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18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA

20 BEVERLY NEHMER, et al.,

21 Plaintiffs,

22 v.

23 UNITED STATES VETERANS  
24 ADMINISTRATION, et al.,

25 Defendants.  
26  
27  
28

RECEIVED

MAY 15 1991

CLERK U.S. DISTRICT COURT  
SAN FRANCISCO

FILED

MAY 20 1991

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Civil Action No.  
CV-86-6160 (TEH)

FINAL STIPULATION AND ORDER

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FINAL STIP. & ORDER

1  
2 Plaintiffs filed an Emergency Motion for Enforcement and  
3 Supplementation of Prior Orders. As a result of subsequent  
4 discussion of the matters raised by plaintiffs' motion,  
5 plaintiffs and defendants, through their undersigned counsel,  
6 hereby stipulate as follows:

7 1. The Veterans' Advisory Committee on Environmental  
8 Hazards, ("Advisory Committee" or "Committee") created  
9 pursuant to the Veterans' Dioxin and Radiation Exposure  
10 Compensation Standards Act of 1984, 38 U.S.C. § 354 note,  
11 Sect. 6, will complete its analysis as to whether the scien-  
12 tific or medical evidence reveals a connection between  
13 exposure to dioxin and diabetes, lung cancer and peripheral  
14 neuropathy (hereafter referred to as the "three diseases") at  
15 or shortly after its May 23-24, 1991 meeting and convey its  
16 evaluations and any recommendations to the Secretary forth-  
17 with.

18 2. The Secretary will review the Committee's report and  
19 all other relevant scientific or medical evidence he deter-  
20 mines appropriate and, for each of the three diseases, make  
21 one of the following determinations: (a) to initiate rule-  
22 making to service connect the disease through the issuance of  
23 a proposed positive rule and a final rule as appropriate  
24 following public comment on the proposed rule; (b) to initiate  
25 rulemaking to issue a negative proposed rule, i.e., rejecting  
26 service connection (based on a finding of a lack of evidence  
27 establishing a significant statistical association between the  
28

1 disease and exposure to dioxin) and a final rule as appropri-  
2 ate following public comment on the proposed rule; or (c)  
3 defer issuing any rule (for example, but not limited to,  
4 circumstances where there is a decision that there is insuffi-  
5 cient current information). The Secretary's determination for  
6 each of the three identified diseases will be made and  
7 communicated to the Court and plaintiffs no later than July 1,  
8 1991.

9  
10 3. As soon as a final rule is issued service connect-  
11 ing, based on dioxin exposure, any of the three diseases, soft  
12 tissue sarcoma, and any other disease which may be service  
13 connected in the future pursuant to the Agent Orange Act of  
14 1991, 38 U.S.C. § 316(b), the VA shall promptly thereafter  
15 readjudicate all claims for any such disease which were voided  
16 by the Court's Order of May 3, 1989, as well as adjudicate all  
17 similar claims filed subsequent to the Court's May 3, 1989  
18 Order, without waiting for final rules to be issued on any  
19 other diseases.

20 4. Prior to conducting the adjudications referred to in  
21 paragraph 3, above, VA will provide individual notice to each  
22 claimant denied benefits under the previous regulation (as  
23 identified from the Special Issue Rating System ("SIRS") or as  
24 a result of a VA finding based on information brought to its  
25 attention by a claimant or claimant's representative, that,  
26 although the individual is not on SIRS, he or she had a claim  
27 denial that was voided by the Court's Order) that the claims  
28

1 will be readjudicated with all of the procedural rights  
2 normally applicable to such VA proceedings. The notice will  
3 inform the claimant: that the claim is in the process of  
4 being readjudicated; that the claimant will be afforded a  
5 reasonable and specified time within which to present evidence  
6 or reasons why the claim is meritorious under the new regula-  
7 tions, and that if the claimant does not present such evidence  
8 or reasons, VA will readjudicate the claim on the basis of the  
9 previous adjudicatory record alone; and that VA will provide  
10 notice of the final result. The VA shall conduct all adjudi-  
11 cations referred to in paragraph 3 above, in accordance with  
12 all the terms of the notice specified in this paragraph.  
13

14 5. For any of the three diseases for which the Secre-  
15 tary determines to issue a final positive rule, as well as  
16 soft tissue sarcoma, as to which the Secretary has issued a  
17 proposed rule providing service connection in certain circum-  
18 stances, and any other disease which may be service connected  
19 in the future pursuant to paragraph 3 above, as to any denials  
20 of claims which were voided as a result of the Court's May 3,  
21 1989 Order, the effective date for disability compensation or  
22 dependency and indemnity compensation ("DIC"), if the claim is  
23 allowed upon readjudication pursuant to paragraphs 3 and 4  
24 above, will be the date the claim giving rise to the voided  
25 decision was filed (except as otherwise provided in 38 U.S.C.  
26 § § 3010(b)(1), or 3010(d)(1)), assuming the basis upon which  
27 compensation is granted after readjudication is the same basis  
28

1 upon which the original claim was filed,<sup>1</sup> or the date the  
2 claimant became disabled or death occurred, whichever is  
3 later. In the event the basis upon which a claim for compen-  
4 sation benefits is granted after readjudication is different  
5 than the basis for the original claim giving rise to the  
6 voided decision,<sup>2</sup> the effective date for beginning disability  
7 compensation or DIC will be the date on which the claim  
8 asserting the basis upon which the claim is granted was filed,  
9 or the date the claimant became disabled or death occurred,  
10 whichever is later. For any claim for any such disease which  
11 was not filed until after May 3, 1989, the effective date for  
12 beginning disability compensation or DIC will be the date the  
13 claim was filed or the date the claimant became disabled or  
14 death occurred, whichever is later.

15  
16 6. For any of the three diseases for which the Secre-  
17 tary determines, pursuant to paragraph 2(c) above, not to  
18 issue any rule, and for all other diseases for which the  
19 Secretary has not already issued a proposed or final rule, the  
20 Agent Orange claims of plaintiff class will not be denied at  
21 least until the Secretary acts on the first report from the  
22 National Academy of Sciences, or another entity in its stead,

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23 <sup>1</sup> The basis upon which the original claim was filed  
24 refers to the disease[s] or condition[s] which Chapter 46 of  
25 VA Manual M21-1, paragraph 46.02 required to be coded in the  
ratings decision contained in the claimant's claim file, which  
ratings decision was voided by the Court's May 3, 1989 Order.

26 <sup>2</sup> E.g., the original claim giving rise to the voided  
27 decision was based on a disease different than the disease  
28 upon which the claim is granted under the final regulations.



1 pursuant to Section 2 of the Agent Orange Act of 1991, Pub. L.  
2 102-4, amending 38 U.S.C. § 316(c). The claims for any of the  
3 identified diseases may be denied only if the Secretary makes  
4 a determination for such disease, in accordance with 38 U.S.C.  
5 § 316(c), as amended, to the effect that there is no positive  
6 association for such disease.

7  
8 7. Pursuant to the court's protective order, VA will  
9 provide to plaintiffs' counsel at plaintiffs' expense, mailing  
10 lists of those individuals listed on the Agent Orange Registry  
11 and of all Agent Orange claimants identified from SIRS whose  
12 names are not currently on the Registry and whose addresses  
13 are obtained through computer matches and searches of VA  
14 files. Mailing lists, with addresses updated through sources  
15 other than Internal Revenue Service, as described below, will  
16 be provided within 10 days of any request by plaintiffs'  
17 counsel. The "court's protective order" referred to above is  
18 Attachment B to the Stipulation and Order of January 12, 1990  
19 entered in this case, the terms of which protective order are  
20 incorporated herein by reference. As explained in the court's  
21 protective order, the mailing list of individuals will not at  
22 this time include current addresses of individuals obtained  
23 from Internal Revenue Service taxpayer returns, the disclosure  
24 of which may be prohibited by 26 U.S.C. § 6103.

25 8. Upon the Court's signing this proposed Final  
26 Stipulation and Order, plaintiffs agree to dismiss their  
27 Emergency Motion for Enforcement and Supplementation of Prior  
28

1 Orders with prejudice.

2 9. Upon expiration of 30 days after VA has notified the  
3 Court and plaintiffs of the determinations the Secretary has  
4 made pursuant to paragraph 2, above, with respect to the three  
5 diseases, assuming that there are no motions pending before  
6 the Court which directly relate to the parties' compliance  
7 with the terms of this Final Stipulation and Order,<sup>3</sup> final  
8 judgment will be entered. The final judgment will provide  
9 that it incorporates the terms of the Court's May 3, 1989  
10 decision and this Final Stipulation and Order, but that any  
11 provisions of the January 12, 1990 Stipulation and Order which  
12 have not been expressly incorporated into this Final Stipula-  
13 tion and Order are superseded. The parties will seek to agree  
14 to the contents of a proposed Final Judgment and submit it to  
15 the Court at least 10 days prior to the expiration of the 30  
16 day period referred to above. Consistent with the Court's  
17 practice, the Final Judgment also will result in the case  
18 being closed.

19 10. Nothing in the Final Stipulation and Order is  
20 intended by the parties to waive arguments concerning the  
21 Court's jurisdiction after August 6, 1991, except that the  
22 parties agree not to dispute the jurisdiction of the Court to  
23 enter Final Judgment in accordance with the terms of paragraph  
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26 <sup>3</sup> This proviso is without prejudice to, and does not  
27 encompass, any claim either party could make with respect to  
28 attorney's fees, expenses or costs in this action.

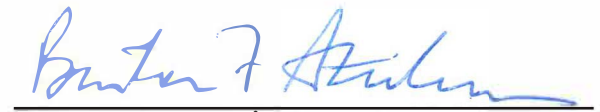
9 above, or to rule on attorney's fees after August 6, 1991.

Respectfully submitted,

  
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Attorneys for Defendants

Attorneys for Plaintiffs and  
their Class

May 14, 1991

May 14, 1991

It is so ORDERED this 17<sup>th</sup> day of May 1991:

  
Thelton E. Henderson  
United States District Judge