

## **Part 1: GENERAL SUGGESTIONS FOR FILING BLUE WATER NAVY EXPOSURE CLAIMS**

If you are filing a Claim for herbicide exposure, and you were in a Harbor, our suggestion is to submit the following information:

The Grey Ruling Itself, <http://bluewaternavy.org/Gray13-3339.pdf> presented as “new and material evidence” if your denial is more than one year old. If it is a recent denial (within one year), present this as a request for reconsideration.

The interpretation of the Gray Ruling  
<[http://www.bluewaternavy.org/8\\_29\\_15%20Opinion%20on%20CAVC%20Ruling.pdf](http://www.bluewaternavy.org/8_29_15%20Opinion%20on%20CAVC%20Ruling.pdf)>

Use a VA Form 21-4138 and make a statement that says something like this:

The previous restriction for granting herbicide exposure to Navy and Marine veterans who were on board ships in the harbors of Vietnam but who never set foot on land have been struck down by the CAVC in the Gray Ruling. The probability that individuals in harbors of Vietnam were exposed to the herbicide Agent Orange is as least as likely as not. The veteran should be granted the presumption of exposure to herbicide.

If you are filing a Claim for herbicide exposure, and you were on a ship off shore Vietnam, and were NOT in a harbor, our suggestion is to RE-OPEN your claim using “new and material evidence” per the following information:

- 1) The Grey Ruling Itself, presented as “new and material evidence” if your denial is more than one year old. If it is a recent denial (within one year),

present this as a request for reconsideration

<http://bluewaternavy.org/Gray13-3339.pdf> ;

- 2) The 'expanded interpretation of the Gray Ruling,' presented as "new and material evidence,"

<[http://www.bluewaternavy.org/8\\_29\\_15%20Opinion%20on%20CAVC%20Ruling.pdf](http://www.bluewaternavy.org/8_29_15%20Opinion%20on%20CAVC%20Ruling.pdf)>

- 3) "Beyond Arbitrary and Capricious" which reviews the IOM supportive statements, presented as "new and material evidence," as long as that has not been submitted yet

<http://www.bluewaternavy.org/Beyond%20Arbitrary%20and%20Capricious.pdf> ;

- 4) BWN Written testimony for Senate Hearing on Toxic Exposure in Military, presented as "new and material evidence," as long as that had not been submitted yet

<http://www.bluewaternavy.org/Toxic%20Exposure%20Testimony%20JR.pdf> ;

- 5) Use a VA Form 21-4138 and make a statement that says something like this: The previous restrictions for granting herbicide exposure to Navy and Marine veterans who served on ships off the coast of Vietnam have been struck down by the CAVC in the Gray Ruling. The probability that all ships of the Seventh Fleet were exposed to herbicide through a number of pathways is evident from the research done by both the Australian Royal Academy and our own Institute of Medicine. This includes ships of all sizes located anywhere within the Theater of Combat. Anyone who was awarded the VSM was in the Theater of

Combat. The benefit of the doubt regarding herbicide exposure should be given to all crew members of all offshore ships.

## **PART 2: SUGGESTIONS FOR FILING EXPOSURE CLAIMS FOR CARRIER SAILORS AND OTHERS**

Claims relating to sailors who served on Aircraft Carriers need to take additional circumstances into consideration since the carriers were often not as close to shore as other hull types. Carriers had the extra condition that aircraft left the carrier deck and later returned. Often those airplanes would be in a different state of "potential contamination" when they returned, depending on where they went and what they returned with.

Aircraft Carriers acted as distribution points for supplies, equipment, personnel and mail that were delivered to it from a shore facility on the Vietnamese mainland and then, if need be, distributed to other ships in the Fleet, especially when the target ship was assigned to that particular Carrier Group. The next time the target ship would come alongside the carrier for fuel or underway replenishments, the supplies brought aboard from land would be moved to them by high-line transfer (a cable strung between the two ships) or by helicopter.

Certain regulations within the M21-1 Adjudication Manual which are still in use by the VA are factually in error regarding the condition of aircraft and equipment that came from or flew over South Vietnam (RVN) and returned to a carrier. Based on a report from the Institute of Medicine<sup>1</sup> (IOM) and the recent (June, 2015) acknowledgment by the VA<sup>2</sup> regarding the degree of contamination

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<sup>1</sup> <http://www.bluewaternavy.org/IOMC123Report.pdf>

<sup>2</sup> <http://www.benefits.va.gov/compensation/agentorange-c123.asp>

of the C-123 spray aircraft that were used in-country Vietnam and later left the mainland, information specific to Part IV, Subpart 2, Chap. 1, H, which includes a 1 May 2009 memo,<sup>3</sup> from the Joint Services Records Research Center (JSRRC), are no longer valid and should not be used. VA has acknowledged that exposure to Agent Orange (TCDD) did occur from "contact with aircraft that flew over Vietnam and equipment that was used in Vietnam," which contradicts the JSRRC Memo and the intent of the cited M-21 section. Individuals other than the C-123 crews are not being given the same reasonable probability of exposure and benefit of the doubt for this type of exposure. This situation involving the veteran needs to be considered a viable 'direct exposure' that occurred quite often.<sup>4</sup>

Regarding the C-123s, the time from last exposure to time of first detection of active contaminant was nearly 20 years. What does this say about the toxicity of Agent Orange/dioxin? Science reports the half-life of TCDD as 7 years. This means that during each 7 year interval, the level (or measure of intensity or toxicity) of contamination drops by half. In instances of very high contamination levels, such as on the C-123s, the amount of remaining contaminant may be sufficiently high after 21 years such that only 1/8<sup>th</sup> of the original amount can still contaminate to a secondary level through direct contact because TCDD molecules are still being given off at a measurable degree; a high enough toxicity to cause exposure to anyone in contact with it.

The IOM states: "The committee notes emphatically: it is now accepted in the field of exposure science that the physiochemical properties of semi-volatile organic compounds (SVOCs) like TCDD keep them in dynamic flux toward equilibrium" in all forms and from all surfaces and sources. In other words, no matter how diminished the toxicity of TCDD is, the physical properties of the

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<sup>3</sup> [http://www.bluewaternavy.org/JSRRC Memorandum.pdf](http://www.bluewaternavy.org/JSRRC%20Memorandum.pdf)

<sup>4</sup> <http://www.bluewaternavy.org/The-importance-of-the-C-123-Study.pdf>

chemical structure of TCDD are such that they will continue to give off molecular level contamination that can be absorbed by the skin, inhaled or ingested.<sup>5</sup>

VA may argue that the “massive daily doses” of TCDD is what account for the fact that TCDD molecules were still active, even after 38 years on the C-123’s because of the in-country daily presence of Agent Orange aboard the aircraft. They may attempt to obfuscate the scientific reality of this molecular-level toxicity by some other absurdity in an attempt to deny the known science of TCDD and thus continue to deny veteran claims for exposure. They should not be allowed to do this and veterans should be on the lookout for such antics. The C-123 aircraft might have had Agent Orange on board for as short as 6 or less years or as long as 8 or more years on a nearly daily basis<sup>6</sup>. More likely than not, ‘massive doses’ may have had something to do with the high levels of contamination that were present after long intervals of time. But VA cannot negate the basic fact that any amount of contamination at all, on any item, will pose a risk to humans for at least the first period of 7 years at the same toxicity level that the item originally received.

Based on the presumption of exposure, every item, whether a piece of equipment or a living plant or animal within the land boundaries of Vietnam, had the potential for some measurable level of exposure and moved forward in time with that same level of exposure unless it was intentionally washed off or otherwise cleaned. This would rarely have been done if the basic facts about exposure and contamination were unknown, which was the case during the Vietnam War.

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<sup>5</sup> <http://www.nap.edu/catalog/18848/post-vietnam-dioxin-exposure-in-agent-orange-contaminated-c-123-aircraft>

<sup>6</sup> This may be due to the varying life and service of the aircraft used by the Ranch Hand Project

Items that were directly sprayed may have had a higher level of exposure than items that were “somewhere near” a sprayed area. Being ‘directly sprayed’ includes being within the intended spray area or being within 50 kilometers from that area due to spray drift. But that concept is merely theoretical since no measurements were taken to demonstrate that fact. As the safest default, which is the basis for “presumptive exposure,” it must be presumed that all items received the same lethal level of exposure.

In addition to direct spray, exposure or contamination could have occurred because an item, a person, a plant, or an animal came into contact with something like dirt or dust that was contaminated, and they were exposure at a ‘secondary level,’ thus becoming part of a “cascading effect” from primary contaminant to secondary contaminant.

There was equipment that was brought directly to the offshore carriers and other ships on a daily basis by COD planes via the Fleet Air Support Unit (FSU) facilities at Da Nang Airbase. The FASU was located about 100 yards down the open runway from the Ranch Hand Operations location at Da Nang. “Equipment “ refers to the personnel, mail bags, supplies, equipment intended for use on the ships, including equipment used on land being sent to the ships to be repaired, or equipment being returned to the ships after being repaired at some facility that was land-based.

It is more likely than not that items exposed to a much lower level of contamination than the C-123 aircraft were moved from the mainland to the aircraft carrier decks within the first days or weeks following their initial contamination. So even though their “level of contamination” could have been less than the C-123’s in a comparative sense, the fact that their immediate ability

to expose 'secondary targets' made the cascade of contamination likely for the exposure of individuals not in the immediate spray areas.

Regarding contaminated items leaving the Da Nang Airbase, they were staged out in the open in an area within direct line of sight of the C-123 loading area and they were exposed to and contaminated by particles within the environment during that time of staging within the toxic environment of the runway of the Da Nang Airbase (We know this by the conditions of the airbase which later necessitated the decontamination of the soil just off the northern edge of the runway);

Per various reports from the IOM, we know that there were no measurements of dioxin (TCDD) levels recorded during the Vietnam War at any location. Therefore, it logically follows that:

- No one can deny the probability of exposure and or contamination to any person or inanimate object that was on mainland Vietnam by using any known scientific measurement;
- The VA has already acknowledged contamination of C-123 aircraft that left Vietnam;
- For any person who set foot on Vietnamese soil, a presumption of exposure is given. That presumption should extend to the equipment that was on the ground anywhere in Vietnam as well;
- The question of immediate proximity and the requirement to be located on the mainland at this juncture is moot. If the equipment (personnel, mailbags, supplies and other equipment) was itself contaminated or contained contaminated dirt or others particles, the movement off the land for handling of such items once on-board a ship exposed the

- handlers to the toxic residue. This effectively negates the “boots on ground” requirement imposed by VA in 2002;
- Contaminated dirt from Da Nang is of particular concern. At least once a day, every day for nearly a decade, the area where Agent Orange was mixed and loaded onto Ranch Hand spray planes (the C-123's mentioned earlier) were washed down and rinsed clear of the tarmac onto the dirt area off the north end of the runway. That dirt area was so heavily contaminated that 30 years after the end of the War, the soil from that wash-down area required an International effort of severe decontamination. In that project, 73,000 cubic meters of dirt was extremely contaminated and was subsequently scraped up to create a mound of soil 70 meters wide by 10 meters high by 100 meters long. Soil contamination levels of TCDD were measured at over 360 times the acceptable International standard. It required all workers on that decontamination project to wear protective clothing and respiratory masking gear to avoid exposure to any of the dirt and dust.<sup>7</sup>
  - As the IOM concluded regarding the contaminated C-123 aircraft, it stands to reason that if the level of contamination of the dirt was that high 30 years after the fact, the level of contamination had to have been at least that high over the previous 30 years and would have been extremely high for at least 7 years following the initial contamination. This is a valid and logical assumption in lieu of having any data on exposure measurements to review. It was during the first days and

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<sup>7</sup> <https://www.usaid.gov/vietnam/environmental-remediation-dioxin-contamination-danang-airport-project-frequently-asked-questions>

weeks of the initial contamination that the personnel, mailbags, supplies and other equipment were moved from the mainland of Vietnam to the ships at sea with absolutely no time whatsoever for degradation in toxicity level.

Once again addressing the JSRRC memo, we now know that there is no documentation that could have addressed contamination of objects or discussed any levels of contamination, mostly because the majority of record keepers were unaware that the exposure and contamination was even taking place. So, it is not surprising that the JSRRC memo reports they found no evidence to support claims of contamination. But such a report in a memo is not at all the same as stating with any authority or with any empirical evidence, that no such contamination ever took place. It only provides information that no documentation could be found addressing that fact. Relying on the JSRRC Memo for purposes of denying exposure claims is absolutely incorrect and illogical, is definitely unethical and is probably illegal. That JSRRC memo itself does not contain enough evidence to meet VA guidelines of stringent factual evidence required of a claimant; it should not constitute a document to be used to deny a claim for exposure. The presence of that memo within that section of the M21-1 renders the entire section FALSE, and any claim decision relying on that portion of the M-21 is a Clear and Unmistakable Error (CUE).

We know there are many existing documents showing that military documentation from the Vietnam War era, especially from the naval services, that directly and consistently address these issues is non-existent either because such records were not retained or because such information was not recorded at all.

So JSRRC could not find documentation on this because no measurement of contamination was ever taken that provides anything of probative value for the denial of an exposure claim.

Use of the JSRRC Memo is, at best, an obvious act of Bad Faith. VA has used that memo inappropriately since it was first provided to them. For instance, when a claim is submitted for Agent Orange exposure on a navy ship or for exposure by handling contaminated equipment, no one investigates any of those specific instances. VA simply reaches for this pre-existing JSRRC Memo from 2009, attaches it to the claim with no further research, and the claim is automatically denied. The specific items of the claim are never 're-investigated.'

This activity is wrong and must be changed immediately and all denials previously based on this practice need to be re-opened for a more complete analysis and fair assessment with consideration given for all possible routes of exposure.

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