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Blue Water Navy Veterans And The Agent Orange Rulings: A Lifeboat For The Veterans; A Storm Warning For The VBA

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Cover Page Footnote

J.D. Candidate, May 2023, The Catholic University of America, Columbus School of Law; B.A. 2010, University of Maryland University College. I would like to sincerely thank Daniel Marusak for his extensive insight and substantive feedback throughout this drafting process. I am also grateful for Brandy Disbennett-Albrecht and David Kendall's guidance and support. Above all, I am grateful for the service of the tens of thousands of Blue Water Navy Veterans who served during the Vietnam War. You are not forgotten.

BLUE WATER NAVY VETERANS AND THE AGENT ORANGE RULINGS: A LIFEBOAT FOR THE VETERANS; A STORM WARNING FOR THE VBA

JENNIFER A. HOWLEY⁺

Agent Orange was a herbicidal chemical used by the U.S. military for tactical use during the Vietnam War. Although initially told by the government not to worry about exposure to the chemical, veterans, their wives, and their offspring began having severe health and reproductive issues. In the early 1990's, Congress passed the Agent Orange Act and the government directed the Institute of Medicine to report on the health effects of Agent Orange. Through this approach, Vietnam Veterans could claim benefits for illnesses listed in connection with Agent Orange. But only some Vietnam Veterans.

Initially, only veterans who served on-shore or near fresh water channels were entitled to claim disability benefits from exposure. The ruling in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (codified through the Blue Water Navy Vietnam Veterans Act) extended the presumption of herbicide exposure to Veterans who served in the offshore waters as well. Beginning Jan. 1, 2020, the so-called Blue Water Navy Veterans are finally also presumed to have been exposed to herbicides and may be entitled to benefits.

Although wonderful news for the veterans and families, there may be far-reaching impacts on the VA's already ballooning budget, highly burdened VA system, and overworked VA personnel.

⁺ J.D. Candidate, May 2023, The Catholic University of America, Columbus School of Law; B.A. 2010, University of Maryland University College. I would like to sincerely thank Daniel Marusak for his extensive insight and substantive feedback throughout this drafting process. I am also grateful for Brandy Disbennett-Albrecht and David Kendall's guidance and support. Above all, I am grateful for the service of the tens of thousands of Blue Water Navy Veterans who served during the Vietnam War. You are not forgotten.

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INTRODUCTION

There is a wealth of time and money the size of an aircraft carrier for planning wars, but the amount of time and money for helping soldiers when they get home is more akin to the size of a guillotine.¹

The U.S. Department of Veteran Affairs, Veterans Benefits Administration (“VBA,” “administration,” “agency,” “VA”), which is responsible for administering benefits for our military veterans, their dependents, and their survivors, has long faced internal and external hurdles in adjudicating the thousands of claims it receives each year. The VBA must balance its duty of effectively and timely processing veterans’ claims with its duty of assuring it is making the correct determination of each claim. As of April 2023, there are nearly 803,000 pending claims and the agency’s backlog includes more than 210,000 claims.² The Covid-19 pandemic contributed to the backlog, as well as recent rulings mandating readjudication of previously denied claims by Blue Water Navy Veterans.³

These claims come from veterans of the Vietnam War who served on ships within twelve nautical miles around the coast of Vietnam.⁴ Referred to as the Blue Water Navy Veterans, these service members have previously been denied many benefits that veterans who served on land are entitled to, specifically because of the exposure to the toxic herbicide known commonly as “Agent Orange.”⁵

1. Thor Benson, *Our Soldiers Fought for America, So Why Won’t Congress Fight for Them?*, THE DAILY BANTER (Nov. 9, 2018), <https://thedailybanter.com/2014/06/26/rising-tide-fallen-warriors-unemployment-among-soldiers/>.

2. *Veterans Benefits Administration Reports*, U.S. DEP’T OF VETERANS AFFS., https://www.benefits.va.gov/reports/detailed_claims_data.asp (last visited Apr. 11, 2023).

3. *VA Prepares to Get Ahead of Surge in Backlogged Claims*, U.S. DEP’T OF VETERANS AFFS., (Oct. 13, 2021), <https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=5728>.

4. *Blue Water Navy Veterans and Agent Orange Exposure*, U.S. DEP’T OF VETERANS AFFS., <https://www.publichealth.va.gov/exposures/agentorange/locations/blue-water-veterans.asp> (last visited Mar. 23, 2022).

5. See, e.g., *Procopio v. Wilkie*, 913 F.3d 1371, 1374 (Fed. Cir. 2019).

In the late 1970s, military members began to suspect their health issues could be traced back to their exposure to the herbicide.⁶ Initially, the federal government denied any claim made based on exposure to the agent.⁷ It was not until 1991 that Congress enacted legislation, the Agent Orange Act, compensating veterans for their health issues related to exposure to Agent Orange.⁸ The Act did not recognize the Blue Water Navy Veterans.⁹

After veterans fought for their disabilities to be recognized for nearly fifty years, the U.S. Court of Appeals for the Federal Circuit, in *Procopio v. Wilkie*, ruled the Agent Orange Act did include those who had also served in the “territorial sea of the ‘Republic of Vietnam.’”¹⁰ This ruling, later codified through the Blue Water Navy Vietnam Veterans Act, opened the door for thousands of Blue Water Navy Veterans to submit claims to the Veterans Affairs Administration.¹¹ This ruling also created a great deal of new work for an administration that was not properly equipped or trained to handle the influx of Blue Water Navy Veterans’ claims.¹²

This Note will discuss the history of Agent Orange use during the Vietnam War. Next, the article will move to address Blue Water Veterans and survivors and the obstacles they have faced in receiving benefits for their exposure to Agent Orange. The article will discuss the early legislation and policies regarding Agent Orange, and the impacts those policies had on the VBA. Finally, the article will discuss the *Procopio* ruling, Blue Water Navy Vietnam Veterans Act, and the effects they had on the VBA, veterans, and survivors.

6. SIDATH VIRANGA PANANGALA & DANIEL T. SHEDD, CONG. RSCH. SERV., R43790, VETERANS EXPOSED TO AGENT ORANGE: LEGISLATIVE HISTORY, LITIGATION, AND CURRENT ISSUES 1 (2014).

7. *Id.* at 2–3.

8. Agent Orange Act of 1991, 38 U.S.C. § 1116A.

9. *Id.*

10. *Procopio*, 913 F.3d at 1380–81.

11. See Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23, § 1116A, 133 Stat. 966, 966 (2019).

12. Steve Beynon, *Lawmakers Question Whether VA Can Process Blue Water Claims in Time*, STARS & STRIPES (Oct. 31, 2019), <https://www.stripes.com/lawmakers-question-whether-va-can-process-blue-water-claims-in-time-1.605258>.

I. OPERATION RANCH HAND: “ONLY YOU CAN PREVENT A FOREST”¹³

The Agent Orange would just, it would kill things, but it didn’t destroy anything else. It would kill everything, but trees were standing. Things were just dead.¹⁴

Herbicides were used widely by American forces during the Vietnam War as “jungle defoliant.”¹⁵ The United States government was busy in early 1961 developing new techniques that would be used in Vietnam against the guerrilla tactics of the Viet Cong forces.¹⁶ By July 10, 1961, a report on the developments suggested using “chemical plant killers” to clear fire breaks and defoliation chemicals were sent to Saigon to begin testing their effectiveness.¹⁷ On August

13. James G. Lewis, *Smokey Bear in Vietnam*, 11 ENV’T HIST. 598, 598–603 (July 2006), <https://www.proquest.com/docview/216130201/fulltextPDF/87CAFE14E9AE4B58PQ/1?accountid=9940> (explaining how a satirical take on Smokey the Bear’s “Only you can prevent forest fires!” became the slogan of Operation Ranch Hand). Posters such as this were displayed around training buildings on Air Force bases:



Paul Cecil, Smokey the Bear (photograph), in VIETNAM CENTER AND SAM JOHNSON VIETNAM ARCHIVE, TEXAS TECH UNIV., <https://www.vietnam.ttu.edu/virtualarchive/items.php?item=VAS006661>, (last accessed Mar. 31, 2022).

14. Terry Parris, Jr., *Blue Water Veterans Share Their Agent Orange Stories*, PROPUBLICA (Sept. 11, 2015), <https://www.propublica.org/article/blue-water-veterans-share-their-agent-orange-stories> (Vietnam Veteran Jim Kerr describing the effects of Agent Orange he witnessed firsthand).

15. News Staff, *Agent Orange Linked to Skin Cancer Risk*, SCI. 2.0 (Jan. 29, 2014), https://www.science20.com/news_articles/agent_orange_linked_skin_cancer_risk-128602.

16. WILLIAM A. BUCKINGHAM, JR., OPERATION RANCH HAND: THE AIR FORCE AND HERBICIDES IN VIETNAM 1961-1971 9–10 (1982), <https://media.defense.gov/2010/Sep/28/2001329797/-1/-1/0/AFD-100928-054.pdf>.

17. *Id.* at 11.

10, 1961, a South Vietnamese Air Force helicopter performed “the first defoliant test mission in South Vietnam,”¹⁸ while a C-47 performed a second spray mission just two weeks later.¹⁹ These trials were the “first step toward what became [the military objective known as] Operation Ranch Hand.”²⁰

During Operation Ranch Hand, the United States military used herbicides from 1961 to 1971 “to defoliate forests and mangroves, to clear perimeters of military installations and to destroy ‘unfriendly’ crops as a tactic for decreasing enemy food supplies.”²¹ As one author described, “the herbicidal warfare program targeted not specific weeds but entire ecosystems. In Vietnam the forest was the weed.”²² The main types of herbicides employed were formulated using “phenoxyacetic acids (2,4-D and 2,4,5-T), cacodylic acid and picloram.”²³ The chemicals were color-coded by a strip of paint on their barrels: orange, purple, blue, and white.²⁴ Consequently, the herbicides soon were referred to by military personnel as “Agent Orange,” “Agent Purple,” etc.²⁵

18. KENNETH H. WILLIAMS, 2 THE U.S. AIR FORCE IN SOUTHEAST ASIA AND THE VIETNAM WAR, VOLUME II: 1960–1961, A NARRATIVE CHRONOLOGY 193 (2020), <https://media.defense.gov/2020/May/11/2002297644/-/1/1/USAF%20VIETNAM%20CHRONOLOGY%20V2.PDF>.

19. BUCKINGHAM, *supra* note 16, at 11.

20. WILLIAMS, *supra* note 18, at 193.

21. Jeanne M. Stellman, et al., *The Extent and Patterns of Usage of Agent Orange and Other Herbicides in Vietnam*, 422 NATURE 681, 681 (Apr. 17, 2003), <http://www.vn-agentorange.org/edmaterials/nature01537.pdf>.

22. DAVID ZIERLER, THE INVENTION OF ECOCIDE: AGENT ORANGE, VIETNAM, AND THE SCIENTISTS WHO CHANGED THE WAY WE THINK ABOUT THE ENVIRONMENT 2 (2011).

23. J. B. Neilands, *Vietnam: Progress of the Chem. War*, 10 ASIAN SURVEY 209, 209–10 (1970), <https://www.jstor.org/stable/2642575>.

24. *Id.* An example of the paint strip on the barrel is included below.



See ALVIN LEE YOUNG, THE HISTORY, USE, DISPOSITION AND ENVIRONMENTAL FATE OF AGENT ORANGE 16 (2009).

25. Neilands, *supra* note 23, at 209–10; see also *Agent Orange*, BRITANNICA.COM, <https://www.britannica.com/science/Agent-Orange> (last visited January 8, 2023).

The United States military mainly used the herbicide known as Agent Purple until 1965, when it discovered that Agent Orange was a faster-acting chemical.²⁶ Agent Orange was produced by several chemical companies, including Monsanto and Dow Chemicals, and was claimed to be a “mixture of two herbicides—2,4-D and 2,4,5-T.”²⁷ In 1969, however, the formula was “found to be inadvertently contaminated with the most toxic form of dioxin, known as TCDD.”²⁸ Despite the finding, the military continued using Agent Orange until 1971.²⁹ An estimated 45,677,937 liters of the dioxin-contaminated Agent Orange were sprayed from 1965 to 1970.³⁰

The United States government assured its military members that the herbicide was harmless.³¹ One Air Force report written in 1967 stated that “[i]t must be remembered that the chemical spray is non-toxic and has had no effects on aircrews or [South Vietnamese] regular troops, nor have there been any ill effects reported during use of these chemicals in the United States.”³² Shockingly, United States military members were never required nor even told to take precautions while handling the chemicals.³³ While commercial drums of the herbicide were required by federal law to have labels that included correct product usage, handling, and potential risks, the military only allowed the colored stripes to be placed on the barrels.³⁴ United States Army Sergeant Sammy Davis testified before the House Subcommittee on Veteran’s Affairs at the hearing for the Vietnam Veterans Agent Orange Relief Act: “They came in and said, ‘Well, now, we are going to spray this area, but it will go away. It gets absorbed and taken up by the atmosphere and stuff in about 2 weeks. So you don’t have nothing to worry about.’”³⁵

In 1966, while the United States government was assuring its troops that the chemicals were harmless to humans, twenty-nine scientists “requested that President Lyndon B. Johnson begin discussions with the allies on . . . [banning] herbicides in Vietnam,” citing the tactics as “barbarous.”³⁶ That same year, the Council of the American Association for the Advancement of Science (“AAAS”) reached out to the Secretary of Defense, Robert McNamara,

26. See Richard Stone, *Agent Orange’s Bitter Harvest*, 315 SCI. 176, 177 (2007), <http://www.jstor.org/stable/20035179>.

27. Charles Schmidt, *The Fog of Agent Orange*, 314 SCI. AM. 72, 73 (2016).

28. *Id.*

29. *Id.*

30. Stelman, et al., *supra* note 21, at 682.

31. David A. Butler, *Connections: The Early History of Scientific and Medical Research on Agent Orange*, 13 J. OF L. & POL’Y 527, 545 (2005).

32. *Id.* (alteration in original).

33. PETER SILLS, TOXIC WAR: THE STORY OF AGENT ORANGE 96 (2014).

34. *Id.*

35. *Vietnam Veterans Agent Orange Relief Act: Hearing on H.R. 1961 Before the Subcomm. On Compensation, Pension, and Ins. of the Comm. On Veterans’ Affs.*, 98th Cong. 98-23, 37 (1983).

36. INST. OF MEDICINE, VETERANS & AGENT ORANGE: HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM 29 (1994).

requesting the government to perform studies relating to the effects of deploying massive amounts of herbicides in Vietnam.³⁷ And in 1967, “a second petition signed by more than 5,000 scientists, including 17 Nobel laureates, was delivered to President Johnson requesting that he end the use of herbicides in Vietnam.”³⁸ Despite these appeals from the scientific community, the United States government kept maintaining the herbicide’s safety.

Nonetheless, members of the military began suspecting that the herbicide was not safe after an increasing number began experiencing health problems such as: skin problems, miscarriages, birth defects, mental disorders, and various cancers.³⁹ Veterans first began filing claims in 1977.⁴⁰ That year, the wife of Vietnam Veteran Charles Owen contacted the VBA office in Chicago, believing her husband’s terminal cancer was due to Agent Orange.⁴¹ Upon his death and once his widow applied for and was denied benefits, benefits counselor Maude deVictor started her own investigation into the exposure.⁴² She reached out to the military, scientists, veterans, and survivors, but once Ms. deVictor’s research became common knowledge, “she was asked to cease these additional inquiries and concentrate on her assigned duties.”⁴³ Eventually, news reporter Bill Kurtis was made aware of the research, leading him to produce a documentary titled, “Agent Orange, the Deadly Fog,” which aired on March 23, 1978.⁴⁴ “By the spring of 1979, veterans’ complaints were flooding congressional offices,” and as a result, the United States government could not simply continue denying the claims.⁴⁵

II. LITIGATION AND LEGISLATION: “THE TIME FOR WAITING IS OVER.”⁴⁶

I am an American, gentlemen, and therefore too proud and too bull-headed to beg you. But I humbly request that you do not break faith

37. *Id.*

38. *Id.*

39. John C. Hansen, *The Vietnam Veteran vs. Agent Orange: The War That Lingers*, GAO REV. Spring 1981, at 30, https://www.gao.gov/assets/Agent_Orange.pdf.

40. *Id.*

41. *Veterans and Agent Orange*, INST. OF MED. (US) COMM. TO REVIEW THE HEALTH EFFECTS IN VIETNAM VETERANS OF EXPOSURE TO HERBICIDES, WASH. (DC) (1994) [hereinafter *Veterans and Agent Orange*], <https://www.ncbi.nlm.nih.gov/books/NBK236351/>.

42. *Id.*

43. *Id.*

44. *Id.*

45. Hansen, *supra* note 39, at 32 (“Many complaints were from ground troops in Vietnam who believed they were sprayed and had drunk from water contaminated with Agent Orange.”).

46. *Preparing for Blue Water Claims – VA Status Update on Implementation: Hearing before the Subcomm. on Disability Assistance and Mem’l Aff. of the H. Comm. on Veterans’ Affs.*, 116th Cong. 2 (2019) (statement of Ryan M. Gallucci, Dir. of VFW) (quoting VFW National Commander William “Doc” Schmitz: “We cannot, and will not, stand by and allow another veteran to lose their life because of the bureaucracy of Washington. The time for waiting is over.”),

with those of us who answered the call that came from this very building. Think of the legacy you will leave for the next army you may have to raise to stand under our flag should you turn your backs on us. I can only ask you to do what is right.⁴⁷

Litigation in connection with the herbicide occurred when military veterans brought a private class action case against the U.S. chemical companies in 1979.⁴⁸ Paul Reutershan, a former helicopter crew chief, “had flown almost daily through clouds of herbicides being discharged from C-123 cargo planes.”⁴⁹ “Upon returning home from Vietnam, Reutershan was diagnosed with cancer” and “at the age of 28, [he] died from the cancer that had invaded his colon, liver, and abdomen.”⁵⁰ Before his death, Reutershan contacted a personal injury lawyer in Long Island, New York and requested that the attorney file a suit against the “chemical companies that manufactured Agent Orange”—Dow, Monsanto, and Diamond Shamrock.⁵¹ “A class action lawsuit was filed on January 8, 1979, in the U.S. District Court for the Southern District of New York in Manhattan, New York[,]” with “[t]he class consisting of Vietnam veterans, their spouses, their parents, and their children.”⁵² Four months later, the pending civil actions of multiple districts were merged and titled *In re Agent Orange Product Liability Litigation* (a multidistrict litigation referred to as MDL 381).⁵³

In 1984, the companies settled out of court with the plaintiff class made up of over 10 million veterans, for \$180 million dollars, on the condition they need not admit fault.⁵⁴ The settlement included a Payment Program which stipulated that those veterans “rated unequivocally medically ill” from the herbicide were to receive up to \$12,800.⁵⁵ Families with veterans that had already passed away were to receive a lump sum of \$3,400.⁵⁶ Applications to receive payment “had

<https://docs.house.gov/meetings/VR/VR09/20191030/110127/HHRG-116-VR09-Wstate-GallucciR-20191030.pdf>.

47. *Vietnam Veterans Agent Orange Relief Act: Hearing on H.R. 1961 Before the Subcomm. on Compensation, Pension, and Ins. of the Comm. on Veterans' Affs.*, 98th Cong. 98-23, 36 (1983) (statement of Sammy Davis, recipient of the Congressional Medal of Honor).

48. *See generally In re “Agent Orange” Prod. Liab. Litig.*, 475 F. Supp. 928, 933–34 (E.D.N.Y. 1979).

49. *Veterans and Agent Orange*, *supra* note 41.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Compensation: Agent Orange Settlement Fund*, U.S. DEP’T OF VETERANS AFFS., https://www.benefits.va.gov/compensation/claims-postservice-agent_orange-settlement-settlementFund.asp (last visited Oct. 23, 2021); *The U.S. Veterans Lawsuit, AGENT ORANGE RECORD*, <https://agentorangerecord.com/the-u-s-veterans-lawsuit/> (last visited November 21, 2012).

55. *The U.S. Veterans Lawsuit, AGENT ORANGE RECORD*, <https://agentorangerecord.com/the-u-s-veterans-lawsuit/> (last visited November 21, 2012).

56. *Id.*

to be submitted prior to December 31, 1994.”⁵⁷ Between 1988 and 1994, the Payment Program received nearly 105,000 applications, of which “approximately 52,000 Vietnam Veterans or their survivors received cash payments.”⁵⁸ The settlement fund was declared exhausted and closed by the district court in 1997.⁵⁹

The United States government was slowly taking notice. The Veterans Health Programs Extension and Improvement Act of 1979 instructed the Department of Veterans Affairs to conduct an epidemiological study concerning human exposure and the adverse health effects of dioxins and phenoxy herbicides.⁶⁰

The first public state inquiry into the health effects was spearheaded by New Jersey State, which created the New Jersey Agent Orange Commission in 1980.⁶¹ The commission worked with Rutgers University in what was called the “Pointman Project,”⁶² and ultimately helped in persuading the government that veterans exposed to Agent Orange should receive pay.⁶³ Previously, the federal government had held that military members were not exposed directly to the herbicide.⁶⁴ The study, based on blood and fat samples taken from a group of veterans, proved otherwise.⁶⁵ Presented with this scientific evidence, Congress could no longer ignore the veterans’ claims.

The 1983 Veterans’ Dioxin and Radiation Exposure Compensation Standards Act (the “Dioxin Act”) required the Administrator of Veterans’ Affairs to make regulations regarding the determination of service connection of certain disabilities of veterans who were exposed to dioxin in Vietnam, and to provide interim benefits for certain disabilities and deaths.⁶⁶ The Dioxin Act allows the Veterans’ Administration to determine what diseases are caused by exposure to dioxin as new science emerges, and to update regulations to govern dioxin-related disability claims as needed.⁶⁷

57. *Compensation: Agent Orange Settlement Fund*, U.S. DEP’T OF VETERANS AFFS., https://www.benefits.va.gov/compensation/claims-postservice-agent_orange-settlement-settlementFund.asp (last visited Oct. 23, 2021).

58. *Id.*

59. *Id.*

60. The Veterans’ Health Programs Extension and Improvement Act of 1979, 38 U.S.C. § 219.

61. Darryl Isherwood, *Agent Orange Commission Among Sate’s Most Effective*, OBSERVER (July 15, 2021), <https://observer.com/2010/07/agent-orange-commission-among-states-most-effective/>.

62. *Id.*

63. Terry Pristin, *NEW JERSEY DAILY BRIEFING: Agent Orange Panel Closes*, N.Y. TIMES (July 3, 1996), <https://www.nytimes.com/1996/07/03/nyregion/new-jersey-daily-briefing-agent-orange-panel-closes.html>.

64. *Id.*

65. *Jersey Tests Look For Dioxin Effect*, N.Y. TIMES (Dec. 9, 1984), <https://www.nytimes.com/1984/12/09/nyregion/jersey-tests-look-for-dioxin-effect.html>.

66. *Veterans’ Dioxin and Radiation Exposure Compensation Standards Act*, Pub. L. No. 98-542, §§ 2, 3, 5, 98 Stat. 2725, 2725–28 (1984).

67. *Id.*

Two major landmark court decisions regarding Agent Orange determinations occurred in the 1980s. First, in *Nehmer v. United States Veterans Administration (Nehmer I)* a class action lawsuit was brought to challenge a VBA regulation, formerly 38 C.F.R. 3.311a, which identified chloracne as the only disease that scientific evidence showed to be associated with exposure to herbicides like Agent Orange used by the United States in Vietnam.⁶⁸ Chloracne is a skin disorder accompanied by blackheads, cysts, and sores.⁶⁹ The district court certified the case as a class action on behalf of all Vietnam Veterans and their survivors who had been denied VBA benefits for a condition allegedly associated with herbicide exposure or who would be eligible to file a claim for such benefits in the future.⁷⁰

Second, in *Nehmer v. United States Veterans Administration (Nehmer II)*, the federal district court found that the VBA had violated the Dioxin Act by failing to give the “benefit of the doubt to the veterans when confronted with conflicting evidence of approximately equal weight.”⁷¹ The court’s ruling required the VBA to conduct new regulations and voided all denials issued from 1985 to 1989 that had been based on the invalidated regulation that only chloracne was associated with Agent Orange.⁷²

Finally, on February 6, 1991, thirty years after the United States military began spraying the toxin in Vietnam, Congress enacted the Agent Orange Act.⁷³ The Act allowed the Department of Veteran’s Affairs to declare certain health issues and conditions “presumpti[ve]” to exposure to Agent Orange and established provisions for the National Academy of Sciences to analyze and summarize scientific evidence regarding military service exposure to Agent Orange during the Vietnam War.⁷⁴ By declaring conditions presumptive, the VA acknowledges certain disabilities are caused by military service.⁷⁵

In May of 1991, plaintiffs in the *Nehmer II* litigation entered into a stipulation agreement with the government.⁷⁶ The Final Stipulation and Order provided that upon the VBA issuing new determinations designating particular diseases as

68. *Nehmer v. U.S. Veterans Admin.*, 118 F.R.D. 113, 115–16 (N.D. Cal. 1987); 38 C.F.R. § 3.311a (1985).

69. *Chloracne or Acneform Disease and Agent Orange*, U.S. DEP’T OF VETERAN AFFS., <https://www.publichealth.va.gov/exposures/agentorange/conditions/chloracne.asp#:~:text=Chloracne%20is%20a%20rare%20skin,from%20more%20common%20skin%20disorders> (last visited November 21, 2021).

70. *Nehmer*, 118 F.R.D. at 116, 125.

71. *Nehmer v. U.S. Veterans Admin.*, 712 F. Supp. 1404, 1409, 1423 (N.D. Cal. 1989).

72. *Id.* at 1408–09, 1423.

73. Agent Orange Act of 1991, Pub. L. No. 102-4, § 316, 105 Stat. 11, 11 (1991).

74. *Id.*

75. *Presumptive Disability Benefits*, U.S. DEP’T OF VETERANS AFFS., <https://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/presumption.pdf> (Sept. 2021).

76. *Nehmer v. U.S. Veterans Admin.*, No. CV-86-6160 (TEH), 1991 U.S. Dist. LEXIS 22110, at *1–8 (N.D. Cal. May 17, 1991).

“service-connected,” the agency must immediately readjudicate the claims of veterans suffering from the disease so long as their previously filed claims were denied or still pending.⁷⁷ Further, the agency would pay the veterans’ retroactive benefits, with the effective date of such benefits being based on the filing, “or the date the claimant became disabled or death occurred, whichever is later.”⁷⁸

Despite the Stipulation Order, when the VBA “issued a regulation finding Chronic Lymphocytic Leukemia to be a disease that was associated with dioxin,” it “did not readjudicate the prior claims of Vietnam veterans.”⁷⁹ In 2007, the U.S. Court of Appeals for the Ninth Circuit upheld the Northern District of California’s holding that those previous wrongfully-denied claims were to be readjudicated.⁸⁰ In the opinion’s conclusion, Circuit Judge Reinhardt admonishes, “[t]hose young Americans who risked their lives in their country’s service and are even today suffering greatly as a result are deserving of better treatment from the Department of Veterans Affairs than they are currently receiving.”⁸¹ The Ninth Circuit affirmed that the VBA was obligated by law to readjudicate prior claims and “pay disability benefits to the veterans who [were] suffering from Chronic Lymphocytic Leukemia as a result of their exposure to Agent Orange.”⁸²

As courts and Congress took decades to determine the exact benefits owed to veterans for Agent Orange exposure, Vietnam Veterans and their families suffered. Scientific evidence now shows that a long list of diseases are caused by Agent Orange, and the administration has recognized the connection between the diseases and Agent Orange.⁸³ Currently, these recognized diseases are: bladder cancer, Hodgkin’s disease, multiple myeloma, Non-Hodgkin’s Lymphoma, prostate cancer, respiratory cancers, soft-tissue sarcoma, amyloidosis, chloracne, Type 2 Diabetes, hypothyroidism, ischemia heart disease, Parkinson’s Disease, peripheral neuropathy, and porphyria cutanea tarda.⁸⁴ Unfortunately, it took decades for formal recognition. Even in 2021, sixty years after the first use of the herbicide, the administration added new diseases related to the exposure.⁸⁵ In May 2021, the AARP reported the VA announced bladder cancer, hypothyroidism, and Parkinson’s-like symptoms were to be considered related to Agent Orange exposure.⁸⁶ The agency expects

77. *Id.* at *5.

78. *Id.* at *5–6.

79. *Nehmer v. U.S. Veterans Admin.*, 494 F.3d 846, 849 (9th Cir. 2007).

80. *Id.* at 864.

81. *Id.* at 865.

82. *Id.* at 864.

83. *Veterans’ Diseases Associated with Agent Orange*, U.S. DEP’T OF VETERANS AFFS., <https://www.publichealth.va.gov/exposures/agentorange/conditions/> (last visited Nov. 21, 2021).

84. *Id.*

85. See Aaron Kassraie, *Three More Conditions Linked to Agent Orange Exposure Covered by VA Health Benefits*, AARP, <https://www.aarp.org/home-family/voices/veterans/info-2020/court-order-blue-water-claims.html> (May 28, 2021).

86. *Id.*

this decision to “provide additional health benefits to approximately 50,000 veterans and their survivors whose claims were previously denied.”⁸⁷

Although not yet recognized by the VBA, many veterans—and scientists—are convinced Agent Orange carries with it generational effects as well.⁸⁸ In 1990, the American Legion, the Vietnam Veterans of America, and the National Veterans Legal Services Project funded an independent study by an Agent Orange Scientific Task Force.⁸⁹ The Task Force, consisting of seven scientists and physicians, “concluded that elevated incidences of specific birth defects in the children of Vietnam veterans were found in several studies.”⁹⁰ These birth defects included: spina bifida, oral clefts, cardiovascular defects, hip dislocations, hypospadias, neuroblastoma, and digestive tract defects.⁹¹ In addition, doctors from the Harvard School of Public Health conducted a study on “paternal military service in Vietnam and the risk of late pregnancy outcomes.”⁹² The doctors reported they had “observed positive associations between paternal military service in Vietnam and the risk of fathering an infant with one or more major malformations.”⁹³ And in a study published by the *Journal of Medical Genetics*, it was reported that “patterns of malformation and disease among veterans’ children involved predominantly the central nervous system, skeletal, and cardiovascular systems.”⁹⁴

As veterans who served in Vietnam can attest, getting recognition of their diseases has been a struggle. And for Blue Water Navy Veterans, it was nearly impossible until 2019. In 2011, a Committee on Blue Water Navy Vietnam Veterans and Agent Orange Exposure for the Institute of Medicine released a study detailing the effects of the herbicide.⁹⁵ The committee concluded, “ground troops and Brown Water Navy veterans had more plausible pathways of exposure (that is, there was a greater number of plausible exposure mechanisms) to Agent Orange—associated with TCDD than did Blue Water Navy veterans.”⁹⁶

“Ground troops” refers to veterans who actually stepped foot on the Vietnam land mass.⁹⁷ “Brown Water” Navy Veterans refers to service members who

87. *Id.*

88. Betty Mekdeci, *Agent Orange and Birth Defects*, BIRTH DEFECT RSCH. FOR CHILD., <https://birthdefects.org/agent-orange/> (last visited Oct. 23, 2021).

89. *Id.*

90. *Id.*

91. *Id.*

92. Ann Aschengrau & Richard R. Monson, *Paternal Military Service in Vietnam and The Risk of Late Adverse Pregnancy Outcomes*, 80 AM. J. OF PUB. HEALTH 1218, 1218 (1990), <https://doi.org/10.2105/AJPH.80.10.1218>.

93. *Id.* at 1221.

94. Barbara Field & Charles Kerr, *Reproductive Behaviour and Consistent Patterns of Abnormality in Offspring of Vietnam Veterans*, 25 J. OF MED. GENETICS 819 (1988).

95. See INST. OF MEDICINE, BLUE WATER NAVY VIETNAM VETERANS AND AGENT ORANGE EXPOSURE, (2011), <http://nap.nationalacademies.org/13026>.

96. *Id.* at 13.

97. *Id.* at 1.

served on Navy and Coast Guard vessels that went into inland rivers and waterways in Vietnam.⁹⁸ These veterans were “presumed to have been exposed to the herbicides . . . including Agent Orange.”⁹⁹ Thus, the VA was allowed “to be selective in who is worthy of presumptive exposure based on ‘boots on soil’ and operating in the inner waterways, based on ‘plausibility’ of pathways of contamination, i.e., inhalation, dermal contact, and ingestion, and the likelihood of those with the greatest exposure opportunities.”¹⁰⁰ This type of selective “science” was neither scientific nor effective.

In 2009, the Department of Veterans Affairs (“DVA”) directed the Institute of Medicine (“IOM”) to focus research on Blue Water Navy Veterans’ exposure to Agent Orange.¹⁰¹ The report detailed the possible ways veterans who served only on ships could have been exposed to the herbicide: contaminated shipboard water, spray drift, and dermal contact with the marine water.¹⁰²

Sailor James May recounted his experience with Agent Orange spray drift as a deckhand on the USS Sanctuary from 1966 to 1967.¹⁰³ He recalled that after the planes would fly over: “I would need to have a wash down to clean the deck to wash off the residue from the spray.”¹⁰⁴ After observing planes fly over on a monthly basis, he claimed: “I will never forget watching the spray planes till I pass away.”¹⁰⁵

Although the committee concluded there was not enough scientific evidence “that exposures to Blue Water Navy personnel, taken as a group, were qualitatively different from their Brown Water Navy and ground troop counterparts,” they also declined from saying there was absolute proof that the veterans were actually exposed.¹⁰⁶ However, they did reference a report of Australia’s Department of Veterans Affairs which emphasized how susceptible Blue Water Navy Veterans were to the Agent Orange via potable water.¹⁰⁷ The 2002 report determined their navy personnel were unequivocally exposed

98. *Brown Water and Blue Water Veterans*, VETSHQ.COM, <https://www.vetshq.com/brown-water-blue-water-veterans/> (last visited Nov. 21, 2021).

99. *Id.*

100. Ed Ball, *How Blue Water Navy Veterans Were Exposed to Agent Orange*, BLUE WATER NAVY ASS’N (Aug. 4, 2018), <https://www.bwnvva.org/how-blue-water-navy-ships-were-exposed-to-agent-orange.html>.

101. John Rossie & Ray Melninkaitis, *A Re-Analysis of Blue Water Navy Veterans and Agent Orange Exposure*, <http://www.oldbluewater.com/ReIOM.htm> (Sept. 2017).

102. INST. OF MEDICINE, *supra* note 95, at 105.

103. See Letter from James E. May (March 15, 2012), https://www.bwnvva.org/uploads/1/2/0/7/120755470/exhibit_5.pdf.

104. *Id.*

105. *Id.*

106. INST. OF MEDICINE, *supra* note 95, at 133.

107. *Id.* at 11 (citing J.F. MULLER ET AL, EXAMINATION OF THE POTENTIAL EXPOSURE OF ROYAL AUSTRALIAN NAVY (RAN) PERSONNEL TO POLYCHLORINATED DIBENZODIOXINS AND POLYCHLORINATED DIBENZOFURANS VIA DRINKING WATER 9 (2002), <https://www.dva.gov.au/sites/default/files/files/consultation%20and%20grants/healthstudies/nrcet.pdf>).

through a ship's water distillation process which used high heat flash system to evaporate the salt from the water.¹⁰⁸ The study found that this actually enhanced the toxicity level of any dioxin that had been present in the collected water.¹⁰⁹ This water was used by ship personnel for cooking, drinking, doing laundry, and bathing.¹¹⁰ But while the Australia government formally recognized the exposure to their veterans since 2002, it took the U.S. government much longer.¹¹¹

In effect, the VA alienated many veterans—an estimated 90,000 claims by Blue Water Navy Veterans (“BWNV”) had been denied—as their illnesses were not recognized as being related to Agent Orange’s effects.¹¹² When a federal court did recognize the BWNV, it was not based on scientific facts, but rather a determination that if and when Congress granted veterans who had “served in the Republic of Vietnam”¹¹³ a presumption of service-connected conditions, it also included those who had served in its territorial sea.¹¹⁴ On January 29, 2019, in *Procopio v. Wilkie*, a federal appellate court ruled that in passing the Agent Orange Act of 1991, Congress intended to include Vietnam’s territorial sea:

Congress has spoken directly to the question of whether those who served in the 12 nautical mile territorial sea of the “Republic of Vietnam” are entitled to § 1116’s presumption if they meet the section’s other requirements. They are. Because “the intent of Congress is clear, that is the end of the matter.”¹¹⁵

After the ruling, Congress enacted the Blue Water Navy Vietnam Veterans Act (the “Act”).¹¹⁶ The Act amended the legislation related to the presumptions of service-connected illnesses to include those veterans who served offshore of the Republic of Vietnam.¹¹⁷ In defining “offshore,” Section (d) of the Act states “the location is not more than 12 nautical miles” off the coast of the Republic of

108. JOCHEN MULLER ET AL. EXAMINATION OF THE POTENTIAL EXPOSURE OF ROYAL AUSTRALIAN NAVY (RAN) PERSONNEL TO POLYCHLORINATED DIBENZODIOXINS AND POLYCHLORINATED DIBENZOFURANS VIA DRINKING WATER 5–8 (2002), <https://www.dva.gov.au/sites/default/files/files/consultation%20and%20grants/healthstudies/nrcet.pdf>.

109. *Id.* at 7.

110. John Rossie & Ray Melnikaitis, *supra* note 101.

111. *Id.*

112. Aaron Kassraie, *Trump Signs Benefits Bill for ‘Blue Water’ Vietnam Vets*, AARP (June 27, 2019), <https://www.aarp.org/home-family/voices/veterans/info-2019/trump-vietnam-blue-water-bill.html>.

113. Agent Orange Act of 1991, 38 U.S.C. § 1116; *see generally* *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019).

114. *Procopio*, 913 F.3d at 1375.

115. *Id.* at 1379–81 (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984)).

116. Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23, §§ 101, 1116A, 133 Stat. 966, 966–67 (codified as amended in scattered sections of 38 U.S.C.).

117. *Id.*

Vietnam.¹¹⁸ The Act opened the opportunity for many Blue Water Navy Veterans to finally get their claims approved.¹¹⁹

But what would happen to the claims of the thousands of veterans and survivors who had previously filed claims and been denied? On November 5, 2020, the U.S. District Court for the Northern District of California once again determined that the Department of Veterans Affairs is required to readjudicate thousands of denied claims.¹²⁰ Seemingly frustrated, the district court pointed out that “[o]n three separate occasions (four including this motion), [class counsel] have had to seek enforcement of the consent decree on a class-wide basis.”¹²¹ The court required the VA to: (1) identify, within 120 days, all decisions made before this ruling that denied benefits based on the veteran being a Blue Water Navy Veteran; (2) within 240 days, issue a replacement decision based on the ruling that Blue Water Navy Veterans may be entitled to the benefits; and (3) provide opposing counsel with the results of each determination.¹²² The court further required the VA to provide a copy of “each

118. The Act requires the VA to treat a location as being in the offshore waters of Vietnam if the location is not more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting the following points:

“Points Geographic Names	Latitude North	Longitude East
At Hon Nhan Island, Tho Chu Archipelago Kien Giang Province	9°15.0’	103°27.0’
At Hon Da Island southeast of Hon Khoai Island Minh Hai Province	8°22.8’	104°52.4’
At Tai Lon Islet, Con Dao Islet in Con Dao-Vung Toa Special Sector	8°37.8’	106°37.5’
At Bong Lai Islet, Con Dao Islet	8°38.9’	106°40.3’
At Bay Canh Islet, Con Dao Islet	8°39.7’	106°42.1’
At Hon Hai Islet (Phu Qui group of islands) Thuan Hai Province	9°58.0’	109°5.0’
At Hon Doi Islet, Than Hai Province	12°39.0’	109°28.0’
At Dai Lanh point, Phu Khanh Province	12°53.8’	109°27.2’
At Ong Can Islet, Phu Khanh Province	13°54.0’	109°21.0’
At Ly Son Islet, Nghia Binh Province	15°23.1’	109°9.0’
At Con Co Island, Binh Tri Thien Province	17°10.0’	107°20.6’

Id.

119. *See id.*

120. *Nehmer v. U.S. Dep’t of Veteran Affairs*, No. C 86-06160 WHA, 2020 U.S. Dist. LEXIS 207458 at *17–18 (N.D. Cal. Nov. 5, 2020).

121. *Id.* at *6.

122. *Id.* at *17–18.

notice letter sent to the class members.”¹²³ Prior to this ruling, the VBA originally left it to the veteran to re-file his or her claim; and as the *Nehmer* court acknowledged: “Significantly, then existing statutes did not require automatic readjudications. (Nor ha[d] any statute since.)”¹²⁴ This decree required the VBA to identify and readjudicate without a new claim from the veteran.¹²⁵

III. EFFECTS ON VICTIMS: “DELAY AND DENY, UNTIL THEY ALL DIE”¹²⁶

Not everyone who lost his life in Vietnam died there.

—Anonymous¹²⁷

The *Procopio* ruling and subsequent *Nehmer* determination were the actions Blue Water Navy Veterans and their families had been waiting decades to receive. Finally, their struggles, sacrifice, and health issues were formally and legally required to be recognized by the VBA. For many, however, the decision would come too late.

The number of Blue Water Navy Veterans who died from their illnesses connected with Agent Orange is difficult, if not impossible, to determine. Although those still alive today may see compensation, many say it is unfair to the deceased veterans: “Anything that you can get after death is just a benefit that should have been granted in life. VA has no leg to stand on as this is not a new program to implement, just an expansion of the number of people eligible for the benefits.”¹²⁸

Alfred Procopio, Jr., of the landmark case discussed above, fought many years to get his diabetes and cancer diagnoses recognized by the VBA.¹²⁹ Procopio was “stationed on the USS Intrepid off the coast of Vietnam in 1966,” and “drank water on the aircraft contaminated with the chemical,” Agent Orange.¹³⁰ But fifty-five years after being poisoned by the dioxin, and only a little over two

123. *Id.* at *18.

124. *Id.* at *10.

125. *Id.* at *17–18.

126. *The VA Motto: “Delay and Deny, Until They All Die” – The VA Is Now Lying to Members of Congress to Stop or Delay Life-Saving Legislation*, MILITARYCORRUPTION.COM (Dec. 13, 2018), <https://militarycorruption.com/lying-to-congress/>.

127. Doug MacEachern, *As a Good Man Lies Dying: A Story of Life and Vietnam*, AZCENTRAL, <https://www.azcentral.com/story/dougmaceachern/2014/07/18/agent-orange-vietnam-roney/12865347/> (July 22, 2014).

128. Ryan M. Gallucci, *Preparing for Blue Water Navy Claims – VA Status Update on Implementation*, VFW (Oct. 30, 2019), <https://www.vfw.org/advocacy/national-legislative-service/congressional-testimony/2019/10/preparing-for-blue-water-navy-claims-va-status-update-on-implementation>.

129. See Lou Raguse, *MN veteran who fought for Agent Orange benefits dies*, KARE (May 31, 2021), <https://www.kare11.com/article/news/local/minnesota-veteran-who-fought-for-agent-orange-benefits-dies/89-d74236d8-04be-4e77-b739-ca8cec253182>; see *supra* note 115.

130. *Id.*

years since his victory in court, Mr. Procopio succumbed to his ailments on May 28, 2021.¹³¹

Mr. Procopio is just one of many who have passed away because of diseases connected to Agent Orange.¹³² The Blue Water Navy Vietnam Veterans™ Association's webpage lists many more: Robert P. Taylor served in Vietnam in 1968, had diabetes for over thirty years and died from total renal failure in 2011; Tom Yates served from 1960 to 1964 and died of malignant mesothelioma in 2016; Dale L. Drenning developed diabetes within six months of serving and succumbed to the disease in 2015; David Gilmore served from 1971 to 1974 and died from cancer in 2019; Timothy Bruce Mims served from 1973 to 1976, and died from cancer in 2009; Julian Taylor served from 1964 to 1967, and died from lung cancer in 2017.¹³³ These veterans, and many more just like them, did not live long enough to see the rulings in their favor.

Thankfully, the current policies do allow for veterans' survivors to receive benefits under different types of claims. One option is a Dependency and Indemnity Compensation ("DIC") claim.¹³⁴ A DIC benefit is a monetary amount paid to surviving spouses and/or dependent children on a monthly basis if the veteran dies due to a service-connected condition or was rated by the VA at 100% disabled for ten years before death.¹³⁵ VA regulations also allow for benefits for a qualifying widow if a VA claimant dies while the claim "was pending before the agency of original jurisdiction or the Board of Veterans' Appeals when the claimant died."¹³⁶ The surviving spouse may be deemed "entitled to receive the money the VA claimant would have received if the pending claim had been granted on the day of death."¹³⁷ And the recent ruling in *Nehmer* also recognized that the VA was required to readjudicate the claims made by survivors that were previously denied.¹³⁸

Despite the progress made, many Blue Water Navy Veterans and their dependents are still excluded from the recent rulings. The Act only covers those veterans on ships within twelve nautical miles.¹³⁹ Most of the ships that participated in the Vietnam War were part of carrier groups that undertook bombing campaigns that remained stationed about 100 miles off the coast at a

131. *Id.*

132. See generally *In Memoriam*, BLUE WATER NAVY VIETNAM VETERANS ASS'N, <https://www.bwnvva.org/in-memoriam.html> (last visited Nov. 22, 2021) (listing Blue Water Navy Veterans who have passed away due to diseases connected to Agent Orange exposure).

133. *Id.*

134. *Survivors' Dependency and Indemnity Compensation (DIC)*, BENEFITS.GOV, <https://www.benefits.gov/benefit/290> (last visited Nov. 21, 2021).

135. *Id.*

136. 38 C.F.R. §§ 3.1000(d)(5), 3.1010(a) (2021).

137. 1 VETERANS BENEFITS MANUAL 7.3, 7.3.1 (2021).

138. *Nehmer v. U.S. Dep't of Veteran Affairs*, No. C 86-06160 WHA, 2020 U.S. Dist. LEXIS 207458, at *18 (N.D. Cal. Nov. 5, 2020).

139. Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23, § 1116A(B)(d), 133 Stat. 966, 967 (2019).

location referred to as “Yankee Station.”¹⁴⁰ Dixie Station, located “80 miles southeast of Cam Ranh Bay in the South China Sea,” also harbored carriers which undertook South Vietnam bombing missions.¹⁴¹ As these “operations did not routinely move carriers close to the Vietnam coastline,” the veterans aboard are routinely excluded from receiving benefits under the recent rulings.¹⁴²

IV. EFFECTS ON ADMINISTRATION: “SIGNIFICANT CHALLENGES”:

The Veterans’ Benefits Administration has faced many challenges since its creation and does not appear to be currently operating at full capacity.¹⁴³ In his 2020 report on the “VA’s Major Management and Performance Challenges,” Inspector General Michael J. Missal stated, “Recent [Office of the Inspector General (“OIG”)] reports have identified significant challenges in VBA’s attempts to deliver accurate and timely claims decisions and appeals.”¹⁴⁴ He attributed these challenges to “failures in guidance, training, quality assurance, and systems.”¹⁴⁵

Of course, the pandemic only made matters worse: “The COVID-19 pandemic has complicated benefit determinations by reducing VA resources available to conduct in-person medical examinations. This was compounded by the hesitancy of Veterans to get the exams needed to determine their level of benefits because of the in-person requirement.”¹⁴⁶ In response to the report, the VA management stated, “VBA’s claims backlog increased to 198,425 claims as of July 31, 2020.”¹⁴⁷ As previously stated, the agency’s backlog includes more than 210,000 as of April 2023.¹⁴⁸

The OIG report also acknowledges the VA’s responsibility following the Blue Water Navy Veterans Claims has contributed to the backlog.¹⁴⁹ To its credit, the VBA moved quickly to begin processing the Blue Water Navy Veterans’ claims, although there were hurdles. The first major hurdle was determining the proof required that the veterans had actually been within twelve nautical miles of Vietnam. Military records of the 1960s and 1970s were not as systematically filed as they are today, and to exacerbate matters, the VBA did not have the tools

140. INST. OF MEDICINE, *supra* note 95, at 32.

141. *Id.*

142. *Id.*; see also Blue Water Navy Vietnam Veterans Act of 2019, *supra* note 116.

143. DEP’T OF VETERANS AFFS., OFFICE OF INSPECTOR GENERAL, FISCAL YEAR 2020 INSPECTOR GENERAL’S REPORT ON VA’S MAJOR MANAGEMENT AND PERFORMANCE CHALLENGES 6–7 (2020) [hereinafter FISCAL YEAR 2020 REPORT], <https://www.va.gov/oig/pubs/VAOIG-2020-MMC.pdf>.

144. *Id.* at 6

145. *Id.*

146. *Id.*

147. *Id.* at 7.

148. Veterans Benefits Administration Reports, *supra* note 2.

149. See FISCAL YEAR 2020 REPORT, *supra* note 143, at 7.

in place to make the determination.¹⁵⁰ In response to the problem, the administration implemented the use of a ship locator tool, which displays whether a ship entered by a claims processor was within the 12-nautical-mile boundary, and thus eligible.¹⁵¹ The VBA worked with the National Archives and Records Administration to “digitize all Navy and Coast Guard deck logs for ships with known Vietnam service” in order for the ship locator tool to be accurate.¹⁵²

On October 26, 2020, the VBA announced that more than 34,000 claims have been decided under the Act, which was effective on January 1st of that year, ultimately “awarding more than \$664 million in retroactive benefits to eligible Veterans and families.”¹⁵³ But there was a lack of quality training to re-adjudicate the Blue Water Veteran’s claims, as they “are more likely to involve retroactive awards, which can be quite complex.”¹⁵⁴ With the push to process the claims quickly, the VBA has failed in efficiency; the VA Inspectors General’s Office found almost half, an estimated 2,100 of 4,600, of the 2020 claims reviewed for accuracy were inaccurate.¹⁵⁵ In fact, the mistakes have totaled an estimated \$37 million.¹⁵⁶

There are still many veterans who have been waiting since the Act for their claims to be adjudicated. In her article entitled *Bureaucracy is failing Blue Water Vietnam Veterans*, Ashley Merryman points out the lengthy delays, noting, “[one veteran’s] VA application has been pending for almost three years.

150. U.S. DEP’T OF VETERANS AFFS.: OFF. OF INSPECTOR GEN., R20-03938-208, BLUE WATER NAVY OUTREACH REQUIREMENTS WERE MET, BUT CLAIMS PROCESSING AND PROCEDURES COULD IMPROVE i–ii (2021), <https://www.va.gov/oig/pubs/VAOIG-20-03938-208.pdf>.

151. *Id.* at ii.

152. U.S. Dep’t of Veterans Affs.: Off. of Pub. and Intergov’t Aff., *VA Reaches Milestone, Completing Nearly Half of Blue Water Navy Disability Claims Received Since Beginning of Year*, (Oct. 26, 2020), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5551>; *see also* *VA Approves Claims For More Than 22,500 Blue Water Navy Veterans*, THE AM. LEGION (Oct. 08, 2020), <https://www.legion.org/veteransbenefits/250665/va-approves-claims-more-22500-blue-water-navy-veterans>.

153. *See* *VA Reaches Milestone, Completing Nearly Half of Blue Water Navy Disability Claims Received Since Beginning of Year*, *supra* note 152.

154. Leo Shane III, *Blue Water Vietnam Veterans Are Getting Benefits Payouts, But Not Always The Right Amount*, MILITARY TIMES (Sep. 7, 2020), <https://www.militarytimes.com/veterans/2021/09/07/blue-water-vietnam-veterans-are-getting-benefits-payouts-but-not-always-the-right-amount/> (“In some cases, the start date for payouts is the first day veterans file a claim. In others, the benefits can be pushed back retroactively only to the start of the 2019 law. Staff were more likely to award extra retroactive benefits incorrectly than underestimate the payout start date.”).

155. *See* BLUE WATER NAVY OUTREACH REQUIREMENTS WERE MET, BUT CLAIMS PROCESSING AND PROCEDURES COULD IMPROVE, *supra* note 150, at iii.

156. *Id.* at 163.

If it goes much longer, he'll have fought the VA longer than he fought the Vietnam War."¹⁵⁷

Exacerbating matters, the VA's November 30, 2021 statement acknowledged that their printing vendor was experiencing supply chain and staffing issues, resulting in "delays in printing and mailing notification letters to veterans and claimants."¹⁵⁸ These notifications often include mandatory deadlines for veterans.¹⁵⁹ Thankfully, the agency stated that it will extend deadlines, but it is just another hurdle for those veterans who have waited so long for benefits.¹⁶⁰

The United States government has recognized the VBA's needs and their Fiscal Year 2022 Appropriations Bill provided \$3.5 billion for "additional claims processors and initiatives to address the claims backlog, including claims resulting from new laws and interpretations related to toxic exposures, such as Agent Orange."¹⁶¹ U.S. Senator Martin Heinrich said, "[t]his bill takes a bipartisan approach to . . . enable the Department of Veterans Affairs to care for our nation's veterans."¹⁶² While a welcome approach for many of the Blue Water Navy Veterans, it is also long overdue.

V. CONCLUSION

In 1961, the United States government made the significant and deadly decision to use herbicides in the Vietnam War. Within one decade, the military would dump millions of liters of the poison on its own servicemembers. While it is difficult to ascertain exactly who and how many knew of its deadly consequences, there is enough evidence to show the herbicide's effects appeared quickly. With the recent court rulings and government funding, it seems the United States government is finally ready to recognize the full extent of the injuries Blue Water Navy Veterans have endured due to their exposure to Agent

157. Ashley Merryman, *Bureaucracy is failing Blue Water Vietnam veterans*, MILITARY TIMES (Jan. 31, 2022), <https://www.militarytimes.com/opinion/2022/01/31/bureaucracy-is-failing-blue-water-vietnam-veterans/>.

158. *VA Statement on GPO Printing and Mailing Delay*, U.S. DEP'T OF VETERANS AFFS. (Nov. 30, 2021), <https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=5744>.

159. Courtney Bubl , *Some Veterans Affairs Beneficiaries Will Receive Notification Letters Late Due to Printing Delays*, GOV'T EXEC. (Dec. 1, 2021), <https://www.govexec.com/management/2021/12/some-veterans-affairs-beneficiaries-will-receive-notification-letters-late-due-printing-delays/187197/>.

160. *Id.*

161. *SUMMARY: Military Construction, Veterans Affairs, And Related Agencies Fiscal Year 2022 Appropriations Bill*, U.S. SENATE COMM. ON APPROPRIATIONS (Aug. 4, 2021), <https://www.appropriations.senate.gov/news/majority/summary-military-construction-veterans-affairs-and-related-agencies-fiscal-year-2022-appropriations-bill->. This amount is \$259 million more than was allotted for the 2021 fiscal year. *Id.* The bill also included what it called a "historic level of investment into research," with \$882 million to support ongoing and new research areas, one of which is toxic exposures. *Id.*

162. *Id.*

Orange. Five decades later. Five decades of pain, suffering, denial, and death. The United States could have used the past five decades to acknowledge the harm, process the claims, provide care for the veterans, and perfect the process. Instead, the VBA is left scrambling to readjudicate thousands of claims on new, unfamiliar technology, with personnel not fully trained for such work. Hopefully, the next generation of military servicemembers will not have to wait five decades for their war injuries to be recognized.

