

No. _____

In the

United States Court of Appeals for the Federal Circuit

MILITARY-VETERANS ADVOCACY, INC.

Petitioner,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

PETITION FOR REVIEW

Military-Veterans Advocacy

John B. Wells

LA Bar #23970

P. O. Box 5235

Slidell, LA 70469-5235 (mail)

769 Robert Blvd. Suite 201D

Slidell, LA 70458 (physical)

Phone: (985) 641-1855

Direct: 985-290-6940

Email: JohnLawEsq@msn.com

Basis of the Petition

Pursuant to 38 U.S.C. § 502, Federal Rules of Appellate Procedure Rule 15(a), and Federal Circuit Rules 15 and 47.12, Petitioner Military-Veterans Advocacy (MVA) petitions the Court for review of the denial of rulemaking request by the Department of Veterans Affairs (hereinafter "VA"), to provide compensation and medical benefits for veterans exposed to herbicides on Guam, American Samoa and Johnston Island. The rulemaking requests are attached hereto.

Petitioner's Standing.

MVA is a non-profit corporation organized under the laws of Louisiana who has been granted tax exempt status under 26 U.S.C. § 501(c)(3). MVA litigates, legislates and educates on behalf of members of the military and military veterans. This includes pursuing appeals on behalf of veterans who have been improperly denied earned veterans' benefits.

MVA has in excess of 1100 members and is growing quickly. The corporation has four sections, Blue Water Navy,(hereinafter BWN), Agent Orange Survivors of Guam, (AOSOG) Veterans of Southeast Asia (VOSEA) and Veterans of Panama Canal Zone (VOPCZ). Two sections, BWN and AOSOG are directly impacted by the regulation. BWN includes those who served in the

waters offshore Vietnam not covered by Pub. L. 116-23 who made a port call in Guam. AOSOG includes those who were stationed in the territories of Guam and American Samoa as well as the former base and current wildlife refuge at Johnston Atoll.

MVA has been found by this Court to have standing to bring actions on behalf of veterans. *Procopio v. Sec'y of Veterans Affairs*, 943 F.3d 1376, 1378 n. 1 (Fed. Cir. 2019)

Jurisdiction

Jurisdiction is alleged under 38 U.S.C. § 502 for judicial review pursuant to Chapter 7 of Title 5 of the United States Code, specifically 5 U.S.C. § 706. This Court has jurisdiction because the VA denied the rulemaking request submitted pursuant to 5 U.S.C. § 553. *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011). Additionally, the denial included an interpretation of law, specifically 38 U.S.C. §§ 1113(b), and 1116 which vests this Court with jurisdiction. *Procopio v. Sec'y of Veterans Affairs*, 943 F.3d 1376, 1380 (Fed. Cir. 2019).

The regulation does constitute final agency action for purposes of a Chapter 7 of Title 5 United States Code review. Review under 5 U.S.C. § 706 is appropriate since the VA refused to follow notice and comment procedures by

publishing a preliminary rule in the Federal Register. Review is further proper under 5 U.S.C. § 704 since there is no other remedy at law.

Factual Background

On November 15, 2018, the Government Accountability Office reported on their investigation of Agent Orange use on Guam. The report, initially requested by MVA and formally requested by the Congress in House Report 115-200 was released to Congress on November 15, 2018. Titled “Agent Orange: Actions Needed to Improve Accuracy and Communication of Information on Testing and Storage Locations,” GA0-19-24 (Nov. 15, 2018) (hereinafter GAO Report), the following major findings were made: (1) At least one vessel carrying Agent Orange stopped at Guam; (2) Existing records do not show what cargo was unloaded; (3) Record keeping on behalf of the Department of Defense was deficient; (4) Identification of Agent Orange testing and storage sites outside of Vietnam was deficient; (5) The two chemical components—n-butyl 2,4-D and n-butyl 2,4,5-T— have a half-life deterioration in soil ranging from several days to many months, depending on conditions. (6) The suggested half-life of the dioxin 2,3,7,8-TCDD—a by-product of the 2,4,5-T manufacturing process is longer although dioxin can be generated by sources other than Agent Orange.

The GAO report also examined and compared tactical herbicides such as Agent Orange with commercial herbicides which the VA concedes were used in Guam. The GAO report found that some of these commercial herbicides contained 2,4-D; 2,4,5-T; or both, although they were not in the n-butyl form used in Agent Orange. These included at least 4 commercial herbicides that contained some form of 2,4,5-T, the component that contained the contaminant 2,3,7,8-TCDD. Also known as dioxin.

The Agent Orange Act of 1991, Pub. L. 102-4 applies to all herbicides containing 2,4-D or dioxin used in support of combat operations in Vietnam. The Act does not limit its applicability to Agent Orange or other tactical herbicides. Military forces on Guam supported United States and allied operations in Republic of Vietnam through air strikes, air logistics, force replenishment and refugee processing.

On December 4, 2018, during a meeting with Secretary of Veterans Affairs Robert L. Wilkie, MVA presented the initial request for rulemaking to the Secretary and his staff. MVA officials orally briefed the Secretary on the need to cover veteran victims of herbicide exposure on Guam, American Samoa

and Johnston Island.¹ The request noted that a recent report by the Government Accounting Office (GAO) confirmed the presence of 2,4,5-T a chemical associated with toxic herbicides was used on Guam as late as 1980. The GAO report also noted that herbicide was used through 1980.

On December 3, 2019, MVA sent an amplification of the rulemaking request to Secretary Wilkie. The amplification included an excerpt of a Public Health Assessment showing a 19,000 ppm level of dioxin at the Andersen AFB fire training school,² an excerpt from the Guam Land Use Plan prepared for the Base Realignment and Closure Committee confirming herbicide use as late as 1980, a Guam EPA press release referring to a recently released study confirming the presence of 2,4,5-T and 2,4-D at Guamanian military bases and a treatise entitled “Aspects of the Biology and Geomorphology of Johnston and Wake Atolls, Pacific Ocean,” which confirmed storage of 25,000 barrels of Agent Orange on the Atoll along with other toxic chemicals. The study noted that many barrels leaked and some were merely dumped into the lagoon for

¹ Johnston Island is the largest of four islands that make up Johnston Atoll. It constitutes approximately 241 hectares or .93 square miles of land area.

² This school served more than Air Force personnel. Navy Sailors and Marines from the Naval Station and Guam based ships also underwent training at that facility.

disposal.

https://www.researchgate.net/publication/225849247_Aspects_of_the_Biology_and_Geomorphology_of_Johnston_and_Wake_Atolls_Pacific_Ocean. The study also reflects the small size of the islands.

On December 23, 2019, MVA sent another amplification of the rulemaking request to Secretary Wilkie. The amplification included an excerpt from a report by Weston Solutions to Mr. Harry Allen of the Environmental Protection Agency concerning the presence of the chemicals 2,4-D and 2,4,5-T on and off military bases on Guam.

On May 12, 2020, the VA issued a letter denying rulemaking. The letter was not postmarked until one week later on May 19, 2020 and not received until May 22, 2020. The denial, signed by Mr. Paul Lawrence, Under Secretary for Benefits ignored the provisions of Pub. L. 102-4 concerning the chemical components of herbicide, and claimed, without authority that victims of commercial herbicide exposure cannot be compensated. Lawrence conceded the presence of 2,4,5-T and 2,4-D in the soil stating that trace amounts would be expected. He further conceded the use of commercial herbicides on Guam, arguing that despite the presence of chemical components similar to tactical herbicides, injuries resulting from commercial herbicides were not compensable.

Lawrence went on to dismiss the presence of tactical herbicides on Guam, because of a lack of shipping documentation. In doing so, he ignored the two year destruction protocol in effect at the time for those type of shipping documents.

The Lawrence denial conceded that the VA recognized the use of herbicides outside of Vietnam: Korea and the C-123 aircraft. In actuality there are three. VA also compensates veterans of Thailand who served on the perimeter of several Royal Thai airfields. Notably the air bases in Thailand were used for some of the same type of operations as Andersen Air Force Base in Guam.

Lawrence goes on to say that the presence of extremely high levels of dioxin may not be tied to Agent Orange. He ignores the fact that exposure to toxic dioxin, in the line of duty, is compensable under 38 U.S.C. § 1113.

Lawrence went on to concede the storage of Agent Orange in steel drums in the salt air of Johnston Island. He further conceded that these barrels leaked. His rationalization for denying coverage for Johnston Island veterans was that civilian contractors, not military personnel, were charged with storing and maintaining the tens of thousand of rusting steel barrels on that 241 hectares of coral.

On June 8, 2020 MVA in a letter to the Secretary, asked him to overrule Lawrence and grant the rulemaking request. The letter addressed the arguments raised by Lawrence, and provided evidence that the herbicide was used on Guam as early as 1958. The letter concerned an expert affidavit from Dr. Wayne Dwernychuk, Environmental Scientist and Agent Orange Expert, retired Vice-President from Hatfield Consultants who conducted numerous Agent Orange studies in Vietnam. Dr. Dwernychuk also noted the close quarters on Johnston Island and the common areas used by both civilian and military. Notably the water distillation system took source water from the lagoon, the site of significant leakage.

On July 7 (Guam time - July 6 on the mainland United States) the latest Weston report on soil sample taken in Guam was released. This report confirmed the presence of 2,3,7,8-TCDD, dioxin, in the soil. The report went on to conclude that due to the passage of time the concentration at one point would have been significantly higher. Finally the report concludes: "It is probable that TCDD dioxin congener concentrations detected in soils are associated with chlorinated herbicides. Records of chlorinated herbicide use by the military on Guam (Navy, 1958) and veteran affidavits documenting the use of 2,4,5-T and 2,4,5-TP along with data collected from previous soil sampling events suggest

the presence and use of chlorinated herbicides was likely. Finally, the herbicides in question were known to contain TCDD.” This report was immediately sent to the Secretary.

Failure to Promulgate Rules to presume exposure to herbicides on Guam, American Samoa and Johnston Island Represents an Incorrect Interpretation of the Agent Act of 1991, Pub. L. 102-4.

The plain meaning of Pub, L. 104-2 contravenes the VA interpretation of the statute. In this law Congress stated, in § 2(a) in pertinent part:

(3) For the purposes of this subsection, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era and has a disease referred to in paragraph (1)(B) of this subsection shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

(4) For purposes of this section, the term 'herbicide agent' means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the Vietnam era.

Reading these subsections *in para materia*, as the Court must, the intent of Congress is clear to extend the presumption to those exposed to herbicides of any types, if they are contaminated with dioxin or 2,4-D used in support of operations on the Republic of Vietnam.

The clarity of Congressional intent is underscored by the Secretary's own actions. He has stepped out on three occasions to cover personnel who served outside of Vietnam. While arguably Pub. L. 116-23 required him to cover specified areas in Korea, the VA had via the adjudication manual covered other Korea veterans. Without the benefit of special legislation, the VA covered veterans associated with the C-1234 aircraft. 38 C.F.R. § 3-307(a)(6)(4). Additionally, without the benefit of legislation, the VA extended the presumption to some Thailand veterans in their M21-1 Adjudication Manual Sections IV.ii.1.H.4.a through IV.ii.1.H.4.b.

To the extent that any ambiguity exists, and none appears to, it is the Secretary's duty to interpret statutes in the most veteran-friendly manner. The pro-claimant or pro-veteran canon has been repeatedly recognized as an accepted canon of statutory construction. A unanimous Supreme Court re-affirmed "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki* 561 U.S. 428, 441, 131 S.Ct. 1197, 1206 (2011). The Federal Circuit has also recognized the paternalistic non-adversarial intent of the system designed by Congress. *Gambill v. Shinseki*, 576 F.3d 1307, 1317 (Fed. Cir.2009). The *Gambill* court described the process as uniquely pro-claimant." *Id.* at 1316.

As recently as 2018, Judge O’Malley argued in dissent that there is little logic deferring to agency regulations “promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated.” *Kisor v. Shulkin*, 880 F.3d 1378, 1379 (Fed. Cir. 2018)(O’Malley, J dissenting). *See also, Procopio v. Wilkie*, 913 F.3d 1371, 1382 (Fed. Cir. 2019) (O’Malley, J. Concurring).

Since the days of World War II, the United States, has properly recognized that “legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone v. Lightner*, 319 U.S. 561, 565 (1943)). Military veterans have “been obliged to drop their own affairs and take up the burdens of the nation” (*Boone*, 319 U.S. at 575), “subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service.” (*Johnson v. Robison*, 415 U.S. 361, 380 (1974)). Gone are the days of the veteran amputees squatting along the road to beg for pennies or the bonus marchers being forcibly dispersed by federal troops. Instead the United States adopted the “long standing policy of compensating veterans for their past contributions by providing them with numerous advantages.” *Regan v. Taxation with*

Representation, 461 U.S. 540, 550-551 (1983). This led to the pro-claimant canon which requires interpretative ambiguities to be resolved in favor of the beneficiaries. See, e.g., *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Hodge v. West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998) (use of canon in construing regulations).

Review of the Secretary's actions must take place via this unique pro-claimant, pro-veteran canon of construction.

Failure to Promulgate Rules to Presume Exposure to Herbicides on Guam, American Samoa and Johnston Island Represents an Arbitrary and Capricious Action.

The VA has conceded the presence of 2,4,5-T, 2,4-D and 2,3,7,8-TCDD on Guam. The GAO has found these components in commercial herbicides and two EPA reports have confirmed their presence almost four decades after the last confirmed use. It is not the name, or the designation given to the herbicide that is relevant to this process.

The VA's main argument was that the herbicide containing the dangerous elements cannot conclusively be shown to be Agent Orange or any tactical herbicide. Additionally, the lack of long destroyed shipping documents is relied upon by the VA to deny rulemaking. The Agent Orange Act of 1991 does not make any differentiation between tactical or commercial use.

Whether the herbicide was considered tactical or commercial is of no moment if the pertinent chemical composition was the same. The source and control of the herbicides is not relevant. Nor is the spraying method of any real import. Whether the herbicide arrived on island by, ship, plane or in a suitcase is irrelevant. The EPA has found that dioxin is still present on Guam and that it's presence was probably tied to the herbicide spraying.

The situation on Johnston Island is even more absurd. The VA's denial of rulemaking is based upon their position that civilians, not military personnel, maintained the leaky 25,000 55-gallon steel drums, stored in the salt air of the .93 square miles of area. Although there was a chain link fence around the storage area, it is inconceivable that the leaking contaminant did not flow outside the enclosure³ or into the lagoon. They also ignored the fact that the petroleum/contaminant mix would have adhered to the shoes and clothing of the civilians allowing COVID-like "community" contamination in the common recreation, dining, latrine, showering and chapel areas. There was no segregation of civilians and military aboard the island and given its size, none would have been possible. Additionally, the Secretary failed to consider that the

³ The island is coral and sand which would result in less absorption of the spillage.

contaminated lagoon was the source of the potable water distillation plant.

The bottom line is that active duty military personnel, acting incident to their service responsibilities, were contaminated with herbicide sprayed by their government. This herbicide use and the presence of the dangerous components was conceded by the government. It is blatantly arbitrary and capricious to hide behind technical terms to dodge their responsibilities to our nation's heroes is *per se* arbitrary and capricious.

. Failure to Promulgate Rules to Presume Exposure to Herbicides on Guam, American Samoa and Johnston Island Is Unsupported By Substantial Evidence..

Lawrence's reliance on the absence of records of Agent Orange shipments is clearly error. The VA has it wrong! If anything, any lack of contemporaneous documentation is a policy justification for the presumption of service connection, not a valid argument against it. It was a similar lack of documentation that led to the presumption of exposure in the Agent Orange Act of 1991.

Additionally, the Veterans Court has held that where a condition would not normally have been recorded, "the Board may not consider the absence of evidence as substantive negative evidence" of that condition. *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011). *See, also, AZ v. Shinseki*, 731 F.3d 1303, 1317 (Fed. Cir. 2013). Although records were probably kept, there was no requirement to retain them.

Accordingly there is no substantial evidence to support the Secretary's position that Agent Orange, or tactical herbicides or herbicides with dangerous chemical components were not shipped to Guam. The many affidavits to the contrary, referenced in the GAO and EPA reports, confirm that tactical herbicides, especially Agent Orange, was present on the island. More importantly, there is no evidence to support the proposition that veterans were not exposed to 2,4,5-T, 2,4-D or 2,3,7,8-TCDD as part of their military duties, or that this exposure resulted in diseases or disabilities associated with herbicide exposure.

There is no evidence, substantial or otherwise, to support the argument that military personnel were not exposed to Agent Orange on Johnston Island. There is no evidence that military and civilian personnel were segregated. There is no evidence that there was no cross-contamination on common areas. There was no evidence that the Agent Orange did not leak outside of the chain link fence or into the lagoon. The opposite is true.

The Secretary's position on this rulemaking request is unsupported by substantial evidence and ignores the substantial evidence to the contrary.

Conclusion.

For all of these reasons, MVA and its members are adversely affected by the unlawful denial of rulemaking and respectfully petition this Court for review

Respectfully Submitted:

Military-Veterans Advocacy

/s/ John B. Wells

John B. Wells

LA Bar #23970

P. O. Box 5235

Slidell, LA 70469-5235 (mail)

769 Robert Blvd. Suite 201D

Slidell, LA 70458 (physical)

Phone: (985) 641-1855

Direct: 985-290-6940

Email: JohnLawEsq@msn.com

Certificate of Service

The undersigned certifies that the within was served on the respondent Secretary of Veterans Affairs by electronic mail and UPS courier the 10th day of July, 2020.

/s/ John B. Wells
John B. Wells

CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,466 words by computer word count, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a monospaced typeface using Wordperfect 8.0 with 14-point proportionally spaced face.

/s/ John B. Wells
John B. Wells

APPENDIX

Denial of Rulemaking



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

May 12, 2020

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

Dear Commander Wells:

This is in response to your letters to the Department of Veterans Affairs (VA) dated December 3, 2018, December 2, 2019 and December 23, 2019, petitioning for a 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.

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 thousands of original source documents dating back to the inception of 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

Commander John B. Wells

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, 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 and December 2019 letters, you suggested that 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 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's 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 Agency prior to market availability and would have been used according to the manufacturer's instructions.

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."). And, although your December 2018 letter suggested that the difference between tactical herbicides and commercial herbicides "is of no moment," presumptive service connection only applies to chemicals in "an herbicide used in support of the United States and allied military operations." 38 U.S.C. § 1116(a)(3); 38 C.F.R. § 3.307(a)(6)(i).

To the extent your petition can be construed as a request that VA interpret its regulation to apply to commercial herbicides used for standard vegetation and

Commander John B. Wells

weed control, we must reject this request. This would broaden the regulation far beyond its intended function. The primary purpose of the statute underlying the regulation 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 as a result of 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").

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 urge us to include 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. 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.

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 where evidence of a toxic or environmental exposure, and associated health risk, are strong in the aggregate, but hard to

Commander John B. Wells

prove on an individual basis. Presumptions are a blunt tool, contemplate false positives and 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 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 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.¹ 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.²

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

Johnston Island

In your December 2018 and December 2019 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, 1977 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 Service members, and Holmes and Narver, Inc., contractors. PACAF contracted with the civilian company for maintenance of the Agent

¹ 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>.

² 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>.

Commander John B. Wells

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.³

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.⁴ 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.⁵ 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."⁶

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

³ 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 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/554400000014940/M21-1-Part-IV-Subpart-ii-Chapter-1-Section-H-Developing-Claims-for-Service-Connection-SC-Based-on-Herbicide-Exposure.

⁴ 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/Heracles/Environmental%20Fate%20and%20Bioavailability%20of%20TCDD%20and%20Agent%20Orange001.pdf>.

⁵ 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.

⁶ See T.J. Thomas, *supra* at Report Documentation Page, § 20.

Commander John B. Wells

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. Rodney Grimm, Compensation Service, Veterans Benefits Administration at Rodney.Grimm1@va.gov or 202-461-9733.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul R. Lawrence".

Paul R. Lawrence, Ph.D.