outside of Vietnam, which VA has made publicly available on its website, but this list is neither accurate nor complete. DOD's list includes information on testing and storage locations, applicable dates, the herbicide or herbicide components tested, a description of the project, and DOD's involvement. See appendix IV for the list that was posted on the VA website as of September 2018. When we began this review, DOD and VA officials were unable to identify the origin of the DOD list that is posted on the VA website, which does not have a date. A DOD official subsequently informed us that the list was initially created in 2003 by an individual in the Office of the Secretary of Defense in response to a congressional inquiry about the use of Vietnam-era herbicides at specific locations in the United States and overseas. DOD subsequently provided this list to VA, which in turn posted the information on its website. *VA's Claims Adjudication Procedures Manual* related to Agent Orange directs VA officials to review the DOD list to determine whether herbicides were used as claimed as part of verifying potential herbicide exposure when a veteran alleges exposure at locations other than the Republic of Vietnam,

the Korean demilitarized zone, or Thailand.[65] However, in our review of several sources provided by DOD and VA officials,[66] we identified multiple examples of inaccurate and incomplete information in DOD's list, to include the following:[67]

- **Omission of specific testing and storage locations:** We identified additional testing and storage locations in the United States and its territories that were not included on DOD's list.[68] For instance, we identified additional testing locations at Belle Glade, Florida, and Stuttgart, Arkansas, where researchers reported small-plot field tests of the components of Agent Orange on rice. In addition, we found examples of shipments of herbicides to Kelly Air Force Base, Texas, where Agent Orange components were stored following the cancellation of tactical herbicide contracts. None of these locations are included on DOD's list.
- **Lack of clarity in descriptive information:** DOD's list lacks clarity in descriptive information, making it difficult to identify which specific herbicides or components were tested and stored, as well as when and where. For example, the size and scope of some testing activities are unclear from the descriptions provided in DOD's list, making it difficult to differentiate between small-scale and large-scale testing. Some testing events on DOD's list are described in detail, including the amount of herbicide or components tested, while descriptions of other testing activities contain little information about what took place. Furthermore, we could not identify the chemical components of some of the agents on DOD's list. We asked DOD and VA officials to

[65]VA Claims Adjudication Procedures Manual, M21-1, part IV, subpart ii, ch. 1, sec. H, *Developing Claims for Service Connection (SC) Based on Herbicide Exposure* (change date Mar. 27, 2018).

[66]We reviewed, for example, the proceedings of three defoliation conferences; archives search reports and other environmental studies for several Army, Air Force, and Navy installations; contractor studies; and other historical documents related to the development and testing of tactical herbicides, including Agent Orange.

[67]We did not attempt to recreate the DOD list or perform a comprehensive update of its contents; therefore, there may be other locations and testing events that are not reflected above.

[68]While we did not work to identify every location, in our research we found at least 30 testing and storage locations that were not included. Of these locations, 20 were identified in a report prepared for DOD in 2006, and we identified an additional 9 locations that were neither in the 2006 report nor on the list on VA's website. Our research also indicated that this list did not include, among the storage locations, the manufacturing sites, nor did it include all of the ports from which Agent Orange was shipped to Southeast Asia.

2020-1537

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MILITARY-VETERANS ADVOCACY, INC.,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

BRIEF FOR RESPONDENT

BRIAN M. BOYNTON
Acting Assistant Attorney General

MARTIN F. HOCKEY, JR.
Acting Director

ERIC P. BRUSKIN
Assistant Director

Of Counsel:

BRIAN D. GRIFFIN
Deputy Chief Counsel
Office of the General Counsel
U.S. Dep't of Veterans Affairs

MEEN GEU OH
Senior Trial Counsel
Commercial Litigation Branch
Civil Division, Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-0184
Fax: (202) 305-7644
Meen-Geu.Oh@usdoj.gov

Attorneys for Respondent

July 19, 2021

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Respondent's counsel is also unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

Although this case was designated as a companion case to *National Organization of Veterans Advocates v. Secretary of Veterans Affairs*, No. 20-1321 (Fed. Cir.), only the jurisdictional issues in these cases are related. The substantive challenges at issue in these cases are not related.

TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases **Page(s)**

Statutes

Rules

Regulations

Other Authorities

BRIEF FOR RESPONDENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-1537

MILITARY-VETERANS ADVOCACY, INC.,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

STATEMENT OF THE ISSUES

This is a case brought under 38 U.S.C. § 502. Section 502 grants this Court exclusive jurisdiction to review actions of the Secretary of the Department of Veterans Affairs (VA) so long as the challenged actions are referenced in 5 U.S.C. §§ 552(a)(1) or 553.

On December 31, 2019, the VA updated its Veterans Benefits Administration (VBA) Adjudication Procedures Manual (M21-1 Manual), *see* Pet. Br. 4, which is a resource that "consolidates [VA] policy and procedures" to "provide[] guidance to [VBA] employees and stakeholders" in reaching decisions on claims for veterans benefits. *Nat'l Org. of Veterans' Advocates v. Sec'y of*

Veterans Affairs, 981 F.3d 1360, 1374 (Fed. Cir. 2020) (en banc) (*NOVA*) (citations omitted). The petitioner challenges a variety of the VA's revisions as arbitrary and capricious, or contrary to law. The petitioner refers to these revisions as the "BWN Rule," the "Airspace Rule," and the "Thailand Rules." The issues in this case are:

1. Whether the petitioner has standing to bring this action for pre-enforcement review of these specified manual updates under 38 U.S.C. § 502.

2. Whether the six-year statute of limitations in 28 U.S.C. § 2401 bars the petitioner from challenging two of the purported rules—the "Airspace Rule" and the "Thailand Rules"—which have been in effect since 1993 and 2010, respectively.

3. Whether the Court should dismiss petitioner's challenge to the VA's Thailand herbicide policy given that the VA timely and recently granted the petitioner's request to initiate rulemaking on the precise issue it is now asking this Court to decide.

4. Whether the Court should dismiss the petitioner's challenge to the "BWN Rule" because the purported rule "do[es] no more than establish centralized claims-processing rule[] for adjudicating of claims connected to service off the Vietnamese Coast." Pet. Br. 35

5. Whether MVA has failed to demonstrate that any of the challenged manual updates are arbitrary and capricious, or contrary to law.

STATEMENT OF THE CASE

I. Nature Of The Case

The petitioner in this case is a veterans service organization called Military Veterans Advocacy, Inc. (MVA). MVA claims to be aggrieved by three specific revisions that the VA made to its M21-1 Manual. Under § 502, MVA urges the Court to declare the "VA's revisions" "unlawful," and thereby "set [them] aside." *See* Pet. Br. 5-6.

The three revisions MVA seeks to invalidate are as follows:

1. "BWN Rule"—Section IV.ii.2.C.3.e of the M21-1 Manual generally explains how the VA processes claims for benefits involving certain Vietnam era veterans. It further explains that claimants who "serv[ed] in the [Republic of Vietnam or] RVN" are afforded certain presumptions, Appx51, making it easier for them to prove specific types of disability claims. In the past, that section defined those that served "offshore," and had not stepped foot on RVN soil, as *not* having served "in the RVN" (the so-called foot-on-land rule) and thus not benefitting from certain legal presumptions. Appx51-52. Recently, Congress passed the Blue Water Vietnam Veterans Navy Act of 2019 (BWN Act), making clear that veterans who served "offshore of Vietnam" during the Vietnam era count as having served

in the RVN. Congress authorized the VA to implement regulations to adjudicate these claims. In the interim, the VA issued a policy letter implementing the rule, and then updated section IV.ii.2.C.3.e of the manual to recognize that those who served "aboard a vessel operating on [RVN's] . . . *eligible offshore waters*" under the BWN Act were now included within the definition of having "serv[ed] in the RVN." Appx51 (emphasis added). And to process these claims, the VA added language to the section explaining that local offices should send BWN Act claims to newly-created centralized processing teams that would decide these claims going forward. MVA dubs these changes the "BWN" or Blue Water Navy "Rule," Pet. Br. 20-21, and insists that these "revisions" must be "set aside," *id*. 5.

2. "Airspace Rule"—In that same section, but several lines below, the M21-1 Manual states that the "term service in RVN does not include service of a Vietnam era Veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace." Appx51. MVA dubs this the "Airspace Rule." Pet. Br. at 5. That rule has been in effect since it was first introduced in 1993. The only change the VA made to the provision on December 31, 2019 was to uncapitalize the first letter of "Era" in the noun-phrase "Vietnam era." Appx51. MVA claims that this "revision" must be "set aside." Pet. Br. 5.

3. "Thailand Rule"—Sections IV.ii.1.H.4.a and IV.ii.1.H.4.b explain how the VA processes benefits claims involving disability claimants that "serv[ed]

in Thailand during the Vietnam era" and whether "special considerations"—which make it easier for claimants to prove their claims—should be afforded to particular claimants based on where in Thailand they served. Appx23-24 and Appx190-191. MVA dubs these sections the "Thailand Rules." Pet. Br. 22. The provisions at issue explain that these "special considerations" apply only to "Veterans whose duties placed them on or near the perimeters of Thailand military bases." Appx24 and Appx191. The substance of that provision has not changed since it was first introduced in 2010, Appx208-210, and the VA did not touch the provision when it updated its manual on December 31, 2019. There were some edits to other provisions, but all were clerical, *compare* Appx190-192 (prior version of provisions) *with* Appx23-24 (uncapitalizing the first letter in "Era" in noun-phrase "Vietnam Era" and updating references to other subsections of the manual which have since moved), or "technical" in nature and involving other unrelated subsections. Appx2. MVA claims that these "revisions" must be "set aside." Pet. Br. 5-6.

II. Legal Background On Disability Compensation For Veterans

Under 38 U.S.C. § 1110, the United States compensates veterans "[f]or disability resulting from personal injury suffered or disease contracted in the line of duty…." As the statute suggests, however, not all disabilities or claims of personal injury are compensable. The claimant must make various showings,

including that the claimed disability is service-connected, *i.e*., the disability was "incurred or aggravated in line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16); *see Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009); 38 U.S.C. § 5107(a) (explaining that normally "a claimant has the responsibility to present and support" the service connection claim). This is the "so-called nexus requirement." *Holton*, 557 F.3d at 1366.

The nexus requirement is sometimes difficult to establish, particularly where a claimant may not have direct evidence that a service-connected event caused the claimed disability. Cognizant of that issue, the VA or Congress (or sometimes both) have created exceptions to the nexus requirement with the aim of making it easier for claimants to prove their claims. *E.g*., H.R. Rep. 116-58 at 10 (May 10, 2019) (explaining that a "presumption of service connection" "simplifies the disability claim process for veterans" "due to the difficulty of proving actual exposure to herbicide agents"). One of these exceptions relates to claims of herbicide exposure during the Vietnam era.

III. Factual Background On Herbicide Use In Military Operations And The Genesis Of Certain Presumptive Rules For Vietnam Era Veterans

Between 1962 and 1971, the United States military used millions of liters of tactical herbicides on land and along river banks in the Republic of Vietnam (South Vietnam or RVN). *See* Institute of Medicine (IOM), *Blue Water Navy Vietnam*

Veterans and Agent Orange Exposure (2011) (2011 IOM Report), at 7, 36-37, 49.[1] The aim of the practice was to defoliate forests and thereby reduce cover for enemy forces. *Id*. Some of these herbicides, the most prominent of which was Agent Orange, which accounted for about 60 percent of the herbicides used by the military during that timeframe, included a highly toxic chemical, 2,3,7,8-Tetrachlorodibenzo-p-dioxin, known as TCDD. *Id.* at 15.

Over time, many veterans began developing illnesses that some believed were traceable to herbicide exposure. In 1979, Congress directed the VA to "design a protocol for and conduct an epidemiological study of persons who, while serving in the Armed Forces of the United States during the period of the Vietnam conflict, were exposed to" herbicides containing dioxin. Veterans Health Programs Extension and Improvements Act of 1979, Pub. L. No. 96-151, § 307, 93 Stat. 1092, 1097-98 (1979). Shortly thereafter, Congress delegated the study to the Centers for Disease Control (CDC). *See* H. Rep. No. 98-592, at 5 (1984).

As the CDC study was ongoing, Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (1984 Dioxin Act). The 1984 Dioxin Act directed the VA to establish a framework, and "establish guidelines," for veterans that served "in the Republic

[1] Blue Water Navy Vietnam Veterans And Agent Orange Exposure, *available at* https://www.nap.edu/read/13026/chapter/1#xiv (last visited Jul. 16, 2021).

of Vietnam," and to grant claims on a presumptive basis for diseases shown by "sound scientific or medical evidence" to be associated with exposure to herbicides containing dioxin. *Id.* §§ 5(a)(1) and 5(b)(2)(B). In part, Congress told the VA to *presume* that a veteran had been exposed to herbicides "if the information in the veteran's service records and other records of the Department of Defense is not inconsistent with the claim that the veteran was present where and when the claimed exposure occurred." *Id*. § 5(b)(3)(B). The VA was thus authorized for the first time to presume that a servicemember had been exposed to herbicides so long as he (or she) served "in the Republic of Vietnam."[2]

Within a year, the VA implemented the 1984 Dioxin Act by promulgating a new regulation, 38 C.F.R. § 3.311a. In that regulation, the VA explained that veterans who served "in the [RVN]" during the Vietnam era are presumed to have been exposed to dioxins, eliminating their burden of proving direct exposure. But the regulation further defined service "in the [RVN]" as extending to "service in the waters offshore and service in other locations" only "if the conditions involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.311a(b) (1986).

[2] To the extent the VA determined that a disease was positively associated with herbicide exposure, the law directed the VA to set forth that determination in its regulations along "with any specification (relating to exposure or other relevant matter) of limitations on the circumstances under which service connection shall be granted, and [to] implement such determination in accordance with such regulations." 1984 Dioxin Act, § 5(b)(2)(A)(i).

In March 1990, the CDC completed its study. The CDC found a statistically significant association between non-Hodgkin's lymphoma and service in Vietnam. *See* 55 Fed. Reg. 25,339 (June 21, 1990) (proposed rule); 55 Fed. Reg. 43,123 (Oct. 26, 1990) (final rule). In light of the CDC's findings, the VA promulgated 38 C.F.R. § 3.313 in October of that same year, which extended presumptive service connection to some claimants who suffered from certain cancer diagnoses. 55 Fed. Reg. at 43,123; *see* CDC, *The Association of Selected Cancers with Service in the U.S. Military in Vietnam: Final Study* (1990).

IV. Congress Promulgates The Agent Orange Act, Which Authorizes The VA To Presume That Vietnam Era Veterans That "Serv[ed] In The Republic of Vietnam" Were Exposed To Herbicides

Just several months later, in February 1991, Congress promulgated the Agent Orange Act of 1991, Pub. L. No. 102-4, § 2, 105 Stat. 11 (1991) (AOA), which is now codified at 38 U.S.C. § 1116. The AOA established statutory presumptions of service connection for veterans who "served in the Republic of Vietnam" and were diagnosed with specific illnesses. The AOA was expressly understood as codifying the VA's existing and announced regulatory presumptions. *See* 137 Cong. Rec. H719, H726 (1991) (joint explanatory statement); 1991 U.S.C.C.A.N. 11, statement by President George Bush on signing H.R. 556 (Feb. 6, 1991).

The AOA directed the VA, in conjunction with the National Academy of Sciences and based on "sound medical and scientific evidence," to determine whether additional diseases "warrant[] a presumption of service connection by reason of having positive association with exposure to an herbicide agent." 38 U.S.C. §§ 1116(a)(1)(B), 1116(b)(1). Congress directed the VA to make that association "if the credible evidence for the association is equal to or outweighs the credible evidence against the association." *Id.* at § 1116(b)(3). Congress further defined the term "herbicide agent" as "a chemical in an herbicide used 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." *Id.* at § 1116(a)(3). The AOA did not, however, define the phrase "served in the Republic of Vietnam."

In 1993, the VA promulgated regulations to implement the AOA. 58 Fed. Reg. 29,107 (May 19, 1993). Under its new regulations, the VA incorporated the language of the AOA and limited the presumption of herbicide exposure to claimants that "served in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6) (1993). That same year, to ensure that all Vietnam era herbicide-exposure rules were placed in one regulatory section, the VA proposed moving its definition of "service in [RVN]" in 38 C.F.R. § 3.311a(b)—which included "offshore" claimants only "if the conditions involved duty or visitation in the Republic of

Vietnam"—to 38 C.F.R. § 3.307(a)(6). 58 Fed. Reg. 50,528, 50,529 (Sept. 29, 1993). With that regulatory amendment, the VA defined "service in the Republic of Vietnam" in § 3.307(a)(6)(iii) as "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam."

V. The VA's Implementation Of The Law And The Resulting Controversy Over What Should Constitute "Service In The Republic Of Vietnam"

Questions soon arose as to what should constitute service "in the Republic of Vietnam" under the law. In 1993—the same year the VA promulgated regulations implementing the AOA—the VA's General Counsel was asked to address whether the language "service in Vietnam" in 38 C.F.R. § 3.313 included veterans who flew missions in Vietnamese airspace but never landed in Vietnam. VA Office of Gen. Counsel Prec. Op. 7-93 (Aug. 12, 1993), *available at* https://www.va.gov/ogc/opinions/1993precedentopinions.asp (last visited Jul. 16, 2021). The General Counsel acknowledged that the phrase "duty or visitation in Vietnam" was ambiguous as to whether entering Vietnamese airspace could constitute service "in Vietnam" under the regulation. *Id.* at ¶ 3. But based on the regulatory history, the VA General Counsel concluded that the "service in Vietnam" language in § 3.313 "does not include service of a Vietnam era veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace." *Id.* at 2-4. The VA General Counsel reasoned that the regulation was based on the CDC's

1990 cancer study, which included veterans on land and "offshore," including "Blue Water" veterans, but did not include "[v]eterans whose only service with respect to Vietnam was in aircraft which flew in Vietnamese airspace." *Id*. at 2-3.[3] Accordingly, the VA General Counsel concluded that term "service in Vietnam" was never meant to include Vietnamese airspace within its definition.

The VA then reflected that understanding in its M21-1 Manual. Consistent with the General Counsel's opinion, the manual explained that "service in the Republic of Vietnam" did *not* include that country's airspace, citing directly to the opinion itself. *E.g*., Appx107 ("[t]he term service in the RVN does not include service of a Vietnam Era Veteran whose only contact with Vietnam was flying high-altitude missions in Vietnam airspace" (citing "VAOPGCPREC 7-1993")).

A second question arose as to whether entering RVN's *offshore waters* should constitute service "in the Republic of Vietnam." The VA's regulations made clear that offshore waters did not qualify, 38 C.F.R. § 3.307(a)(6)(iii), which came to be known as the foot-on-land rule. But claimants challenged that limitation. In 2008, this Court upheld the VA's foot-on-land rule, explaining that "[d]rawing a line between service on land, where herbicides were used, and service

[3] VA Office of Gen. Counsel Prec. Op. 7-93 at 2-3 (Aug. 12, 1993) ("The Selected Cancers Study results were based on analysis of veterans who were present on the ground or in the waters in Vietnam or in the waters off the shore of Vietnam.").

at sea, where they were not, is prima facie reasonable." *Haas v. Peake*, 525 F.3d 1168, 1193 (Fed. Cir. 2008).

In 2019, however, this Court sitting *en banc* in *Procopio v. Wilkie* overruled *Haas*. 913 F.3d 1371, 1380 (Fed. Cir. 2019). *Procopio* held that by using the phrase "Republic of Vietnam" in the AOA, Congress unambiguously intended to extend the presumption of herbicide exposure to qualifying veterans who served within the 12-nautical mile territorial sea of the Republic of Vietnam. *Id.* at 1376. The Court explained that Congress chose to "invoke a notion of territorial boundaries" by including "service *in* the Republic of Vietnam." *Id*. at 1375 (emphasis in original). Other than referencing a 12-nautical mile boundary, however, *Procopio* did not further define the territorial sea of the Republic of Vietnam. H.R. Rep. No. 116-58 at 11 (May 11, 2019).

VI. Congress Promulgates The BWN Act, Which The VA Then Implements Through A Policy Letter

Shortly after this Court's *Procopio* decision, Congress enacted the BWN Act, Pub. L. 116-23, 133 Stat. 966. The BWN Act, which is codified at 38 U.S.C. § 1116A, statutorily extends the herbicide exposure presumption for veterans who served "offshore of Vietnam." The BWN Act defines "offshore of Vietnam" as any location "not more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and

intersecting the following points," followed by a table of geographic names and longitudinal and latitudinal coordinates. 38 U.S.C. § 1116A(d).[4]

The House Committee on Veterans' Affairs explained that the statute was "necessary" because the *Procopio* decision did not define the term "territorial sea," and the BWN Act was meant to "codify the Court's decision and mitigate concerns that the VA may narrowly interpret the decision, thereby excluding some [Blue Water Navy] veterans." H.R. REP. NO. 116-58, at 11 (May 10, 2019). The committee further stated that "[t]o ensure that VA construes this bill to extend the presumption to all applicable [Blue Water Navy] veterans who may have been exposed to herbicide agents, the Committee intends that VA's definition of the Republic of Vietnam for this purpose be broad and comprehensive." *Id.*

The Secretary of the VA subsequently recommended to the President that he sign the BWN Act, explaining that the "central provision of the bill is intended to codify" this Court's *Procopio* decision, "which expanded the presumption of herbicide exposure under 38 U.S.C. § 1116 to all veterans who served within the 12-nautical mile territorial sea of the Republic of Vietnam during the Vietnam era." Appx78. The Secretary added that "the expansion of the presumption *is*

[4] The coordinates are consistent with a November 12, 1982, declaration by the government of the Socialist Republic of Vietnam (SRV) of its territorial waters. *Compare* 38 U.S.C. § 1116A(d) *with* Appx266 (SRV's declaration reprinted in a 1983 U.S. State Department report).

already current law," and for that reason, the "VA does not oppose this provision." *Id.* (emphasis added).

Although neither *Procopio* nor the BWN Act state that service "in the Republic of Vietnam" includes Vietnamese airspace, *see Procopio*, 913 F.3d 1371; 38 U.S.C. § 1116A, the House Committee on Veterans' Affairs made clear that the BWN Act did not extend that far. It stated that "an aircraft that passed in the airspace above the offshore waters would not have drawn water from the sea and therefore is not considered present within the offshore waters for purposes of this legislation." H.R. REP. NO. 116-58, at 11-12 (May 10, 2019).

The BWN Act also authorized the Secretary to implement § 1116A by prescribing regulations, 38 U.S.C. § 1116A(c)(1), and permitted him to stay any claims that might be affected by the new law until the VA could implement the statute. 38 U.S.C. § 1116A(c)(3)(A). On July 1, 2019, six days after Congress enacted the BWN Act, the Secretary stayed all potentially affected pending claims for six months. Appx70; *see* 38 U.S.C. § 1116A(c)(3)(A).[5] As the Secretary's stay was about to expire, on December 31, 2019, the VA Under Secretary for Benefits released a letter explaining the process the VA would use to adjudicate the claims affected by the BWN Act. Appx61. The letter explained that the VA had created

[5] Although no "offshore" claims were granted during the stay—either under *Procopio* or the BWN Act—the VA regional offices continued to grant herbicide exposure claims that qualified under other existing rules. Appx73.

centralized processing teams to process "all herbicide claims based on Vietnam-era service," Appx62, and that these teams would adjudicate claims involving all types of qualifying RVN service, whether it be "in-country RVN service, service on the inland waterways, [or] service on the eligible offshore waters as defined in the new law." Appx63. The letter further clarified that "evidence-based determinations regarding eligible RVN service . . . are the sole jurisdiction of the centralized processing teams for consistency and recordkeeping purposes, and their determination is binding on all [regional offices] and centers." *Id.*

That same day, the VA updated section IV.ii.2.C.3.e of the M21-1 Manual to reflect the processing change articulated in the VA's letter, adding the words "eligible offshore waters" to reflect the more inclusive reading of "service in the RVN" articulated in the BWN Act, and to remove references to *Haas* (which *Procopio* had overruled) as governing precedent. Appx51.

VII. The VA Separately Develops A Policy As To When Thailand-Based Vietnam Era Veterans Are Entitled To A Herbicide Exposure Presumption

While presumptive herbicide exposure rules for Vietnam era veterans that served in the RVN can be linked to specific acts of Congress, similar rules for Thailand-based veterans have a different lineage.[6] Before 2009, relevant Thailand-

[6] Under 38 U.S.C. §§ 1116(a)(1)(A) and 1116A(a), the statutory presumption of herbicide exposure is textually limited to veterans who served in the Republic of Vietnam during the Vietnam era. Nonetheless, the VA has, by regulation, included within that presumption those who served in Thailand (or

based veterans had to prove herbicide exposure claims by directly proving the "nexus requirement." *See, e.g., Combee v. Brown*, 34 F.3d 1039, 1044-45 (Fed. Cir. 1994). Back then, upon receiving a benefits claim from a veteran who served in Thailand, the VA would assess the nature of the request, and then rely on evidence from the Department of Defense (DoD) showing where and how the military used herbicides. That process was time-consuming.

In May 2009, "[t]o facilitate a timely resolution of claims from veterans with Thailand service," the VA circulated a memorandum (called a Fast Letter) that better summarized evidence that the DoD had collected about military herbicide use. Appx255 (Fast Letter 09-20). The memorandum relied on official DoD monographs showing where herbicides were used, tested, and stored, and specifically cited a document called the *Project CHECO Southeast Asia Report: Base Defense in Thailand*, which detailed where herbicides were used in and around Thailand. Appx257; *see, e.g.* Appx333 ("To further aid in observation, herbicides were employed to assist in the difficult task of vegetation control. Use of these agents was limited by such factors as the [rules of engagement] and supply problems."). The memorandum explained that "if a veteran's MOS (military

---

served in any other location) but also had "duty or visitation" in Vietnam. 38 C.F.R. § 3.307(a)(6)(iii). The VA also created a regulatory presumption for veterans of the Air Force or Air Force Reserve who "regularly and repeatedly operated, maintained, or served onboard C-123 aircraft known to have been used to spray an herbicide agent during the Vietnam era." 38 C.F.R. § 3.307(a)(6)(v).

occupational specialty) or unit [was] one that regularly had contact with the base perimeter, there was a greater likelihood of exposure to commercial pesticides, including herbicides," while adding that "[s]ecurity police units were known to have walked the perimeters, especially dog handlers." Appx258.[7]

That memorandum forecasted a new VA policy. About a year later, the VA officially instructed its adjudicators to essentially presume that certain Thailand-based claimants had been exposed to herbicides if "credible evidence" showed that the claimant "served near the air base perimeter" at a specified military base. Appx220 (explaining that the "majority of troops in Thailand during the Vietnam era were stationed" at one of seven specified bases and announced that "[i]f a US Air Force Veteran served on one of these air bases as a security [member] . . . or otherwise served near the air base perimeter, as shown by . . . credible evidence, *then herbicide exposure should be acknowledged on a facts found or direct basis*" (emphasis added)).

To reflect this new policy, on October 4, 2010, the VA updated its adjudication manual (then-called the M21-1MR Manual). The manual explained

[7] The VA reminded adjudicators in August 2009 of its memorandum and explained that if adjudicators encountered a claimant that had a "greater likelihood" of herbicide exposure, based on the descriptions provided in the memorandum, adjudicators should forward "a summary of the evidence contained in the claims files" whereby the "C[ompensation] & P[ension (C&P)] Service will then review the claim to determine the likelihood of herbicide exposure based on the facts of the case and available Department of Defense documents." Appx230.

that adjudicators should presume that those that "served near the air base perimeter" of specified bases in Thailand had been exposed to herbicides. Appx216. And in doing so, the manual further provided a step-by-step table for VA adjudicators to follow when deciding Thailand-based claim. Appx208-10 (M21-1MR, section IV.ii.2.C.10.q). Both this policy and step-by-step procedural table have guided VA adjudicators since 2010. *Compare* Appx208-210 (Oct. 2010 version) and Appx191-192 (Nov. 12, 2015 version) *with* Appx23-24 (Dec. 31, 2019 version).

VIII. Relevant Procedural Background And History

On December 31, 2019, the VA updated its M21-1 Manual. Among the updates were changes to specific portions of sections IV.ii.2.C.3.e, IV.ii.1.H.4.a and IV.ii.1.H.b.

At section IV.ii.2.C.3.e, which MVA dubs the "BWN Rule," the VA made two relevant changes. First, consistent with a policy letter that the VA's Under Secretary for Benefits issued that same day, the manual explained that going forward, centralized processing teams would process "all herbicide claims based on Vietnam-era service." *Compare* Appx61-62 (policy letter) *with* Appx16 (manual provision). The manual subsection, entitled "Processing of Herbicide Claims," details what claims must be routed to the new centralized processing teams and the process rules those teams should follow in adjudicating the claims

under their purview. Appx16. Second, consistent with the BWN Act, the manual removed any reference to *Haas*, and stated that veterans who served "aboard a vessel operating on [RVN's] . . . *eligible offshore waters*" were now statutorily considered to have "serv[ed] in the RVN." Appx51 (emphasis added).

As part of that same section, where the manual states that the "term service in RVN does not include service of a Vietnam era Veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace," Appx51, which MVA dubs the "Airspace Rule," the VA uncapitalized the first letter in the word "Era" when referring to "Vietnam era." Appx51 (tracking changes with additions highlighted and deleted with strikethrough); *see also* Appx45 (listing key changes and making no reference to any changes to the "Airspace Rule"). No other changes were made to this subsection.

At sections IV.ii.1.H.4.a and IV.ii.1.H.b, which MVA dubs the "Thailand Rules," the VA made two changes. In step 3 of the adjudicators' procedures table, which applies to veterans not afforded a presumption of herbicide exposure, the procedure previously told adjudicators to "[a]sk the Veteran for approximate dates, location, and nature of the alleged exposure." Appx191. After the revision, it tells adjudicators to "[a]sk the Veteran for the approximate dates, location, and nature of the alleged exposure *using the VBMS AO – Exposure General Notice paragraph*." Appx24. These additional eight words, which direct adjudicators to

use form language provided in the "VBMS AO – Exposure General Notice paragraph" when asking about their "alleged exposure," systematizes how VA decisionmakers seek claims-processing information from claimants who *do not receive the benefit of a presumption*.[8] The presumptive exposure rules—which are reflected in steps 1 and 2 of the step-by-step table—were not modified in any way. *Compare* Appx190 (Nov. 12, 2015 version) *with* Appx23 (Dec. 31, 2019 version).

Three days after the VA released its manual update, MVA wrote to the VA raising two issues. *First*, MVA contended that the VA's changes to the "Thailand Rules" effectively denied a petition for rulemaking that someone else had sent the VA several years before. Appx13.[9] MVA was referring to a petition from three individuals—led by the veteran Charles F. Beck—from December 2015, Appx127 (the Beck petition), who requested in part that the VA establish a "presumption of herbicide exposure for all veterans who served in Thailand during the Vietnam

[8] Appx26 shows a screenshot of how a VA adjudicator would select the "AO – Exposure General Notice" from a list of standardized language to populate a letter to be sent to the veteran. Appx27 is an example of such a letter (with a fictional veteran's name and personal information).

[9] On February 10, 2020, MVA submitted a follow-up "amplification" to its Thailand rulemaking request, which consisted of an expert opinion from an environmental scientist. Appx3-11.

War." Appx142.[10] On September 22, 2017, the VA granted the Beck petition's request to initiate rulemaking on its Thailand policy, and restated its commitment on March 23, 2018. Appx121-122. In those communications, the VA told the Beck petitioners that it had "been working to reexamine its current policy and consider potential modifications and to prepare a proposed rule that will be based on VA's analysis of the historical record," while explaining that it could not offer a specific date as to when rulemaking might occur. *Id.* Nonetheless, the VA assured the Beck petitioners that it was "committed" to initiate rulemaking for Thailand-based Vietnam veterans. Appx121. Despite these repeated assurances from the VA to the Beck petitioners, MVA argued that the VA's non-substantive updates to the Thailand Rules on December 31, 2019 amounted to a denial of the Beck petition. *See* Appx13.

Second, in that same letter, MVA submitted its own petition for rulemaking on the same issue, requesting that the VA add a presumption of herbicide exposure for any veteran, who within a specified period of service, served "at any military base located in Thailand without regard to where on the base the veteran was located or what military job specialty the veteran performed." Appx15. Without waiting for a response, MVA filed its petition in this Court about one month later,

[10] The petition also described and quoted some of VA's Thailand herbicide policy contained in the M21-1MR at section IV.ii.2.C.10.q, and alleged that the policy had not been consistently applied. Appx132.

claiming (among other things) that the VA's December 31, 2019 manual update—which the VA released three days before MVA submitted its petition—constituted a denial of MVA's rulemaking request. ECF No. 1.

On March 23, 2020, the VA's Acting General Counsel responded to MVA's rulemaking petition clarifying two separate issues. *First*, the General Counsel informed MVA that the VA had *granted* the Beck petition to initiate rulemaking as it related to Thailand-based claimants in the Vietnam era. Appx1.[11] The General Counsel further stated to MVA that the "VA grants your petition to the extent that VA will undertake rulemaking on the issue of herbicide exposure in the Thailand during the Vietnam era." *Id*. *Second*, the General Counsel advised MVA that it was incorrect to suggest that the December 2019 revisions to the Thailand Rules were meant in any way to respond to the Beck Petition. *See* Appx1-2. The General Counsel explained that the December 2019 revision to the Thailand section was only a "technical update . . . to reflect current information technology functionality" and not "any change to its substantive policy," and that the VA would publish a "proposed rule in the Federal Register." Appx2.

[11] The letter also noted the VA's review of a recent Government Accountability Office (GAO) report and DoD findings and directed MVA to a website where "VA published an updated list of locations outside of Vietnam and Korea where Agent Orange and other tactical herbicides were used, tested, stored, or transported." Appx1 (providing link: https://www.publichealth.va.gov/exposures/agentorange/locations/tests-storage/index.asp).

MVA then commenced briefing on all the issues it raised in this action, characterizing its case as challenging the "VA's revisions" to the M21-1 Manual. Pet. Br. 5-6.

SUMMARY OF THE ARGUMENT

MVA claims that its petition challenges the VA's recent revisions to its M21-1 Manual, but its brief belies that claim. Over and over again in its brief, MVA asks this Court to vindicate its disagreements with VA's policies, but those policies bear no meaningful connection to the challenged manual revisions. MVA real intention here, regardless of what the manual states, is for the Court, under the guise of a § 502 review of the VA's manual revisions, to make legally binding, stand-alone pronouncements on benefits eligibility on a number of herbicide exposure presumptions.

MVA's petition must fail. As an initial matter, MVA lacks standing to challenge any of the manual revisions at issue because they did not injure (or imminently threaten to injure) it or its members. Even if the Court were to give MVA the relief that it seeks—that is, to undo the challenged revisions—MVA (and the members it presents for purposes of standing) would obtain no relief whatsoever.

Apart from standing issues, at least two of MVA's challenges—to the Airspace Rule and the Thailand Rules—are time-barred by 28 U.S.C. § 2401,

which establishes a six-year statute of limitations. Both rules have been in place since 1993 and 2010, respectively, meaning both of MVA's challenges are years too late. And MVA's challenge to the Thailand Rules fails for the added reason that the VA expressly, timely, and promptly agreed (just months ago) that it would revisit that precise rule through formal rulemaking. MVA, therefore, has no grounds to establish the jurisdiction of this Court over that issue.

The Court further lacks jurisdiction over MVA's claim involving the VA's purported interpretation of the BWN Act. MVA seeks to challenge that interpretation by challenging the VA's December 2019 revision to the manual, but a plain reading of the specific revisions shows that they do "no more than establish centralized claims-processing rule[] for adjudicating of claims connected to service off the Vietnamese Coast." Pet. Br. 35. The revision thus makes no declaration regarding any claimant's substantive rights, and is not reviewable under § 502 as a result.

Finally, if the Court reaches the merits of MVA's petition, the record and law demonstrate that none of the VA's manual revisions are arbitrary and capricious, or contrary to law. The VA's actions, whether reflected in the M21-1 Manual or otherwise, are consistent and in accordance with prevailing law.

ARGUMENT

I. Jurisdiction And Standard Of Review

The Court possesses jurisdiction to review an action of the VA "to which section 552(a)(1) or 553 of title 5 (or both) refers[.]" 38 U.S.C. § 502. Section 552(a)(1) refers to agency actions that must be published in the Federal Register including when the agency issues "substantive rules of general applicability . . . and statements of general policy or interpretations of general applicability." *See LeFevre v. Sec'y of Veterans Affairs*, 66 F.3d 1191, 1196 (Fed. Cir. 1995) (quoting 5 U.S.C. § 552(a)(1)). Provisions in the M21-1 Manual can constitute a reviewable action under § 552(a)(1) if they are, among other things, interpretative rules that "limit[] VA staff discretion, and, as a practical matter, impact[] veterans benefits eligibility for an entire class of veterans." *NOVA*, 981 F.3d at 1374.

In reviewing a petition pursuant to 38 U.S.C. § 502, the Court applies the standards of review pursuant to the Administrative Procedures Act (APA). 38 U.S.C. § 502 (citing chapter 7 of title 5). Unless made reviewable by statute, only a final agency action is subject to judicial review under the APA. 38 U.S.C. § 704; *see NOVA*, 981 F.3d at 1378-79. But "to qualify as final agency action, the [M21-1 Manual provision] must (1) mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature and (2) be one by which rights or obligations have been determined, or from

which legal consequences will flow." *Id.* (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807, 1813 (2016) (internal quotation marks omitted). "A preliminary, procedural, or intermediate action or ruling not directly reviewable is subject to review on the review of the final agency action." 38 U.S.C. § 704.

If the agency action is reviewable, the APA requires the Court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The Court reviews questions of statutory interpretation without deference. *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1372 (Fed. Cir. 2002). The Court will "hold unlawful and set aside" agency action that is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "This review is 'highly deferential' to the actions of the agency." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1372 (Fed. Cir. 2001) (citing *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 691 (Fed. Cir. 2000)).

II. MVA Lacks Standing To Challenge Any Of The Manual Updates

MVA has not carried its burden to establish associational standing in this case.[12] Pet. Br. 24-28. Under 38 U.S.C. § 502, an organization has associational

[12] The organization bringing the petition has the burden of proving the standing of its members. *NOVA*, 981 F.3d at 1368, 1370; *see Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1172-73 (Fed. Cir. 2017) (adopting the summary

standing to challenge the VA's actions if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *NOVA*, 981 F.3d at 1368 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434 (1977)). In *NOVA*, this Court explained

> that . . . [for] the first prong of the *Hunt* test for associational standing, the organization must show that the veteran member has an actual or potential claim and that this claim is sufficiently affected by the particular challenged rule to meet the requirements of actual or imminently threatened concrete harm and the other requirements for that member to have Article III standing.

981 F.3d at 1369-70.

None of the manual revisions MVA disputes affect any of its members' substantive rights. MVA challenges the VA's December 31, 2019 revisions to the Airspace Rule and the Thailand Rules, but neither update affected the substance of those provisions. *See* Appx51 (uncapitalizing letter "E" in "Vietnam Era"); Appx23 (clerical and technical changes that do not affect Thailand-based

---

judgment burden of production in cases challenging final agency action); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (noting that, "[i]n response to a summary judgment motion," the plaintiff "must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e) [supporting his or her standing], which for purpose of the summary judgment motion will be taken to be true").

claimants' presumptions). Thus, although MVA urges the Court to declare the VA's December 31, 2019 updates invalid, Pet. Br. 5-6, doing so would not change the substance of these provisions and would not, therefore, provide MVA's members any of the relief they purportedly seek. *See Lujan*, 504 U.S. at 560–61 (explaining that the purported "injury has to be 'fairly ... traceable to the challenged action of the defendant…'" (quoting *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41–42 (1976) (internal brackets omitted)).

The declarations MVA submits to support its standing prove our point. *See* Pet. Br. A1-A5. To establish standing as to the VA's revisions to the Airspace and Thailand Rules, MVA presented declarations from two of its members—Frederick Hinchliffe 2nd and Jay Lawrence Cole—to attempt to show their "actual" or "imminent" injury resulting from the VA's updates. The first of these two declarants is Mr. Hinchliffe, who served as a pilot during the Vietnam era. He states that he flew "over South Vietnam and the territorial sea of Vietnam," and has a "claim pending before the Board of Veterans Appeals for benefits arising out of Agent Orange exposure." A3 ¶¶ 2-3, 6. Undoing the VA's December 31, 2019 manual revisions to the Airspace Rule would not give Mr. Hinchliffe any better chance of proving his claim. Prior to December 2019, the M21-1 Manual excluded Vietnamese Airspace, meaning even if the Court were to undo the VA's December 31, 2019 update, Mr. Hinchliffe would be in the same position he is now.

The same is true for MVA's next declarant, Mr. Cole, who served in Thailand during the Vietnam era. He states that, while in Thailand, he "worked on the flight line and did not have duties on the base perimeter" and for that reason, he had a disability claim denied by a local VA office "in March 2020." A1 ¶ 2-3. But none of the VA's revisions to the Thailand Rule resulted in that outcome. Like Mr. Hinchliffe, Mr. Cole's claim would have been decided the same way under the prior iteration of the manual, which also precluded the extension of "special considerations" to those in Mr. Cole's situation. *See* Appx190.

This lays bare the thrust MVA's real intentions. MVA does not want the "revisions" declared "invalid" or "set aside" as its brief claims. *See* Pet. Br. 5-6. Regardless of what the manual states, MVA's petition seeks for the Court to use § 502 to make legally binding, stand-alone pronouncements on benefits eligibility for certain presumptions. *E.g.*, *id*. at 58 (urging Court to "extend the presumption of herbicide exposure (and with it, the presumption of service connection) to all veterans serving on U.S. military bases in Thailand during the Vietnam era"). But the manual revisions petitioner challenges did not establish or substantively change the presumptions at issue, and thus any harm claimed by MVA or its members is not traceable to those revisions. Rather, the harms MVA seeks to remedy stem from the substance of the manual provisions, most specifically the lack of clear and affirmative pronouncement in the M21-1 Manual more broadly applying the

presumptions, but that harm does not result from the revisions it challenges in its petition.

MVA also claims that the VA constructively denied its petition for a change to the Thailand Rules. Pet. Br. 56-58. First, that is not true. As we explain below, MVA submitted its petition on January 3, 2021, and it was granted in a timely fashion, on March 23, 2021. *See infra* at 37 (citing Appx1-2).[13] Second, in challenging the Thailand Rules, MVA does not rely on its own petition, but rather relies on a different rulemaking petition—the Beck petition, which MVA did not submit—to suggest that the VA should be faulted for not acting on *that petition* more quickly. Pet. Br. 56-57.[14] But MVA did not submit the Beck petition and we are aware of no reason why MVA should be able to stand in the Beck petitioners' shoes or vindicate their rights. *See Singleton v. Wulff,* 428 U.S. 106, 113–14

[13] The VA granted the Beck petition in September 2017 and repeated its commitment to initiate rulemaking in March 2018. Appx121-122. When MVA separately approached the VA about the same issue, the VA told MVA the same thing—that it was "committed to initiate rulemaking on the issue of an herbicide presumption for service in Thailand…." Appx1. MVA thus has no factual or legal grounds to argue that its rulemaking petition was denied.

[14] Part of MVA's construct here is the assertion that the VA "reissued" the Thailand Rules despite telling petitioners who submitted the Beck petition that it would initiate rulemaking. Pet. Br. 57. The VA did not, however, "reissue" the manual provisions MVA now challenges, it simply has not yet revised the provisions in accordance with the rulemaking it has committed to undertake.

(1976) (explaining that a litigant cannot assert the rights of others unless, in relevant part, the third party is unable to assert his or her own right).

MVA also lacks standing to challenge updates it refers to as the BWN Rule. That manual update did only two things. First, in light of a separate policy letter that the VA issued that same day, the manual explains that in the future centralized processing teams will process "all herbicide claims based on Vietnam-era service." *Compare* Appx61-62 (policy letter) *with* Appx16 (manual provision). The manual revision does not explain how those centralized processing teams will decide those claims, nor does it make any declaration about what rules those processing teams will apply. *See* Appx16. Thus, all the update does is direct a subset of benefits claims to specific adjudicatory teams for decision. Second, to reflect the governing law in the BWN Act, the manual removes any reference to *Haas*, and now states that veterans who served "aboard a vessel operating on [RVN's] . . . *eligible offshore waters*" are now statutorily considered to have "serv[ed] in the RVN." Appx51 (emphasis added).

If these two revisions were "set aside," as MVA urges, Pet. Br. 5-6, MVA's members' grievances would still persist. The two declarations that MVA provides to support its standing concerning the BWN Rule—that of Leonard Brzozowski and Michael Austin—make our point. Mr. Brzozowski's declaration states that during the Vietnam era, he was at all relevant times on a "ship . . . deployed to the

waters of Vietnam." Pet. Br. A2 ¶ 3. He states that he has various illnesses and that he has a pending claim before the Board of Veterans' Appeals. *Id*. ¶ 7. Likewise, Mr. Austin's declaration states that he was on a "ship deployed to the Western Pacific, including off the coast of Vietnam," and that he currently has a pending "claim for Agent Orange benefits." Pet. Br. A5 ¶¶ 2, 6. If the Court were to strike the December 31, 2019 updates, that would merely restore the language in the prior version of the manual, meaning (1) that the relevant provisions in the M21-1 Manual would continue to reflect the VA's pre-*Procopio* foot-on-land policy under *Haas*, (2) the processing provisions under the BWN Act would be taken out and all 52 VA regional offices would continue to adjudicate herbicide exposure claims instead of specific regional office teams, and (3) the manual's outdated references to *Haas* would be reinstated. If this is truly the relief MVA seeks in this case, as it claims, it cannot establish standing because the harms that Mr. Brzozowski and Mr. Austin alleged would not be remedied by those changes.

At bottom, MVA cannot demonstrate that the "revisions" it claims to challenge present an "actual or imminently threatened concrete harm" for its members or that the harms alleged are fairly traceable to the manual revisions. *NOVA*, 981 F.3d at 1369-70. Rather, MVA seeks to vindicate deeper policy disagreements that bear no meaningful connection to the VA's revisions to the manual itself. Consequently, because MVA has not demonstrated that any of its

members are harmed by the VA's revisions to the challenged manual provisions, the petition should be dismissed for lack of standing.

III. MVA's Challenge To The Purported "Airspace Rule" And "Thailand Rules" Are Time-Barred By The Statute of Limitations[15]

On top of these standing issues, two of MVA's challenges—to the "Airspace Rule" and the "Thailand Rules"—are time-barred. Under 28 U.S.C. § 2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *See NOVA*, 981 F.3d at 1383 (stating that six-year statute of limitations applies to pre-enforcement challenges brought under 38 U.S.C. § 502 (citing *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008)). A right of action first accrues when the challenged rule is "in full force and effect and operative." *Preminger*, 517 F.3d at 1307.

Here, both the "Airspace Rule" and the "Thailand Rules" have been "in full force and effect and operative" since 1993 and 2010, respectively, *e.g.*, Appx107

[15] The most recent cases from this Circuit appear to treat the timing requirements of 28 U.S.C. § 2401(a) as jurisdictional, *e.g., Ross v. United States*, 374 F. App'x 960, 962–63 (Fed. Cir. 2010), meaning the timing provisions cannot be equitably tolled. But other circuits, such as the D.C. Circuit, appear to be changing their stance in light of a 2015 Supreme Court decision. *E.g.*, *Jackson v. Modly*, 949 F.3d 763, 776 (D.C. Cir. 2020) (declining to apply existing Circuit precedent treating § 2401(a) as jurisdictional in light of recent Supreme Court decision (citing *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015)), *cert. denied sub nom. Jackson v. Braithwaite*, 141 S. Ct. 875 (2020).

(citing VAOPGCPREC7-1993); Appx208-210; Appx216; Appx220; Appx230; meaning MVA's challenge to the substance of these provisions have been time-barred for years. Omitting any reference to these timeliness issues, MVA attempts to cast its petition as a challenge to "revisions" that the VA made recently, on December 31, 2019.[16] Pet. Br. 5-6. But the VA did not revise the substance of these provisions when it revised them in 2019, and MVA cites no support for the proposition that *de minimis*, non-substantive revisions restart (or start anew) the statute of limitations to challenge unrevised substantive portions of those rules under § 502.

MVA's challenge to the substance of the Airspace Rule capably demonstrates the issue. MVA asks the Court to "invalidate the Airspace Rule as contrary to the governing statute, international law, and this Court's recent decision in *Procopio*." Pet. Br. 29. But the only change the VA made in December 2019 to the Airspace Rule was to uncapitalize the first letter in the word "Era" in the noun phrase, "Vietnam Era." Appx51. This one-letter revision did not bring the Airspace Rule into "full force and effect"—that occurred some 28 years ago in 1993. MVA insists, nevertheless, that the entire Airspace Rule should be declared invalid because it is incompatible with this Court's *en banc* holding in *Procopio*.

[16] As explained above, if MVA truly challenges the non-substantive revisions the VA made to the Airspace and Thailand Rules in December 2019, it has not demonstrated that its members have standing to maintain this petition.

Pet. Br. 29 (citing 913 F.3d at 1371). But the suggestion that *Procopio* permits a new § 502 challenge to the 1993 Airspace Rule is wrong: "While the courts have power to give a decision only prospective effect, they have no authority to suspend a statute of limitations enacted by Congress." *Canton v. United States*, 265 F. Supp. 1018, 1021 (D. Minn. 1967), *aff'd,* 388 F.2d 985 (8th Cir. 1968) ("The applicable statute of limitations operates to curtail the effect of judicial pronouncements as to matters occurring prior to the decision"). Nor is it persuasive to suggest that the VA action of *not* revising the Airspace Rule's substance in December 31, 2019, when it changed the capitalization of one letter, constitutes a timely, reviewable action under § 502. Even if the act of *not* revising parts of a rule can constitute reviewable final agency action under § 502, this Court in *Preminger* rejected the "continuing violation theory" because if, as the theory assumes, the injury caused by an invalid agency rule is ongoing, the statute of limitations would always be nullified in these types of actions. *Preminger*, 517 F.3d at 1307 (citing *Wind River Mining Corp. v. United States*, 946 F.2d 710, 714 (9th Cir. 1991)). The same reasoning applies here, because every day the VA does *not* revise an interpretive rule in the manual would, under MVA's theory, permit a timely § 502 challenge to that provision.

As to the "Thailand Rules," MVA concedes that it is not challenging any revision to that manual provision at all, but is instead challenging that "the VA

[re]issued the Thailand Rules," while "retaining all their flaws." Pet. Br. 57; *see id*. 56 ("correct[ed] none of the known flaws"). Again, MVA's theory appears to be that any time the VA does *not* revise a manual provision, it is "reissuing" the rule and that this constitutes final and reviewable agency action that can be challenged within six years under § 502. Such a theory of timeliness would, like the rejected continuing violation theory, nullify § 2401(a)'s six-year statute of limitations, and should likewise be rejected.

At its heart, MVA's challenge to the Airspace and Thailand Rules do not truly arise out of the "VA's revisions," Pet. Br. 5-6, but rather arise from the substance of the rules themselves. Indeed, the merits portion of MVA's brief proves this point beyond dispute. Pet. Br. 29-34, 56-58. Both rules, however, have been "in full force and effect and operative," *see Preminger*, 517 F.3d at 1307, for at least the past decade, leaving MVA no room to argue that its challenge to these provisions is timely.

IV. This Court Lacks § 502 Jurisdiction Over MVA's Lawsuit

Under 38 U.S.C. § 502, this Court possesses jurisdiction to review final agency action by the VA "to which section 552(a)(1) or 553 of title 5 (or both) refers[.]" It is the petitioner's burden to establish the Court's jurisdiction. *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1075 (Fed. Cir. 2017) ("A party seeking the exercise of jurisdiction in its favor has the burden of

establishing that such jurisdiction exists." (citing *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)) (overruled on other grounds). MVA has not satisfied that burden here for any of the provisions it challenges.

A. The Act Of *Granting* MVA's Thailand Rulemaking Petition Is Not Referred To In 5 U.S.C. § 553

Section 502 grants this Court jurisdiction to "review the Secretary's denial of a request for rulemaking made pursuant to [5 U.S.C.] § 553(e)." *Preminger*, 632 F.3d at 1351-52; *see also* 5 U.S.C. § 553(e) (providing for "the right to petition for the issuance, amendment, or repeal of a rule"). Jurisdiction extends to instances "in which the petitioner is somehow denied 'the right to petition,'" *Preminger*, 632 F.3d at 1351 (quoting 5 U.S.C. § 553(e)), and also where the petitioner seeks review of "the Secretary's denial" of the petition itself, *id.* at 1352.

Here, the VA did *not* deny MVA's Thailand rulemaking request. In fact, the VA expressly *granted* MVA's request, explaining that it was "committed to initiate rulemaking on the issue of an herbicide presumption for service in Thailand" and that it would "publish the proposed rule *in the Federal Register*." Appx1-2 (granting petition on March 23, 2021). The Court does not have jurisdiction, therefore, to consider the Thailand Rules based on the VA's decision to *grant* MVA's rulemaking request. *Preminger*, 632 F.3d at 1351 (explaining that this Court has jurisdiction over "the Secretary's *denial*" of a rulemaking petition (emphasis added)).

MVA does not deny that the VA granted its petition. *See* Pet. Br. 56-58. Instead, MVA attempts to sidestep the jurisdictional limits of § 502 by arguing that the manual "revisions" the VA made to the "Thailand Rules" on December 31, 2019 should be construed as some sort of constructive denial. *See* Pet. Br. 56-58. That argument has at least three problems. *First*, MVA did not submit its petition for rulemaking until January 3, 2020—three days *after* the VA updated its manual. MVA cannot reasonably argue that a manual update published before VA received MVA's petition can constitute a denial of the petition. Appx12. *Second*, MVA's constructive denial argument makes no sense because less than three months after the VA received MVA's petition, the VA expressly granted it. Appx1. *Third*, after the VA granted MVA's petition, the VA confirmed (to MVA) that its December 2019 revision to the relevant manual provisions should not be viewed as a response to any rulemaking request, explaining that any changes in the Thailand provisions were non-substantive in nature. Appx1-2. Consequently, the Court lacks § 502 jurisdiction to review the VA's revision to the Thailand Rules based on the incorrect assertion that the VA has denied MVA's petition for rulemaking.

B. The "BWN Rule" Is Not Referred To In Section 552(a)(1)

Section 552(a)(1) refers to agency actions that must be published in the Federal Register including when the agency issues "substantive rules of general applicability . . . and statements of general policy or interpretations of general

applicability." *See LeFevre*, 66 F.3d at 1196 (quoting 5 U.S.C. § 552(a)(1)). Provisions in the M21-1 Manual can constitute reviewable actions under § 552(a)(1) if, for instance, they constitute an interpretative rule that "limits VA staff discretion, and, as a practical matter, impacts veterans benefits eligibility for an entire class of veterans." *NOVA*, 981 F.3d at 1374.[17]

But the BWN Rule is not an interpretative rule. The vast majority of the VA's revisions simply effectuate a policy letter that instructs adjudicators to route "all herbicide claims based on Vietnam-era service" to newly-created centralized processing teams. *Compare* Appx61-62 (policy letter) *with* Appx16 (manual provision). And the remaining updates do no more than incorporate prevailing law, such as removing any reference to *Haas* (which *Procopio* overruled) and explaining that veterans that served "aboard a vessel operating on [RVN's] . . . *eligible offshore waters*" are now statutorily considered to have "serv[ed] in the RVN." Appx51 (emphasis added). Neither of these revisions altered MVA's members' rights.

[17] MVA does not identify which of the provisions in § 552(a)(1) it believes applies to the BWN Rule. *See* Pet. Br. 4-5 (reciting statutory language). Our best understanding is that MVA contends that the BWN Rule provides a "substantive rule of general applicability," referred to in 5 U.S.C. § 552(a)(1)(D). *See* Pet. Br. 35-37 (arguing that "[t]he BWN Rule restricts the presumption of service connection" to certain veterans "defined by the BWN Act").

MVA concedes that the "surface" of these updates "do no more than establish centralized claims-processing rules for adjudicating of claims connected to service off the Vietnamese Coast." Pet. Br. 35. But unwilling to cede the point, MVA urges the Court to search more deeply, arguing that by piecing together different phrases in the VA's revisions, these "claims-processing rules" "subtl[y] and erroneous[ly]" do something more. *Id*. In addition to taking certain claims out of the hands of regional decisionmakers, MVA alleges that the manual also suggests that centralized processing teams will exclude certain claimants from the presumption while conceding "qualifying service in herbicide cases," thereby applying an incorrect interpretation of the law. *See* Pet. Br. 35-36.

The manual does not say any of this. The manual does not dictate how the centralized processing teams will decide offshore water claims, nor does it dictate the rules those teams will apply. *See* Appx16. The manual simply recognizes that centralized processing teams will bear "responsibilities" for "concessions of qualifying service, to include . . . eligible offshore waters as defined in *PL 116-23*." Appx16 (emphasis in original). That assignment of "responsiblit[y]" to a particular VA unit for BWN Act claims, Appx49, "does no more than" articulate "claims-processing rules for adjudicating of claims connected to service off the Vietnamese Coast." Pet. Br. 35. Whatever it is that MVA fears thus does not arise from the manual revisions it challenges here.

The most sensible reading of the BWN Rules is that they naturally fit the definition of "instructions to staff that affect a member of the public," which are referred to in 5 U.S.C. § 552(a)(2)(C) and may not be reviewed under § 502. Consistent with a VA policy letter published the same day as the manual revisions, the "BWN Rule" is an instruction that routes "all herbicide claims based on Vietnam-era service" to newly-created centralized processing teams. *Compare* Appx61-62 (policy letter) *with* Appx16 (manual provision). Thus, although the BWN update to the manual may "affect a member of the public," it does not affect any of those members' rights, meaning it is fundamentally nonsubstantive.

Accordingly, because MVA has not established that the BWN update is referred to in §§ 552(a)(1) or 553, and apparently acknowledges that the provision naturally fits the definition of a staff instruction, *see* Pet. Br. 35 (conceding that "surface" of the provision "does no more than" articulate "claims-processing rules for adjudicating of claims connected to service off the Vietnamese Coast"), the Court should find it lacks jurisdiction to entertain MVA's challenge to the BWN Rule.

C. The Revision To The "Airspace Rule" Is Not Referred To In Section 552(a)(1)

MVA's Airspace Rule challenge fails for the same reason. The manual update it challenges is not an interpretative revision that "limits VA staff discretion, and, as a practical matter, impacts veterans benefits eligibility for an

entire class of veterans." *NOVA*, 981 F.3d at 1374. As the VA makes clear, the only change the VA made to the Airspace provision on December 31, 2019 was to uncapitalize the first letter of "Era" in the noun-phrase "Vietnam era," Appx51, which is a non-substantive change. Accordingly, the Court should find it lacks jurisdiction to entertain MVA's challenge to the purported Airspace Rule.

V. Neither The "Airspace Rule" Nor The "BWN Rule" Is Contrary To Law, And Review Of The "Thailand Rules" Is Premature

A. The Airspace Rule Is A Valid Interpretation Of The AOA

Assuming that MVA has standing, the petition is timely, and the Court has § 502 jurisdiction to entertain MVA's challenge to the Airspace Rule, it should conclude that the VA's 1993 implementation of the rule under the AOA was both legal and proper.

When the AOA became law, it was expressly understood as codifying the VA's existing regulatory presumptions. *See* 137 Cong. Rec. H719, H726 (1991) (joint explanatory statement); 1991 U.S.C.C.A.N. 11, statement by President George Bush on signing H.R. 556 (Feb. 6, 1991). Shortly after Congress passed the AOA, the General Counsel concluded in a precedential opinion that the phrase "service in Vietnam" in the regulations did not "include service of a Vietnam era veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace." VA Office of Gen. Counsel Prec. Op. 7-93 (Aug. 12, 1993). The General Counsel reasoned that the VA's regulatory presumption,

codified in the AOA, was based on the CDC's 1990 cancer study that included veterans on land and at sea, but did not include "[v]eterans whose only service with respect to Vietnam was in aircraft which flew in Vietnamese airspace." *Id.* at 2-3. That view has remained unchanged and unaffected by Congress for the past three decades.

In fact, Congress buoyed the VA's understanding when it codified *Procopio* in the BWN Act. Congress is "presumed to have had knowledge" of VA's long-standing interpretation of the phrase "service in Vietnam" as it concerns service in Vietnamese airspace when it enacted the BWN Act. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n. 66 (1982). Yet Congress did not countermand VA's prevailing view by extending the statutory herbicide presumption to Vietnamese airspace. To the contrary, the House Committee on Veterans Affairs expressly *excluded* service in Vietnam's airspace from the ambit of the BWN Act: "an aircraft that passed in the airspace above the offshore waters would not have drawn water from the sea and therefore is not considered present within the offshore waters for purposes of this legislation." H.R. REP. NO. 116-58, at 11-12 (May 10, 2019). Congress and VA are thus in lockstep on this question.

MVA urges the Court not to consider these facts or any legislative history in deciding the issue, insisting that the text of the AOA is "clear on its face." *See* Pet. Br. 33-34 n. 3. Relying on the statutory rationale provided in *Procopio*—which

held that service in the "Republic of Vietnam" includes service in its territorial waters—MVA asserts that the location "'Republic of Vietnam'" must "clearly encompass[] that country's airspace" as well. Pet. Br. 29-34.

Respectfully, the statutory language "service in the Republic of Vietnam" is not clear on its face with respect to service in Vietnam's airspace. The VA's General Counsel grappled with the extent to which "service in Vietnam" encompasses service over Vietnam and found that phrase ambiguous. VA Office of Gen. Counsel Prec. Op. 7-93, ¶ 3 (Aug. 12, 1993). Only upon examining the regulation's history did the General Counsel arrive at the VA's prevailing view of the regulatory and statutory reach of the presumption. As explained in the precedential opinion, the VA General Counsel had good reason to review the history surrounding that phrase, and Congress reached the same conclusion as the VA just a few years ago.

MVA further argues that the AOA's "express inclusion of "active military … air service … in the Republic of Vietnam" means "Congress clearly intended to extend the presumption of service connection to air personnel who served in the 'air … in the Republic of Vietnam.'" Pet. Br. 34. But MVA fails to acknowledge that the BWN Act contains nearly identical language. 38 U.S.C. § 1116A(b). Yet neither party can reasonably dispute that the BWN Act does *not* cover Vietnamese airspace. This language does not, therefore, demonstrate clear Congressional

intent to include Vietnamese airspace within the herbicide exposure presumption in the AOA.

MVA is further incorrect in believing that *Procopio* should decide the matter. *Procopio* does not address whether its international law rationale applies to the airspace over the Republic of Vietnam. And factually, there is an important reason why the rationale should not apply. As veterans have frequently argued to this Court, it is "possible" that herbicides "ran into the seas surrounding Vietnam" which ships "used for drinking, bathing, and cooking." H.R. Rep. 116-58 at 10. That route of potential exposure simply does not apply to service in the confines of a military aircraft on a "high-altitude mission" above Vietnam. Appx37. To suggest that these two situations were equivalent in the eyes of Congress when it promulgated the AOA in 1991 is unsupported.[18]

At bottom, MVA relies almost squarely on *Procopio* to challenge the Airspace Rule, but fails to demonstrate that the VA's Airspace Rule conflicts with that decision.[19] Its petition on this issue should be denied.

---

[18] Without directly saying so, MVA seems to concede our point. While devoting pages of its brief to explain how "wind-drift" might affect how herbicide droplets travel when it comes to risk of herbicide exposure on the ground, Pet. Br. 51 (herbicide droplets "do not politely confine themselves to landing on the precise plants the military wishes to eliminate"), MVA makes no similar point when it comes to those travelling in "high altitude" airspace, *see* Pet. Br. 29-35.

[19] MVA has other avenues available if it wishes to have this precise issue examined, most notably a request for rulemaking to the Secretary.

B. MVA's Interpretation Of The BWN Act Does Not Accord With The Text Or History Of That Statute, Nor Does It Show That The BWN Rule Is Contrary To Law

By passing the BWN Act, Congress explicitly and unambiguously codified this Court's interpretation of the AOA in *Procopio* and thus intended the BWN Act's geographic scope to dictate the reach of the offshore presumption of exposure. Every relevant provision in the BWN Act, as well as the statute's legislative history, support this reading.

Starting with the statutory text, in subpart (a), the BWN Act explains that it covers same service covered by the AOA: "offshore of the Republic of Vietnam during the period beginning January 9, 1962, and ending May 7, 1975." *Compare* 38 U.S.C. § 1116A(a) and 38 U.S.C. § 1116(a). The BWN Act also covers "every disease covered by 1116 of this title becoming manifest as specified in that section in a veteran" with qualifying service. 38 U.S.C. § 1116A(a). And demonstrating that the purpose of the BWN Act was to cover areas that a prior implementation of the AOA may have missed, the BWN Act provides for retroactive awards corresponding with the filing dates of the previously denied claims as far back as September 25, 1985. 38 U.S.C. § 1116A(2)(B)(i).

When explaining the purpose of the statute, the House Committee on Veterans' Affairs stated that the BWN Act was "necessary" because the *Procopio* decision did not define the term "territorial sea," and so Congress chose to "codify

the Court's decision and mitigate concerns that the VA may narrowly interpret the decision, thereby excluding some [Blue Water Navy] veterans." H.R. REP. NO. 116-58, at 11 (May 10, 2019). Making clear its intent, the Committee added that the purpose of the BWN Act was "[t]o ensure that VA construes this bill to extend the presumption to all applicable [Blue Water Navy] veterans who may have been exposed to herbicide agents," and that "the Committee intends that VA's definition of the Republic of Vietnam for this purpose be broad and comprehensive." *Id.*

The Executive Branch made similar statements. In recommending that the President sign the BWN Act, the Secretary of the VA explained that the "central provision of the bill is intended to codify" this Court's *Procopio* decision, "which expanded the presumption of herbicide exposure under 38 U.S.C. § 1116 to all veterans who served within the 12-nautical mile territorial sea of the Republic of Vietnam during the Vietnam era." Appx78. The Secretary added that "the expansion of the presumption *is already current law*," and for that reason, the "VA does not oppose this provision." *Id.* (emphasis added).

Despite this unanimous understanding of the BWN Act's purpose and scope of coverage, MVA demurs. Rather than codifying *Procopio*, MVA argues that the BWN Act simply established a proverbial floor on the presumption of herbicide exposure for "offshore water" claims. Pet. Br. 41 (arguing that the BWN Act does no more than direct the VA to include "*at least* the listed areas."). According to

MVA, the BWN Act's definition of "offshore of Vietnam" evinces Congress' belief that offshore waters should "encompass additional areas beyond those expressly listed in subsection (d)." *Id*. That reading has no support in the statutory text or the legislative history.

The text of the BWN Act defines the term "offshore" in a decidedly exclusive manner:

> Notwithstanding any other provision of law, for purposes of this section, the Secretary shall treat a location as being offshore of Vietnam if the location is not more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting the following points[.]

38 U.S.C. § 1116A(d). The statutory phrase, "notwithstanding any other provision of law" "clearly signals the drafters intention that the provision of the 'notwithstanding' section overrides conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp*., 508 U.S. 10, 18 (1993). And by leading with that language, Congress indicated its intent for subpart (d) of § 1116A to govern claims for service connection filed by veterans who served offshore of Vietnam, including claims that would have previously been considered under the AOA (and accordingly under *Procopio*).

MVA has no meaningful answer to this textual argument, claiming baldly that "Congress did not purport to override any other statute or regulation's definition of the word 'offshore,'" and attempting to cast doubt on Congress' intent

by noting that Congress also used the phrase "for purposes of this section" within the same subpart. Pet. Br. 41 (citing 38 U.S.C. § 1116A(d)). By using the "notwithstanding" phrase, however, Congress was in fact "overrid[ing] conflicting provisions of *any other section*." *Cisneros*, 508 U.S. at 18 (emphasis added). It did not have to "purport to override" anything, Pet. Br. 41, because the "notwithstanding" phrase does precisely that. Similarly unpersuasive is MVA's reliance on the statutory phrase "for purposes of this section," which to MVA establishes a limit on the effect of the BWN Act itself. But treating the phrase as that kind of limiter in the context of *this* statute makes no sense. *See United States v. Garcia-Paz*, 282 F.3d 1212, 1214 (9th Cir. 2002) (stating that the "phrase 'for purposes of this section' has been interpreted in other contexts not to limit the application of the relevant definition to that section only" (citing *Johnson v. United States,* 206 F.2d 806, 808 (9th Cir.1953)). The statutory text leads with the "notwithstanding" phrase, 38 U.S.C. § 1116A(d), which signifies that it controls over any conflicting statutes. The text then uses the "for purposes of this section" phrase, meaning that the phrase does no more than subordinate *what follows*, which here is the definition of the term "offshore." Accordingly, when the statute provides the phrase "for purposes of this section" immediately before defining the meaning of "offshore," the phrase is establishing clear limitations on how term "offshore" can be defined. It is not capping the effect of the BWN Act, but is

rather capping the meaning of the term "offshore" to no "more than 12 nautical miles seaward of a line commencing" from various proscribed coordinates. 38 U.S.C. § 1116A(d).

MVA's reading does more than fail textually, it also requires that the Court ignore the history of the statute. The House Committee on Veterans Affairs stated without equivocation that the BWN Act would "codify" *Procopio*. *See* H.R. REP. NO. 116-58, at 11 (May 10, 2019). The Secretary of the VA agreed. Appx78. And in direct contravention of MVA's view that the BWN Act should be treated as nothing more than a floor for the herbicide exposure presumption, Pet. Br. 41-42, the House Committee on Veterans Affairs referred to the "definition of the Republic of Vietnam" as "*comprehensive*." H.R. REP. NO. 116-58, at 11 (May 10, 2019) (emphasis added).

MVA next argues that § 1116A "does not capture the entire territorial sea of the Republic of Vietnam." *See* Pet. Br. 39 (observing that the offshore "border outlined in section 1116A passes well to the south of the island" of Phu Quoc, "exclud[ing] the 12-mile territorial sea that surrounds it"). But it was Congress—not the VA—that defined the geographic scope of what "offshore" areas were included within the BWN Act. If MVA wishes to challenge the scope of the plain reach of the statute, it must direct that grievance toward Congress. The BWN Act states that "notwithstanding any other provision of law," "offshore" means "*not*

more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting" coordinates listed within a following table. 38 U.S.C. § 1116A(d) (emphasis added). That language is controlling.

Certainly there are some gaps in the BWN Act that the VA must fill through rulemaking. For instance, the coordinates Congress provided in § 1116A(d) appear to be derived from the Socialist Republic of Vietnam's (SRV) 1982 declaration of its territorial waters. *Compare* 38 U.S.C. § 1116A(d) *with* Appx266 (declaration printed in a State Dept. report). At least one of those demarcation lines is an open question, as signified by the fact that the line between those two points states that the "[c]laimed historic waters" will be "defined by later negotiations." Appx274 (starting point to "A1"). Rulemaking can resolve such questions, and that is what the VA is in the process of now doing.[20] But until that process concludes, MVA has no grounds to argue that the way in which the VA has routed herbicide exposure claims within the Veterans Benefits Administration "contains a subtle

[20] Congress presumably anticipated that implementing the law would be a time-consuming process, which is why Congress authorized the VA to implement § 1116A though other forms of guidance before prescribing regulations. Pub. L. 116-23, § 2(c)(1). Congress is, moreover, monitoring the situation by requiring the VA to provide quarterly updates on the status of its regulatory implementation. *Id.* at § 2(c)(2)(B).

and erroneous limitation." Pet Br. 35. MVA's challenge to the BWN Rule thus lacks merit and should be denied.

C. The VA Granted MVA's Thailand Petition, So Evaluating A Future Rulemaking Act Is Premature

Finally, the record demonstrates that VA has not denied MVA's Thailand rulemaking request. To the contrary, the VA informed MVA that it was granting its request. Appx1-2. And any suggestion that VA has unreasonably delayed in its implementation of its rulemaking decision is unfounded. See *Telecommunications Research Action Ctr. v. FCC*, 750 F.2d 70, 77-79 (D.C. Cir. 1984) (explaining that delay must be so "egregious as to warrant" an order compelling an agency to act). Court intervention in this action would be premature and "inappropriately interfere with further administrative action," *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998), by hindering the agency's efforts to do precisely what it has already committed to do. Appx1-2.

Moreover, even if the Court were inclined to grant MVA substantive relief in this regard, the Court may not grant MVA the relief it seeks, which is an order that the VA "extend the presumption of herbicide exposure (and with it, the presumption of service connection) to all veterans serving on U.S. military bases in Thailand during the Vietnam era." Pet. Br. 58. Remand is the proper remedy when, as alleged here, an agency's rule or decision is alleged to be arbitrary, capricious, or contrary to law. *See, e.g., Am. Horse Protection Ass'n, Inc. v. Lyng*,

812 F.2d 1, 7 (D.C. Cir. 1987) ("This remedy is particularly appropriate when the agency has failed to provide an adequate explanation of its denial [of a rulemaking petition]."); *Deloach v. Shinseki*, 704 F.3d 1370, 1380-81 (Fed. Cir. 2013) (noting that when the Board of Veterans' Appeals "fail[s] to provide adequate reasons and bases" for its decision as required by statute, remand is the proper remedy). Although, for the reasons provided above, the Court should not provide MVA with any of the relief that it seeks in its petition.

CONCLUSION

For these reasons, the Court should dismiss or deny MVA's petition.

Respectfully Submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

MARTIN F. HOCKEY, JR.
Acting Director

/s/ Eric P. Bruskin
ERIC P. BRUSKIN
Assistant Director

Of Counsel:

/s/ Meen Geu Oh
MEEN GEU OH
Senior Trial Counsel
Commercial Litigation Branch
Civil Division, Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-0184

BRIAN D. GRIFFIN
Deputy Chief Counsel
Office of the General Counsel
U.S. Dep't of Veterans Affairs

Fax: (202) 305-7644
Meen-Geu.Oh@usdoj.gov

July 19, 2021

Attorneys for Respondent

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify under penalty of perjury that on this 19th day of July, 2021, a copy of the foregoing "BRIEF FOR RESPONDENT" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

I further certify that pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, this brief complies with the Court's type-volume limitation rules. According the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 13,018 words.

/s/Meen Geu Oh
MEEN GEU OH
Counsel for Respondent