Through Regulations.gov and by hand-delivery
January 28, 2008

Director
Regulation Management (00REG)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Room 1068
Washington, D.C. 20420

Re: Proposed Rescission of M21-1 provisions published in 72 Fed. Reg. 66218-19 (Nov. 27, 2007)

Dear Director:

Three veterans service organizations – The American Legion, Military Order of the Purple Heart, and the National Veterans Legal Services Program – and several individual veterans – David E. Raymond, Allan B. Hemmings, and George T. Rowland – all of whom served on active duty in the U.S. Navy in the waters offshore the land mass of Vietnam during part of the period beginning on January 9, 1962, and ending on May 7, 1975, hereby submit comments on the VA's proposed rescission of certain M21-1 provisions identified by VA and published in 72 Fed. Reg. 66218-19 (Nov. 27, 2007).

Contrary to the novel interpretation of the M21-1 provisions at issue advanced by VA some 17 years after the fact, the proper interpretation of these M21-1 provisions – indeed the only interpretation that a reasonable person could possibly give to these provisions – is that they establish a rule (hereinafter, the "offshore duty rule") that a veteran who served on active duty in the waters offshore the land mass of Vietnam satisfies the statutory phrase "served in the Republic of Vietnam" set forth in the Agent Orange Act of 1991 ("AOA). The reasons that VA's 17 years-after-the-fact interpretation is wrong are set forth in the unanimous opinion of the U.S. Court of Appeals for Veterans Claims in *Haas v. Nicholson*, 20 Vet. App. 257 (Fed. Cir. 2006), *appeal pending*, No. 07-7037 (Fed. Cir.).

As we explain below, VA cannot validly rescind this offshore duty rule because Congress addressed this precise issue when it enacted the AOA and resolved it by providing that veterans who served on active duty in the waters offshore the land mass of Vietnam satisfy the statutory definition of service in the Republic of Vietnam. Even if Congress was unclear on this point – which is not the case – VA has no valid basis to

exclude these veterans and their survivors from disability and death benefits under the AOA under the guise of interpreting the statutory phrase "served in the Republic of Vietnam."

I. CONGRESS SPOKE TO THE PRECISE QUESTION WHETHER VETERANS WHO SERVED IN THE WATERS OFFSHORE THE LAND MASS OF VIETNAM "SERVED IN THE REPUBLIC OF VIETNAM" AND ANSWERED THAT QUESTION IN THE AFFIRMATIVE

VA cannot validly rescind the offshore duty rule if Congress intended to include veterans who served on active duty in the waters offshore the land mass of Vietnam within the statutory phrase "served in the Republic of Vietnam." Thus, the first question VA must address (and the proposed rescission shows no evidence that VA has even considered this question) is whether Congress intended to include veterans who served on active duty in the waters offshore the land mass of Vietnam within the statutory phrase "served in the Republic of Vietnam."

The answer to this question is yes. As we demonstrate below, Congress provided in the AOA that service connection must be awarded for non-Hodgkins lymphoma "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam," and in doing so, codified a regulation that spoke directly to the precise question whether veterans who served in the waters offshore are included, and it answered that question in the affirmative. Therefore, the phrase "served in the Republic of Vietnam" must include those who served in the waters offshore.

Our analysis starts with the statutory language. Section 2 of the AOA, Pub. L. No. 102-4, 105 Stat. 11, added § 316 (later renumbered as § 1116) to title 38 of the U.S. Code. Subsection (a) (1) of that new section provided, in pertinent part, that:

> (A) a disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era; and
>
> (B) any additional disease (if any) that (1) the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having a positive association with exposure to an herbicide agent, and (2) becomes manifest . . . . in a veteran who, during active military, naval or air service, served in the Republic of Vietnam during the Vietnam era and while so serving was exposed to that herbicide agent,
>
> shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service. [Emphasis added].

Thus, Congress divided the diseases covered by AOA subsection (a) into two separate categories. The first category are those diseases specified in paragraph (2) of subsection (a) (hereinafter, a "paragraph (a) (2) disease"). Congress has included many diseases in paragraph (a) (2).[1] Under the AOA, a veteran with a paragraph (a)(2) disease only needs to have "served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975" to be entitled to service connection.

The second category of diseases discussed in AOA subsection (a) are those "additional disease[s] (if any)" that the Secretary determines have "a positive association with exposure to an herbicide agent" (hereinafter, an "additional disease added by VA due to its association with Agent Orange"). The service connection criteria for an "additional disease added by VA due to its association with Agent Orange" differ in a critical respect from the criteria applicable to a "paragraph (a) (2) disease." To be entitled to service connection, a veteran suffering from an additional disease added by VA due to its association with Agent Orange not only needs to have "served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975"; he must also, "while so serving," have been "exposed to an herbicide agent."

Thus, the plain statutory language demonstrates that to qualify for service connection, a veteran with a paragraph (a)(2) disease does <u>not</u> need to establish exposure to an herbicide agent, whereas a veteran with an additional disease added by VA due to its association with Agent Orange <u>does</u> need to establish herbicide exposure. Subsection (a) (3) of the AOA as originally enacted underlines this critical distinction. That subsection, set forth in the margin below, makes clear that a veteran with a paragraph (a) (2) disease qualifies for service connection even if there is affirmative evidence that the veteran was <u>not</u> exposed to an herbicide agent during military service.[2]

---

[1] Since the AOA was enacted in 1991, Congress has amended paragraph (a) (2) of 38 U.S.C. §1116 many times to specify additional diseases. Currently, paragraph (a) (2) includes the following diseases: Non-Hodgkin's lymphoma, soft-tissue sarcomas, chloracne, Hodgkin's disease, porphyria cutanea tarda, respiratory cancers (cancer of the lung, bronchus, larynx, or trachea), multiple myeloma, and diabetes mellitus (Type 2).

[2] As originally enacted, subsection (a)(3) of the AOA provided:

> For the purpose of this subsection, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era and <u>has a disease referred to in paragraph (1)(B) of this subsection</u> shall be presumed to have been exposed during such service to an herbicide agent . . . . , unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. [emphasis added]

Since by its terms, subsection (a)(3) only applied to an additional Agent-Orange related disease added by VA ("a disease referred to in paragraph (1)(B)") – and not to a

Turning to the critical issue whether active duty personnel who served in ships offshore the land mass of the Republic of Vietnam "served in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A), the answer to this precise question is yes. Congress spoke to this precise question in selecting non-Hodgkin's lymphoma ("NHL") for inclusion as a paragraph (a) (2) disease. The AOA as originally enacted included three diseases within paragraph (a) (2): NHL, soft tissue sarcomas ("STS") and chloracne. Congress' express intent was to codify decisions previously made by the Secretary of Veterans Affairs on each of these three diseases.[3]

The Secretary's prior decision to accord presumptive service connected status to NHL was based on a scientific study conducted by the Centers for Disease Control (CDC). See 55 Fed. Reg. 25339 (June 21, 1990) (proposed NHL rule) and 55 Fed. Reg.

---

paragraph (a)(2) disease – a veteran with a paragraph (a)(2) disease who "served in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A) would qualify for service connection even if there were affirmative evidence that that the veteran was never exposed to a herbicide agent.

When Congress later reworded subsection (a) (3) and relocated it as subsection (f) of section 1116, it did not intend to change the fact that it does not apply to a paragraph (2) disease. See Pub. L. No. 107-103, § 201(c), 115 Stat. 976; The legislative history demonstrates that the amendment was to benefit veterans by overruling the decision in McCartt v. West, 12 Vet.App. 164 (1999). See 147 CONG. REC. S 13227, 13237-38 (Dec. 13, 2001) (Joint Explanatory Statement to the bill that became Pub. L. No. 107-103 prepared by House and Senate conferees in lieu of a conference report); Sen. Report 107-86 (Oct. 15, 2001) at 12.

It is noteworthy that VA bases its proposal to rescind the offshore duty rule on the dubious proposition that a sailor who served offshore the land mass of Vietnam "was exceedingly unlikely to have been exposed to herbicides as a result of Vietnam service." VA cites no support for this proposition. But for the many thousands of veterans who served in the waters offshore the land mass of Vietnam, this allegation is irrelevant to the proper construction of the AOA.

[3] As Rep. G.V. (Sonny) Montgomery, the Chairman of the House Committee on Veterans Affairs, stated on January 17, 1991, in introducing on the House floor the compromise bill (H.R. 556) that was enacted without amendment as the AOA shortly thereafter (on February 6, 1991), the bill "would codify the presumptions of service connection that have been administratively provided for chloracne, non-hodgkin's lymphoma, and soft-tissue sarcomas . . . " 137 CONG. REC. E203 (daily ed. Jan. 17, 1991); see also, 137 CONG. REC. E390-03 (daily ed. Jan. 29, 1991) (statement of Rep. Burton); Statement of President George Bush Upon Signing H.R. 556 (Feb. 6, 1991), reprinted in 2 1991 U.S. Cong. & Admin. News 11 (stating that the AOA "will codify decisions previously made by my Administration with respect to presumptions of service connection . . .").

43123 (Oct. 26, 1990) (final NHL rule) (both stating that the Secretary's decision to service connect NHL was "based on the results of a study of the association of selected cancers with service in the U.S. military in Vietnam by the . . . CDC"). This study "indicated that Vietnam veterans are at increased relative risk of developing [NHL]" and found that the "higher [NHL] ratio was due to excessive [NHL] among men who served on ships offshore Vietnam." 137 CONG. REC. H724 (Jan. 29, 1991) (emphasis added); Agent Orange Brief, Department of Veterans Affairs (December 1997) (same).

The NHL regulation promulgated by the Secretary (38 C.F.R. § 3.313), entitled "Claims based on service in Vietnam," provided:

> (a) Service in Vietnam. "Service in Vietnam" includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.
>
> (b) Service connection based on service in Vietnam. Service in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease.

55 Fed. Reg. 43123 (Oct. 26, 1990) (underlines added). This regulation includes veterans who served in the waters offshore Vietnam, regardless whether they set foot on the land mass of Vietnam. VA has already admitted as much.[4] Indeed, to read the "service in Vietnam" provision of the NHL regulation to exclude those who served in the waters offshore would turn the regulation on its head: the very same veterans who, according to the CDC study, experienced the greatest incidence of NHL, and prompted the Secretary to issue the NHL regulation would be barred from disability compensation by the very regulation that was issued as a direct result of their illnesses. This would be an absurd result.

Thus, when Congress provided that service connection must be awarded for NHL "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam," it codified a regulation that spoke directly to the precise question whether veterans who served in the waters offshore are included, and it answered that question in the affirmative. Therefore, the phrase "served in the Republic of Vietnam" must include those who served in the waters offshore.

The 1991 AOA also codified the prior decisions of the Secretary to accord presumptive service connected status to STS and chloracne – decisions that were based on scientific studies showing a positive association between herbicide exposure and these two diseases. In defining the universe of veterans to whom the STS and chloracne

---

[4] See Secretary's Motion for a Stay of Proceedings filed on January 16, 2007 in Ribaudo v. Nicholson, U.S. Vet. App. No. 06-2762 at 5 ("Section 3.313 was based on a [CDC] study that found an increased risk of NHL among Vietnam veterans, including those who served in offshore waters.") (emphasis added).

presumptions would apply, Congress decided the universe should be exactly the same as for NHL. It placed STS and chloracne after NHL in the paragraph (a) (2) list of diseases, and made their presumptions applicable to the defined universe that appears at the beginning of subsection (a): any "veteran who, during active military, naval, or air service, served in the Republic of Vietnam".[5]

Thus, Congress intended the defined universe to be the same for all three diseases. Deeply embedded canons of statutory construction provide that this phrase cannot have one meaning for NHL and a different meaning for other paragraph (a) (2) diseases.[6] The statutory phrase "veteran who, during active military, naval, or air service, served in the Republic of Vietnam" in 38 U.S.C. § 1116(a)(1)(A) must therefore include a veteran who served in the waters offshore – a fact that Rep. Montgomery recognized when he introduced the compromise bill that was enacted into law without amendment two weeks later. See 137 CONG. REC. E203 (Jan. 17, 1991) (stating that the AOA "would codify the presumptions of service connection that have been administratively provided for . . . . veterans who served in theater[7] during the Vietnam war") (emphasis added).

---

[5] If Congress believed that veterans who served in the waters offshore the land mass of Vietnam should not be entitled to service connection for STS and chloracne, it could easily have defined the universe of veterans entitled to presumptions for STS and chloracne in language that differed from the language used to define the universe of veterans entitled to the NHL presumption. This Congress did not do.

[6] This construction inexorably follows from the well-settled rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, __, 126 S. Ct. 1503, 1513 (2006) (emphasis added); IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005). Unlike a statute in which "identical words" are used "in different parts of the same act," the definition of the universe of veterans subject to the NHL, STS, and chloracne presumptions does not appear in different parts of the AOA. Rather, the AOA links each of these paragraph (a) (2) diseases directly to the universe language that appears in one part of the AOA -- at the beginning of subsection (a). A fortiori, the universe must be same for all three diseases.

[7] The word "theater" is defined as "a large geographical area in which military operations are coordinated." The American Heritage Dictionary of the English Language 1333-34 (New College Edition 1979); *see also* Blanche B. Armfield, Medical Department, United States Army in World War II, Organization and Administration 245 (Office of the Surgeon General, Department of the Army 1963), *available at* http://history.amedd.army.mil/booksdocs/wwii/orgadmin/org_admin_wwii_chpt7.htm (explaining that, based on War Department Field Manual 100-10, Field Service Regulations, Administration, 9 Dec. 1940, "[t]he term 'theater of operations' was defined in the field manuals as the land and sea areas to be invaded or defended, including areas necessary for administrative activities incident to the military operations ….").

During the 17 years that have expired since the AOA was enacted, Congress has added many other diseases to the list of paragraph (a) (2) diseases. See note 1, supra. But Congress has never altered the defined universe of veterans entitled to the presumption of service connection for a paragraph (a) (2) disease. Accordingly, Congress has directly spoken to the precise question whether active duty personnel who served on ships offshore the land mass of the Republic of Vietnam are entitled to a presumption of service connection for all paragraph (a) (2) diseases.

The statutory language used by Congress to describe the universe of veterans covered by section 1116(a) reinforces the conclusion that Congress spoke directly to the precise issue whether active duty personnel who served on ships offshore the land mass are within this universe. The statutory language "served in the Republic of Vietnam" in section 1116(a) expressly refers to the sovereign nation of the Republic of Vietnam. All relevant definitions of the sovereign nation of the Republic of Vietnam include the territorial waters offshore the land mass of Vietnam.[8]

II. VA'S RATIONALE FOR ITS PROPOSED RESCISSION IS CONTRARY TO LAW BECAUSE IT IS BASED ON AN IMPERMISSIBLE CONSRUCTION OF THE AOA

If Congress did not address the precise question set forth above (which is not the case), VA might well have authority to fill in the gap created by Congress by adopting a substantive rule to precisely define the meaning of the statutory phrase "veteran who, during active military, naval, or air service, served in the Republic of Vietnam" in 38 U.S.C. § 1116(a) (1) (A). But that would not mean that VA has unlimited discretion in devising a definition to fill the gap. VA would still be required to make a reasonable attempt to adopt a definition that fit within the intent of Congress.

---

[8] See e.g., Presidential Proclamation 5928 of December 27, 1988, 54 Fed. Reg. 777 (Jan. 9, 1989) ("International law recognizes that coastal nations and jurisdictions may exercise jurisdiction over their territorial seas."); United Nations Convention on the Law of the Sea, Part II, Dec. 10, 1982, at http://www.un.org/Depts/los/convention_ agreements/texts/unclos/closindx.htm (last visited June 4, 2007) ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil."); see also United Nations Convention on the Law of the Sea, Participants, http://www.un.org/depts/los/reference_files/ status2007.pdf (noting that the Republic of Vietnam ratified the Convention on July 25, 1994); cf. United Nations Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, Participants, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/ /partI/chapter XXI/treaty1.asp (reporting that the United States signed this treaty on Sept.15, 1958, and ratified the treaty on Apr. 12, 1961, thus adopting the 12 nautical mile standard for its territorial seas, and the 200 nautical mile standard for its contiguous zone).

A second and independent fatal flaw with VA's proposed rescission of the off-shore duty rule is VA's stated rationale. In publishing the proposed rescission, VA admits that it is based on the dubious proposition that a sailor who served offshore the land mass of Vietnam "was exceedingly unlikely to have been exposed to herbicides as a result of Vietnam service." Under the AOA, that rationale is impermissible.

Congress expressly provided in § 1116(a) that the thousands of veterans who suffer from a paragraph (a) (2) disease do not have to establish that they were exposed to an herbicide agent. See discussion in part I supra. Under the AOA, the likelihood of exposure to an herbicide agent is only relevant to veterans who suffer from an additional disease added by VA due to its association with Agent Orange. Id.

It inexorably follows from the fact that Congress expressly exempted veterans with a paragraph (a) (2) disease from the necessity of establishing exposure to an herbicide agent that it is impermissible and directly contrary to legislative intent for VA to use that very factor – exposure to an herbicide agent – as a benchmark for assessing the meaning of the only criterion that a veteran with a paragraph (a) (2) disease must satisfy -- "service in the Republic of Vietnam."

III. EVEN IF VA COULD VALIDLY INTERPRET THE STATUTORY PHRASE "SERVED IN THE REPUBLIC OF VIETNAM" BY ANALYZING THE LIKELIHOOD OF HERBICIDE EXPOSURE, THE EXPOSURE STANDARD ADOPTED BY VA IS IRRATIONAL, CAPRICIOUS AND CONTRARY TO LEGISLATIVE INTENT

Even if Congress did not address the precise issue whether those who served offshore the land mass of Vietnam are included within the statutory phrase "served in the Republic of Vietnam," and even if the VA could validly take into account the likelihood of a particular veteran's exposure to herbicides in devising a definition, the standard adopted by VA in its proposed rescission for analyzing herbicide exposure is irrational, capricious and contrary to legislative intent.

There are some conclusions about the meaning of the AOA that cannot reasonably be disputed. One obviously valid conclusion is that Congress intended that a veteran who, during any part of the period beginning on January 9, 1962, and ending on May 7, 1975, served on land in Vietnam is included within the statutory phrase "veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." 38 U.S.C. § 1116(a) (1) (A). It is universally recognized that herbicide "[s]praying [by the United States] began in 1962 and greatly increased in 1967. After a scientific report in 1969, ... U.S. forces suspended use of the herbicide in 1970 and halted all herbicide spraying in Vietnam the next year." *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam*, (NAS Institute of Medicine 1994), at 1.

Accordingly, there can be no reasonable dispute that Congress mandated VA, as a matter of law, to award service-connected disability benefits to a claimant who suffers

from one of the diseases set forth in AOA paragraph (a)(2), even though the only time the claimant was ever within 500 miles of the Republic of Vietnam while serving on active duty was when he landed at the airport in Saigon (where herbicides were never sprayed) in early 1975 (four years after all herbicide spraying was halted), got off the airplane and set foot on land, never left the airport, and, one hour later, reboarded the airplane and departed Vietnam. Under the AOA, the VA has no discretion to deny service-connected disability benefits to such a veteran/claimant.

What plainly derives from this analysis is that Congress did not intend for VA to exclude a veteran from the scope of the phrase "veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975" simply because VA may believe that the veteran "was exceedingly unlikely to have been exposed to herbicides as a result of Vietnam service." This leads inexorably to the conclusion that Congress did not intend for VA to exclude other veterans who served in locations near where herbicides were sprayed – such as those who served in the waters offshore the land mass of Vietnam -- from the scope of the AOA based on VA analysis of whether the veteran "was exceedingly unlikely to have been exposed to herbicides as a result of Vietnam service." Yet, this is exactly what VA proposes to do by rescinding the off-shore duty rule. Such action is plainly contrary to legislative intent.[9]

Assuming for the sake of argument that Congress intended VA to exclude veterans based on the likelihood of herbicide exposure, then VA, to be consistent with the intent of Congress, would have to use an exposure standard that is much more favorable to the veteran. This is particularly evident given 38 U.S.C. § 1116(f). Subsection (f) provides, in pertinent part, that a veteran who has developed a disease that is not a paragraph (a) (2) disease and

---

[9] Indeed, the standard VA used in its current proposal is inconsistent with the standard VA articulated several years ago in making a similar proposal which has yet to be finalized. In 2004, the VA published a proposal that would in effect repeal VA's offshore duty rule. *See* 69 Fed. Reg. 44614, 44626 (July 27, 2004). The VA provided the following explanation for why it proposed to exclude those who served offshore the land mass of Vietnam:

> We are not aware of any valid scientific evidence showing that individuals who served in the waters offshore of the Republic of Vietnam or in other locations were subject to the same risk of herbicide exposure as those who served within the geographic land boundaries of the Republic of Vietnam.

Id. (emphasis added). This standard (whether those who served in the waters offshore "were subject to the same risk of herbicide exposure as" those who served on land) is obviously a different standard than whether a particular group of veterans "was exceedingly unlikely to have been exposed to herbicides as a result of Vietnam service."

> who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent . . . . , unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

[Emphasis added]. Thus, this provision requires VA, for the purpose of deciding a claim for compensation for a disease other than a paragraph (a) (2) disease, to presume that a claimant who only set foot on land for one hour in April 1975 at the Saigon airport was exposed to herbicides, unless the record contains "affirmative evidence to establish that the veteran was not exposed to" a herbicide agent during that one hour.

This provision shows Congressional recognition of the difficulty of determining decades after the fact whether any particular veteran was actually exposed to herbicides, as well as Congress' determination to resolve this issue in a highly pro-claimant manner. Only in the exceedingly unlikely event that there is "affirmative evidence to establish that the veteran was not exposed to" an herbicide agent should VA be relieved of its obligation to presume exposure.

Given that Congress intended this highly pro-claimant standard to apply to veterans who set foot on land for as little as a few minutes and suffer from a disease other than those in paragraph (a) (2), then to be consistent with legislative intent, those who served in the waters offshore the land mass of Vietnam cannot validly be found not to have been exposed unless the record contains "affirmative evidence to establish that the veteran was not exposed to" a herbicide agent. The M21-1 provisions that VA proposes to rescind are consistent with this analysis, and VA's proposal to rescind it is inconsistent with legislative intent.

IV. VA HAS FAILED TO ANALYZE THE SUBSTANTIAL SCIENTIFIC EVIDENCE CONCERNING WHETHER THOSE WHO SERVED IN THE WATERS OFFSHORE WERE EXPOSED TO HERBICIDE AGENTS

The final independent flaw in VA's proposal is that VA has not even analyzed the scientific evidence concerning the likelihood that those who served in the waters offshore were exposed to herbicide agents. VA asserts that a veteran who served off-shore the land mass of Vietnam "was exceedingly unlikely to have been exposed to herbicides as a result of Vietnam service." To reach this factual finding, a rational decision-maker would have to engage in a factual analysis of the relevant scientific evidence on this matter. But VA never engaged in such an analysis.

VA cannot validly rescind a rule based on a factual conclusion about a scientific issue without first analyzing the relevant scientific evidence and discussing the scientific evidence that supports its factual conclusion in the proposed rulemaking. This basic step VA has not done.

This failure is particularly egregious given VA's previous conclusions about exposure. In 1985, VA conceded that there are

> [w]hile it may be possible to approximate areas where herbicides were sprayed, it would be extremely difficult to determine with an acceptable degree of precision whether an individual veteran was exposed to dioxin.

50 Fed. Reg. 34452, 34455 (Aug. 25, 1985). Given that VA found it "extremely difficult to determine with an acceptable degree of precision whether an individual veteran was exposed to dioxin," the proposed rescission should have, but failed to explain how VA determined with an acceptable degree of precision that a veteran who served off-shore the land mass of Vietnam "was exceedingly unlikely to have been exposed to herbicides as a result of Vietnam service."

The failure to analyze the relevant scientific evidence is also egregious given that substantial scientific evidence exists that is relevant to this exposure issue. A rational decision-maker would have to consider all the pathways by which military personnel who served in the waters offshore could have been exposed to the toxic chemicals that are contained in herbicides so as to produce adverse health effects. There is a whole body of scientific evidence addressing this question.

For example, when pollutants and chemicals that are toxic in nature are located on land, they often drain underground (carried by rain) and then travel to nearby rivers, which then carry the pollutants or toxic chemicals out to sea. This process is called "non-point source pollution," or simply, "runoff." See Edward A. Laws, Aquatic Pollution: an Introductory Text 117-18 (3rd ed. 2000); National Ocean Service, Pollutants from Nonpoint Sources: Pesticides and Toxic Chemicals, at http://www.oceanservice.noaa.gov/education/kits/pollution/012chemicals.html; Environmental Protection Agency, Polluted brochure EPA-841-F-94-005 (1994), at http://www.epa.gov/owow/nps/qa.html. Toxic chemicals on land may also be transported out to sea via the wind, by a process known as "spray drift." Michael S. Majewski and Paul D. Chapel, Pesticides in the Atmosphere: Distribution, Trends, and Governing Factors (1995); National Ocean Service, Pollutants from Nonpoint Sources: Pesticides and Toxic Chemicals, at http://www.oceanservice.noaa.gov/education/kits/pollution/012chemicals.html; Mason Gaffney, Nonpoint Pollution: Tractable Solutions to Intractable Problems, 18-1, 2 Journal of Business Administration 141 (1988). These toxic chemicals can often travel great distances via this process. J.B. Unsworth et. al., Significance of the Long Range Transport of Pesticides in the Atmosphere, 71-7 Pure Applied Chemistry 1359-83 (1999). Thus, those who served in the waters offshore the land mass of Vietnam could well have been exposed to herbicide agents through "spray drift."

In the late 1980s, the U.S. Environmental Protection Agency began to study contaminants that would persist in the environment and could bioaccumulate up the food chain. See M. Lorber, Indirect Exposure Assessment at the United States Environmental

Protection Agency, Toxicology and Industrial Health 2001; 17: 145-156 ("Lorber"). The EPA ultimately found that "[a]n important class of compounds that posed a greater indirect than direct risk [of adverse health effects] were the dioxin-like compounds." Lorber at 145.

Dioxin is the toxic contaminant in Agent Orange. The EPA concluded that "dioxin-like compounds are essentially insoluble in water." Lorber at 151. Moreover, they

> enter water bodies primarily via direct deposition from the atmosphere or by surface runoff and erosion. From soils, these compounds reenter the atmosphere either as resuspended soil particles or as vapors. In water, they can be resuspended into the water column from sediments, volatilized out of the surface waters into the atmosphere or become buried in deeper sediments.

Id.

The EPA also concluded that dioxins accumulate in fish:

> [i]n the aquatic food chain, dioxins enter water systems via direct discharge or deposition and runoff/erosion from watersheds. Fish accumulate these compounds through their direct contact with water, suspended particles, bottom sediments, and through their consumption of aquatic organisms.

Id. This conclusion reinforces the results of studies of the dioxin levels found by scientists in freshly caught fish and crustaceans in South Vietnam in August and September of 1970 obtained from local fishermen. See R. Baughman and M. Meselson, An Analytical Method for Detecting TCDD (Dioxin): Levels of TCDD in Samples from Vietnam, Environment Health Perspectives (September 1973). Thus, military personnel, including those who served offshore the land mass of Vietnam, were potentially exposed to herbicides by consuming fish, not to mention food that was produced on the Vietnamese soil.

Yet another potential pathway for exposure to dioxin is by consumption of distilled water. In 2001, the National Research Centre for Environmental Toxicology published a study regarding Australian sailors who served in the same waters offshore the Republic of Vietnam during the same period of time as American sailors. It studied what occurred when sea water containing dioxin at levels found in fish caught by local fisherman in South Vietnam in 1970 was distilled through use of the distillation systems used by the Australian ships that were located in the same waters offshore the Republic of Vietnam during the Vietnam era. The findings of that study "suggest that the personnel on board ships were exposed to biologically significant quantities of dioxins" by drinking water produced from evaporative distillation of surrounding waters, and the

study observed that "evaporative distillation of water does not remove but rather enriches certain contaminants such as dioxins (Agent Orange) in drinking water."[10]

Given that the ships used by the U.S. Armed Forces in the waters offshore the land mass of Vietnam during the Vietnam era employed distillation plants that operated on the same principles as the distillation plants used by the Australian ships in the waters offshore the Republic of Vietnam during the Vietnam era,[11] the results of this study strongly suggest that American sailors who served in the waters offshore were exposed to herbicide agents as a result of drinking their ship's distilled water.

[10] Muller, J., Gaus, C., Alberts, V., Moore, M., Examination of the Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibensofurans via Drinking Water, Canberra: National Research Centre for Environmental Toxicology, Department of Veterans' Affairs, 2002:75 (2001), available at http://www.dva.gov.au/adf/health_studies/dva_nrcet_final_report.pdf.

[11] According to the study by National Research Centre for Environmental Toxicology,

> The distillation plants used on the various [Australian] ships at the time of the conflict all operated using the same principles. In general, sea water was fed into an evaporator where the water was boiled by a combination of heating and reduced pressure (vacuum) and the vapour was condensed in the condenser from where it was pumped into feed tanks.

Id. at 11. Attached to this comment are numerous signed declarations and email statements from United States Navy veterans who served in the waters offshore Vietnam during the Vietnam era, attesting to the fact that the distillation plants on their ships operated on the same principles as the distillation plants on the Australian ships. See Signed Declarations of Frank Gross, Floyd E. Hecker, Richard H. King, John W. Ladendorf, James B. McGeever, James T. Reed, Jacob E. Schu, Raymond A. Stutz, Charles M. Taylor, Robert M. Taylor, Harry D. Telles, Michael W. Vaughan, and Frank Weber; Email Statements of Thomas M. Bannon, Herman C. Falcon, Michael E. Floyd, Gregory Matuskovic, Dennis A. Missall, Dwight P. Nutting, and William J. Severns.

Conclusion

Given the numerous flaws in the VA proposal, The American Legion, Military Order of the Purple Heart, the National Veterans Legal Services Program and the individual veterans identified above strongly urge VA to abandon its efforts to rescind the offshore duty rule contained in the M21-1 provisions. If VA moves forward to consider promulgating rules that would replace the M21-1 provisions VA seeks to repeal, the aforementioned commentators request that VA consider these comments in any such rulemaking process.

Sincerely,

_____

Barton F. Stichman
Richard V. Spataro
Louis J. George

Counsel for The American Legion,
Military Order of the Purple Heart,
National Veterans Legal Services Program,
and Messrs. Raymond, Hemmings, and
Rowland