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April 8, 2024

SECTIONS:
Blue Water Navy

Agent Orange
Survivors of Guam

Veterans of
Southeast Asia

Veterans of
Panama Canal Zone

Veterans of Okinawa

Via regulations.gov

Director, Regulation Policy and Management (00REG)
Department of Veterans Affairs
810 Vermont Avenue NW, Room 1064
Washington, DC 20420

Re: RIN 2900–AR10, Updating VA Adjudication Regulations for Disability or Death Benefit Claims Related to Exposure to Certain Herbicide Agents

Military-Veterans Advocacy Inc.® (MVA™) is a tax exempt IRC 501[c][3] organization based in Slidell, Louisiana that works for the benefit of the armed forces and military veterans. Through litigation, legislation and education, MVA works to advance benefits for those who are serving or have served in the military. In support of this, MVA provides support for various legislation on the State and Federal levels as well as engaging in targeted litigation to assist those who are serving or who have served.

As well as legislative advocacy, Military-Veterans Advocacy represents veterans in all facets of the veterans law system. MVA's Director of Litigation is admitted to practice before the Department of Veterans Affairs, the Court of Appeals for Veterans Claims, the Court of Appeals for the Federal Circuit and the Supreme Court of the United States.

MVA is the leader in support of the Blue Water Navy. Our victory in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) forced the VA to abandon their arbitrary and capricious “boots on the ground” position concerning herbicide exposure. Our organization also drafted legislation that became part of § 403 of the Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act of 2022, Pub. L. 117-168 (hereinafter PACT Act). MVA also filed rulemaking requests concerning Okinawa and the Panama Canal Zone pursuant to 5 U.S.C. § 553(e).

Introduction.

The proposed rule would amend 38 CFR part 3 to address portions of the Blue Water Navy Vietnam Veterans Act, (hereinafter BWN Act) Pub. L. 116-23 and Section 403 of the PACT Act. MVA submits that the with small exceptions delineated herein, pertinent provisions of the proposed rule are arbitrary and capricious and in derogation of both the Constitutional and statutory rights of veterans to obtain benefits for service-connected disabilities under what was intended to be a fair and non-adversarial veteran-friendly claims system.

The comments under the proposed rule, entitled “Wells All pending Petitions” (hereinafter Wells Petitions) were initiated by MVA and are incorporated by reference into this comment.

Due to the length of some supporting documentation, links are provided. The information in these links is incorporated by reference into this comment.

Authority of the Secretary to Issue Regulations beyond the scope of legislation

Despite the VA's attempt in the preliminary rule to shift responsibility back to Congress, the Secretary has plenary authority under 38 U.S.C. § 501 to issue rules and regulations in support of the Veterans benefits scheme authorized by Congress. The statute reads in pertinent part:

- (a) The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including—
- (1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;
 - (2) the forms of application by claimants under such laws;
 - (3) the methods of making investigations and medical examinations; and
 - (4) the manner and form of adjudications and awards.

Section 501(a) confers “broad” rulemaking authority on the Secretary. *Nat'l Org. of Veterans' Advocates, Inc. (NOVA) v. Sec'y of Veterans Affairs*, 669 F.3d 1340, 1345 (Fed. Cir. 2012). Such broad authority, defined in general terms, encompasses particular topics that are not themselves expressly mentioned as long as they come within the generally defined grant: “A regulation does not contradict the statutory scheme ... simply because it addresses an issue on which the scheme is silent.” *Lofton v. West*, 198 F.3d 846, 850 (Fed. Cir. 1999). Various regulations make evidentiary distinctions without express statutory authorization. *See, e.g.*, 38 C.F.R. § 3.307(a)(6)(iv) (presumption applies only to veterans who operated “in or near the Korean DMZ”); *id.* § 3.307(a)(6)(v) (presumption applies only to veterans who “regularly and repeatedly operated, maintained, or served onboard C-123 aircraft” “during the Vietnam era”); *id.* § 3.307(a)(7) (presumption applies only to veterans who served at Camp Lejeune). *See, Snyder v. McDonough*, 1 F.4th 996, 1004 (Fed. Cir. 2021).

Additionally, Section 202 of the PACT Act implemented a new framework in Chapter 11 of Title 38 U.S.C (38 U.S.C. §§ 1171-1176) to establish, modify, or remove the presumptions of service connection based on toxic exposure, including locations. This new framework builds upon the Congressional authority granted in 5 U.S.C. § 301.

In the preliminary rule, the Secretary basically punted the ball to the Department of Defense noting that the Pesticide Board had not confirmed the presence of herbicide in Okinawa and Panama. Such a determination is not necessary given the volume of evidence resented in the Wells petitions. MVA also notes with dismay that the Secretary did not address or did not adequately address the evidence included with the Wells petitions. Pursuant to 5 U.S.C. § 555(e), MVA demands that all evidence of record be addressed and that the Secretary provide a

logical reason for rejecting any such evidence. An abstention of the Secretary's statutory authority is not considered an acceptable response.

Concurrence with the Preliminary Rule.

MVA concurs with the preliminary rule to the extent that its provisions do not violate the BWN Act or the PACT Act, but notes that the rule is a mere recitation of the statutory language. MVA does note and concurs with the extension of the Blue Water Navy offshore requirement to include Phu Quoc Island and the territorial waters surrounding, Phu Quoc's exclusion from the demarcation area of the BWN Act was brought to the Secretary's attention by MVA. We are happy to see that in this single case the Secretary actually listened and used his authority to expand the benefit area.

Dependents Exposure.

As delineated in Attachment 1 to this comment, Ms. Nancy Flight, who accompanied her military spouse to Guam, confirms that civilian dependents are not covered by the PACT Act or any other legislation or regulation for herbicide benefits. This oversight is unconscionable. Dependents breathed the same air and drank the same water as their sponsor and were exposed to the deadly toxins while serving alongside their military sponsor.

MVA is not seeking compensation for dependent. We do believe that the Secretary should include any family member of a veteran described in section 1110, 1116, 1117, 1118, 1119 and 1120 or any other pertinent Section of Chapter 11 of Title 38, who accompanied a military sponsor for at least thirty days in a location determined by Congress or the Secretary, to have been the site of a presumption of herbicide or other toxic contaminant exposure, during the time period described in such section, or who was in utero during such period while the mother of said family member resided at the location, shall be eligible for hospital care, medical services, and nursing home care furnished by the Secretary pursuant to Chapter 17 for any covered condition, or any disability that is associated with a covered condition, that is associated with toxic exposure during such period. This is consistent with the Janey Ensminger Act, which became the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. 112-154 and is well within the authority of the Secretary to expand to other areas where military dependents were exposed to toxic substances.

Guam Exposure Commencement Date.

Section 403(d)(5) grants the presumption of herbicide exposure to service members who "(5) performed on Guam or American Samoa, or in the territorial waters thereof, during the period beginning on January 9, 1962, and ending on July 31, 1980." Unfortunately, this reflects the commencement date for spraying in Vietnam, not Guam, which was quite a bit earlier.

Although MVA received promises from the PACT Act sponsor, Mark Takano, to change the date until August 15, 1958, that never happened.

MVA was the lead organization advocating for herbicide coverage on Guam and American Samoa. We discovered and provided to Congress a U. S. Navy Public Works publication entitled Guam Soils Conservation Series No. 2. Herbicides dated August 15, 1958, which described the procedures for the handling and spraying of herbicides on the island. [1958 Herbicides Navy \(1\).pdf \(militaryveteransadvocacy.org\)](#). A bill in Congress, HR 1191, with 73 sponsors, should reset the commencement date to August 15, 1958. While spraying might have actually commenced earlier, MVA was unable to locate any documentation to confirm an earlier date.

The number of people affected by the earlier commencement date is small – MVA estimates a couple of dozen – but they deserved to be covered. MVA requests the Secretary to use his plenary power to modify the preliminary rule to reflect a herbicide commencement date of August 15, 1958, instead of January 9, 1962.

Restoration of the Blue Water Navy Line to the pre-2002 area.

The Blue Water Navy Vietnam Veterans Act. Pub. L. 116-23 granted presumptive herbicide exposure status to US servicemembers who served in a geographic area which closely parallels the territorial sea. Section 2(d) of the Act grants the presumption of herbicide exposure to servicemembers who performed in an area 12-nautical miles seaward if a line drawn between certain geographic points off the coast of the Republic of Vietnam.

Prior to 2002, the VA by regulation and policy, recognized the presumption of exposure in the entire area of the South China Sea covered by Executive Orders No. 11,216, (Designation of Vietnam and Waters Adjacent Thereto as a Combat Zone for the Purposes of Section 112 of the Internal Revenue Code of 1954, 30 Fed. Reg 5817 (1965) and Executive Order 11, 231. Establishing the Vietnam Service Medal.

In early 2002, the VA implemented a General Counsel Opinion that held veterans qualifying for the presumption of the herbicide exposure must have touched land or the internal rivers of the Republic of Vietnam. The Court of Appeals for the Federal Circuit held in a case brought by Military-Veterans Advocacy called *Procopio v. Wilkie*, 913 F.3d 1371 held that the herbicide presumption must be extended to include the bays, harbor, and territorial sea of Vietnam. Ships, especially aircraft carriers, outside the line were not covered.

The riverbanks of major rivers were sprayed with herbicide and additional herbicide washed off the land and into the rivers, streams and other bodies of water eventually reaching the South China Sea. The river discharge (known as the plume or estuarine waters) could be found several hundred kilometers from the mouth of the river within a couple of weeks. This contaminated seawater would be ingested into the distillation intake. Additionally, planes and helicopters, especially carrier based strike aircraft flying at tree-top level for close air support, would fly through clouds of Agent Orange. The Carrier Onboard Delivery (COD) planes would deliver personnel, supplies, equipment, and mail that was staged in and around Da Nang or other

Vietnamese airfields. Ships outside the demarcation line would also receive ammunition foodstuffs, via underway replenishment, which had originated from South Vietnam or Guam. This resulted in cross-contamination which quickly occurred throughout the ship.

The cross-contamination was a real problem. As herbicide was mixed with diesel fuel, it adhered to the under carriage of aircraft and the personnel and cargo they carried. Underway replenishment ships unloaded cargo, munitions and personnel staged in Guam or South Vietnam. The petroleum based herbicide would quickly transfer to the personnel handling the contaminated materials.

MVA ordered a review of the cross-contamination from Dr. Wayne Dwernychuk, a Canadian scientist who conducted several studies of herbicide use and effects near and within Vietnam. His report is here: [Dr. L.W. \(Wayne\) Dwernychuk \(militaryveteransadvocacy.org\)](http://militaryveteransadvocacy.org). Additionally, Attachment 2 contains comments from Blue Water Navy sailors operating outside the line to validate their exposure and that of their shipmates.

SUBMARINES

Submarines represent a special problem. Unlike surface ships, the submarines do not record their latitude/longitude when deployed, especially to a war zone. Confidentiality remains an essential consideration. While the submarine patrol reports are more specific, they generally remain classified.

The VA-Navy solution has been to have properly cleared persons from the Naval Historical and Heritage command review the patrol reports to determine whether the submarine was within the designated area. This is a major due process violation. As the Supreme Court held in *Greene v. McElroy*, 360 U.S. 474 (1959), when the government seeks to deprive a citizen of any property interest, to include benefits, they must be furnished with all documents used by the adjudicator to make a decision. Given past experience with the Board, where they are unwilling or unable to make a navigational plot, the proper placement of the submarine is simply critical. The veteran must have the opportunity to review and confirm the location of the submarine. Continuing to classify these reports fifty years after war seems to be arbitrary, especially when truly sensitive information can be redacted.

Panama Canal Zone

The U.S. Census Bureau Commodities by Country show 2,4-D & 2,4,5-T shipped, stored and used in Panama from 1958 until at least December 1977. [united stated exports of domestic merchandise calendar year 1958.pdf \(militaryveteransadvocacy.org\)](http://militaryveteransadvocacy.org) This chemical, produced and shipped from 1958-1964, was code named "Agent Purple" with a higher dioxin content (30-50 PPM TCDD), whereas shipments from 1965-1977 were to have a lower dioxin content closer to 0.5 code named "Agent Orange." As outlined in the DOD Herbicide Manual, TM 5-629, these herbicides were used routinely as needed on base. 2,4-D & 2,4,5-T was used to kill poison ivy, poison oak and sumac where troops were deployed. See page 34, 3-7. Silvex was used on golf courses, parade fields and gun ranges. See page 41, 3-6. As well as many other persistent pesticides harmful to man as listed in this Tri-service manual to be used on every base as needed. Silvex also contains 2,4,5-T and the

by-product Dioxin (TCDD).

The VA claims that they lack statutory authority to provide benefits to veterans of service in the Panama Canal Zone (PCZ) because they argue that DOD has not confirmed the use of herbicide in the PCZ. As discussed above, the Secretary enjoys plenary authority in this area. Additionally, the evidence listed above indicates that tactical herbicides were shipped to the Panama Canal Zone from 1958 until at least December 1977. In addition, many veterans have developed illnesses consistent with herbicide exposure and the VA continuously denies these claims. Finally, MVA has previously submitted a picture of herbicide spraying on Lake Gatun, which is part of the Panama Canal. Barrels of Agent Orange, presumably empty, were in use in Panama as late as February 2020 to block off access to buildings at old Fort Sherman.

[mva_rulemaking_request_amplification_1.pdf \(militaryveteransadvocacy.org\)](#).

As confirmed in the Pesticide Monitoring Special Study No. 44-0102-77, Environmental Sampling in the Panama Canal Zone, U.S. Army Environmental Hygiene Agency, Aberdeen Proving Ground, MD, page 2, Table 1, a total of 406,466 gallons of pesticides were used between the Atlantic (Ft Davis) and the Pacific side of the Isthmus (Corozol) as well as 71,386 gallons of Chlordane and 1,696 gallons of DDT used in just the year 1975. And as we see on the shipping records, all of these chemicals were shipped and stored/used in Panama for decades.

As confirmed and acknowledged by the Department of Veterans Affairs, Center for Disease control and other medical and scientific communities, it is immaterial whether those herbicides were called “tactical” or commercial.” These designations represent a distinction without a difference as both contained 2,4-D & 2,4,5-T and the unintended by-product of 2,3,4,7,8-TCDD (Dioxin). See, GAO Report *Agent Orange, Actions Needed to Improve Accuracy and Communication of Information on Testing and Storage Locations*, GAO 19-24 at page 11.

Without question, herbicides were used in the Panama Canal Zone, Attachment 3 contains the personal stories of veterans were exposed. Attachment 4 is a bi-partisan letter from 17 Members of Congress asking the VA to take action n to cover herbicide use in the Panama Canal Zone.

Okinawa

Since January 9, 1962 (and possibly earlier) the herbicide Agent Orange was shipped to, stored upon and used on United States military installations on Okinawa. Agent Orange Barrels were discovered on Marine Corps Air Station Futenma in August of 1981 and at a soccer pitch in Okinawa City (previously part of Kadena Air Force Base) in June of 2013. Evidence in the request included a form DD 250, showing that 2,4,5-T was shipped to Okinawa in July of 1966. It further included excerpts from Jon Mitchell's analysis, "Poisoning the Pacific" which provides documentary and photographic evidence of the presence of herbicide on Okinawa during the Cold War. It also contains the later excavations of Agent Orange herbicide at Marine Corps Air Station (MCAS) Futenma and Kadena Air Force Base (AFB). The investigation of the former Kadena discovery is included in a survey by the Okinawa Defense

Bureau, entitled Former Kadena Airfield {2 S) Soli Investigation Survey {Part 2). The rulemaking request also contains sworn affidavits from Gerald Balmes, the MVA Section Chief for Veterans of Okinawa, and Allan Davis who served on Okinawa to confirm their personal observations concerning the use of herbicide. Balmes actually sprayed herbicide on a Marine Corps station, Davis inventoried 25,000 leaking barrels of Agent Orange at Kadena Air Force Base. [mva_rulemaking_request_to_va_secretary_061821.pdf \(militaryveteransadvocacy.org\)](https://www.militaryveteransadvocacy.org/mva-rulemaking-request-to-va-secretary-061821.pdf).

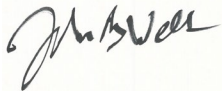
Attachment 5 provides statements from those who were assigned to Okinawa and were exposed to Agent Orange herbicide.

Consequently, the Secretary should use his plenary power to extend the presumption of herbicide exposure to those who served on Okinawa.

Conclusion

The proposed rule is insufficient and unfairly limits coverage to those who were exposed to herbicide. The Secretary should incorporate the matters herein into the final rule and to assess specifically any issue which he does not intend to adopt.

Sincerely,

A handwritten signature in black ink, appearing to read "John B. Wells". The signature is written in a cursive style and is positioned above a light-colored rectangular area that likely represents a stamp or a placeholder for a signature.

John B. Wells
Commander, USN (ret)
Chairman