

Dated: May 19, 2000.

**L. Robert Lake,**

*Director of Regulations and Policy, Center for Food Safety and Applied Nutrition.*

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 270

[RIN 0790-AG67]

#### Compensation of Certain Former Operatives Incarcerated by the Democratic Republic of Vietnam

**AGENCY:** Office of Under Secretary of Defense for Personnel and Readiness, DoD.

**ACTION:** Final rule.

**SUMMARY:** This rule adopts as final an interim rule implementing section 657 of the National Defense Authorization Act for Fiscal Year 1997, which authorizes the Secretary of Defense to make payments to persons captured and incarcerated by the Democratic Republic of Vietnam. The rule established policy and procedures concerning the payments to these persons. The rule amended regulations to reflect changes necessary as a result of new language in section 658 of the FY99 National Defense Authorization Act. Section 658 expands the field of beneficiaries of the Vietnamese Commandos Compensation Commission to parents and siblings of deceased Commandos. It also added words "notwithstanding any agreement (including a power of attorney) to the contrary, the actual disbursement" must be made directly to the person who is eligible for the payment. The rule also amended regulations to reflect necessary technical changes to accommodate the new language. The Department of Defense is adopting the Interim Final Rule as a Final Rule without change.

**EFFECTIVE DATE:** This rule is effective October 17, 1998.

**FOR FURTHER INFORMATION CONTACT:** LTC Frank Hudson, (703) 588-6570 or Mr. Chuck Witschonke, (703) 693-1059, Directorate of Compensation, Office of the Secretary of Defense, 4000 Defense Pentagon, Washington, DC, 20301

**SUPPLEMENTARY INFORMATION:** The Department of Defense published an Interim Final Rule with a request for comments on December 10, 1998 (63 FR 68194). The following comments were received:

**Comment:** *The Statute Requires Prompt Payment In A Manner Requested By The Awardee.*

Section 657(d)(2) of Pub. L. 104-201, as amended, states that "Subject to subsection (f), if the Secretary determines that the claimant is eligible for the payment, the Secretary *shall promptly pay the claim.*" (Emphasis added.) Subsection (f) provides notwithstanding any agreement (including a power of attorney) to the contrary, the actual disbursement of a payment under this section may be made only to the person who is eligible for payment under subsection (a) or (b) and only—upon the appearance of that person, in person, at the designated distribution office in the United States or its territories; or as such other location or in such manner as that person may request in writing.

The only change made to this subsection by the FY 99 National Defense Authorization Act was the addition of "[n]otwithstanding any agreement (including a power of attorney) to the contrary" at the beginning of Subsection (f)(1).

The statutory requirements for disbursement are clearly stated. First, the payment must be disbursed to the person eligible for payment. Thus, the check must be made payable to the intended beneficiary and not to a third party, such as the person's attorney or another designee or assignee, regardless of any agreement to the contrary.

The second condition for payment is that it be made: (1) in person at a designated distribution office in the United States or its territories or, (2) if the beneficiary requests in writing, at such other location or in such other manner as that person may request. The statute recognizes that many payment recipients may not be able to appear in person to receive their payments. Many, for instance, still live in Vietnam under a repressive government that denies them the ability to travel or even to correspond freely. Hence the statute allows the eligible person to request alternative methods of payment.

The Secretary of Defense has complete discretion in determining whether a claim is justified and such determinations are considered final and conclusive. Pub. L. 104-201, section 657(d). However, once DoD has determined that a person is eligible for payment under the provisions of the Vietnamese Commando Compensation Act, that discretion ends. The agency is mandated by statute to promptly pay the claim. DoD may not establish unreasonable regulations that hinder payments to those persons eligible for the compensation established by

Congress. In fact, section 657(f)(2) provides that DoD shall hold funds in trust for eligible persons only until such time as "*the person makes an election*" (emphasis added) to appear in person at a disbursing office or to request payment at another location or in another manner.

**Response:** Section 657(f) provides that the actual disbursement of a payment may be made only to an eligible claimant, notwithstanding any agreement to the contrary. The statute does not require that payment be made in any manner requested by a claimant; rather, it authorizes the Department, in its discretion, to grant requests by eligible claimants to receive their payments at a particular location or in a manner other than the personal appearance of the claimant at a designated distribution office. This provision does not negate the independent requirement that only eligible claimants may receive payments.

**Comment:** *The Interim Regulation Violates The Statute And Inflicts Hardship.*

The interim regulation drastically curtails the statutory right of eligible persons to receive their payments in the manner they request. As revised, regulation states that:

The Commission [on Compensation] may, in its discretion, require the person who is eligible for the payment to appear at any designated Defense Finance Accounting Service disbursement office in the United States to receive payment. The Commission may, in its discretion, coordinate with other U.S. governmental agencies to facilitate disbursement of payments to persons eligible for payments who reside outside the United States. If an eligible person makes a written request that payment be made at an alternate location or in an alternative manner, the Commission may, in its discretion, grant such request, provided that the *actual payment (i.e., the physical delivery of the payment) is made only to the eligible person.* The Commission will not disburse payment to any person other than an eligible person, notwithstanding any written request, assignment of rights, power of attorney, or other agreement.

32 CFR 270.11. (Emphasis added.)

By requiring that all payments be made by "physical delivery of the payment" only to the eligible person, DoD has imposed an unreasonable burden on the intended beneficiaries of the Congressionally mandated compensation. By imposing such an arbitrary condition on payments, DoD set an unnecessary hurdle which many persons eligible for compensation will be unable to clear. Such arbitrary action violates DoD's statutory obligation to

promptly pay the claims after eligibility has been determined.

It does little good for DoD to state that it will hold the funds in trust for the person authorized to receive payment "until such time as the person complies with the conditions for disbursement." 32 CFR 270.11. For the most part, the Commandos and their beneficiaries, especially those still living in Vietnam, are poor and need the money now. The Commandos themselves are middle-aged or older and many are in very poor health. Disbursing payments only if the awardees can figure out some way to get to a Defense Finance Accounting Service office or can arrange some other face-to-face meeting with a Defense Department representative authorized to disburse payments would frustrate the intent of Congress to pay claimants as fairly and expeditiously as possible.

In fact, the statutory language found in section 657(f)(2) does not authorize the Commission to withhold payment until "the person complies with the conditions for disbursement" but rather until "the person makes an election under such paragraph (i.e., appear in person at a designated disbursement office or request payment at another location or in another manner)." The statute gives the awardee, and not DoD, the right to elect how payment will be made. If that request is reasonable, i.e., if the eligible person will receive the funds to which he or she is entitled, DoD may not deny the request without a valid reason.

DoD states that it is required to make physical delivery of the payment to the eligible person because of new language in section 668 of the FY 99 National Defense Authorization Act, Pub. L. 105-261, which amended section 657(f)(1) of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104-201). The amendment simply added the words "Notwithstanding any agreement (including a power of attorney) to the contrary" before the description of how "actual disbursement" will be made. DoD's revised regulation, however, equates "actual disbursement" to "the physical delivery of payment." 63 FR 68195. Such a distortion of the term "actual disbursement" is completely unreasonable.

"Disbursement" does not equate to "physical delivery." As defined in the American Heritage College Dictionary, to disburse means "to pay out; expend." The Federal Government typically makes disbursements of payments by issuing checks or initiating electronic funds transfers ("EFTs"). See, e.g., 31 CFR 205.3, 206.2, 208.2(c). The Department of Defense, as a matter of course, disburses payments by mail or

EFT to service members and civilian employees, as well as to other persons eligible for government payments. See, e.g., 32 CFR 63.6 (procedures for direct payment of retired pay to former spouses). Therefore, to equate disbursement with the actual physical delivery of a payment to the beneficiary is unreasonable and flies in the face of the Government's normal way of doing business.

The statutory language mandating payments to eligible individuals provides no authority for DoD to withhold payment until "physical delivery" of the payment can be made. DoD seems to believe that some remarks contained in the Congressional Record justify its avoidance of the statutory mandate to make prompt payment for approved claims. Such a position is entirely insupportable.

It is a basic canon of statutory construction that, absent a clearly expressed legislative intention to the contrary, the language of the statute must ordinarily be regarded as conclusive. *United States v. Turkette* 452 U.S. 576, 580 (1981); *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.* 447 U.S. 102, 108 (1980). Given a "straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 10 (1997) (quoting *Connecticut Nat. Bank v. Germain* 503 U.S. 249, 254 (1992)). There is no ambiguity in the language of section 657(f) that would necessitate looking beyond the four corners of the statute to decipher its meaning.

Even if the statutory language were not clear regarding disbursement of payment, a review of the scant legislative history associated with the modification of the disbursement language in section 657(f)(1) lends no support to DoD's position that payments must be made physically to the eligible person. In remarks made on the floor of the Senate on June 23, 1998, Senator John McCain (R-Arizona), one of the sponsors of the amendment explained that the amendment "would ensure that the Vietnamese commandos receive their rightful share of the funds authorized and appropriated by Congress." 142 Cong. Rec. S6849 (daily ed. July 23, 1998). Senator McCain stated that the amendment "seeks to clarify that the actual disbursement of a payment under our 1996 legislation may be made only to the person eligible for the payment, notwithstanding any agreement, including a power of attorney, to the contrary." *Id.*

Nothing in the Senator's brief remarks supports a conclusion that payments must be made by means of "physical

delivery" to the eligible persons. The statute and the Senator's remarks clearly establish that payments can be made only to the eligible recipients. Hence, a payment check could not be made out to a third person for later payment to the recipient. However, an eligible recipient can request that his or her check be mailed to a particular address or that the funds be electronically transferred to a particular account. Unless DoD had a reasonable basis for concluding that the recipient would not receive the payment to which he or she was entitled if the payment request were honored, the statute requires the Commission to follow the reasonable payment request of an eligible recipient.

**Response:** As discussed above, the regulation implements the plain language of the statute, and ensures that eligible claimants receive all of the money they are owed in the most secure and expeditious manner possible.

**Comment:** *The Regulation Can Be Revised To Comply With The Statute.*

For all of these reasons, the amendment to 32 CFR 270.11 must be modified. In order to comply with Section 657(f) of Pub. L. 104-201, as amended, the following revised language is suggested:

#### § 270.11 Limitation on disbursement

(a) Subject to subparagraph (b) below, if the Secretary determines that a claimant is eligible for the payment of compensation, the Commission shall promptly pay the claim.

(b) Notwithstanding any agreement (including a power of attorney) to the contrary, the Commission will make a disbursement of a payment under this part only to the person who is eligible for payment. Payment will be made only in one of the following ways:

(1) Upon appearance of the eligible person, in person at any designated Defense Finance Accounting Service disbursement office in the United States or its territories;

or

(2) At such other location or in such other manner as the eligible person may request in writing.

The Commission will comply with any reasonable request for payment, as described in (2) above, unless the Commission believes that the requested method of payment is likely to result in the eligible person not receiving his or her rightful share of the funds authorized and appropriated by Congress. Methods of payment approved by a Federal court or agency of appropriate jurisdiction will be considered as reasonable *per se*.

(c) In the case of a claim approved for payment but not disbursed as the result of operation of paragraph (b) above, the Commission shall hold the funds in trust for the eligible person in an interest bearing account until such time as the person makes an election under paragraph (b).

This revised language would allow the Commandos and their beneficiaries to receive their rightful share of the money Congress intended them to have, while at the same time allowing DoD to exercise control if the payments are not in conformance with the law. DoD is strongly urged to implement this proposed revision in place of the unfair, unworkable, and unreasonable language proposed in the Interim Final Rule.

**Response:** The suggested change to the regulation is not consistent with or required by the statute. This statute makes clear that the compensation must be paid directly to the claimants, notwithstanding a power of attorney indicating that another disposition is preferred.

#### **Executive Order 12866, Regulatory Planning and Review**

It has been determined that 32 CFR part 270 is not a major rule. It does not have an annual effect to the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities.

#### **Public Law 96-354, Regulatory Flexibility Act (5 U.S.C. 601)**

It has been certified that 32 CFR part 270 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it does not, it promulgated, have a significant economic impact on a substantial number of small entities. The primary reason for this rule is to provide compensation for a limited number of Vietnamese Commandos who were incarcerated in North Vietnam, and as such, does not affect small entities.

#### **Public Law 96-511, Paperwork Reduction Act (44 U.S.C. Chapter 35)**

It has been certified that 32 CFR part 270 does not impose reporting and recordkeeping requirements under the Paperwork Reduction Act of 1995. The reporting and recordkeeping requirements are exempt from this Act, as it directly involves active litigation in which the U.S. is a party.

The specific exemption from the Paperwork Reduction Act is found in 5 CFR part 1320. The information collection in this final rule is exempt from OMB approval under Section 1320.4(a)(2), "Controlling Paperwork Burdens on the Public; Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act".

#### **Public Law 104-4, Unfunded Mandates Report Act of 1995 (UMRA)**

It has been determined that 32 CFR part 270 does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year.

Accordingly, the interim rule amending 32 CFR Part 270, which was published at 63 FR 68194 on December 10, 1998, is adopted as a final rule without change.

Dated: May 22, 2000.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

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## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 216**

[Docket No. 990922260-0141-02; I.D. 083199E]

RIN 0648-AM84

#### **Designating the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA)**

**AGENCY:** National Marine Fisheries Service (NMFS), NOAA, Commerce.

**ACTION:** Final rule, response to comments.

**SUMMARY:** Based upon the available information regarding the status of the Cook Inlet stock of beluga whales, NMFS has determined that the Cook Inlet stock of beluga whales is below its Optimum Sustainable Population (OSP) levels and, therefore, is depleted as defined in the MMPA. This action is a step in the process under the MMPA to address the sharp decline in the number of Cook Inlet beluga whales. It is intended as a conservation measure to reverse the decline and to promote recovery of the stock of beluga whales.

**DATES:** Effective June 30, 2000.

**FOR FURTHER INFORMATION CONTACT:** Michael Payne, NOAA/NMFS, Alaska Region, (907) 586-7235, Barbara Mahoney, NOAA/NMFS, Alaska Region, Anchorage Field Office, (907) 271-5006, or Thomas Eagle, Office of Protected Resources, (301) 713-2322, ext. 105.

**SUPPLEMENTARY INFORMATION:**

## **Background**

Section 3(1) of the MMPA (16 U.S.C. 1362(1)) defines the term, "depletion" or "depleted", as

\* \* \* any case in which

(A) The Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals \* \* \* determines that a species or population stock is below its optimum sustainable population.

(B) A state, to which authority for the conservation and management of a species or population stock is transferred \* \* \* determines that such species or population stock is below its optimum sustainable population.

(C) A species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 \* \* \*

Section 3(9) of the MMPA (16 U.S.C. 1362(9)) further defines OSP as " \* \* \* with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity (K) of the habitat and the health of the ecosystem of which they form a constituent element."

NMFS regulations at 50 CFR 216.3 clarify the definition of OSP as a population size that falls within a range from the population level of a given species or stock that is the largest supportable within the ecosystem (K) to its maximum net productivity level (MNPL). Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population from reproduction, less losses due to natural mortality.

Section 2 of the MMPA (13 U.S.C. 1361) states that marine species, populations and/or stocks should not be permitted to fall below their OSP level. Historically, MNPL has been expressed as a range of values (generally 50 to 70 percent of K) determined theoretically by estimating what size stock in relation to the original stock size will produce the maximum net increase in population (42 FR 12010, 1 March 1977). In 1977, the midpoint of this range (60 percent) was used to determine whether dolphin stocks in the eastern tropical Pacific Ocean were depleted (42 FR 64548, 27 December 1977). The 60-percent value was included in the final rule governing the taking of marine mammals incidental to commercial fishing operations (45 FR 72178, 31 October 1980).

On November 19, 1998, NMFS initiated a Status Review of the Cook Inlet beluga whale stock (63 FR 64228). The comment period on the status