

**EIGHTY-FOURTH NATIONAL CONVENTION  
OF  
THE AMERICAN LEGION  
CHARLOTTE, NORTH CAROLINA  
August 27, 28, 29, 2002**

**Resolution No. 214: Clarification Of “Service In The Republic Of Vietnam” For The  
Purpose Of Agent Orange Presumption  
Submitted by: Veterans Affairs and Rehabilitation**

WHEREAS, The Department of Veterans Affairs (VA) has begun to implement a General Counsel opinion that impacts negatively on the eligibility of veterans who served their country during a time of war; and

WHEREAS, Until most recently, VA awarded service connection on a presumptive basis for all individuals who served on the Republic of Vietnam soil and also those who served in the territorial waters of Vietnam, thus recognizing such service as service in the Republic of Vietnam; and

WHEREAS, Congress in its plain language included a definition of “Service in Republic of Vietnam” in the most general of terms; “performed active military, naval or air service in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975,” so as to plainly be deemed an intent of inclusion, rather than exclusion; and

WHEREAS, Succeeding interpretations in 38 CFR and General Counsel opinion prior to VAOPGCREC 27-97 have considered service in a “naval” capacity as service in the offshore or territorial waters of the Republic of Vietnam, as included in the category of “exposed” to Agent Orange, and, therefore, included in those eligible for presumptive consideration; and

WHEREAS, The plain language and sentence structure of the statute is expanded in 38 CFR 3.307(a)6(iii) to include restrictive terminology which was further supported and confirmed in VAOPGCREC 27-97; and

WHEREAS, The sentence structure and plain meaning of even the restrictive language can be interpreted to include “service in the territorial waters offshore” as “service in the Republic of Vietnam;” as “territorial waters” would be considered to be within the boundaries of the Republic of Vietnam; now, therefore, be it

**RESOLVED, By The American Legion in National Convention assembled in Charlotte, North Carolina, August 27, 28, 29, 2002, That The American Legion seek legislation to plainly identify and further clarify “service in the Republic of Vietnam beginning January 9, 1962 and ending on May 7, 1975” to include those who served in the territorial waters offshore, as this was clearly the original intent of the statute; and be it finally**

**RESOLVED, That those individuals who served in “other locations,” who can show their condition of service-involved duty or visitation in the Republic of Vietnam, shall also be included under the definition of those exposed to Agent Orange and the resultant presumptive conditions.**

## White Paper

Subject: Necessity to clarify Congressional intent that “service in the Republic of Vietnam” during the period January 9, 1962 and ending on May 7, 1975, include service in the waters off-shore of the Republic of Vietnam for the purpose of entitlement to the presumption of exposure to herbicide agents, under 38 USC 1116(a)(1)(A)

The Agent Orange Act of 1991 (PL 102-4) amended 38 USC 1116(a) to provide that the presumption of service connection for diseases associated with exposure to certain herbicide agents applied to individuals with active military, naval, or air service in the Republic of Vietnam during the period January 9, 1962 to May 7, 1975. On October 26, 1990, VA issued the implementing regulation 38 CFR 3.313(a) defining service in Vietnam as, “Service in Vietnam includes service in the waters off-shore,…” It further provided that qualifying Vietnam service also included “service in other locations if the conditions of service involved duty or visitation in Vietnam.”

According to VAOGCPREC 7-93 (August 12, 1993), notices in the Federal Register discussing the proposed and final rule cited the Selected Cancers Study finding of increased disease risk among veterans who served in Vietnam as opposed to those whose service was elsewhere in the world during this period. Paragraph 5 of the opinion stated:

“5. The Selected Cancers Study focused on veterans who were ‘stationed in Vietnam.’ That phrase was defined as including those veterans who were ‘stationed in Vietnam or off the coast of Vietnam.’” (Selected Cancers Study at 7)

Paragraph 6 of the opinion stated:

“The preamble to the final regulation [38 CFR 3.313] specifically stated that the Secretary’s decision to issue the regulation was based on the Selected Cancers Study. Neither the preamble to the final-rule notice, nor the preamble to the proposed regulation provided further insight into the meaning of ‘service in Vietnam,’ although the preamble to the final regulation did state that the Secretary, in making his decision, and the Selected Cancers Study, both noted an increased risk of Non-Hodgkins Lymphoma (NHL) ‘based on service in Vietnam during the Vietnam era’ rather than exposure to herbicides containing dioxin. **In any event, it is clear that section 3.313 was intended to provide**

**compensation to veterans suffering from NHL who were shown by the Selected Cancers Study to have been placed at greater risk of contracting that disease through Vietnam service.”** (Emphasis added.)

Paragraph 7 of the opinion stated:

“Section 3.313(a) specifically provides that the phrase “service in Vietnam” includes “service in the waters off-shore[,] or service in other locations if the conditions of service involved duty or visitation in Vietnam.” (Emphasis added) The group of Vietnam era veterans covered under 38 CFR 3.313 is thus somewhat broader than the “exposed group” analyzed in the Selected Cancers Study, since it includes veterans who served on the ground in Vietnam or in the waters off-shore of Vietnam, but who were not actually stationed there. **In our view, it is reasonable to assume that the inclusion within the scope of the regulation of such veterans was to assure that all veterans who may have shared the same experience as those included in the Selected Cancers Study would be compensated, if they subsequently developed NHL.”** (Emphasis added)

This VA OGC Precedential opinion was in the context of whether missions flown in Vietnamese airspace would meet the qualifying service requirement of “duty or visitation in Vietnam”, under 38 CFR 3.313(a). However, as part of the analysis of the development of this regulatory provision, the discussion clearly indicates that, for the purposes of entitlement to the presumption of exposure to certain herbicide agents and entitlement to compensation, those veterans whose service was in the waters off-shore of Vietnam, i.e. within the territorial waters, “shared the same experience” as those whose official duties took them to Vietnam or who may have only visited the country. The opinion drew no medical or legal distinction between individuals who served on land or in the waters off-shore of Vietnam. Thus, entitlement to the presumption of service connection, under 38 USC 1116(a)(1)(A) was meant to apply to naval and other personnel whose duty was in the waters off-shore, regardless of the fact that such individuals may not have ever physically set foot ashore in Vietnam. Under this regulation, they were considered to be at increased risk of developing diseases associated with the type of herbicides used in Vietnam, beginning May 9, 1962.

The enactment of subsequent legislation and further changes to 38 CFR 3.313 expanded the list of presumptive diseases to include soft tissue sarcoma, chloracne, Hodgkin’s disease, porphyria cutanea tarda, respiratory cancers, multiple myeloma, and more recently prostate cancer and diabetes mellitus. From August 12, 1993 to July 23, 1997, VAOGCPREC 7-93 remained the guiding principle in the adjudication of the claims by Vietnam veterans for diseases and death due to exposure to herbicides during their Vietnam service

On July 23, 1997, VAOGCPREC 27-97 was issued addressing the question of whether shipboard service in waters off-shore of Vietnam prior to

August 4, 1964 constituted “wartime service” for the purposes of eligibility for improved pension. In its analysis of the relevant statutes and legal precedents, the opinion states in paragraph 3, “We do not believe that the language of 38 USC 101(29)(A) conclusively resolves whether service in the waters off the shore of Vietnam is included in the statutory reference to service in the Republic of Vietnam.” It further states that “The term in the Republic of Vietnam’ is to some degree inherently ambiguous in that it may be subject to differing interpretations regarding whether it refers only to areas within the land borders of the Republic or also encompasses, for example Vietnamese airspace or territorial waters. See generally VAOGCPREC 7-93.”

It is significant that, in paragraph 7, the OGC opinion cites, “VA regulations, currently codified at 38 CFR 3.307(a)(6)(iii), on which the statutory presumption of exposure to herbicide agents was based, provides that ‘service in the Republic of Vietnam’ includes service in the waters off-shore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.” In paragraph 8, OGC opinion makes a clear distinction between the statutory definition of qualifying service during the Vietnam Era contained in 38 USC 101(a)(1)(A) for pension purposes and the regulatory definition set forth in 38 CFR 3.307(a)(6)(iii) as it pertains to entitlement to service connection and medical care under 38 USC 1116 and 1710. The discussion concludes, “Thus, the definition of ‘service in the Republic of Vietnam’ in section 3.307(a)(6)(iii) is not inconsistent with our interpretation of the reference to service in the Republic of Vietnam in section 101(29)(A).”

VAOGCPREC 27-97 held that service on a deep-water vessel in the waters off the shore of the Republic of Vietnam does not constitute service in the Republic of Vietnam for the purposes of 38 USC 101(29)(A) as added by section 505 of the Veterans’ Benefits Improvements Act of 1996. This opinion did not supercede or modify the definition of qualifying Vietnam service which applies to claims of entitlement to service connection for herbicide-related diseases set forth in 38 CFR 3.313(a).

In addition to VA regulations and VA General Counsel opinions, which prescribe how the statute is to be interpreted and applied, VA Adjudication Manual M21-1, Part III, Chapter 4 has further defined term “service in Vietnam.” Prior to February 2002, M21-1, Part III, 4.24(g), in citing to VAOGCPREC 7-93 stated:

“In the absence of contradictory evidence, ‘service in Vietnam’ will be conceded if the records show the veteran received the Vietnam Service Medal, except if the veteran participated in high altitude flights over Vietnam only.”

However, on February 27, 2002 Change 88 to the M21-1 was issued. It substantially revised Part III, Chapter 4. In para. 4.24(e)(1), it stated that:

“...A veteran must have actually served on land within the Republic of Vietnam (RVN) to qualify for the presumption of exposure to herbicides, under 38 CFR 3.3.07(a)(6). The fact that a veteran has been awarded the Vietnam Service Medal does not prove that he or she was ‘in-country.’ Service members who were stationed on ships off-shore, or who flew missions over Vietnam, but never set foot in-country, were sometimes awarded the Vietnam Service Medal.”

Based on this provision, regional offices were directed to deny claims of Vietnam veterans whose service was in the waters off-shore and who had been awarded the Vietnam Service Medal. In certain instances, where service connection had previously been awarded for an Agent Orange-related disease, service connection has been severed. The surviving spouses of some Vietnam veterans who would have previously been awarded service-connected death benefits are also being denied, despite the fact that the veteran had been awarded the Vietnam Service Medal.

The Adjudication Manual, M21-1, is generally intended to provide clarification and guidance to adjudicators on VA rating policy and the application of existing laws and regulations to claims for benefits. However, in some instances, the M21-1 sets forth substantive rules, which prescribe and narrowly limit what administrative action that must be taken in the initial level of adjudication, rather than merely explaining an existing law or regulation. The M21-1 guidelines in effect prior to February 2002 constituted a substantive rule concerning determinations of qualifying service in Vietnam based on the award of the Vietnam Service Medal. Any change must comply with 5 USC 551, the Administrative Procedures Act (APA), which requires public notice and comment period. Change 88 was issued on February 27, 2002 in violation of the APA procedures and should, therefore, have no effect on Agent Orange claims.

Title 38, Code of Federal Regulations, section 3.313, VAOGCPREC 7-93 and 27-97, and prior M21-1, Part III, 4.24(g) have consistently represented the view that title 38, United States Code, section 1116 applies to those who served in the waters off-shore of Vietnam. In view of VA’s recent efforts to arbitrarily change the rule pertaining to entitlement to presumptive service connection for herbicide diseases, there appears to be a need to have a formal expression of congressional intent concerning the issue of qualifying Vietnam service.

The draft bill would amend title 38, United States Code, section 101(29)(a)(1)(A) to insert the phrase “to include service in the waters offshore.” after the term “in the Republic of Vietnam” each place it appears in that section.

## Draft Legislation

Subject: Amendment to title 38, United States Code, sections 101(29), 1116(a)(1)(A), and 1116(a)(3), clarifying “service in the Republic of Vietnam” for the purpose of entitlement to the presumption of exposure to a herbicide agent

### A Bill

Be it enacted by the Senate and the House of Representatives of the United States in Congress assembled,

That title 38, United States Code, section 101(29)(A), 1116(a)(1)(A), and 1116(a)(3), be amended by adding after the term “in The Republic of Vietnam” each place it appears “, to include service in the territorial waters offshore,”