Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

To help the Coast Guard establish regular and meaningful consultation and collaboration with Indian and Alaskan Native tribes, we published a notice in the **Federal Register** (66 FR 36361, July 11, 2001) requesting comments on to best carry out the order. We invite your comments on how this proposed rule might impact tribal governments, even if that impact may not constitute a ''tribal implication'' under the Order.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that Order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have considered the environmental impact of this proposed rule and concluded that, under figure 2–1, paragraph (34)(f), of Commandant Instruction M16475.lD, this rule is categorically excluded from further environmental documentation because it is a regulation establishing an additional anchorage ground. A ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 110

Anchorage grounds.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2030, 2035, 2071; 49 CFR 1.46 and 33 CFR 1.05–1(g).

2. In § 110.197, add a new paragraph (a)(3), and revise paragraph (b) to read as follows:

§ 110.197 Galveston Harbor, Bolivar Roads Channel, Texas.

(a) * * *

(3) Anchorage area (C). The water bounded by a line connecting the following points:

Latitude	Longitude
29°20′39.0″ N	94°46′07.5″ W
29°21′06.1″ N	94°47′00.2″ W
29°21′14.5″ N	94°46′34.0″ W
29°21′24.0″ N	94°45′49.0″ W

and thence to the point of beginning.

(b) *The regulations.* (1) The anchorage area is for the temporary use of vessels of all types, but especially for naval and merchant vessels awaiting weather and other conditions favorable to the resumption of their voyages.

(2) Except when stress of weather makes sailing impractical or hazardous, vessels shall not anchor in anchorage areas (A) or (C) for more than 48 hours unless expressly authorized by the Captain of the Port Houston-Galveston. Permission to anchor for longer periods may be obtained through Coast Guard Vessel Traffic Service Houston/Galveston on VHF–FM channels 12 (156.60 MHz) or 13 (156.65 MHz).

(3) No vessel with a draft of less than 22 feet may occupy anchorage (A) without prior approval of the Captain of the Port.

(4) No vessel with a draft of less than 16 feet may anchor in anchorage (C) without prior approval of the Captain of the Port Houston-Galveston.

(5) Vessels shall not anchor so as to obstruct the passage of other vessels proceeding to or from other anchorage spaces.

(6) Anchors shall not be placed in the channel and no portion of the hull or rigging of any anchored vessel shall extend outside the limits of the anchorage area.

(7) Vessels using spuds for anchors shall anchor as close to shore as practicable, having due regard for the provisions in paragraph (b)(5) of this section.

(8) Fixed moorings, piles or stakes, and floats or buoys for marking anchorages or moorings in place, are prohibited.

(9) Whenever the maritime or commercial interests of the United States so require, the Captain of the Port, or his authorized representative, may direct the movement of any vessel anchored or moored within the anchorage areas.

Dated: January 3, 2003.

Roy J. Casto,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 03–1873 Filed 1–27–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AL37

Effective Dates of Benefits for Disability or Death Caused by Herbicide Exposure; Disposition of Unpaid Benefits After Death of Beneficiary

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its adjudication regulations concerning certain awards of disability compensation and dependency and indemnity compensation (DIC). Under the proposed amendment, certain awards of disability compensation or DIC made pursuant to liberalizing regulations concerning diseases presumptively associated with herbicide exposure may be made effective retroactive to the date of the claim or the date of a previously denied claim, even if such date is earlier than the effective date of the regulation establishing the presumption. The proposed rule also provides that VA may pay to certain individuals any amounts a deceased beneficiary was entitled to receive under the effective-date provisions of this proposed rule, but which were not paid prior to the beneficiary's death. This amendment appears necessary to reflect the requirements of court orders in a class-action case.

DATES: Comments must be received on or before March 31, 2003.

ADDRESSES: Mail or hand deliver written comments to: Director, Office of Regulatory Law (02D), Room 1154, 810 Vermont Ave., NW., Washington, DC 20420; or fax comments to (202) 273–9289; or e-mail comments to *OGCRegulations@mail.va.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AL37.'' All comments received will be available for public inspection in the Office of Regulatory Law, Room 1158, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: David Barrans, Staff Attorney (022), Office of General Counsel, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–6332.

SUPPLEMENTARY INFORMATION: A series of court orders in the class-action litigation in *Nehmer* v. *United States Department of Veterans Affairs,* No. CV–86–6160 TEH (N.D. Cal.), requires VA to assign retroactive effective dates for certain awards of disability compensation and DIC in a manner not provided for in any existing statute or regulation. The court orders require that, when VA awards disability compensation or DIC pursuant to a regulatory presumption of service connection under the Agent Orange Act of 1991, Pub. L. 102–4, VA must in certain cases make the award effective retroactive to the date of the claimant's application or the date of a previously-denied application, even if such date is earlier than the effective date of the regulation establishing the presumption. Current regulations, however, prohibit VA from making a benefit award effective any earlier than the effective date of the regulation establishing the presumption. Because the conflict between current statutes and regulations and the *Nehmer* court orders may create confusion, we propose to amend our regulations to reflect the requirements of the *Nehmer* court orders.

In 1991, Congress enacted the Agent Orange Act of 1991, Pub. L. 102–4 (codified at 38 U.S.C. 1116 and in the notes to that section). That Act established presumptions for chloracne, non-Hodgkins lymphoma, and soft-tissue sarcoma. It further provided that VA would obtain reports from the National Academy of Sciences (NAS) every two years for a ten-year period, assessing the available scientific evidence regarding the association between exposure to herbicides and the development of diseases in humans. After receiving each report, VA must determine whether there is a ''positive association'' between herbicide exposure and any of the diseases discussed in the report. If a positive association exists for any such disease, VA must issue regulations to establish a presumption of service connection for that disease in veterans exposed to herbicides during service. VA has established presumptions of service connection for seven additional diseases or categories of disease, which are listed in 38 CFR 3.309(e).

The Agent Orange Act of 1991 provides that regulations issued pursuant to that act shall take effect on the date they are issued. Under generally applicable effective-date rules in 38 U.S.C. 5110(g) and 38 CFR 3.114, when VA awards benefits pursuant to a liberalizing regulation, the award may not be made effective any earlier than the effective date of the liberalizing regulation. Under those provisions, awards based on presumptions of service connection established under the Agent Orange Act of 1991 can be made effective no earlier than the date VA issued the regulation authorizing the presumption.

However, the district court orders in the *Nehmer* litigation create an exception to the generally applicable rules in 38 U.S.C. 5110(g) and 38 CFR 3.114, and require VA to assign retroactive effective dates for certain awards of disability compensation and DIC that are based on VA's regulations under the Agent Orange Act of 1991, Pub. L. 102–4. This exception applies only to claims by members of the *Nehmer* class. VA is required to comply with the district court's orders, which have been affirmed by the United States Court of Appeals for the Ninth Circuit to the extent they were appealed. Accordingly, we propose to issue a regulation explaining the requirements established by those orders to ensure timely and consistent adjudication under those orders without further need for special instructions.

The *Nehmer* court orders also require that, if an individual was entitled to retroactive benefits as a result of the court orders but died prior to receiving such payment, VA must pay the entire amount of such retroactive payments to the veteran's estate, without regard to statutory limits on payment of benefits following a beneficiary's death. Section 5121(a) of title 38, United States Code, provides that, when VA benefits remain due and unpaid at the time of a beneficiary's death, VA may pay to certain survivors only the portion of such benefits that accrued during the two-year period preceding death. Current VA regulations reflect the requirements of section 5121(a), and contain no exception for cases covered by the *Nehmer* court orders. Because the conflict between current regulations and the *Nehmer* court orders may create confusion, we propose to amend our regulations to reflect the requirements of the *Nehmer* court orders. Accordingly, we propose to issue rules reflecting the limited exception to section 5121(a) established by the *Nehmer* court orders. This exception applies only to certain benefits for members of the *Nehmer* class. As stated above, the intent of this rule is to ensure timely and consistent compliance with the court's orders without the need for further special instructions.

The Nehmer Litigation

The *Nehmer* litigation was initiated in 1986 to challenge a VA regulation, former 38 CFR 3.311a (which has since been rescinded) that stated, among other things, that chloracne was the only disease shown by sound medical and scientific evidence to be associated with herbicide exposure. In 1987, the district court certified the case as a class action on behalf of all Vietnam veterans and their survivors who had been denied VA benefits for a condition allegedly associated with herbicide exposure or who would be eligible to file a claim for such benefits in the future. In an order issued on May 3, 1989, the court invalidated the portion of the regulation providing that no condition other than chloracne was associated with herbicide exposure and voided all VA decisions denying benefit claims under that portion of the regulation. *Nehmer* v. *United States Veterans' Admin.,* 712 F. Supp. 1404 (N.D. Cal. 1989).

After Congress enacted the Agent Orange Act of 1991, Pub. L. 102–4, VA and the plaintiff class in *Nehmer* entered into a stipulation to address remedial issues resulting from the May 1989 order. The stipulation provided that VA would not deny any claims of the *Nehmer* class members until VA had acted on the first NAS report issued under the Agent Orange Act of 1991, Pub. L. 102–4. The stipulation further stated that, once VA issued regulations establishing a presumption of service connection for any disease pursuant to the Act, VA would readjudicate all claims for any such disease in which a prior denial had been voided by the district court's May 3, 1989 order and would adjudicate all similar claims filed after May 3, 1989. The stipulation stated that, if benefits were granted upon readjudication of a claim where a prior denial was voided, the effective date of the benefit award would be the date VA received the claim underlying the

voided decision or the date the disability arose or the death occurred, whichever was later. In claims filed after May 3, 1989, the stipulation stated that the effective date of any benefits awarded would be the date VA received the claim or the date the disability arose or the death occurred, whichever was later. The district court incorporated the stipulation in a final order.

On October 15, 1991, VA issued a regulation establishing a presumption of service connection for soft-tissue sarcomas based on herbicide exposure. On February 6, 1991, the Agent Orange Act of 1991, Pub. L. 102–4, established statutory presumptions of service connection for non-Hodgkin's lymphoma, soft-tissue sarcomas, and chloracne. In June 1993, VA received the first NAS report under the Agent Orange Act of 1991. Thereafter, VA issued regulations establishing presumptions of service connection for four additional diseases (Hodgkin's disease, February 3, 1994; porphyria cutanea tarda, February 3, 1994; respiratory cancers, June 9, 1994; multiple myeloma, June 9, 1994). In 1994, VA began to readjudicate the claims where a prior denial had been voided by the 1989 court order and to adjudicate claims filed subsequent to that order. In cases where VA granted benefits upon such readjudication or adjudication, it assigned effective dates as required by the *Nehmer* stipulation and order, even though the effective dates in many cases were earlier than the effective dates of the statute or liberalizing regulations that authorized the awards.

In 1996, VA received the second NAS report under the Agent Orange Act of 1991. Based on new information contained in that report, VA issued regulations on November 7, 1996 establishing presumptions of service connection for prostate cancer and acute and subacute peripheral neuropathy. In 2001, based on new information in a later NAS report, VA established a presumption of service connection for type 2 diabetes effective July 9, 2001.

In 2000, the parties to the *Nehmer* case disagreed as to whether the retroactive-payment provisions of the *Nehmer* stipulation and order applied to all eight diseases that were associated with herbicide exposure at that time (type 2 diabetes had not yet been recognized) or only to the seven diseases that were presumptively service connected based on the Agent Orange Act of 1991, Pub. L. 102–4, and the first NAS report under that statute. The plaintiffs argued that the stipulation required VA to pay retroactive benefits for all diseases that are service connected at any time under the Agent Orange Act of 1991, Pub. L. 102–4. VA argued that the stipulation required retroactive payment only for disease service connected based on the first NAS report, and that the broader interpretation urged by the plaintiffs was contrary to the Agent Orange Act of 1991, Pub. L. 102–4 and 38 U.S.C. 5110(g).

In a December 12, 2000 order, the district court held that the stipulation and order required VA to give retroactive effect to all regulations issued under the Agent Orange Act of 1991, Pub. L. 102–4. VA appealed that order to the United States Court of Appeals for the Ninth Circuit. On April 1, 2002, the Court of Appeals affirmed the district court's order.

Purpose of This Rule

We propose to issue a new regulation, to be codified at 38 CFR 3.816, to explain the rules VA is required to apply as a result of the court orders in the *Nehmer* case. Those rules are complex and are not reflected in any current statute or regulation. Moreover, the public may have difficulty accessing and understanding the court orders establishing those rules. Accordingly, we believe a regulation explaining the *Nehmer* rules is necessary to provide guidance to VA personnel as well as to VA claimants and their representatives.

To the extent the rules required by the *Nehmer* court orders depart from the generally-applicable rules in 38 U.S.C. 5110(g) and 5121(a), they are judicially-created exceptions to those general rules. VA is required to comply with the *Nehmer* court orders. In order to clarify the basis for this regulation, we propose to state, in § 3.816(a), that these rules are required by the *Nehmer* court orders.

Definitions

The effective-date rules required by the *Nehmer* court orders apply only to members of the plaintiff class certified by the district court in that case. In a 1987 order, the district court ruled that the *Nehmer* class would consist of all veterans and their survivors who have applied for VA benefits for disability or death due to exposure in service to an herbicide containing dioxin or who would become eligible in the future to apply for such benefits. Accordingly, any Vietnam veteran would potentially be a *Nehmer* class member, as would any survivors of such veteran who would be eligible to apply for DIC. The effective-date provisions of this rule would apply only to class members entitled to disability compensation or DIC for disability or death due to a disease associated with herbicide exposure. Accordingly, for purposes of this rule, we propose to define a ''*Nehmer* class member'' as a Vietnam veteran who has a covered herbicide disease, or a surviving spouse, child, or parent of a deceased Vietnam veteran who died from a covered herbicide disease.

The effective-date rules required by the *Nehmer* court orders apply only to benefits for disability or death caused by a disease for which VA has established a presumption of service connection under the Agent Orange Act of 1991, Public Law 102–4. For purposes of this rule, we propose to use the term ''covered herbicide disease'' and to define that term to mean a disease for which the Secretary of Veterans Affairs has established a presumption of service connection before October 1, 2002 pursuant to the Agent Orange Act of 1991, Public Law 102–4, excluding chloracne. As explained below in this notice, the effective-date rules of the *Nehmer* stipulation and court orders apply only to diseases for which a presumption of service connection is established under the authority granted by the Agent Orange Act of 1991, Public Law 102–4. Because the authority granted by that Act at the time the stipulation was entered extended only until September 30, 2002, any presumptions established after that date based on other legislative grants of rule-making authority are not within the scope of the *Nehmer* stipulation and court orders.

Although chloracne is a presumptive herbicide disease, we propose to exclude it from the definition of covered herbicide disease for purposes of this rule because claims and awards based on chloracne were not affected by any of the *Nehmer* court orders. VA established a presumption of service connection for chloracne effective September 25, 1985, and that presumption has remained in effect throughout the period relevant to the *Nehmer* litigation. In its May 3, 1989, order, the district court invalidated the portion of VA's regulation providing that conditions other than chloracne were not shown to be associated with herbicide exposure and it voided decisions made under that portion of the regulation. The court left intact the provision establishing a presumption of service connection for chloracne and did not void any decisions involving chloracne. Moreover, the *Nehmer* stipulation and order states that it applies to diseases service connected by VA ''in the future'' under the Agent Orange Act of 1991, Public Law 102–4. Because chloracne had been presumptively service connected since

1985, it was not affected by the stipulation and order.

Effective Date Rules

The effective-date rules stated in the proposed regulation reflect paragraph 5 of the *Nehmer* stipulation and order. That paragraph states separate rules governing the effective dates of awards granted upon readjudication of a claim where a prior denial was voided by the May 3, 1989 *Nehmer* order and the effective dates of awards granted upon adjudication of a claim filed after May 3, 1989.

With respect to the voided decisions, the stipulation and order provides that the effective date of an award made upon readjudication of the claim will be the later of the date the claim giving rise to the voided decision was filed (provided that the basis of the award is the same basis upon which the original claim was filed) or the date the disability arose or the death occurred. The stipulation and order states that the ''basis'' of the original claim refers to the disease or condition required, under provisions of a VA procedural manual, to be coded in the VA rating decision on the claim. The stipulation and order further states that the provisions of 38 U.S.C. 5110(b)(1) and (d)(1) will govern when applicable. Section 5110(b)(1) provides for a disability compensation effective date corresponding to the day following the veteran's release from service if the veteran's application is received within one year of that date. Section 5110(d)(1) provides for a DIC effective date corresponding to the first day of the month in which death occurred if the claimant's application is received within one year from the date of death.

With respect to claims filed after May 3, 1989, the stipulation and order provides that the effective date of benefits shall be the later of the date VA received the claim asserting the basis upon which the claim was granted or the date the disability arose or the death occurred.

We propose to provide paragraphs separately explaining the application of these rules to disability compensation awards and DIC awards. In view of the complexity of the *Nehmer* rules, we believe this level of detail will provide greater clarity.

Effective-Date Rules for Disability Compensation

1. Claims by Nehmer Class Members Denied Between September 25, 1985 and May 3, 1989

Section 3.816(c)(1) states that, if a *Nehmer* class member is entitled to disability compensation for a covered herbicide disease, and VA previously denied service connection for the same disease in a decision issued between September 25, 1985, the effective date of the invalidated regulation, and May 3, 1989, the effective date will be the later of the date VA received the claim on which the prior decision was based or the date the disability arose. This rule governs cases where a prior denial was voided by the district court's May 3, 1989 order. In an order dated February 11, 1999, the district court in *Nehmer* held that its 1989 order had voided claims rendered while former 38 CFR 3.311a(d) was in effect, provided that such claims denied compensation for a disease that VA later recognized as being associated with herbicide exposure. The court held that it is irrelevant whether the prior claim alleged that the disease was caused by herbicide exposure or whether the prior decision had referenced former § 3.311a(d). Accordingly, the only requirements for retroactive payment to a class member under proposed § 3.816(c)(1) would be that the decision have been rendered between September 25, 1985 and May 3, 1989—the period when former § 3.311a(d) was in effect—and that the decision have denied service connection for the same covered herbicide disease for which compensation has now been awarded.

Paragraph 5 of the *Nehmer* stipulation and order provides that the basis of the prior claim will be determined by reference to the diseases or conditions coded in the prior rating decision as required by provisions of a VA procedural manual. In accordance with the manual, VA rating decisions on claims for disability compensation ordinarily identify each claimed disease or injury by name and by a diagnostic code found in VA's Schedule for Rating Disabilities, which is located in 38 CFR part 4. There may be variations in both the terminology and diagnostic codes assigned to a particular disease depending on various aspects of the disease or associated conditions. For example, disability due to cancer of the larynx may have been rated as either a malignant neoplasm of the respiratory system (diagnostic code 6844) or residuals of a laryngectomy (diagnostic code 6819). Similarly, soft-tissue sarcomas may be described using different terminology or different diagnostic codes depending upon the body part or system primarily involved. Additionally, some diagnostic codes refer to broad classes of disease that encompass both covered and non-covered diseases. For example, diagnostic code 6819 (Neoplasms, malignant, any specified part of respiratory system exclusive of skin growths) may refer to either a covered disease (*e.g.*, lung cancer) or a non-covered disease (*e.g.*, nasal cancer).

We do not intend that minor, immaterial variations in terminology or diagnostic code would preclude application of the *Nehmer* rules. However, it must be established that the prior decision involved the same disease for which compensation has now been awarded, rather than a distinct condition arguably bearing some relation to the compensable disease because, for example, it involves the same body part or system. Accordingly, we propose to state that a prior decision will be construed as having denied compensation for the same disease if the prior decision denied compensation for a disease that reasonably may be construed as the same covered herbicide disease for which compensation has been awarded. We further propose to state that minor variations in the terminology used in the prior decision will not preclude a finding, based on the record at the time of the prior decision, that the decision denied service connection for the same covered herbicide disease.

2. Claims by Nehmer Class Members Pending on May 3, 1989, or Filed Between May 3, 1989 and the Effective Date of the Authorizing Statute or Regulation

Proposed § 3.816(c)(2) states that, if a class member is entitled to compensation for a covered herbicide disease and the class member's claim for compensation for that same disease was either pending on May 3, 1989 or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the disease, the effective date of compensation will be the later of the date VA received such claim or the date the disability arose. The *Nehmer* stipulation and order refers only to claims denied prior to May 3, 1989 and claims filed after that date. It does not expressly provide effective dates for claims that were filed prior to May 3, 1989 but not yet adjudicated by that date. Notwithstanding this apparent oversight, we propose to treat such claims in the same manner as claims filed after May 3, 1989, as no decision on a claim pending on May 3, 1989, could have been voided by the court order.

We propose to state that a claim will be considered a claim for compensation for a particular covered herbicide disease if the claimant's application and

other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing compensation claims, as indicating an intent to apply for compensation for the covered herbicide disability. This will merely ensure that the generally applicable provisions of statute and regulation governing claims will apply in determining whether and at what date a particular claim was filed for purposes of this rule.

3. Qualifying Claims by Nehmer Class Members Filed Within 1 Year After Separation From Service

We propose to state in § 3.816(c)(3) that, if a claim referenced in paragraph (c)(1) or (c)(2) was received by VA within one year after the date of the veteran's separation from service, the effective date of compensation will be the day following such separation. This would ensure that the principle stated in 38 U.S.C. 5110(b)(1) is applied, as required by the *Nehmer* stipulation and order. We note that the stipulation and order requires VA to apply section 5110(b)(1) to awards made upon readjudication of claims where a prior decision was voided by the court's 1989 order, but not to awards made in claims pending on or filed after May 3, 1989. Nevertheless, we propose to apply section 5110(b)(1) to claims pending on or filed after May 3, 1989, in order to ensure that the generally applicable provisions of that statute are applied in a consistent manner.

4. Other Claims

We propose to state in § 3.816(c)(4) that, if the requirements of paragraph (c)(1) or (c)(2) are not met, the effective date of the award shall be determined in accordance with 38 CFR 3.114 and 3.400, the provisions generally governing the effective dates of disability compensation. The United States Court of Appeals for Veterans Claims has held that the provisions of the *Nehmer* stipulation and order do not apply where a prior claim was denied before September 25, 1985. *See Williams* v. *Principi,* 15 Vet. App. 189 (2001) (en banc).

Similarly, the stipulation and order does not apply in cases where the veteran's initial claim for a covered herbicide disease was filed after the effective date of the regulations establishing a presumption of service connection for that disease. Further, application of the *Nehmer* stipulation to such cases would ordinarily be detrimental to veterans. Under 38 CFR 3.114, when disability compensation is awarded pursuant to a liberalizing regulation, the award may be made effective up to one year prior to the date of the claim, but no earlier than the effective date of the liberalizing regulation. In contrast, the *Nehmer* stipulation and order generally does not permit payment for any period prior to the date of the veteran's claim, except in the limited circumstances described in 38 U.S.C. 5110(b)(1) and (d)(1) involving claims filed within one year of the date of separation from service or the date of death.

Dependency and Indemnity Compensation

1. Claims by Nehmer Class Members Denied Between September 25, 1985 and May 3, 1989

Section 3.816(d)(1) states that, if a *Nehmer* class member is entitled to DIC for death caused by a covered herbicide disease, and VA previously denied DIC for the death in a decision issued between September 25, 1985 and May 3, 1989, the effective date will be the later of the date VA received the claim on which the prior decision was based or the date the death occurred. This rule governs cases where a prior denial was voided by the district court's May 3, 1989 order. Because DIC claims do not require assignment of disability ratings, decisions on DIC claims do not assign a diagnostic code corresponding to VA's rating schedule and may not identify the disease causing death with the same specificity necessary to decisions concerning disability compensation. Moreover, because the cause of death is usually established by the death certificate and medical records existing at death, DIC claims filed at different times ordinarily will not involve different conditions, as often occurs with respect to disability compensation claims. Accordingly, rather than requiring a specific finding that the prior denial of DIC expressly referenced the same covered herbicide disease that provided the basis for the current DIC award, we propose to require only that the prior decision issued between September 25, 1985 and May 3, 1989, have denied DIC for the same death.

2. Claims By Nehmer Class Members Pending on May 3, 1985 or Filed Between May 3, 1989 and the Effective Date of the Authorizing Statute or Regulation

Proposed § 3.816(d)(2) states that, if the class member's claim for DIC for the death was either pending on May 3, 1989 or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the disease causing the death, the effective date of DIC will be the later of the date VA received such claim or the date the death occurred. For the reasons stated above with respect to disability compensation, we propose to include claims filed before May 3, 1989, but still pending on that date, even though the *Nehmer* stipulation and order does not expressly provide for such claims.

The provisions of 38 U.S.C. 5101(b)(1) and 38 CFR 3.152(b)(1) state that a claim by a surviving spouse or child for death pension shall be considered a claim for DIC as well. We propose to reference this requirement in the proposed rule. Further, for the same reasons stated above with respect to disability compensation claims, we propose to state that a claim will be considered a claim for DIC if the claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing DIC claims, as indicating an intent to apply for DIC.

3. Qualifying Claims by Nehmer Class Members Filed Within 1 Year After Date of Death

We propose to state in § 3.816(d)(3) that, if a claim referenced in paragraph (d)(1) or (d)(2) was received by VA within one year after the date of the veteran's death, the effective date of DIC will be the first day of the month of death. This would ensure that the principle stated in 38 U.S.C. 5110(d)(1) is applied, as required by the *Nehmer* stipulation and order. We note that the stipulation and order requires VA to apply section 5110(d)(1) to awards made upon readjudication of claims where a prior decision was voided by the court's 1989 order, but not to awards made in claims pending on or filed after May 3, 1989. Nevertheless, we propose to apply section 5110(d)(1) to claims pending on or filed after May 3, 1989, in order to ensure that the generally applicable provisions of that statute are applied in a consistent manner.

4. Other Claims

For the reasons stated above with respect to disability compensation, we propose to state in § 3.816(d)(4) that, if the requirements of paragraph (d)(1) or (d)(2) are not met, the effective date of DIC will be governed by 38 CFR 3.114 and 3.400.

Effect of Other Provisions

We propose to state in § 3.816(e)(1) that, if the requirements of paragraphs (c)(1) or (c)(2) or (d)(1) or (d)(2) are met, the effective date of benefits will be determined as provided by this rule, without regard to any contrary provision

in 38 U.S.C. 5110(g) or 38 CFR 3.114. As noted above, the effective-date rules required by the *Nehmer* court create a limited exception to that statute and regulation. In order to avoid confusion among VA personnel, claimants, and claimants' representatives regarding the effect of this exception, we believe it is necessary to state clearly that the *Nehmer* rules shall be applied, when they are applicable, without regard to 38 U.S.C. 5110(g) or 38 CFR 3.114.

We also propose to state that the effective-date provisions in this rule will not apply if a statute or regulation other than 38 U.S.C. 5110(g) or 38 CFR 3.114 would bar a retroactive payment that would otherwise be available under the *Nehmer* rules. For example, if a DIC claimant did not qualify as a surviving spouse at the time of the prior DIC claim, VA would lack authority to pay DIC to the claimant for periods relevant to such claim, even if the claimant later attains the status of a surviving spouse, based, for example, upon termination of remarriage. The *Nehmer* court orders require VA to give retroactive effect to its herbicide regulations, but do not purport to eradicate statutory bars to benefits that would preclude payment even if the herbicide regulations apply retroactively.

Proposed paragraph (e)(2) would explain the effect of section 505 of Public Law 104–275, which prohibits VA from making retroactive payments in certain circumstances where a benefit award is based on service in the Republic of Vietnam prior to August 5, 1964. Prior to January 1, 1997, the presumptions of service connection for diseases associated with herbicide exposure applied only to veterans who served in the Republic of Vietnam during the Vietnam era, which was then defined by statute and regulation to encompass the period beginning on August 5, 1964 and ending on May 7, 1975. In 1996, Congress enacted Public Law 104–275, section 505(b) of which extended those presumptions to veterans who served in the Republic of Vietnam during the period between January 9, 1962, and August 4, 1964. Congress specified, in section 505(d) of Public Law 104–275, that the amendment would take effect on January 1, 1997, and that ''[n]o benefit may be paid or provided by reason of such amendments for any period before such date.'' Accordingly, some claims may have been denied prior to January 1, 1997, because the claimants' service did not meet the then-existing statutory requirement of service during the Vietnam era. Although some such claimants may now be entitled to presumptive service connection under the liberalizing 1996 statute, Congress has prohibited VA from paying retroactive benefits based on the amendment made by Public Law 104–275.

We propose to state that the retroactive payment provisions of these proposed rules do not apply if the veteran's Vietnam service ended before August 5, 1964 and the class member's prior claim for benefits was denied by VA before January 1, 1997. In such cases, the denial was required by statute and VA is prohibited from paying retroactive benefits based on the prior claim. We propose to state that the effective date of any subsequent award in such cases will be governed by 38 U.S.C. 5110(g). We further propose to state that, if a veteran's Vietnam service ended before August 5, 1964 and the class member's claim for benefits was pending on or was received by VA after January 1, 1997, the effective date shall be the later of the effective date provided for in the proposed rules or January 1, 1997. This would conform to the requirement in Public Law 104–275 that VA may not pay benefits in such cases for any period before January 1, 1997.

Payment of Benefits to Survivors of Deceased Beneficiaries

1. Requirements of the Nehmer Court Orders

In its December 12, 2000 order, the district court held that, when a *Nehmer* class member entitled to retroactive benefits under the *Nehmer* stipulation and order dies prior to receiving payment of such benefits, VA must pay the full amount of such benefits to the class member's estate. Under 38 U.S.C. 5121 and 38 CFR 3.1000, when any monetary benefits remain due and unpaid at the time of a beneficiary's death, VA may pay to certain individuals only the portion of such benefits that accrued during the two-year period preceding death. Further, VA cannot pay any such accrued benefits unless the appropriate payee files a claim for accrued benefits within one year after the date of death. However, the *Nehmer* court held that these restrictions do not apply to payments of amounts payable pursuant to the *Nehmer* stipulation and order. Rather, the court held that VA must pay the entire amount of such retroactive payment to the class member's estate and must do so without requiring a claim for accrued benefits.

2. Persons Eligible for Payments

In implementing the court's order, VA found that it was impractical in most cases to pay retroactive benefits to a class member's estate. Although VA claims files ordinarily contain information identifying persons who would be eligible for accrued benefits under section 5121 of title 38, United States Code, they generally do not contain information concerning the estates of veterans and other class members. Further, in a substantial number of cases, entitlement to retroactive payments under the *Nehmer* stipulation and order is established several months or even years after the class member's death, at a time when the decedent's estate would have been finally settled. In such cases, there may be no existing estate to receive payment. Even if an estate exists, paying benefits to the estate would arguably contravene the fundamental purpose of the veterans' benefits laws to provide payments for the use of the veteran and his or her family. Section 5121 provides that accrued benefits shall be paid to the decedent's surviving spouse, children, or dependent parents (in that line of succession), but does not permit payment to a decedent's estate. Although this statute limits the amount of accrued benefits payable, it clearly indicates that the accrued benefits are intended for the use of the decedent's family rather than the decedent's estate and creditors. If benefits were paid to a decedent's estate, they would potentially be subject to claims of creditors of the estate, with the possibility that the decedent's family would obtain no benefit from such payments. This would improperly deprive the decedent's family of the benefits expressly authorized by section 5121(a) (to the extent the payment to the estate encompassed benefits due and unpaid for the two-year period preceding death), and would contravene the general purpose of veterans benefits laws to provide benefits for the personal use of the veteran and his or her family.

After consulting with representatives of the *Nehmer* class, VA decided to issue payment directly to the persons who would have been eligible to receive accrued benefits under 38 U.S.C. 5121(a) at the time of the class member's death, rather than withholding all payment. We believe this procedure is consistent with the purpose of the *Nehmer* court orders and is more beneficial to class members, in view of the impracticability of locating and paying estates and the possibility that payments to estates may not inure to the benefit of the class member's survivors. We also believe that this procedure ensures that payments are made in the

manner most consistent with the language and purpose of existing law.

Consistent with this practice, we propose to state in paragraph 3.816(f)(1) that, if a *Nehmer* class member dies prior to receiving payment of retroactive benefits due pursuant to the *Nehmer* stipulation and order, VA will pay the full amount of such unpaid benefits directly to the person or persons who would have been eligible to receive accrued benefits under 38 U.S.C. 5121(a)(2)–(a)(4) at the time of the class member's death (*i.e.*, the class member's spouse, children (in equal shares), or dependent parents (in equal shares), in that order of preference). If no such survivors are in existence, VA would pay as much of the unpaid retroactive benefits as necessary to reimburse the person who bore the expense of the class member's last sickness and burial, in the same manner as provided in 38 U.S.C. 5121(a)(5) for accrued benefits.

Paragraph (f)(1) would further provide that a person's status as the spouse, child, or dependent parent of the class member would be determined as of the date of the class member's death, rather than the date that payment is made under this rule. As noted above, some class members may have died several months or years before payment can be made under these rules. Due to the lapse of time, a person who qualified as the class member's spouse or child on the date of the class member's death may no longer meet the statutory or regulatory definition of spouse or child, due to changes in their age or marital status. For example, a ''child'' is generally defined in 38 U.S.C. 101(4)(A) to refer to an unmarried child who is (with certain exceptions) under the age of eighteen years. A person who met this definition on the date of a class member's death may have married or attained the age of eighteen years before VA releases payment of unpaid retroactive benefits due to the class member. Because the *Nehmer* court orders were generally intended to correct past errors, we propose to authorize payment to persons who would have been eligible for payment as a spouse, child, or dependent parent on the date of the class member's death, irrespective of subsequent changes in age or marital status that would otherwise affect their entitlement to payment.

In view of language in the *Nehmer* court's order requiring payments to estates, however, we believe it is necessary to seek an order from that court clarifying or modifying its prior order to make clear that VA may release payments in the manner proposed. Accordingly, we intend to request such an order from the district court concurrently with the publication of these proposed rules.

3. Inapplicability of Certain Accrued Benefit Requirements

As stated above, the district court indicated that the statutory two-year limit on payment of accrued benefits and the statutory requirement that a qualified payee or payees file a claim for accrued benefits do not apply to payments of retroactive benefits due and unpaid to a *Nehmer* class member at the time of death. Accordingly, we propose to state, in paragraph (f)(2), that those requirements do not apply. We further propose to state that, if a class member dies before receiving payment of retroactive benefits due to him or her, VA will pay the amount to the known payee(s) without requiring a claim. A veteran's VA claim file will often contain information identifying the surviving spouse, children, or parents of a class member. By clarifying that VA will release payment based on such information without awaiting communication from such survivors, this provision would permit expeditious release of payments.

4. Identifying Payees

We propose to state, in paragraph (f)(3), that VA shall make reasonable efforts to identify appropriate payees based on information contained in the veteran's claims file. We propose to state that, if further information is needed to determine whether an appropriate payee exists, or whether there is any person having precedence equal to or greater than a known survivor, VA will request such information from a known survivor or the class member's authorized representative if the claims file contains sufficient contact information. We also propose to state that, before releasing payment to a known survivor, VA will request information from the survivor concerning the possible existence of other survivors with equal or greater priority for payment, unless the circumstances clearly indicate that such a request is unnecessary. For example, if the claims file contained the name and address of a child of the deceased class member, VA would contact the child to inquire whether there is a surviving spouse or any other children of the class member in existence. In seeking to identify appropriate payees, VA necessarily must rely on information in the claims file. VA does not have the resources to conduct independent investigations of estate issues.

We propose to state that, after making reasonable efforts to identify the appropriate payee(s), if VA releases the full amount of retroactive payments to a payee, VA generally may not thereafter pay any portion of such benefits to any other individual, unless VA is able to recover any payment previously released.

5. Prohibition On Duplicate Payments

We propose to state, in paragraph (f)(4), that, payment of benefits pursuant to this rule shall bar a later claim by any individual for payment of all or any part of such benefits as accrued benefits under 38 U.S.C. 5121 and 38 CFR 3.1000. The district court ordered VA to release all retroactive amounts due a class member at the time of death under the *Nehmer* stipulation and order. This would necessarily include amounts that otherwise would be payable as accrued benefits under 38 U.S.C. 5121. Accordingly, once payment has been made pursuant to the court's order, no retroactive benefits would remain for payment to any person as accrued benefits. Inasmuch as this rule applies only to retroactive benefits payable for a covered herbicide disease pursuant to the 1991 stipulation and order, it would not preclude a survivor's right to seek accrued benefits under section 5121 in the event a deceased class member was entitled at death to benefits for conditions other than a covered herbicide disease.

Awards Not Covered by the Nehmer Rules

We propose to state, in § 3.816(g), that the provisions of this rule do not apply to awards of disability compensation or DIC for disability or death due to a disease for which the Secretary of Veterans Affairs establishes a presumption of service connection after September 30, 2002. The *Nehmer* stipulation and order applies to awards based on diseases for which the Secretary establishes a presumption of service connection pursuant to the Agent Orange Act of 1991, Public Law 102–4. The Act established a sunset date of September 30, 2002, for the Secretary to establish such presumptions. Accordingly, the *Nehmer* stipulation and order applies only to awards based on presumptions established within the time frame specified in the Agent Orange Act of 1991, Public Law 102–4.

The Agent Orange Act of 1991, Public Law 102–4, added section 1116 to title 38, United States Code. Section 1116(b) authorized the Secretary of Veterans Affairs to issue regulatory presumptions of service connection for diseases associated with herbicide exposure. Section 1116(e), as added by the Act, stated that section 1116(b) would cease

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

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

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

In its December 12, 2000, order, the district court held that the 1991 stipulation and order must be interpreted in accordance with general principles of contract law. It is well established that, unless the parties provide otherwise, a contract is presumed to incorporate the law that existed at the time the contract was made. *See Norfolk & Western Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129–30 (1991). A subsequent change in the law cannot retrospectively alter the terms of the agreement. *See Florida East Coast Ry. Co.* v. *CSX Transportation*, Inc., 42 F.3d 1125, 1129–30 (7th Cir. 1994). Accordingly, the enactment of the Benefits Expansion Act of 2001 does not alter the scope of the 1991 stipulation and order.

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

Executive Order 12866

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

Paperwork Reduction Act

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

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of $100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries and their survivors could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

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

List of Subjects in 38 CFR Part 3

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

Approved: November 4, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

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

PART 3—ADJUDICATION

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

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

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

2. Section 3.816 is added to read as follows:

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

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

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

(1) *Nehmer class member* means:

(i) A Vietnam veteran who has a covered herbicide disease; or

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

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

(i) Type 2 Diabetes (Also known as type II diabetes mellitus or adult-onset diabetes).

(ii) Hodgkin's disease.

(iii) Multiple myeloma.

(iv) Non-Hodgkin's lymphoma.

(v) Acute and Subacute peripheral neuropathy.

(vi) Porphyria cutanea tarda.

(vii) Prostate cancer.

(viii) Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea).

(ix) Soft-tissue sarcoma (as defined in § 3.309(e)).

(c) *Effective date of disability compensation.* If a *Nehmer* class member is entitled to disability compensation for a covered herbicide disease, the effective date of the award will be as follows:

(1) If VA denied compensation for the same covered herbicide disease in a decision issued between September 25, 1985 and May 3, 1989, the effective date of the award will be the later of the date VA received the claim on which the prior denial was based or the date the disability arose, except as otherwise provided in paragraph (c)(3) of this section. A prior decision will be construed as having denied compensation for the same disease if the prior decision denied compensation for a disease that reasonably may be construed as the same covered herbicide disease for which compensation has been awarded. Minor differences in the terminology used in the prior decision will not preclude a finding, based on the record at the time of the prior decision, that the prior decision denied compensation for the same covered herbicide disease.

(2) If the class member's claim for disability compensation for the covered herbicide disease was either pending before VA on May 3, 1989, or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the covered disease, the effective date of the award will be the later of the date such claim was received by VA or the date the disability arose, except as otherwise provided in paragraph (c)(3) of this section. A claim will be considered a claim for compensation for a particular covered herbicide disease if the claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing compensation claims, as indicating an intent to apply for compensation for the covered herbicide disability.

(3) If the class member's claim referred to in paragraph (c)(1) or (c)(2) of this section was received within one year from the date of the class member's separation from service, the effective date of the award shall be the day following the date of the class member's separation from active service.

(4) If the requirements of paragraph (c)(1) or (c)(2) of this section are not met, the effective date of the award shall be determined in accordance with §§ 3.114 and 3.400.

(d) *Effective date of dependency and indemnity compensation (DIC).* If a Nehmer class member is entitled to DIC for a death due to a covered herbicide disease, the effective date of the award will be as follows:

(1) If VA denied DIC for the death in a decision issued between September 25, 1985 and May 3, 1989, the effective date of the award will be the later of the date VA received the claim on which such prior denial was based or the date the death occurred, except as otherwise provided in paragraph (d)(3) of this section.

(2) If the class member's claim for DIC for the death was either pending before VA on May 3, 1989, or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the covered herbicide disease that caused the death, the effective date of the award will be the later of the date such claim was received by VA or the date the death occurred, except as otherwise provided in paragraph (d)(3) of this section. In accordance with § 3.152(b)(1), a claim by a surviving spouse or child for death pension will be considered a claim for DIC. In all other cases, a claim will be considered a claim for DIC if the claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing DIC claims, as indicating an intent to apply for DIC.

(3) If the class member's claim referred to in paragraph (d)(1) or (d)(2) of this section was received within one year from the date of the veteran's death, the effective date of the award shall be the first day of the month in which the death occurred.

(4) If the requirements of paragraph (d)(1) or (d)(2) of this section are not met, the effective date of the award shall be determined in accordance with §§ 3.114 and 3.400.

(e) *Effect of other provisions affecting retroactive entitlement.*—(1) *General.* If the requirements specified in paragraphs (c)(1) or (c)(2) or (d)(1) or (d)(2) of this section are satisfied, the effective date shall be assigned as specified in those paragraphs, without regard to the provisions in 38 U.S.C. 5110(g) or § 3.114 prohibiting payment for periods prior to the effective date of the statute or regulation establishing a presumption of service connection for a covered herbicide disease. However, the provisions of this section will not apply if payment to a *Nehmer* class member based on a claim described in paragraph (c) or (d) of this section is otherwise prohibited by statute or regulation, as, for example, where a class member did not qualify as a surviving spouse at the time of the prior claim or denial.

(2) *Claims Based on Service in the Republic of Vietnam Prior To August 5, 1964.* If a claim referred to in paragraph (c) or (d) of this section was denied by VA prior to January 1, 1997, and the veteran's service in the Republic of Vietnam ended before August 5, 1964, the effective-date rules of this regulation do not apply. The effective date of benefits in such cases shall be determined in accordance with 38 U.S.C. 5110. If a claim referred to in paragraph (c) or (d) of this section was pending before VA on January 1, 1997, or was received by VA after that date, and the veteran's service in the Republic of Vietnam ended before August 5, 1964, the effective date shall be the later of the date provided by paragraph (c) or (d) of this section or January 1, 1997.

(Authority: Pub. L. 104–275, sec. 505)

(f) *Payment of Benefits to Survivors of Deceased Beneficiaries.*—(1) *General.* If a *Nehmer* class member entitled to retroactive benefits pursuant to paragraphs (c)(1) through (c)(3) or (d)(1) through (d)(3) of this section dies prior to receiving payment of any such benefits, VA shall pay such unpaid retroactive benefits as follows:

(i) VA will pay the full amount of unpaid retroactive benefits to the living person or persons who, at the time of the class member's death, would have been eligible to receive payment of any accrued benefits under 38 U.S.C. 5121(a)(2)–(a)(4). For purposes of this paragraph, a person's status as the spouse, child, or dependent parent of a veteran shall be determined as of the date of the class member's death, irrespective of the person's age or marital status at the time payment is made under this section. The determination shall be based on evidence on file at the date of death. If the person or persons who would have been eligible to receive accrued benefits at the time of the class member's death are now deceased, VA shall pay the full amount of unpaid retroactive benefits to the living person or persons who were next in priority under 38 U.S.C. 5121(a)(2)–(a)(4) at the time of the class member's death.

(ii) If there is no living person eligible for payment under paragraph (f)(1)(i) of this section, VA will pay to the person who bore the expense of the class member's last sickness and burial only

such portion of the unpaid retroactive benefits as is necessary to reimburse the person for such expense.

(2) *Inapplicability of certain accrued benefit requirements.* The provisions of 38 U.S.C. 5121(a) and § 3.1000(a) limiting payment of accrued benefits to amounts due and unpaid for a period not to exceed two years do not apply to payments under this section. The provisions of 38 U.S.C. 5121(c) and § 3.1000(c) requiring survivors to file claims for accrued benefits also do not apply to payments under this section. When a *Nehmer* class member dies prior to receiving retroactive payments under this section, VA will pay the amount to an identified payee in accordance with paragraph (f)(1) of this section without requiring an application from the payee. Prior to releasing such payment, however, VA may ask the payee to provide further information as specified in paragraph (f)(3) of this section.

(3) *Identifying Payees.* VA shall make reasonable efforts to identify the appropriate payee(s) under paragraph (f)(1) of this section based on information in the veteran's claims file. If further information is needed to determine whether any appropriate payee exists or whether there are any persons having equal or higher precedence than a known prospective payee, VA will request such information from a survivor or authorized representative if the claims file provides sufficient contact information. Before releasing payment to an identified payee, VA will ask the payee to state whether there are any other survivors of the class member who may have equal or greater entitlement to payment under this section, unless the circumstances clearly indicate that such a request is unnecessary. If, following such efforts, VA releases the full amount of unpaid benefits to a payee, VA may not thereafter pay any portion of such benefits to any other individual, unless VA is able to recover the payment previously released.

(4) *Bar to accrued benefit claims.* Payment of benefits pursuant to paragraph (f)(1) of this section shall bar a later claim by any individual for payment of all or any part of such benefits as accrued benefits under 38 U.S.C. 5121 and § 3.1000.

(g) *Awards covered by this section.* This section applies only to awards of disability compensation or DIC for disability or death caused by a disease listed in paragraph (b)(2) of this section.

(Authority: 38 U.S.C. 501)

[FR Doc. 03–1834 Filed 1–27–03; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[NV–039–0053; FRL–7444–1]

Approval and Promulgation of State Implementation Plans; State of Nevada; Clark County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve state implementation plan (SIP) revisions submitted by the State of Nevada to provide for attainment of the carbon monoxide (CO) national ambient air quality standards (NAAQS) in the Clark County Nonattainment Area. EPA is proposing to approve the SIP revisions under provisions of the Clean Air Act (CAA or the Act) regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards, and plan requirements for nonattainment areas.

DATES: Written comments on this proposal must be received by February 27, 2003.

ADDRESSES: Comments should be addressed to the EPA contact below. You may inspect and copy the rulemaking docket for this notice at the following location during normal business hours. We may charge you a reasonable fee for copying parts of the docket.

Steven Barhite, Chief, Environmental Protection Agency, Region 9, Air Division, Air Planning Office (AIR–2), 75 Hawthorne Street, San Francisco, CA 94105–3901.

Copies of the SIP materials are also available for inspection at the addresses listed below:

Nevada Dept. of Conservation and Natural Resources, Division of Environmental Protection, 333 West Nye Lane, Room 138, Carson City, NV 89706.

Clark County Department of Air Quality Management, 500 S. Grand Central Parkway, Las Vegas, NV 89155.

FOR FURTHER INFORMATION CONTACT: Karina O'Connor, Air Planning Office (AIR–2), Air Division, U.S. EPA, Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901. Telephone: (775) 833–1276. E-mail: *oconnor.karina@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

Table of Contents

I. Background

A. Why Is CO an Air Quality Problem?

Carbon monoxide (CO) is a colorless, odorless gas emitted in combustion processes. In Clark County, like most urban areas, CO comes primarily from tailpipe emissions of cars and trucks.[1] Exposure to elevated CO levels is associated with impairment of visual perception, work capacity, manual dexterity, and learning ability, and with illness and death for those who already suffer from cardiovascular disease, particularly angina or peripheral vascular disease.

B. How Are CO Levels Assessed?

Under section 109 of the Act, we have established primary, health-related NAAQS for CO: 9 parts per million (ppm) averaged over an 8-hour period, and 35 ppm averaged over 1 hour. Attainment of the 8-hour CO NAAQS is achieved if not more than one non-overlapping 8-hour average per monitoring site per year exceeds 9 ppm in any consecutive 2-year period (values below 9.5 are rounded down to 9.0 and are not considered exceedances).

[1] In the 1996 base year inventory, on-road vehicles accounted for approximately 86 percent of CO emissions while nonroad sources contributed roughly 11 percent and stationary and area sources contributed roughly 3 percent.