



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

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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

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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

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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>.

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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.

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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.