

Removing Contrived Restrictions on Agent Orange Eligibility

There has been a lot of confusion, misunderstanding and disagreement within the Department of Veterans Affairs (DVA), among the legislators and VSOs, and throughout the general population about the actual status of offshore Vietnam personnel and their contamination by dioxin-based herbicides during the Vietnam War. This presentation is intended to bring some clarification to that issue, and to assist offshore personnel in filing compensation claims for disabilities the DVA has recognized as having a relationship with Agent Orange.

These are the same benefits offshore personnel were granted by the 1991 Agent Orange Act, as were all Vietnam veterans. However, in February, 2002, DVA removed offshore personnel (without the knowledge of Congress) from eligibility for Health Care and Lost Wage Compensation for disability claims based on dioxin exposure. But benefits for these same diseases remained in force for any of our Armed Forces who had "boots-on-ground" on the Vietnam Mainland and its territories.

In May, 2011, the Institute of Medicine (IOM) completed an 18-month study ordered by the DVA with the explicit instructions to determine "whether the Vietnam veterans in the Blue Water Navy experienced exposures to herbicides and their contaminants comparable with those of the Brown Water Navy Vietnam veterans and those on the ground in Vietnam." That study, Blue Water Navy Vietnam Veterans and Agent Orange Exposure, concluded that under rigorous standards of scientific analysis, there is no definitive proof, to include a measurable level of any substances, which is available for the IOM Committee to state with certainty that offshore personnel were exposed to, and contaminated by, dioxin-based herbicides.

However, the IOM Committee went on to say, there is no definitive proof to state with certainty that any Inland Water Navy (Brown Water Navy) veteran or any personnel with boots-on-ground were exposed to, and contaminated by, dioxin-based herbicides.

But before jumping forward with urban legends about "how obvious it is" that dioxin-based herbicides "must have been" on the land or in the Inland Waters or in the coastal waters, one needs to realize and accept some very basic facts:

-The IOM was asked for precise measurements. But no data was ever gathered during the Vietnam War to give a basis to such precise measurements. Measuring the amount of herbicide on the land, in the air, or in the water that was present during that War is literally impossible. It had to have been done then; it cannot be done now.

-This lack of data does not conclude that there was no herbicide on the land or in the water. It simply ensures that measurable, quantifiable statements cannot now be made about the conditions that existed during the Vietnam War.

-There is no more ability to make scientific statements about the level of exposure of personnel in any geographical location within Vietnam as it is possible to make scientific statements about the level of exposure of personnel at any position on the water, including within the harbors, right off the beaches, in close proximity to the shore, or 30 miles or more from shore. Any such statement is just unprovable.

-Conversely, there are no scientific statements that can be made to deny any level of exposure, to any personnel, at any location within the proximity of Vietnam, on land or in the water, at any time during the Vietnam War.

This should come as no surprise to anyone. This was already known by everyone, including the DVA when they sent the IOM off on this pointless study only to buy themselves 18 months of not dealing with the Blue Water Navy issue. It was obviously known by our legislators when they drafted the Agent Orange Act of 1991. Because there was absolutely no data to prove or disprove any degree of exposure, level of exposure or any exposure at all, Congress put into place the "presumption of exposure" rule which has been the only "proof" anyone has ever been able to rely on when submitting a claim for service-connected compensation for disability from exposure to dioxin-based herbicides.

In the Agent Orange Act of 1991, Congress had a choice of making the eligibility very narrow, which would eliminate invalid claims but present a high probability of eliminating some valid claims; or to make the eligibility broad enough to be certain to grant all valid claims and take a chance that some invalid claims could make it through the system. They chose the broad interpretation of wording. Their perspective was as broad and expansive as possible.

Whether a claim was accompanied by documentation that a platoon was actually sprayed during a Ranch Hand mission, or whether Deck Logs referenced a ship sailing through the wind-blown mist that could be seen coming from the trailing cloud of a near-shore spray mission, neither claim is more true nor less true than the other. Both events can be reported as having been personally witnessed. But both events simply lack data that could allow an assessment about the level of contamination that occurred in either instance. They are both scientifically inert because they are quantitatively immeasurable.

What this IOM study did was to totally flatten a previously uneven playing field that pitted on-shore and off-shore veterans against one another. In their game of 'Divide and Conquer,' the DVA had successfully set up this totally false division as if these veterans were vying for some limited money prize. That has never been the case. It also brought to the surface deeply suppressed feelings that one group experienced "real war" while another experienced "only a small taste" of combat experience. It was a completely successful divisive move until the results of this IOM Report were published, because it put a new face on an historically false certainty that grew out of relying on the illusive concept of 'presumption of exposure.'

The IOM Report was so successful in putting all Vietnam veterans on the same footing that it opened the door to new avenues for Blue Water Navy veterans to re-claim their earned benefits.

By leveling the playing field, this Study has shown the flaws of previous prejudices and preconceived inequities given one group of veterans over another. Those flaws can now be recognized and dealt with. What is now clearly laid out on the table is equitable uncertainty for everyone.

What appears below is a set of assertions that flow from the IOM Study that can be molded into more successful arguments for equal disability compensation for all Vietnam veterans by using the facts of the Report itself.

A Suggested Approach for Making a Case for Disability Entitlement by Offshore Vietnam Veterans

[The page number citations are from the IOM Report from the Committee on Blue Water Navy Vietnam Veterans and Agent Orange Exposure. This report, along with the *Agent Orange Update:2008*, constitutes the second time the IOM has advised the DVA to include offshore military personnel in eligibility for presumption of exposure to herbicides in Vietnam. 'TCDD' refers to the chemical name for dioxin.]

Was the Blue Water Navy exposed to dioxin-based herbicides?

The IOM Report states that there was too little data to conclusively determine whether the Blue Water Navy (BWN) had or had not been exposed to dioxin-based herbicides, such as Agent Orange.

What is the basis of the "presumption of exposure" rule?

"Because of the impossibility that most Vietnam veterans could prove that they had been exposed to Agent Orange or other herbicides in Vietnam during the war, the 1991 Agent Orange Act created a presumption of service connection; that is, exposure to herbicides in Vietnam was presumed for any Vietnam veteran who became ill with a disease found to be associated with TCDD exposure. That presumption -a mechanism of disability compensation that the VA has used in other contexts- allows veterans to receive disability compensation and treatment for a medical condition without having to provide proof that the condition was "incurred in or aggravated by" their military service. "(pg.4)

Did the BWN have the potential for exposure?

"The committee identified several plausible exposure pathways and routes of exposure to Agent Orange-associated TCDD in the three populations. Plausible pathways and routes of exposure of Blue Water Navy personnel to Agent Orange-associated TCDD include inhalation and dermal contact with aerosols from spraying operations that occurred at or near the coast when Blue Water Navy ships were nearby, contact with marine water, and uses of potable water prepared from distilled marine water."(pg.7)

Were the Blue Water Navy Offshore Veterans exposed to enhanced herbicide concentration in their ship-board water system?

"No measurements of TCDD concentrations in seawater were collected during the Vietnam conflict, so it is not possible to ascertain the extent to which drinking water on US vessels may have been contaminated through distillation processes. However, it seems likely that vessels with such distillation processes that traveled near land or even at some distance from river deltas would periodically collect water that contained dioxin. Thus, a presumption of exposure of military personnel serving on those vessels is not unreasonable." (Agent Orange Update:2008)

"One exposure mechanism is specific to Blue Water Navy ships: possible TCDD contamination of potable water from shipboard distillation plants. The committee's assessment corroborates the Australian finding that in experiments simulating the water-distillation system used on Navy ships the system had the potential to enrich TCDD concentrations from the feed water to the distilled potable water." (pg.93)

Is it possible to demonstrate that Inland Water (Brown Water) Navy or land-based veterans were or were not exposed to dioxin-based herbicides while serving in Vietnam?

"[] lack of information makes it impossible to quantify exposures for Blue Water and Brown Water Navy sailors and, so far, for ground troops as well. Thus, the committee was unable to state with certainty whether Blue Water Navy personnel were or were not exposed to Agent Orange and its associated TCDD. Moreover, the committee concluded that it could not state with certainty that exposures to Blue Water Navy personnel, taken as a group, were qualitatively different from their Brown Water Navy and ground troop counterparts."(pg.93)

"The lack of environmental concentration data and the lack of sufficient data on ground troop and Navy personnel locations, made it impossible to quantify exposure for either of these populations."(pg.61)

Were the boots-on-ground personnel at any higher risk for dioxin-based cancer than BWN?

"There is no consistent evidence to suggest that Blue Water Navy Vietnam veterans were at higher or lower risk of cancer or other long-term adverse health effects associated with Agent Orange exposure than shore-based veterans, Brown Water Navy veterans, or Vietnam veterans in other branches of service." (pg.8)

"However, the VA noted that the definition of ground troops who served in Vietnam for the purposes of presumption of "service relatedness" was deliberately crafted to include persons who had little or no likelihood of exposure to guarantee that all cases of exposure (in the face of large uncertainties) were included. Thus, for the purposes of this report, if exposure was plausible for any fraction of a population, the committee assumed plausibility of exposure of the population as a whole." (pg.63)

The IOM's Blue Water Navy Vietnam Veterans and Agent Orange Exposure Report brought several facts to light, including:

1. That the DVA has no existing data to contradict or negate a claim for exposure from offshore personnel just as it has no existing data to validate a claim for exposure from service personnel that claim exposure to herbicide while having served with boots-on-ground or on inland water;
2. That it is at least as likely that any claim for exposure to herbicide by offshore personnel is as valid a claim as any claim for exposure to herbicide by personnel who served on land or inland water. In neither case can a causal relationship be established between the injury or disease and the presence of and contamination by dioxin-based herbicide. In neither case can the VA provide any quantitative data to measure a level of contamination or provide an association between the location of the veteran and the location of dioxin-based herbicide by any means other than assumption and presumption;
3. The IOM Report put offshore exposure probability in equipoise with on-land exposure probability. The DVA is not capable of providing any quantitative data that can stand as "contradictory evidence" to any assertion by offshore personnel for claims of presumptive exposure to Agent Orange-dioxin;
4. An argument can be made for the probability of dioxin-based herbicide on the ground, but no data providing actual levels of concentration can support that contention. An argument can be made for the probability of dioxin-based herbicide in the offshore water, but no data providing actual levels of concentration can support that contention. Likewise, no data can refute any assertion regarding any level of concentration or degree of contamination within the offshore waters or on the Vietnam landmass.

The *Agent Orange Update:2008* included a recommendation from the IOM to the DVA to include Blue Water Navy personnel in presumptive claims and was based on the fact that there was absolutely no evidence of a medical or scientific nature that anything had changed between the pre-Feb, 2002 situation and the post-Feb, 2002 situation. There were no grounds by which the IOM could justify the removal of benefits that had been granted in 1991 and had been provided to offshore veterans up until the Feb, 2002 date of change by the DVA.

Because of this, the IOM Committee concluded that "given the available evidence, the committee recommends that members of the Blue Water Navy should not be excluded from the

set of Vietnam era veterans with presumed herbicide exposure." (*Agent Orange Update:2008*)

Despite the acceptance by the DVA of a relationship between only certain diseases and contamination by dioxin, there is a vast body of medical and scientific data that proves dioxin to be a highly potent carcinogen, an immune system and endocrine system disruptor, and one of the most lethal and environmentally persistent man-made poisons.

By using the previously stated concepts in conjunction with the Da Nang Harbor Report, found at <http://www.bluewaternavy.org/danangcombo2.pdf> if applicable, and the associated list of case law excerpts, we believe that a very strong case for the presumption of exposure to herbicides in Vietnam can be made for personnel who served in the Blue Water Navy offshore Vietnam between 1962 and 1975.

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