



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

February 10, 2021

Commander John B. Wells, U.S. Navy (Retired)
Military-Veterans Advocacy, Inc.
Post Office Box 5235
Slidell, LA 70469-5235

Dear Commander Wells:

Pursuant to the U.S. Court of Appeals for the Federal Circuit's December 21, 2020, order in *Military-Veterans Advocacy v. Secretary of Veterans Affairs*, Fed. Cir. No. 20-2086, this is a new response to your petition for Department of Veterans Affairs (VA) rulemaking that would extend the presumption of herbicide exposure in 38 C.F.R. § 3.307(a)(6) to Veterans who served on Guam from January 9, 1962, through December 31, 1980; Johnston Island from January 1, 1972 until September 30, 1977; and American Samoa.¹

In reviewing disability claims premised on exposure to herbicides, VA relies on the Department of Defense (DoD) for information regarding the presence or absence of tactical herbicides in locations outside the Republic of Vietnam. VA and DoD have reviewed a Government Accountability Office (GAO) report concerning the use, testing, storage, and transportation of Agent Orange and other tactical herbicides outside of Vietnam and Korea. See "Agent Orange: *Actions Needed to Improve Accuracy and Communication of Information on Testing and Storage Locations*," GAO-19-24 (Nov. 15, 2018). DoD, working closely with VA, has also recently completed its own extensive review of documentation concerning the presence of Agent Orange and other tactical herbicides outside of Vietnam and Korea. The 18-month review involved analysis of

¹ The original petition was dated December 3, 2018, and has since been supplemented by letters dated December 2, 2019, December 23, 2019, and June 8, 2020. The June 2020 letter modified the petition by requesting that the presumption of herbicide exposure apply to Veterans who served on Guam from *August 15, 1958*, to December 31, 1980.

Page 2.

Commander Wells

thousands of original source documents dating back to the inception of tactical herbicide testing shortly after the end of World War II.

Based on a review of the GAO report and DoD's own findings, VA revised the list of locations outside of Vietnam and Korea where Agent Orange and other tactical herbicides were used, stored, tested, or transported. This list was published on January 27, 2020, and can be found at

<https://www.publichealth.va.gov/exposures/agentorange/locations/tests-storage/outside-vietnam.asp>. In order to constitute a location where tactical herbicides were used, stored, tested, or transported, the VA/DoD joint criteria required the existence of an official record, to include government reports, unit histories, shipping logs, contracts, or scientific reports or photographs. The location must have been a DoD installation, land under DoD jurisdiction, or a non-DoD location where Service members were present during testing, application, transportation or storage of tactical herbicides.

Guam

In your December 2018, December 2019, and June 2020 letters, you suggested GAO found dioxin present on Guam, and that a draft Environmental Impact Statement of the Department of the Navy confirmed the use of herbicides on the island. You also provided many documents, to include four Veterans' affidavits, photographs, excerpts from a U.S. Navy manual, a press release from the Guam Environmental Protection Agency, a letter from Weston Solutions, and a public health assessment of a firefighting training area at Andersen Air Force Base on Guam.

DoD conducted an extensive review of records concerning the use, testing, storage, and transportation of tactical herbicides; however, found no evidence of Agent Orange or other tactical herbicides on Guam. Furthermore, GAO's report found no evidence of tactical herbicides on Guam after reviewing DoD documents and other government records, and interviewing Veterans who alleged Agent Orange exposure while serving on Guam. See GAO-19-24, at 29 ("[W]e found no evidence indicating that Agent Orange or any other tactical herbicides were offloaded . . . or used in . . . Guam.").

To the extent that trace levels of 2,4-D and 2,4,5-T have been found on Guam, that would be expected. During the 1960s, these chemicals were components of commercial herbicides that were commonly used on foreign and stateside military bases, in Guam and elsewhere, for standard vegetation and weed control. Herbicides used for regular vegetation control were registered with the Environmental Protection

Page 3.

Commander Wells

Agency prior to market availability and would have been used according to the manufacturer's instructions. Commercial products containing 2,4-D, such as Scotts® TurfBuilder®, continue to be sold in the United States and throughout the world. See <https://scottsmiracleagro.com/products/24d-answers/> (last visited Feb. 4, 2021).

Thus, the presence of trace levels of 2,4-D and 2,4,5-T cannot be construed as evidence of the presence of Agent Orange or tactical herbicides in such locations. See GAO-19-24, at 20 (“[W]hile D[O]D documents identify the use of commercial herbicides on Guam, they do not identify the use of tactical herbicides there.”). Additionally, although your December 2018 letter suggested that the difference between tactical herbicides and commercial herbicides “is of no moment,” it is clear that Congress did not enact the Agent Orange Act of 1991 and codify presumptive service connection for Veterans who “served in the Republic of Vietnam” because of commercial herbicides commonly used worldwide for standard vegetation and weed control. Pub. Law No. 102-4, § 2(a)(1) (1991). Rather, Congress established presumptive service connection associated with “herbicide[s] used in support of the United States and allied military operations in the Republic of Vietnam” due to the unique nature of the application and exposure in that country. 38 U.S.C. § 1116(a)(3); 38 C.F.R. § 3.307(a)(6)(i).

More specifically, the primary purpose of the statute underlying section 3.307(a)(6) was to acknowledge the uniquely high risk of exposure, and corresponding risk to Service members' health, posed by large-scale application of herbicides for the deliberate purpose of eliminating plant cover for the enemy, as was done in the Republic of Vietnam. See, e.g., 137 Cong. Rec. H719 (Jan. 29, 1991) (Rep. Long) (recognizing the unique circumstances of Vietnam Veterans, “the first to experience widespread exposure to agent orange”); S. Rep. 101-82, at 25 (1989) (noting that the “vast majority” of the 20-plus million gallons of herbicides “used in Vietnam were disseminated by aerial spraying”). It was not intended to presume service connection for any Veteran that served in an environment containing trace amounts of dioxin coinciding with the routine use of standard commercial herbicides. See H.R. Rep. 101-672 at 5 (1990) (recognizing that “[d]ioxin is omnipresent, existing in household products, dust particles and water. It has been found in significant levels across the world. Millions of people have been exposed to it through industrial accidents, fly ash from waste incinerators, herbicide spraying, manufacturing plants, and even in some edible fish.”); Institute of Medicine, *Veterans and Agent Orange* 174-75 (1994) (recognizing that 2,4-D “has been used commercially in the United States since World War II to control the growth of broadleaf plants and weeds on range lands, lawns, golf courses, forests, roadways, parks, and agricultural land”).

Page 4.

Commander Wells

In sum, though your June 2020 letter asserted that the “spraying method” and the commercial-tactical distinction is of no “real import” where Service members “were contaminated with herbicide sprayed by their government,” Congress, in the Agent Orange Act, was addressing the question of when to *presume* the service connection of certain diseases, and “the spraying method” and the extensive scale of application in Vietnam were critical factors in the decision to authorize a presumption—solely for Veterans who served in Vietnam.² The fact that Veterans serving in Guam supported the effort in Vietnam or may have worked with vehicles that traveled to or from Vietnam, as you stated in your June 2020 letter, does not place these Veterans in the same position as Veterans who served in Vietnam insofar as a *presumption* is concerned.

VA’s regulation also recognizes two other specific situations where the risk of exposure was high for an ascertainable group of people: Veterans who served in or near the Korean demilitarized zone where herbicides were known to have been applied, and individuals whose duty regularly and repeatedly brought them into contact with the C-123 aircraft that conducted Agent Orange spray missions in Vietnam. 38 C.F.R. § 3.307(a)(6)(iv)-(v). The exposure scenario you would like included in the presumption is not comparable. The scenarios now covered in the regulation all directly relate to the deliberate application of herbicides for a tactical military purpose on a broad scale. See, e.g., 38 U.S.C. § 1821(d). Expanding the regulation as you urge would leave no principled reason why all military personnel throughout the United States and the world whose bases engaged in standard vegetation and weed control or contained trace amounts of dioxin would not qualify for a presumption.³ Such an expansion would go far beyond Congress’s intent in passing the Agent Orange Act, and VA’s intent to cover comparable scenarios in the current regulation.

In support of your petition, you have provided copies of photographs seemingly showing barrels (what appear to be 55 gallon drums) of Agent Orange in Guam and areas of “browned-out” vegetation in Guam alleged to have resulted from Agent Orange

² Congress has also recently extended presumptions to Veterans who served in or near the Korean Demilitarized Zone (DMZ) and offshore of the Republic of Vietnam. Pub. L. 116-23, §§ 2(a), (3)(a) (2019). These extensions are directly related to the unique nature of the herbicide application in and around Vietnam and the Korean DMZ based on the military exigencies in those areas.

³ In your June 2020 letter, you affirmed your position that any Service member who served on duty at a base in the United States or overseas where there was use of a product containing 2,4-D (e.g., Scotts® TurfBuilder®) warrants a presumption of service connection for certain diseases.

Page 5.

Commander Wells

being employed on the island. Such barrels had various uses in military operations, including shipment of lubricants, fuel additives, cleaning fluids, and non-pesticide chemicals as well as the storage of any number of materials. Furthermore, the photographs do not reveal the contents of the barrels. While the degradation of foliage and vegetation – resulting in the “brown-out” effect shown in the photographs – would be expected from the use of commercial herbicides, which were routinely used in Guam for vegetation management, it would be pure speculation to opine as to the cause of the “brown-out” effect. Additional pictures including images of an airplane, pipeline, personnel and wildlife were also submitted, which do not contain any objective evidence of tactical herbicide use. Thus, the photographs submitted do not provide sufficient evidence of the testing, use, storage, or transportation of Agent Orange or other tactical herbicides in Guam so as to warrant a presumption of exposure for all Veterans serving in Guam from 1958 to 1980.

Your submission of four Veteran affidavits also does not alter this conclusion. Veteran L.F.’s affidavit stated that he prepared, mixed, and sprayed herbicides at Andersen Air Force Base, at off-base fuel facilities, and near the cross country pipeline. According to a 2018 Board of Veterans’ Appeals (Board) decision, L.F. worked with “vegetation control” and “aviation fuels,” and “likely” was “exposed to chemicals” in service. But the Board found that the evidence did not warrant “conceding exposure [to] herbicides in service.”

In his affidavit, Veteran R.S. stated that he performed maintenance on fuel systems and the cross country pipeline and often could not leave the area when L.F. sprayed. A 2014 Board decision found the evidence in equipoise as to whether R.S. was exposed to herbicides in service—and awarded direct service connection on that basis. See 38 U.S.C. § 5107(b) (“in a case before the Secretary . . . , the Secretary shall give the benefit of the doubt to the claimant”). But, importantly, the Board commented that this determination for this one Veteran, 38 C.F.R. § 20.1303, was premised on the “vacuum of evidence from the government regarding herbicide usage in Guam.” Since 2014, the GAO and DoD have engaged in extensive reviews of available records and confirmed no evidence of tactical herbicides on Guam. (And, indeed, in R.S.’s case, the Board conceded exposure to “vegetation killing sprays,” not tactical herbicides of “the same type as that used in Vietnam.”)

We were provided insufficient information to verify the claim status of Veterans C.V. and R.F. But Veteran C.V. did not state that he observed any spraying; rather, he stated that he worked and walked in areas with brown vegetation and that L.F. later informed him that those areas had been sprayed. Veteran R.F. stated that he tried to

Page 6.

Commander Wells

move away from spraying, but it would drift, and he would feel the spray. If Veterans C.V. and R.F. file for VA benefits, they—like all other Veterans—will have the opportunity to establish that any current disabilities were the result of herbicide exposure in service.

In that regard, it is important to note that the lack of a *presumption* of herbicide exposure in certain locations does not foreclose Veterans from proving such an exposure that caused a current disability. *Polovick v. Shinseki*, 23 Vet. App. 48, 52-53 (2009) (lack of a presumption does not preclude establishing direct service connection). But a presumption is an *exception* to the general burden of proof, designed for unique situations, such as where evidence of a toxic or environmental exposure, and associated health risk, are strong in the aggregate, but hard to prove on an individual basis. Presumptions are a blunt tool, contemplate false positives, and, in the area of potential exposure to toxic substances, should be employed only when the evidence demonstrates risk of exposure at meaningful levels.

Basing a presumption on, for instance, the dioxin levels in a firefighting training area at Andersen Air Force Base would implicate this issue of false positives. A high concentration of dioxins would be expected in an area that was used for firefighting activities. Dioxins are not only a byproduct of the production of the Agent Orange chemical component 2,4,5-T, but can also be released into the environment through forest fires, burning of trash or waste, or industrial activities.⁴ Therefore, any high concentration of dioxins in a firefighting training area at Andersen Air Force Base would be no different from any other environment where there were fires or where firefighting equipment was utilized.⁵

In view of the extensive nature of the most recent review conducted by DoD, as well as the investigation completed by GAO, which found no evidence of use, transportation, testing, or storage of Agent Orange or other tactical herbicides on Guam, VA has decided not to promulgate a rule extending a presumption of herbicide exposure

⁴ See National Toxicology Program, U.S. Department of Health and Human Services, “2,3,7,8-Tetrachlorodibenzo-p-dioxin,” REPORT ON CARCINOGENS, FOURTEENTH EDITION (2016), available at <https://ntp.niehs.nih.gov/ntp/roc/content/profiles/tetrachlorodibenzodioxin.pdf>.

⁵ See A. Schecter et al., “Characterization of Dioxin Exposure in Firefighters, Residents, and Chemical Workers in the Irkutsk Region of Russian Siberia,” 47(2) CHEMOSPHERE 147-56 (Apr. 2002), available at <https://www.ncbi.nlm.nih.gov/pubmed/11993630>.

Page 7.

Commander Wells

to Veterans who served on Guam.⁶ VA will continue to consider claims of exposure on an individual, case-by-case basis.

Johnston Island

In your December 2018, December 2019, and June 2020 letters, you stated that Johnston Island was downwind of the fallout from several atmospheric nuclear tests and was a storage site for Agent Orange drums that leaked due to corrosion. DoD documents reflect that, in April 1972, nearly 25,000 barrels of Agent Orange were moved to Johnston Island (also known as Johnston Atoll) and stored in the northwest corner of the island. From July 15 to September 3, 1977, the barrels were transferred to the incinerator ship, *Vulcanus*, for incineration at sea.

Johnston Island was under the jurisdictional control of the Pacific Air Forces (PACAF) command. Personnel on the island included Air Force, Army, and Coast Guard servicemembers, and Holmes and Narver, Inc., contractors. PACAF contracted with the civilian company for maintenance of the Agent Orange storage site on Johnston Island. Civilian contractors, not military personnel, were responsible for site monitoring and re-drumming/de-drumming activities. The area was fenced and off limits from a distance. Drum leakage did occur, due to degradation of the metal drums under the environmental conditions of the island; but, on a daily basis, civilian contractors screened the entire inventory for leaks. The leaking drums were de-drummed, fresh spillage was absorbed, and the surface soil was scraped and sealed.⁷

⁶ The “pro-veteran” canon, mentioned in your June 2020 letter, does not alter my conclusion. This canon applies to the interpretation of a governing text, and “only applies in the situation where the statute or regulation at issue is ambiguous.” *Kisor v. Wilkie*, 969 F.3d 1333, 1343 (Fed. Cir. 2020). To the extent you suggest this should somehow impact the interpretation of section 1116(a) as applied to this situation, the statute is not ambiguous about whether it covers Veterans serving in Guam: it does not. Of course, the Veteran-friendly nature of VA’s mission is reflected in other ways beyond the canon. For example, 38 U.S.C. § 5107(b) contains the “benefit of the doubt rule”, which requires VA to resolve issues in favor of the claimant “in a case before the Secretary” on which there is an approximate balance of positive and negative evidence. Regardless of whether section 5107(b) could be considered to apply to requests for liberalizing changes to VA regulations such as this one, rather than just to VA benefits decisions, VA seeks to ensure that Veterans receive all the benefits to which they are legally entitled. In any event, however, we do not view the evidence in favor of establishing a presumption in the matter at hand to be in equipoise.

⁷ See T.J. Thomas et al., “Land Based Environmental Monitoring at Johnston Island - Disposal of Herbicide Orange - Final Report for Period 11 May 1977 - 30 September

Page 8.

Commander Wells

When an herbicide containing dioxin (such as Agent Orange) enters the environment, it is either rapidly destroyed by photodegradation or quickly binds to the soil.⁸ The floor of the Johnston Island storage site was comprised of densely compacted coral. Because of the composition and properties of coral, any leaked herbicide was bound to the coral, providing little opportunity for the herbicide to become airborne. Moreover, due to the storage location and wind patterns, any airborne herbicide would rapidly be dispersed away from Johnston Island and into the open Pacific Ocean.⁹ Overall, although contemporaneous independent monitors found concentrations of 2,4-D and 2,4,5-T in ambient air and water samples on Johnston Island, they concluded that any exposure was “well below permissible levels.”¹⁰

Notwithstanding the military-civilian division of responsibilities at Johnston Island, your June 2020 letter asserted that “cross-contamination . . . would have been rampant,” as “civilians and military shared common areas including latrine and shower facilities, recreational facilities, a common laundry, dining hall, chapel etc.” Your support for this assertion, however, is the statement of Dr. Wayne Dwernychuk—and Dr. Dwernychuk’s support for his statement is a personal communication with you. Such circular evidentiary support is not persuasive. And, to the contrary, the aforementioned independent monitors chronicled that civilian contractors (1) were

1978,” TR-78-87, at Part II, page 154 (Sep. 1978), available at <https://apps.dtic.mil/dtic/tr/fulltext/u2/a076025.pdf>; see also M21-1, IV.ii.1.H.5.b, available at https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/55440000014940/M21-1-Part-IV-Subpart-ii-Chapter-1-Section-H-Developing-Claims-for-Service-Connection-SC-Based-on-Herbicide-Exposure.

⁸ See N. Karch et al., “Environmental fate of TCDD and Agent Orange and Bioavailability to Troops in Vietnam,” 66 ORGANOHALOGEN COMPOUNDS 3689, 3690 (2004), available at <http://www.dnrec.delaware.gov/dwhs/SiteCollectionDocuments/AWM%20Gallery/Hercules/Environmental%20Fate%20and%20Bioavailability%20of%20TCDD%20and%20Agent%20Orange001.pdf>.

⁹ See T.J. Thomas, *supra* at Part I, pages 2, 4-5; Department of the Air Force, “Final Environmental Statement on Disposition of Orange Herbicide by Incineration” 108 (Nov. 1974), available at <https://www.nal.usda.gov/exhibits/speccoll/files/original/0545f78d07574ee445e99187e3af4175.pdf>; see also M21-1, IV.ii.1.H.5.b.

¹⁰ See T.J. Thomas, *supra* at Report Documentation Page, § 20.

Page 9.

Commander Wells

provided with protective coveralls that were laundered daily, and (2) had a distinct place to shower and change into clean clothing before entering into any common areas on the island.¹¹

In sum, because any 2,4-D and 2,4,5-T exposure was “well below permissible levels,” and because civilian contractors (not military personnel) were directly responsible for control of the storage site, VA has decided not to promulgate a rule extending a presumption of herbicide exposure to Veterans who served on Johnston Island. VA will continue to consider claims of exposure on an individual, case-by-case basis. If evidence shows that a particular Veteran was directly involved with the storage site or other activities directly associated with Agent Orange on Johnston Island, exposure to Agent Orange may be conceded.

American Samoa

Your December 2019 letters requested that VA extend the presumption of herbicide exposure to Veterans who served on American Samoa. DoD’s extensive review of records concerning the use, testing, storage, and transportation of tactical herbicides found no evidence of Agent Orange or any other tactical herbicide having been present on American Samoa. Accordingly, VA has decided not to promulgate a rule extending a presumption of herbicide exposure to Veterans who served on American Samoa.

Thank you for your efforts in support of our Nation’s Veterans. If you or your colleagues have any questions, please contact Mr. Cleveland Karren, Compensation Service, Veterans Benefits Administration at 202-461-1753.

Sincerely,



Thomas J. Murphy
Acting Under Secretary for Benefits

¹¹ See T.J. Thomas, *supra* at Part I, page 106.