# Why the Agent Orange Act of 2009 Is So Badly Needed

On July 24, 2009, the Institute of Medicine (IOM) released the 2008 version of the VETERANS AND AGENT ORANGE UPDATE. It is produced every two years by Congressional mandate of Public Law 102-4, the Agent Orange Act of 1991. With the passage of that law, Congress set several very specific guidelines to ensure the continued attention to medical and scientific relationships between human health and herbicide agents used by US and allied forces during the Vietnam Era. The passage of time has blunted the sharp corners of this monumental law, and so it is within reason to bring forth some of those provisions for re-examination.

PL 102-4 laid the responsibility of conducting reviews of medical and scientific research directly upon the shoulders of the Secretary of Veterans Affairs. In addition to reports provided to the Department from an outside source on a two year basis, the Secretary of the VA has the yearly obligation of presenting a summation of such research to the House and Senate Committees for Veteran Affairs.

Additionally, PL 102-4 does not instruct the gathering and reviewing of medical and scientific data to be entirely and solely the responsibility of the IOM, a non-profit, non-governmental agency operating under the purview of the National Academy of Science. In fact, Congress stipulated that under certain conditions, a relationship with the National Academy of Science was not necessary and the Secretary was free to find any non-profit, non-governmental agency, comparable to the National Academy of Science, which could provide the necessary information. But it gave the primary task of information gathering and analysis directly to the Secretary of the VA.

It appears to be a general consensus that the Institute of Medicine, set up by the National Academy of Science specifically for the purpose of fulfilling PL 102-4, is somehow a "final say, sole source body" to provide information to the DVA. There is no such provision in the 1991 AO Act. In fact, to sit around with bated breath waiting for information out of the IOM is contrary to the intention of that Act. It states "The Secretary of Veterans Affairs shall compile and analyze, on a continuing basis, all clinical data...." that meets the criteria of finding a relationship between service in Vietnam and diseases caused by herbicide agents used there during the Vietnam Era. It essentially instructs the Secretary to "get out and do some research for yourself."

Nonetheless, we do sit with bated breath, waiting to hear the pronouncements of the IOM's bi-annual report. This year, with UPDATE 2008, the IOM finally was able to address the Royal Australian Navy (RAN) report on their assessment that dioxin became a ship board contaminant due to the desalination process used on all allied nation ships. The Blue Water Navy Vietnam Veterans Association (BWNVVA) had pushed to have this document reviewed and included in the Agent Orange Update for 2006. It had been conspicuously absent from the 2004 Update. That single document was responsible for the Australian and New Zealand Governments to accept herbicide-based disability claims from their naval veterans. And although Canada and the UK had no ships that took part in the fight, they had citizens who joined the naval services of allied nations and they also accepted the conclusions of theRAN study. So why were we dragging our feet? Those allied sailors served in the same waters, at the same time, we served, with identical water evaporators on board their ships.

The IOM does nothing but report which ailments show a positive correlation between illnesses and herbicides. The VA is free to accept or reject their recommendations If they are accepted and adopted, it is solely the VA that is responsible for assimilating any new medical conditions into the disability program of the Compensation and Pension Division. The point of this paper is to make sure it is known up front, clearly and loudly, that the recommendation alone to include Blue Water Navy (BWN) veterans in the category eligible for presumption of exposure to herbicides is not going to cut the mustard. Not by a long shot. There is nearly a 20 year history of the DVA totally screwing up IOM recommendations and then screwing up their own internal programs once the recommendations have been accepted. Most of this has occurred through the inevitable internal bumbling of DVA management and training; some has occurred in relationship to political, financial or other motivations. As a point of clarification, BWN personnel include Navy, Coast Guard, Marine, Air Force and others of whatever branch of the US Armed Forces who never set their boots on the soil of Vietnam.

At this point in time, there is a House Bill, HR-2254, The Agent Orange Act of 2009, which would mandate the inclusion of offshore military personnel, as well as others working in direct Vietnam combat support from nearby Southeast Asian countries, into the category receiving hospital care and benefits for long term disability caused by dioxin and other herbicide agents used during the Vietnam War. This bill will end up putting the offshore Vietnam veterans back into the group of Vietnam War veterans originally covered by the Agent Orange Act of 1991, prior to the VA's unilaterally dismissing them in 2002.

We know from past experience that the probability of incorporating Blue Water Navy personnel into the DVA category of "presumptive coverage" will create more problems than it solves. For that reason, as well as others, we need The Agent Orange Act of 2009 to provide the only element of certainty that BWN vets will be taken care of properly, consistently and in a timely fashion, regardless of the tales the DVA attempts to spin. And they will. This is a group of veterans the DVA have been afraid of since the late 1990s and they haven't hidden their animosity.

With every death of a veteran who dies untreated in the least bit because of lack of support and care from the DVA, I see no difference between that and the DVA Compensation and Pension Division putting a gun to the head of the veteran and expending a round. The DVA is almost a million disability claims in backlog. There are groups of claims that appear to be denied out of hand merely to get this growing backlog under control. That kind of processing generally guarantees the claim will be re-submitted under a Notice of Disagreement, creating a circular, self-imposed increase of the VA's work load. Besides doing assassinations, they are very proficient at shooting themselves in the foot.

The VA has just ended a 4-year long court battle to keep BWN personnel out of the category of 'presumption of exposure to herbicides while serving in Vietnam.' They even changed the definition of "service in Vietnam" to accomplish this goal. They have just spent hundreds of thousands of dollars of their internal resources in this protracted legal battle. Given what we know about the internal mindset and corporate culture within the DVA, any hint that they will take up this group of veterans with gleeful, open arms and happily treat them honestly and expediently is absolutely ludicrous. The VA has proven itself incompetent and untrustworthy on too many occasions. That is why we must have the legislation of HR-2254 to back any inclusion of BWN into the VA Benefits System.

It would be a very poor decision to hand this program over to the DVA without codifying the basic rights of the veteran. The DVA has already suspended this group of veterans from their lawful protection given by the Agent Orange Act of 1991. They fought long and hard to deny these veterans service connected care and compensation using every delay-and-deny tactic in their book. They even went well out of their way to delay-and-deny this group service connected benefits totally unrelated to herbicide exposure. How, under any conceivable scenario, could they be trusted to do a 180-degree adjustment to their attitudes when the antagonism is so deeply engrained into their system and their culture? The simple answer is: they can't. Without the protection of The Agent Orange Act of 2009, these veterans will be hens handed over to the foxes. They've suffered enough. Please spare them any continued misery and put into place the needed congressional legislation. The Bill wouldn't have been drafted if it weren't needed. Nothing the DVA can predict or promise will keep this arrangement from going south, sooner rather than later, but it will, as sure as the sun will rise tomorrow.

The IOM has opined that offshore military personnel should be treated identically to boots-on-ground personnel in regards to service connection for herbicide exposure. I would predict the VA to take as long as two years to fully retrain and readjust its internal operations to begin fairly adjudicating BWN claims for disability due to herbicide exposure. But they may be forced to do this re-tooling much quicker because another element that will play into this will be the new opinion of the Federal Court that a veteran is to be afforded "due process" in dealing with a claim for disability. That alone will cause massive and wide chaos all on its own, but we'll leave the analysis of that for another day.

To make matters even more complicated is the general need to treat the rulings of disability claims consistently, throughout the DVA system of 57 Regional Offices (ROs) where the claims are given their first assessment. These ROs are not totally under the control of the Washington-based DVA Headquarters. Many seem to resent the oversight of VA Hqtrs. They want some autonomy in the rating of cases because they see the lack of logic being dictated to them. They want to act at their own discretion on which documents to shred and which to keep. There is a wide range of rating inconsistencies between the 57 Regional Offices, not only in granting or denying claims with identical evidence, but in a wide variety of service connected rating percentages given in identical instances. If the VA cannot or will not adjudicate claims under the laws that are already in place, how can we even contemplate that the VA could find it possible to consistently adjudicate herbicide exposure cases on the mere recommendation of an IOM report? They won't. They can't. They're a less well-controlled organization than they pretend to be. The total unpredictability of their rulings is a classic case of sailing a boat without a rudder. We've seen too many veterans go down this road to heartbreak and ruin. Let's stop that cycle while we have the opportunity.

In the BWNVVA's recent project of assisting Non-Hodgkins Lymphoma cases through the system after their illegal delay under the Haas Stay, we learned some interesting and revealing things. Non-Hodgkins Lymphoma is a special situation where a sailor simply needs to have been aboard ship in the vicinity of Vietnam to become automatically service connected, with no connection at all to herbicide exposure. These claims should never have been held in the Stay imposed by Haas because they have nothing to do with presumption of herbicide exposure. Nonetheless, hundreds of them were. They are claims that get an automatic ruling of service connection much like disabilities on the herbicide illness list are routinely automatic for those who served with boots-on-ground. Claims of herbicide exposure are governed by CFR 38 Sections 3.307(a)(6)(3) and CFR 38 3.309(e) of the Code of Federal Regulations. Claims of Non-Hodgkins Lymphoma are governed by Section 3.313.

When we found an NHL claim that was being held, it required the assistance of both the House and Senate Veterans Affairs Committee staff to get them released and adjudicated. We encountered multiple high level management personnel at several Regional Offices who were not familiar with regulation 3.313, which addresses NHL. We were even thanked on a few occasions for "bringing this new regulation" to their attention. Section 3.313 was in place prior to the Agent Orange Act of 1991! Nearly all the NHL cases we worked on were ruled in favor of the veteran as they stood, without the addition of a single piece of paper to the file.

Unless one has a family member or friend who has had to fight for a disability claim with the VA, the public has no clue how many hoops the VA makes a veteran jump through or how many miles they need to run on the "hamster wheel" before getting their claim a fair hearing, much less actually granted. It is a merciless, impersonal procedure that is rarely navigated upon first attempt. But after that initial heartbreak of a denied claim, many veterans just give up - a reaction exactly as the DVA intends and is structured to bring about. The only way to insure that future BWN claims will be processed correctly is to transition HR-2254 into "law of the land" so it can be enforced with some teeth. We need The Agent Orange Act of 2009 in place regardless of what the Department of Veterans Affairs promises to do.

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Rossie served aboard the USS Radford (DD-446), a Fletcher-class Destroyer out of Pearl Harbor, from August 1968 until her decommissioning in December, 1969. He was on board for the 1969 WESTPAC Cruise and was part of the crew that stayed aboard to salvage the equipment from RADFORD prior to committing her to the moth balled fleet at Vallejo, CA. He finished his active duty service in June, 1970, aboard the USS Piedmont (AD-17) in San Diego, CA. Today he stays busy advocating for American veterans through his role with the Blue Water Navy Association and other veteran organizations. Rossie holds Master's Degrees in Philosophy, Telecommunications (Engineering), and an MBA (Information Systems).