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January 3, 2020

Hon. Robert Wilkie
Secretary of Veterans Affairs
810 Vermont Avenue. NW
Washington DC 20420

Re: Request for Rulemaking 38C.F.R § 3.307 and M21-1 Manual

Dear Mr. Secretary:

Pursuant to 5 USC § 553(e), request that you issue rules recognizing the presumption of Agent Orange exposure to veterans serving in Thailand from February 28, 1961 until June 30, 1976 when the last US military personnel departed from Thailand.

The CHECO Report of 1973 (Contemporary Historical Examination of Current Operations Report for Base Defense in Thailand)¹ clearly states that part of the security operations included the use of herbicides for vegetation control on all Royal Thailand Air Force Bases. CHECO at 58.

The use of herbicides in Thailand was part of a Defense Department approved security plan to prevent further attacks on US force and equipment by Communist forces operating inside Thailand. The use of those herbicides at the Royal Thai Air Force Bases was to deny the Communist forces “cover and concealment. Herbicide deployment was conducted by US military personnel inside the perimeter fences on all RTAFB as per the CHECO Report at 58.

The CHECO Report also states that herbicides were shipped to Thailand from manufacturer’s by rail to various ports of embarkation and, then transported by commercial ships to Vietnam and Thailand.

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 2,3,7,8-TCDD (Dioxin). See, GAO Report *Agent Orange, Actions Needed to Improve Accuracy and Communication of Information on Testing and Storage Locations*, GAO 19-24² (Nov. 2018) at page 11.

¹ <https://apps.dtic.mil/dtic/tr/fulltext/u2/a586193.pdf>

² <https://www.gao.gov/products/gao-19-24>

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Whether that exposure came from Agent Orange or other tactical or commercial herbicides is of no moment. The name of the agent is not the determining factor. It is the chemical composition. If military personnel who served in Thailand were exposed to this chemical, and it appears that they were, any disease or disorder flowing from that chemical component should be service-connected pursuant to 38 U.S.C § 1113 (b). The important thing is that they were exposed to herbicides with toxic components. That is enough to trigger coverage.

I acknowledge that the VA is currently adjudicating claims for benefits for those who served on or near the Thai base perimeters. This has not been properly defined. On September 22, 2017, the VA agreed to issue rules concerning herbicide exposure in Thailand during the Vietnam era. It took the VA over 27 months to issue a change to the M-21 Manual³. I note that no notice of proposed rulemaking has been published in the Federal Register. We are assuming that your intent in publishing the rule in the M21-1 Manual is a concession that this provision was in consonance with 5 U.S.C. § 552(a)(1)(D) and 5 U.S.C. § 553. We also have strong concerns about the limitations placed on adjudicators by this rule.

Limiting the presumption of exposure to the perimeter is just ludicrous. Control of vegetation and foliage was authorized by the Military Assistance Command Thailand throughout the base. *See*, USMACT 210-10 ¶2(a). A copy of this document is available upon request.

Wind drift would cause even low-level hand spraying to contaminate areas outside of the perimeter. The Army Field Manual 3-3 *Tactical Employment of Herbicides*⁴ at ¶5-1(f) discusses the susceptibility of herbicide spraying to the effects of wind drift. The Army Field Manual recommended that ground dissemination systems, which were primarily used in Thailand, maintain a 500-meter (546.8 yards) buffer area. *Id.* At ¶5-2(d). In other words, the Army recognized contamination within five football fields of the perimeter.

This buffer may have been adequate for preventing vegetation contamination, but it is not adequate for preventing personnel contamination. The herbicide was mixed with diesel fuel at the rate of 5 gallons of agent to 50 gallons of diesel fuel. *Id.* at ¶5-2(a). The diesel fuel permits better adherence to vegetation. Unfortunately, it also adhered to the shoes of personnel and any equipment, vehicles or containers crossing the perimeter. Moving equipment, vehicles or containers into the base would result in the herbicide being transported into the base interior.

³ [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](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 http://www.83drsou.org/Main_Page_Items/tactical_employment_of_herbicides.pdf

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Personnel stationed on the perimeter or even crossing the perimeter would track the petroleum-herbicide mixture into the base proper. This would include barracks, eating facilities, latrines, offices and warehouses. Over time, and this was a long war, this cross-contamination would effectively reach every portion of the base.

Additionally, the rule limits coverage to those who performed duties on the perimeter. Many barracks backed up to the perimeter and were certainly within the 500-meter buffer. Consequently, many veterans with other duties were exposed while sleeping or otherwise off duty.

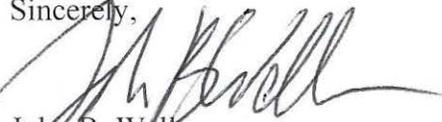
There is no question, scientific, or otherwise, that those US military personnel who served on Royal Thai Air Force bases in Thailand were directly exposed to herbicides from February 28, 1961 through June 30, 1976. A presumption of exposure should be granted to all US military personnel who served in Thailand during the Vietnam War Era up to and, including the last of the US military personnel who departed Thailand in June of 1976.

While May of 1975 has been the tradition cutoff date for the herbicide exposure, veterans served in Thailand through June of 1976. We know that the dioxin remains in the soil for decades. Recent remediations at Da Nang and Bien Hoa confirm this scientific reality. Recent testing on Guam confirms the presence of 2,4-D and 2,4,5-T to the present day.

MVA estimates that there are approximately 200,000 Thailand veterans that are still alive, and that number is decreasing daily. MVA suggests that the Secretary can and should use his rule making authority to provide a presumption of exposure to herbicides for Thailand veterans as delineated in the attached proposal.

Utilization of the M-21 Manual has deprived stakeholders of the opportunity to provide comment on the rule. MVA personnel possess significant "hands on" experience. Issuing the notice of proposed rulemaking will allow the VA to benefit from this expertise.

Sincerely,



John B. Welts
Commander, USN (ret)
Chairman of the Board and Director of
Litigation

Proposed Rulemaking for Thailand Veterans

38 C.F.R. 3.307(a) is amended by adding the following subsection:

A presumption of service connection is created between the occurrence of a disease included in 38 C.F.R. § 3.309 and exposure to a herbicide agent while serving in the Armed Forces February 28, 1961 through June 30, 1976 at a military base in Thailand. Such presumption applies to exposure to a herbicide agent at any military base located in Thailand without regard to where on the base the veteran was located or what military job specialty the veteran performed.