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REQUEST FOR INQUIRY BY SPECIAL COUNSEL

BY WES CARTER, FORT COLLINS CO JUNE 23 2014
CHAIR, THE C-123 VETERANS ASSOCIATION

Summary:

VA Office of General Counsel has not acted on ethics and other complaints submitted to it. Assistance is requested from the U.S. Office of Special Counsel. C-123 medium assault transports used for spraying Agent Orange during the Vietnam War remained contaminated with TCDD (dioxin) until their destruction as toxic waste in 2010. Veterans (aircrew, maintenance and aerial port) assigned to these aircraft need military herbicide exposure benefits from the Veterans Administration. VA has stated TCDD hasn't actually been shown to cause harm to humans, TCDD on the aircraft could not have exposed crews via ingestion, inhalation or dermal routes, and TCDD on the warplanes was "dried dioxin." Numerous federal, state and independent medical and scientific agencies and societies, including NIH, CDC, US Public Health Service, EPA, confirm our exposure. **Only** the VA disputes C-123 veterans' Agent Orange exposure claims.

http://www.c123cancer.org http://www.c123kcancer.blogspot.com

I. Veterans' Ethical Concerns regarding Failures by Veterans Benefits Administration in Employment of Contractors to Oppose Veterans Claims before the 2014 Institute of Medicine, Washington, D.C.

1. At the Institute of Medicine C-123 Agent Orange Committee public hearing on June 16, 2014, a gentleman from A.L. Young Consulting, Inc. stated he was there only to explain the science behind the VA's position. This was disingenuous at best. VA paid him to be there, as he is under a $600,000 consulting contract to address post-Vietnam Agent Orange exposure situations, running from September 2012 to September 2014.
2. We are alarmed that VA has already assumed a negative position before submitting the issue to the IOM, which preceded formal presentation of the charge on May 15, 2014. VA made no attempt to support, but rather only to obstruct scientific and legal verification of the veterans' basis for claims. In their web pages and other publications, no mention is made of any peer-reviewed literature or other federal agency input supporting the C-123 veterans' eligibility for service connection, only those which oppose it.
3. VHA Post Deployment Health redefined exposure, apparently in 2012, in a very unique manner, "exposure = contamination field + bioavailability." Despite challenges to this in professional society meetings and from toxicologist experts in other federal agencies and universities, VA continues to employ this redefinition to prevent, rather than recognize, scientifically-proven C-123 exposure situations. The law clearly states that exposure itself is the only requirement non-Vietnam veterans must establish to qualify for Agent Orange-illness treatment, yet VA reinserts "medical nexus," a barrier already prohibited by law, by incorporating it into the VHA redefinition of exposure.

It isn't an accident that this VA redefinition pose a threat to virtually every veteran's claim to every possible exposure situation not producing an immediate physical injury, such as acid burns. By requiring proof of bioavailability, usually impossible to establish because many toxins take decades for damage to be manifest, VA obstructs legitimate claims.

4. The contractor began his presentation to the IOM claiming he was there only to explain the VA's position on the science, although it was clear that had already been made clear in many ways by the VA.

He made clear he was offering his input as a scientist to insure the integrity of the scientific record. But in fact, as his own support documents submitted to the committee make clear, VA contracted with his firm to produce, and then release to the IOM, his reports, several of which targeted C-123 veterans' claims directly. None have been peer-reviewed.

5. We are alarmed that the only peer-reviewed article confirming the C-123 veterans' exposure claims was immediately targeted by VA through this contractor. In a veteran-friendly VA, peer reviewed scientific articles, confirmations from multiple federal agencies such as the CDC/ATSDR and US Public Health Service and NIH/NEISH would have been persuasive, not targeted for eventual dismissal.

Not one ounce of evidentiary weight seems to have been permitted by VA Compensation and Pension Service to the one hundred supporting documents provided

by C-123 veterans, but rather everything other than their factual service records (DD-214, SMR, etc.) either ignored or challenged in totality, as opposed to being permitted degrees of proof. While benefit of the doubt is required by law to rest with the veteran, in all C-123 issues the VA's doubt is totally against the veterans' basis for exposure claims.

No respect is permitted by VBA for the volume of C-123 veterans' supporting materials, the independence and objectivity of experts or the even statutory authority and expertise of other federal agencies. None of the A.L. Young Consultants' reports were submitted by VA for peer review or critique in any way, but instead all were accepted and forwarded directly to IOM.

6. His reports, regardless of any factual accuracy they may convey, do not meet the appropriate standards of VA or any other federal science-focused agency. The contractor's reports yielded to the VHA/VBA agenda, serving VA rather than science and veterans. The reports could never survive peer review, yet VA selected this person to guide the IOM into preventing the veterans' exposure claims, literally by waiving his reports to the committee in his PowerPoint presentation.

7. Of unique concern is the consultant's denigration of the C-123 veterans in 2011, before the IOM meetings. He certainly should have excused himself after his slurs* were noted and objected to by the veterans who voiced the issue with Dr. Henrick privately before the May 15, 2014 meeting. The veterans had already voiced their objections to the consultant's slurs to the Veterans Affairs executives.

7. The consultant contracted himself on a pivotal issue, and in a manner contrary to the veterans' arguments. In documents submitted to the committee he maintains the lower levels of 1996-2009 testing of TCDD contamination could accurately be assumed to be approximately the same as during the period 1972-1982 that the aircraft were flown by the veterans, because (he insists) the TCDD would have degraded very little over time…a low 2009 test result indicates a relatively low 1972 result. However, in his recommendations to the USAF for destroying the aircraft, he assures base officials that the TCDD in the aircraft would have degraded greatly in the years of desert storage, a flat contradiction and an attempt to dismiss valid test results from reflecting on veterans' actual exposure situations in the decade aboard the C-123s.

9. The consultant was asked by the IOM committee to explain why the fleet of desert-quarantined C-123s was destroyed in 2010. He responded with a prevarication, answering it was because the C-123s were obsolete and an embarrassment to the Air Force, given their Vietnam Agent Orange history.

The consultant failed to mention his own pivotal role. As consultant to the Office of Secretary of Defense, his advice was sought and he recommended that the C-123s all be destroyed immediately and without further testing. He was noted by AF officials as being the "strongest proponent" for this, and his authority cited by AF in seeking Air Staff approval for the consultant's recommended final solution.

10. The consultant is literally a historical figure in Agent Orange issues. He helped develop wartime doctrine for employment of military herbicides, personally applied Agent Orange in various tests, is the historian of the Ranch Hand Association, played a key role in early Administration resistance to evolving veterans' Agent Orange concerns from 1980 on. He is probably very sincere in his perspectives but he certainly did not provide an open-minded, independent, see-where-the-facts-lead investigation. His

mission was to disprove C-123 veterans' Agent Orange claims. None of this background was revealed to the IOM as he introduced himself.

Neither did he explain his 1891 business address was at the VA's Washington DC offices, nor his employment by DOD in selection of which exposure sites to recognize in his 2006 report. Neither did he explain that his perspectives on the relative innocence of Agent Orange have remained unchanged for decades, evolving in later years to arguments that no Agent Orange is present, or that no exposure to the Agent Orange which may be present in a particular situation is possible. He evolved the basis for VA's current definition of exposure to include bioavailability, using his extensive list of articles to present the assumption of bioavailability as part of exposure. He is a perfectly reliable witness for a negative perspective on Agent Orange dangers, against presence of Agent Orange in a questionable situation, and against the potential of exposure to whatever Agent Orange might be present. VA must have concluded no other expert researchers were available to provide alternate input, even though the veterans sought VA assistance to fund those who'd been identified through their publications. All VA challenge to the C-123 veterans was paid; all veterans input to the IOM was unpaid, by researchers, educators and other federal agencies who concluded the C-123 aircraft were contaminated and the veterans were exposed.

In all this, the consultant failed to come before the IOM as an independent scientist whose review of the issue warranted acceptance as factual. In all of this, the consultant failed to reach the ethical standards the IOM, and the veterans as the objects of the study, had the right to demand in-depth examination by VA leaders.

***** Below, the "the only reason these men prepared such a story," although the "story" was created not by us, but by CDC/ATSDR, National Institutes of Health, US Public Health Service, National Toxicology Center, University of Texas Medical School, Columbia University Mailman School of Public Health, Boston University School of Public Health, Oregon Health Sciences University, VA physicians, cancer researchers.

The VA Post Deployment Health Section and their contractors are the ones who decided to oppose the veterans by cherry-picking their consultant, paying him $600,000 for his two years work through the IOM contract, and who made both intrinsic and extrinsic failures.

From his email to correspondent Lou Krieger, Sunday, July 10, 2011:

Lou, A sad commentary for blaming me. The Air Force did the right thing for the right reason in destroying those aircraft. It would have been a benefit to the tax payer to have sold those aircraft, but **we all knew in time that the Air Reservists would seek presumptive compensation, and those aircraft would become the center of a social (not scientific) controversy, and never be used.** The link just about says it all. **The only reason these men prepared such a story is that they are hoping they can cash in on " tax free money" for health issues that originate from life styles and aging. There was no exposure to Agent Orange or the dioxin, but that does not stop them from concocting exposure stories about Agent Orange hoping that some Congressional member will feel sorry for them and encourage DVA to pay them off.** I can respect the men who flew those aircraft in combat and who made the sacrifices, many losing their lives, and almost all of them receiving Purple Hearts, **but these men who subsequently flew them as "trash haulers", I have no respect for such free loaders. If not freeloading, what is their motive?**

II. Veterans' Concerns: VBA Demands an Unusual and Impossibly Higher Standard of Proof for C-123 Agent Orange Exposures

1. The 1991 Agent Orange Act and subsequent legislation was reviewed by the Yale Law School regarding C-123 veterans' post-Vietnam Agent Orange exposures. They concluded C-123 veterans, having established (more likely than not) exposure to military herbicides (Agent Orange) they are entitled to presumptive service connection for recognized illnesses associated with Agent Orange, without having to establish medical nexus except for illnesses not recognized by the Secretary in such a manner.
2. Several agencies of the federal government, possessing both the statutory and scientific authority, concluded these veterans were, more likely than not, exposed to Agent Orange. Included are the US Public Health Service (Captain A. Miller MD USPHS and Rear Admiral R. Ikeda MD USPHS,) CDC/Agency for Toxic Substances and Disease Registry (Dr. Tom Sinks, Deputy Director and Dr. Christopher Portier, Director,) and NIH/National Institute for Environmental Health Sciences (Dr. Linda Birnbaum, Director.)
3. Several highly respected scientists and physicians have, as the Committee of Concerned Scientists and Physicians, formally informed the Under Secretary of Veterans Affairs for Benefits that the C-123 veterans were exposed and incurred health damages.
4. In dismissing the unpaid expert input from the Committee of Concerned Scientists and Physicians, Veterans Benefits Administration, referring to the Committee with a dismissive "some scientists," cited "several scientists offered unsolicited scientists" whose input differed. In fact, there were only three such scientists: two were paid by Dow and Monsanto, and the third paid $600,000 by Veterans Benefits Administration in a contract running Sept 2012 - Sept 2014 at $300,000/year. Our perspective regarding this consultant are addressed in Veterans Concerns I.
5. Veterans Benefits Administration, despite the eligibility of C-123 veterans for presumptive service connection under the law, elected in 2012 to propose an Institute of Medicine special study to resolve the question. This study was canceled, then initiated again in April 2014 with results expected to the Secretary in September. Given the twelve months or more previously taken by the Secretary to act on the IOM findings, this means over three years of denied medical and other benefits at the very time when the veterans' needs are the greatest. While VA provides "catch-up" compensation once claims are approved, there is no means to address years of denied VA medical care as our veterans are forced to seek care elsewhere. Even with Medicare available at their age, absent are dental, vision, pharmacy, rehab, prosthetics, counseling and other services provided by VA.
6. Veterans Health Administration Public Health Section created a VA-unique redefinition of "exposure" employed to prevent C-123 exposure claims. In 2012 VHA presented a poster at the Society of Toxicology which included the statement, "Exposure = contamination field + bioavailability." The Director, National Toxicology Center (Dr. Linda Birnbaum, also director NIESH) wrote she has never heard the term bioavailability as part of the exposure definition. ATSDR, NIH and other federal agencies publishing glossaries of toxicology terminology simply define exposure as "skin (or eye) contact with a chemical (of any kind) or its ingestion or inhalation." Veterans of all eras are concerned that VHA's redefinition of exposure creates an impossible hurdle for proof of any exposure not resulting in immediate harm. Experts have explained that bioavailability is a separate concept from exposure, with bioavailability flowing from an exposure. Many toxins, such as dioxin, can take decades to manifest themselves

following exposure. Dr. Jeanne Stellman, a frequently sought expert in IOM investigations, labeled VHA "unscientific" in its integration of bioavailability with exposure, a concept frequently stressed by its Agent Orange consultant over the decades.

7. VBA policies detailed in VA 21-1MR make clear veterans exposed to Agent Orange need only establish proof of their exposure. Input from Joint Services Records Research Center (JSRRC) can be requested, but only recently has the liaison officer between VHA and JSRRC permitted non-military federal government evidentiary input, including interpretation of military test results provided by the CDC/ATSDR. The VBA manual continues its instruction that such claims are to be forwarded to the Agent Orange desk at VBA, where advisory opinions are issued against the claim. Boiler-plate language is provided for the regional offices to use, citing non-existent VA regulations, policies and procedures. VBA has even directed Agent Orange claims be denied on the basis "In summary, there is no conclusive evidence of TCDD causing adverse effects."

8. VBA spent hundreds of thousands of dollars on preventing C-123 veterans' claims, but permitted no support when the C-123 veterans sought help to establish their proofs. While dozens of unpaid physicians and scientists provided their expert input supporting the C-123 veterans, VA countered only with industry or VA-paid opinions.

9. Three separate times VA used the Federal Register to detail the presumptive eligibility of non-Vietnam veterans proving their exposure to Agent Orange, including the 31 August 2010 language of "we wish to make clear…" VA's redefinition of exposure clearly is intended to skirt the 1991 Agent Orange Act and supplemental legislation as well as its Federal Register announcements. Indeed, it would require an announcement in the Federal Register, if not new legislation, for VA to properly block C-123 veterans from eligibility.

10. VA has predetermined that all C-123 veterans claims will be denied, despite frequent assurances that "each claim is considered on a case-by-case basis" (Under Secretary Hickey letter to W. Carter 12 Oct 2012.)

VHA executives have stated that "no C-123 claims will be permitted" (Dr. Terry Walters, Acting Chief Consultant Post Deployment Health to Major T. Redd, US Army Chemical Corps, March 2012; also Mr. James Sampsel said "unlikely any will ever be approved" to W. Carter, Dr. J. Stellman and Mr. B. Tucker, March 2012.) In May 2014 the Associated Press also quotes Dr. Walters as stating, "We have to draw the line somewhere," regarding C-123 veterans' claims. Mr. Tom Murphy, Director of VBA Compensation Service, explained that regardless of proofs "C-123 claim approvals are unlikely because VHA has already determined the veterans were not exposed" (February 2012 to W. Carter and M. Wentworth.)

Finally, Dr. Walters explained in a teleconference with W. Carter that no C-123 veterans were exposed, and likely no Vietnam veterans exposed, due to VHA's requirement that both exposure and bioavailability must be proven (March 2013.)

11. In what is required by law to be a pro-veteran, non-adversarial and "benefit of the doubt" process, VA has instead fought long and hard against C-123 veterans' claims for service connection of Agent Orange-related illnesses. VHA and VBA have set the bar of "as likely to as not" higher than the law permits in a clearly prejudicial manner.

12. C-123 veterans have, without success, brought these concerns to VA, VBA and VHA executives, VA IG and VA General Counsel (15 Jan 2014) without corrective action.

12. We ask for the immediate attention of the Office of Special Counsel as our good health and personal finances are at risk as we age into the most precarious years of our post-service lives. We've had to fight this battle too long and too hard against extra-legal VA obstacles.

OMB Approved No. 2900-0075
Respondent Burden: 15 minutes

Department of Veterans Affairs

STATEMENT IN SUPPORT OF CLAIM

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN *(Type or print)*	SOCIAL SECURITY NO.	VA FILE NO.
Wesley T. Carter		C/CSS -

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

I am complaining about the failure of the Veterans Benefits Administration and the Veterans Health Administration to adhere to the standards established by the VA Information Enterprise Records Management Service, Section II, III(D) and III(E). Further both agencies failed to meet the standards established in VA Diirective 005 (Scientific Integrity.) The Presidential Memorandum on Scientific Integrity dated 9 March 2009 was also violated and the scientific record on this complex topic tainted and the public disserved. Veterans' personal information was provided contractors to prepare articles against the veterans' exposure claims, submitted by VA to the Institute of Medicine.

The failure by VA to meet the above standards was through submission of erronious and prejudicial documents for the Institute of Medicine to rely upon in evaluating a charge submitted to it by VA dealing with C-123 veterans' Agent Orange exposures. The intent of VA submitting these documents was to obstruct veterans' claims to have been exposed to harmful Agent Orange residue on their aircraft, yet the items, paid for by VA and submitted to the IOM by VA, were in many important areas completely in error and erronious in ways injurious to the veterans' right to clean science from VA publications and reports to the IOM.

The IOM was contracted by the VA, and issued a "charge" for their study, which began in the spring and concludes with an anticipated report to the Secretary in late September.

This process, undertaken per requirements of the1991 Agent Orange Act, addresses veterans' claims for exposure benefits and compensation. The IOM invited input from interested parties and the Department of Veterans Affairs submitted 85 documents for review.

Included were numerous articles authored by Al Young Consulting, Inc., prepared in response to Contract VA-12C-0006. Several dealt specifically with the issue of C-123 contamination and veterans' exposures. These were further dealt with during the IOM June 16, 2014 committee open hearing at which time the consultant also presented a further Addendum (numbered 85 in attached list), entitled, "*Supplement to Investigative Report: New Inforamtion on Forer UC-123K Post-Vietnam Issue."* The failures are detailed in the attached exhibits.

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

SIGNATURE	DATE SIGNED
Wesley T Carter	22 June 2014

ADDRESS	TELEPHONE NUMBERS *(Include Area Code)*	
	DAYTIME	EVENING
1233 Town Center Drive, Fort Collins CO 80524	971 241-9322	

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

Of overriding concern is the objective of VBA and VHA in obstructing these veterans' claims. If an issue is submitted to the IOM the public should expect VA to leave IOM to their mission and not be led to a conclusion, either by the language of the charge or the materials selected to be submitted to the IOM. IOM rules are that their process deals only with public, available information, yet VA in selecting which data to withhold and which to submit has tainted the outcome.

VA, in contracting for preparation of materials by a consultant whose views have been consistent for seveal decades, "cherry-picked" their consultant and supporting materials. The rush to prepare and submit the final Supplement was unseemly as was the consultant's energetic presentation on behalf of the VA to the IOM.

None of the materials VA submitted from the contractor were peer-reviewed. There seem to be no similar contracts issued to support the veteans' claims, as here VA contracted to prevent them. There seem to have been no funds expended in other than a challenge to the veterans' claims, and that challenge from a consultant who has stated his personal distain for these veterans, and who, in his capacity as Consultant to the Under Secretary of Defense, advised the AF to destroy the former Agent Orange spray aircraft because, in part, the exposed veterans might seek VA medical care. These issues, regardless of any merit or legitimacy of the contractor's reports, should have led to selection of another resource. Perhaps, even, one less historically reliable in opposition to veterans' Agent Orange exposure claims.

1. A presenter at Monday’s C-123 Committee open meeting stressed the fact that the stored C-123s at Davis-Monthan were destroyed because they simply had been stored too long and had to be removed. In fact, the USAF Air Material Command and subordinate units at Hill AFB Utah and Davis-Monthan AFB AZ sought permission of the Air Staff in 2009 to destroy the aircraft specifically because of lingering Agent Orange contamination.

2. In fact, USAF legal officers cautioned that an EPA fine of $3.4 billion was threatened for improper storage of the aircraft as HAZMAT. Sales to foreign governments were terminated as per the USAF Security Assistance Command (responsible for sales of surplus military equipment to foreign governments) due to potential hazards.

3. Sales to civilian buyers, under competitive bidding already concluded, were halted by court action in 2000, upon sworn testimony of Dr. Ron Porter who confirmed the former spray aircraft were “a danger to public health.” (

4. The presenter in #1 also advised the USAF that the C-123s must be promptly destroyed without further testing, after half of a sample testing of four showed two contaminated and two without contamination. He further cautioned that exposed aircrew would likely seek exposure benefits. He further cautioned that publicity be minimized and helped craft the press release to eliminate attention-grabbing words such as “Agent Orange” and “Operation Ranch Hand.” He suggested the approach that because some of the aircraft had occasionally sprayed materials other than Agent Orange, there was no need to characterize the aircraft as Agent Orange airplanes but instead infer that they sprayed “herbicide” and were “recycled in an environmentally responsible manner.” In fact, the Defense Remarketing Organization refused to process these aircraft without public bidding, which the AF realized would bring attention, and instead the AF opted to piggy-back on an existing Navy disposal contract. Despite conversation at the Committee that this was routine, it was and is the only such operation ever undertaken by the USAF. Further, after shredding, the material was trucked to a specialized facility in Wisconsin where USAF officials witnessed the final smelting of each aircraft, and certified destruction by tail number.

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AK63

Disease Associated With Exposure to Certain Herbicide Agents: Type 2 Diabetes

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication regulations concerning presumptive service connection for certain diseases for which there is no record during service. This amendment is necessary to implement a decision of the Secretary of Veterans Affairs under the authority granted by 38 U.S.C. 1116 that there is a positive association between exposure to herbicides used in the Republic of Vietnam during the Vietnam era and the subsequent development of Type 2 diabetes. The intended effect of this amendment is to establish presumptive service connection for that condition based on herbicide exposure.

DATES: *Effective Date:* July 9, 2001.

FOR FURTHER INFORMATION CONTACT: Bill Russo, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, telephone (202) 273–7211.

SUPPLEMENTARY INFORMATION: VA published a proposal to amend 38 CFR 3.309(e) to establish presumptive service connection for Type 2 diabetes based on exposure to herbicides in the **Federal Register** of January 11, 2001 (66 FR 2376–80). Interested persons were invited to submit written comments concerning the proposal on or before March 12, 2001. We received 14 comments: one from the New York State Council of the Vietnam Veterans of America, one from the Wisconsin State Council of the Vietnam Veterans of America, and 12 from concerned individuals.

I. Comments on the Proposed Rule

Comments Supporting the Proposed Regulation

Three commenters stated that they supported the proposed regulation. One e-mail comment signed by 86 individuals also stated that they supported the proposed regulation. One commenter stated that he supported the proposed regulation and asked for swift implementation of the regulation.

Minimum 10% Rating

One commenter urged that all Vietnam veterans with Type 2 diabetes be awarded a minimum 10% disability rating.

This rule implements 38 U.S.C. 1116(c), which requires VA to establish a presumption of service connection when a positive association is found between exposure to certain herbicide agents and the subsequent development of a disease. The statute does not require VA to presume that such diseases result in any particular degree of disability. Further, under 38 CFR 3.307(a)(6)(ii), any disease must be manifest to a degree of disability of 10 percent or more before it may be presumed service connected based on herbicide exposure. In establishing presumptions of service connection for specific diseases based on herbicide exposure or other circumstances of service, Congress has consistently required that the disease be manifest to a degree of disability of 10 percent or more before the presumption applies. (See 38 U.S.C. 1116(a)(2)). We are aware of no justification for treating type 2 diabetes differently than other presumptive conditions in this regard. We therefore make no change based on this comment. We note that VA's rating schedule in 38 CFR 4.119, Diagnostic Code 7913, provides that a 10-percent rating will be assigned for diabetes which is ''[m]anageable by restricted diet only.''

Herbicide Exposure Outside Republic of Vietnam

One commenter urged that VA amend the proposed regulation to include veterans who did not serve in the Republic of Vietnam, but were exposed to herbicides during their military service.

Section 1116(a)(3) of title 38 of the United States Code establishes a presumption of exposure to certain herbicides for any veteran who served in the Republic of Vietnam between January 9, 1962 and May 7, 1975, and has one of the diseases on the list of diseases subject to presumptive service connection. However, if a veteran who did not serve in the Republic of Vietnam, but was exposed to an herbicide agent defined in 38 CFR 3.307(a)(6) during active military service, has a disease on the list of diseases subject to presumptive service connection, VA will presume that the disease is due to the exposure to herbicides. (See 38 CFR 3.309(e)). We therefore believe that there is no need to revise the regulation based on this comment.

Another commenter urged VA to use this rulemaking to define service in the Republic of Vietnam to include service in Vietnam's inland waterways or its territorial waters. The commenter asserted that U.S. military personnel were exposed to herbicides while serving in those locations.

Title 38 U.S.C. 1116 requires that a veteran have served ''in the Republic of Vietnam'' to be eligible for the presumption of exposure to herbicides. We believe that it is commonly recognized that this term includes the inland waterways.

With respect to offshore service, 38 CFR 3.307(a)(6)(iii) provides that ''Service in the Republic of Vietnam '' includes service in offshore waters or other locations only if the conditions of service involved duty or visitation within the Republic of Vietnam. In interpreting similar language in 38 U.S.C. 101(29)(A), VA's General Counsel has concluded that service in a deep-water vessel in waters offshore the Republic of Vietnam does not constitute service ''in the Republic of Vietnam.'' (See VAOPGCPREC 27–97). VA's regulatory definition of ''Service in the Republic of Vietnam'' predates the enactment of section 1116(a)(3) (see former 38 CFR 3.311a(a)(1) (1990)), and we find no basis to conclude that Congress intended to broaden that definition. The commenter cited no authority for concluding that individuals who served in the waters offshore of the Republic of Vietnam were subject to the same risk of herbicide exposure as those who served within the geographic boundaries of the Republic of Vietnam, or for concluding that offshore service is within the meaning of the statutory phrase ''Service in the Republic of Vietnam.'' We therefore make no change based on this comment.

Type 1 Diabetes

We received two comments urging VA to broaden the scope of this regulation to include Type 1 diabetes (also known as juvenile diabetes).

One commenter noted that VA's rating schedule (38 CFR 4.119, DC 7913) refers only to ''diabetes mellitus'' and does not distinguish between Type 1 and Type 2. He also noted that DC 7913 refers to ketoacidosis, and asserted that this condition only occurs with Type 1 diabetes.

VA's Schedule for Rating Disabilities (38 CFR part 4) is used to assess the level of disability caused by a disease or injury. It is not used to determine whether disabilities are service connected, nor is it considered when the Secretary determines whether there

in areas where herbicides were used, but whose exposure could not actually be documented due to inadequate records concerning the movement of ground troops.

Because it is known that herbicides were used extensively on the ground in the Republic of Vietnam, and because there are inadequate records of ground-based troop movements, it is reasonable to presume that any veteran who served within the land borders of Vietnam was potentially exposed to herbicides, unless affirmative evidence establishes otherwise. There is no similar reason to presume that veterans who served solely in the waters offshore incurred a significant risk of herbicide exposure.

It is conceivable that some veterans of offshore service incurred exposure under some circumstances due, for example, to airborne drift, groundwater runoff, and the proximity of individual boats to the Vietnam coast. For purposes of the presumption of exposure, however, there is no apparent basis for concluding that any such risk was similar in kind or degree to the risk attending service within the land borders of the Republic of Vietnam. More significantly, because ''offshore service'' encompasses a wide range of service remote from land and thus from areas of actual herbicide use, there is no reason to believe that any risk of herbicide exposure would be similarly pervasive among veterans of offshore service as among veterans of service within the land borders of Vietnam.

In *Haas* the Veterans Court noted that ''there are many ways to interpret the boundaries of a sovereign nation such as the former Republic of Vietnam'' and stated that, based on established definitions of sovereign territory, the statutory phrase ''in the Republic of Vietnam'' could conceivably be construed to encompass waters extending to a distance of either 12 or 200 miles from the coast. *Haas*, 20 Vet. App. at 263–64. It is apparent that any risk of airborne or water-borne exposure due to herbicide spraying on land areas would be negligible for most of such distances, and we believe it is highly unlikely that Congress intended to adopt one of those measures rather than limiting the presumption to persons who served on land where herbicides were actually in use. Finally, we note that, to the extent there may be a risk of exposure through airborne drift or water runoff, that risk would exist across land borders Vietnam shares with other nations as well as to drift over open seas, yet Congress clearly did not intend the presumption to extend beyond the land borders of the Republic of Vietnam in those instances.

It is also relevant to note that VA's interpretation results in a logical and easily manageable presumption of exposure, whereas the alternate interpretation suggested in *Haas* would entail precisely the type of difficult policy and case-by-case determinations that presumptions are generally designed to avoid. As the Veterans Court noted in *Haas*, the category of ''offshore service'' may encompass persons who served hundreds of miles from Vietnam's coast. We believe it is implausible that Congress intended to encompass all offshore service, irrespective of whether there is any likelihood that such service involved the potential for exposure resulting from application of herbicides in the Republic of Vietnam. However, if Congress intended to presume herbicide exposure for veterans who served in offshore waters, but only to the extent there was some risk of herbicide exposure through airborne drift or water-borne runoff, it would be exceedingly difficult and highly speculative to define the class of persons to whom the presumption applies, in the absence of clear evidence defining the point at which the risk of exposure by such means ceases to exist. The legislative and regulatory history does not allude to any basis for making such determinations, which would be essential to application of the presumption under the interpretation set forth in *Haas*. The fact that it would be exceedingly difficult, if not impossible, to define the parameters of the presumption in any logical and meaningful way strongly suggests that Congress did not intend to encompass offshore service for purposes of the presumption of herbicide exposure.

We have found no indication that Congress intended a presumption covering offshore service. Rather, in providing a presumption of herbicide exposure based on service ''in the Republic of Vietnam,'' we believe Congress reasonably intended to distinguish between areas where herbicides were actually applied and other areas, such as offshore areas, where herbicides were not used. That interpretation is reasonable because it comports with VA's long-standing interpretation of its own regulations, which Congress intended to codify in 38 U.S.C. 1116; because it comports with known facts regarding the use of herbicides in Vietnam; because it results in a rule that can easily be administered; and because the alternate interpretation suggested in *Haas* would be exceedingly difficult, if not impossible, to define and apply in a meaningful, non-arbitrary manner.

The CAVC's observation that there may be similarity between certain persons who served offshore and certain persons who served on land does not provide a basis for a different interpretation. ''The 'task of classifying persons for * * * benefits * * * inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.''' *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 83–84 (1976)). The same concern would exist for any rule interpreting the parameters of the presumption of exposure, whether it is limited to service on land or to service within some specified distance from land. For the reasons explained above, we believe it is far more reasonable to interpret the presumption as limited to service on land than to service at some arbitrary distance from land.

We also note that a veteran who does not meet the requirements of § 3.307(a)(6)(iii) for application of the presumption of service connection based on service in Vietnam may establish direct service connection under § 3.307(a)(6) and § 3.309(e) based on herbicide exposure if the veteran can establish that he or she was actually exposed to herbicides in service. Section 3.307(a)(6)(iii) only defines when the presumption of exposure to herbicide agents will apply. Additionally, as part of its duty to assist, VA will assist a claimant in obtaining any relevant evidence related to a claim for exposure to herbicide agents.

For consistency and to avoid possible similar ambiguities in the interpretation of the term, we propose to amend 38 CFR 3.814(c)(1) to clarify the meaning of ''service in the Republic of Vietnam'' in that regulation. Section 3.814 provides benefits for spina bifida to children of veterans who served in Vietnam, based on those veterans' presumed exposure to herbicide agents. Because currently the definition parallels the definition of service in Vietnam in § 3.307(a)(6)(iii), we propose to amend the definition to parallel the clarifications of that definition established by this rulemaking.

Additionally, 38 CFR 3.815 provides benefits for covered birth defects to children of women Vietnam veterans, based on those veterans' service in Vietnam. Section 3.815 was added to VA's adjudication regulations largely based on a study of women Vietnam veterans and women non-Vietnam veterans. *See* 67 FR 200 (Jan. 2, 2002) (discussing *Pregnancy Outcomes*

the muscles of the heart and does not encompass such conditions as hypertension. Therefore, VA makes no change based on these comments.

Two of these commenters would also have VA allow excluded conditions to be rated as secondarily caused by IHD.

VA Response: The presumptive conditions addressed in this rulemaking only concern establishment of a primary service-connected condition. This rulemaking does not affect a claimant's ability to establish secondary conditions proximately caused by a service-connected condition, including those conditions for which service connection is established presumptively. Section 3.310, title 38, Code of Federal Regulations, states that any disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. This principle has not changed and there is no need to reiterate it in this rule. Therefore, VA makes no change based on these comments.

(3) Perceived Uncertainty Concerning the Definition of IHD

One commenter queried "what is ischemic heart disease"?

VA Response: VA's definition of IHD in the proposed rule is based upon the accepted medical premise that, as stated in the preamble, IHD is "an inadequate supply of blood and oxygen to a portion of the myocardium; it typically occurs when there is an imbalance between myocardial oxygen supply and demand." 75 FR 14393; *See Harrison's Principles of Internal Medicine* (Harrison's Online, Chapter 237, Ischemic Heart Disease, 2008). As previously stated, VA interprets IHD, for purposes of service connection, to encompass any atherosclerotic heart disease resulting in clinically significant ischemia or requiring coronary revascularization. In the notice of proposed rulemaking, we explained that the term "ischemic heart disease" does not encompass hypertension or peripheral manifestations of arteriosclerotic heart disease, such as peripheral vascular disease or stroke. To ensure that lay readers are aware of the distinction between these diseases, we are adding a Note 3 following 38 CFR 3.309(e) to include the information stated in the notice of proposed rulemaking.

(4) Inclusion of Angina as a Compensable Disability

One commenter asked whether the rule will include Prinzmetal's Angina, and Stable and Unstable Angina in the list of compensable disabilities.

VA Response: Prinzmetal's Angina, and Stable and Unstable Angina are explicitly included as forms of IHD in the list of illnesses that may be presumptively service connected due to exposure to certain herbicides. 75 FR 14393.

D. Comments Concerning the Scope of Applicability of the Presumptions

(1) Expanding the Presumption of Herbicide Exposure Beyond Service in the Republic of Vietnam

Approximately ten commenters advocated expanding coverage geographically, to include veterans who did not deploy within the land borders of the Republic of Vietnam, but may have been exposed to tactical herbicides in the course of their military service. For example, one commenter, the Vietnam Veterans of America (VVA), cited Update 2008 in support of its recommendation that VA adopt a presumption that veterans who served in the South China Sea during the Vietnam era were exposed to herbicides. Another commenter encouraged amending 38 CFR 3.307(a)(6)(iii), to include "Blue Water Navy Veterans" as qualifying for the presumptions listed in 38 CFR 3.309(e).

VA Response: These comments are beyond the scope of this rulemaking. We proposed to revise 38 CFR 3.309(e) to implement the requirements of 38 U.S.C. 1116(b) and (c) directing the Secretary of Veterans Affairs to determine whether there is a positive association between exposure to the herbicides used in Vietnam and the occurrence of specific diseases. The issue of which diseases are associated with herbicide exposure is distinct from the issue of which individuals are presumed to have been exposed to herbicides in service. The latter issue is governed by a separate regulation in 38 CFR 3.307(a)(6)(iii), which we did not propose to revise in this rulemaking. Accordingly, we make no change based on these comments.

With respect to the issues raised by these comments, we note that, in a separate rulemaking (RIN 2900–AN27, Herbicide Exposure and Veterans With Covered Service in Korea), VA has proposed to provide a presumption of exposure to tactical herbicides for veterans who served with specific military units stationed at or near the Korean DMZ during the April 1968—July 1969 time frame. 74 FR 36640. We note further that, at VA's request, the NAS is undertaking a comprehensive study of the potential herbicide exposure among veterans who served in the offshore waters around Vietnam and VA will carefully evaluate the findings of the NAS resulting from that study. Finally, we wish to make clear that the presumptions of service connection provided by this rule will apply to any veteran who was exposed during service to the herbicides used in Vietnam, even if exposure occurred outside of Vietnam. A veteran who is not presumed to have been exposed to herbicides, but who is shown by evidence to have been exposed, is eligible for the presumption of service connection for the diseases listed in § 3.309(e), including the three diseases added by this rule.

(2) Expanding the Presumptions To Include Other Herbicides

Other commenters, including USMVP, seek to persuade VA to presume service connection for veterans exposed to trichloroethylene (TCE) (a substance found in organic solvents) and malathion (an insecticide). USMVP concedes that TCE and malathion are differently formulated chemical compounds used for pest control and equipment maintenance, respectively. Nevertheless, USMVP contends that VA's mandate is sufficiently broad to allow the Secretary to presume diseases to be service connected upon exposure to TCE and Malathion.

VA Response: These comments are beyond the scope of this rulemaking. We proposed to revise 38 CFR 3.309(e) to implement the requirements of 38 U.S.C. 1116(b) and (c) directing the Secretary of Veterans Affairs to determine whether there is a positive association between exposure to the herbicides used in Vietnam and the occurrence of specific diseases. The comments concerning the health effects of other types of exposures are distinct from the scope and purpose of the proposed rule.

USMVP notes that section 6 of the Agent Orange Act of 1991 directed VA to compile data that is likely to be scientifically useful in determining the association, if any, between disabilities and exposure to toxic substances including, but not limited to, dioxin. This rulemaking, however, is based on the distinct provisions in section 2 of the Agent Orange Act, codified in pertinent part at 38 U.S.C. 1116, requiring VA to determine whether diseases are associated with an "herbicide agent," which is defined to refer to "a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." 38 U.S.C. 1116(a)(3). Accordingly, VA's regulation

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Thank You

Your form has been submitted to the OIG Hotline. You may wish to print a copy of this page for your records.

Requesting Confidentiality: Yes

First Name: Wesley

Last Name: Carter

Title: Major, USAF Retired

Address: 1233 Town Center Drive

City: Fort Collins

State: CO

Zip: 80524

Telephone: 971 241-9322

Email: rustysilverwings@gmail.com

VA facility or office involved:
Post Deployment Health, Compensation & Pension (Washington DC)

Names of wrongdoers:
possibly Mr. James Sampsel, or whoever provided the Advisory Opinion to the contractor. That opinion contained my SSAN, medical issues and VA perspectives on my claim.

Names of victims:
Wesley T. Carter

Alleged legal or policy violation(s) or other misconduct:
possible privacy violations

Effect of the wrongdoing, such as dollars lost, delay produced, etc.:
unknown...personal data compromised

Date(s) when the event(s) occurred:
imprecise; concluded with report from vendor in Nov 2012 which included reference to my personal data contained in a VA document (T. Murphy, Advisory Opinion re Wesley Carter)

Names of witnesses:

Has this allegation been previously reviewed?: No

If yes, please provide the dates and who did the review:

Have you contacted the VA OIG about this issue before?: No

If yes, please provide date contact was made and to whom:

Additional Comments:
I don't know where to submit. I wrote the VA National Center for Ethics in Healthcare, and provided Dr. Kenneth Berkowitz the documents, but was told it should be an IG issue, not ethics. Concerns were exchanged about the overall development of a barrier to veterans' access to medical care via unscientific redefinitions of exposure. I also tried to complain to the report's contracting officer, who said he'd look into it but was on sick leave, and with the Denver Patients Advocate.

This is a pretty serious issue, as the contractor involved was solicited to provide input on our aircrews' Agent Orange exposures. He previously wrote that we are "trash-haulers, freeloaders looking for a tax-free dollar from a sympathetic congressman. I have no respect. Obviously, it is a worry that this contractor's contempt, and expressions of his conclusions over the years before his report was solicited and which were repeated in his report, are used to guide VA in denying service connection for our exposures.

Here is the report, in which the C&P advisory opinion about me was cited
https://www.dropbox.com/s/tjpd1mex54gz2s7/YOUNG%20UC-123K_Report_with_Disclaimer__Nov_2012.pdf

The C-123 Veterans Association

2349 Nut Tree Lane
McMinnville Oregon 97128 tel: 971 241-9322
www.c123agentorange.com

5 June 2013

Richard Hipolit, Assistant General Counsel
Department of Veterans Affairs
810 Vermont
Washington, DC 20420

Dear Mr. Hipolit,

As a veteran looking at the Department of Veterans Affairs and its departments, I expect that you and your office advise the Secretary in all matters regarding the Department's mission, and the proper way in which that is accomplished with regard to the law. May I hope that you suggest a more lawful approach to the manner in which C-123 veterans claims are now being directed to be denied?

I ask that you consider, and intervene if you find it appropriate, in the issue of C-123 veterans and our exposure to military herbicides aboard our medium assault transports which we flew after Vietnam. They remained contaminated, which we only learned about in 2010 after they were all destroyed as toxic waste. Numerous Air Force tests concluded the warplanes remained "heavily contaminated" and "a danger to public health" even decades after those last spray missions.

Dr. Christopher Portier, Director of the CDC/Agency for Toxic Substances and Disease Registry, provided an official finding that our veterans were exposed aboard these airplanes. Similar findings were provided to the VA and JSRRC from Dr. Linda Birnbaum, Director NEIHS and Director, National Toxicology Program. Along with opinions from scientists and physicians across the country, all opinions were dismissed by VA.

Compensation Services told me, at our 28 February meeting, that no amount of additional physician, scientist, or other government agency proofs would permit a C-123 veteran's claim to be approved because VHA had already determined that no exposure could have been possible. As I mention above, a good number of scientists disagree, even my own VA physician. The few cases denied and reaching BVA have been approved for veterans who flew our airplanes, in our timeframe, doing the same duties as we all did aboard the C-123 "Provider."

Compensation Services, in the attached directive denying my claim for Agent Orange exposure, cited the various opinions. In summarizing that of Dr. Sinks (Deputy Director CDC/ATSDR) that the C-123 veterans were exposed, Compensation Services ignores that finding and instead appends a misleading sentence which completely mischaracterized Sink's opinion: "In summary, there is no conclusive evidence that TCDD exposure causes any adverse health effects." Not only does this completely twist Dr. Sink's conclusion, it means to dismiss this Agent Orange exposure claim on the basis that no harm is caused by Agent Orange exposure." In addition, TCDD is recognized as a potent human carcinogen, so

it makes no sense to deny my claim because Agent Orange is harmless. Besides, the issue is that of exposure, regardless. If the law stated lemonade, VA cannot deny claims because lemonade is harmless. Here, I was indeed exposed to Agent Orange and indeed, Agent Orange and its toxic component dioxin, are recognized by science and medicine as harmful.

I respect the obvious dedication of Compensation Services in preventing approval of veterans' claims, but it would be better to avoid deliberate deceptions like this. Please do contact Dr. Sinks to learn of his opinion of the VA's deliberate misinterpretation of his opinion. That opinion, when questioned by JSRRC, was reviewed and restated by Dr. Christopher Portier, Director CDC/ATSDR. We are amazed that an official finding by ATSDR can be persuasive, as in the case of Dr. Sinks' and Dr. Portier's letters to VA regarding Camp Lejune, but another official finding about us is either ignored or twisted to prevent its impact. The totality of our experience is that we are being treated unequally and unlawfully in regards to the amount of proof demanded of us in establishing our claims, especially when we are told that no matter how much evidence we may offer, it has already been determined to be inadequate and irrelevant. In the case of a Manchester NH veteran, all his evidence from all the scientists and physicians was rejected as "unqualified lay evidence."

Additionally, as you can see from the entire 25 Sept 2012 letter, the claim is denied on the basis of no "bioavailability. One does not see bioavailability in the law, CFRs or in the 8 May 2001 Federal Register. The issue for a veteran to establish, if not in a presumptive eligibility category, are Agent Orange-presumptive illnesses and Agent Orange (military herbicide, etc.) exposure. No mention made of amount of Agent Orange, type of exposure, duration, color, scent, age, flavor - nothing besides the word "exposure."

Veterans establishing exposure need not also establish medical nexus for the AO-presumptive illnesses, yet Compensation Services dismissed each of the scientists' independent expert opinions on the basis they are PhDs and not qualified to provide medical nexus – a totally irrelevant point because they were establishing **exposure**! This is deceptive writing, meant to make useless highly qualified expert findings (and here by three of the most respected Agent Orange researchers in the country) supporting our claim, not to honestly find appropriate value in them which may or may not establish the veteran's case.

If it is the appropriate and lawful mission of Compensation Services to misinterpret official expert opinions by other government agencies, and those from eminent independent scientists and universities, for the purpose of denying otherwise meritorious claims, then you should let the issue stand. However, I hope that your duty to the basic mission of the Department of Veterans Affairs is to us, not to guide or permit administrators to at their whim deny valid arguments for service connection. The reference to the "few" statements in support of my claim is curious, as there were over 80 official documents of our aircraft toxicity testing, university analysis of those test results, official opinions from other federal agencies about my exposure, statements from general officers and other field grade officers regarding the toxicity of my specific airplane, my flying records, and much more. Not a few, but as Portland described it, a "plethora." I only mention this to bring attention to the attitude of the VA's letter, in negating every possible part of my argument.

VA's position against C-123 veteran's claim of exposure was challenged by a group of concerned scientists and physicians, who wrote General Hickey of their concern for the scientific errors and misjudgments. Mr. Murphy of Compensation Services responded on 10 January 2013 and explained to these scientists in an interesting and obviously illegal miswording of the law,

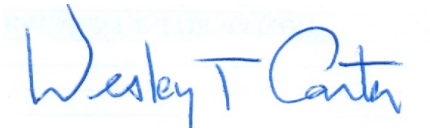
> "In addition to the issue of potential exposure, there is the issue of establishing a medical nexus or link between the in-service event of flying on a post-Vietnam C-123 aircraft and development of a current Agent Orange exposure-related disease. VA laws and policies related to Agent Orange exposure, whether presumptive or based on facts-found evidence, address exposure contact that occurs during the actual spraying or handling of the dioxin-containing liquid herbicide. There are no provisions for secondary or remote exposure, as is the case with dried dioxin residuals on metal surfaces found many years after the liquid state. The scientific evidence available to establish a medical nexus in these cases is limited and the VA Office of Public Health has provided a medical opinion that it is insufficient to establish the required nexus. While your letter focuses on the issue of potential dioxin exposure, it does not offer an opinion on the medical nexus issue nor does it address the potential for long-term health effects or disabilities resulting from service on the post-Vietnam C-123 aircraft."

In the mission of Compensation Services, if they are determined to prevent my claim and those of other C-123 veterans, couldn't they use more valid legal arguments, if any are to be found?

I am an honorably retired war veteran. I was exposed to Agent Orange flying my C-123 for six years, and I've provided a plethora of supporting evidence of my Agent Orange-presumptive illnesses and the facts supporting my claim of exposure. I am angry that instead of some honorable VA employee (you, perhaps) trying to champion my claim, I instead have faced two years of an agency viscerally determined to prevent my claim regardless of merit. As the Department's attorney, you should advise them on finding only legal barriers to my claim.

Better, it is my hope that you advise them of its clear merit and that it has reached the low threshold of "as likely to as not" which we are promised. Please suggest that the VA follow the law, just as I have to.

Sincerely,



Wesley T. Carter, Major, USAF Retired

Web: www.c123agentorange.com Email: rustysilverwings@gmail.com
Blog: www.c123kcancer.blogspot.com

The C-123 Veterans Association

2349 Nut Tree Lane
McMinnville Oregon 97128 tel: 971 241-9322
www.c123agentorange.com

21 October 2013

Richard Hipolit, Assistant General Counsel
Department of Veterans Affairs
810 Vermont
Washington, DC 20420

Dear Mr. Hipolit,

This June I brought to your attention concerns The C-123 Veterans Association has regarding blanket policy-driven denials of our veterans claims for service connection, but without response from your office.

I request that you again consider our request, as it is inappropriate for the Department of Veterans Affairs to continue refusing medical care for veterans whose Agent Orange exposure is confirmed by several federal agencies as well as numerous university medical schools and schools of public health. We seek a better solution than waiting until our veterans have entered hospice care to make such deserved awards, as was the case this July of Lieutenant Colonel Paul Bailey (*Huffington Post* July 10 2013, *Washington Post* 3 August 2013, page A1 and page A14, and *Washington Post* & UPI, 7 August 2013, page A2, Fox News, 11 August 2013, *Stars and Stripes*, 15 August 2013)

We believe the blanket predetermination of our ineligibility, as per the verbal assurance given me on 28 February 2013 by officials of Compensation Services that no amount of proof from any university, federal agency or military service will permit approval of our claims to be improper. And not "veteran-friendly."

We believe VBA's blanket refusal to accept expert toxicologists' input in support of veterans' claims to be incorrect, considering decisions by both the 8th and 9th Circuit Courts. We believe the failure to correct numerous prejudices and improper, VA-unique VHA Post Deployment Health redefinition of the word "exposure" to reintroduce medical nexus is an issue that demands attention from your office.

If you feel I am incorrect in these assertions, as chair of a national veterans organization whose argument has been vetted by both the American Legion and Vietnam Veterans of America, I ask that the issue be referred to the ethics office which overseas both VHA and VBA? I believe it proper for VA to adhere to the law, even without specific court orders to do so. Somebody at VA must agree.

Sincerely,

Wesley T. Carter, Major, USAF Retired
Chair
Web: www.c123agentorange.com Email: rustysilverwings@gmail.com
Blog: www.c123kcancer.blogspot.com

VA | U.S. Department of Veterans Affairs

Office of the General Counsel
Washington DC 20420

In Reply Refer To: 022

JAN 15 2014

Wesley T. Carter, Major, USAF Retired
2349 Nut Tree Lane
McMinnville, OR 97128

Dear Mr. Carter:

I am writing in response to your recent letters expressing concern regarding Department of Veterans Affairs (VA) processing of disability claims based on Agent Orange (AO) exposure aboard C-123 aircraft previously flown in Southeast Asia, some of which were used for aerial AO spraying over Vietnam. You have asked that the Office of the General Counsel (OGC) take any necessary steps to prevent the "blanket policy-driven denials" of such claims.

As an initial matter, your assertions regarding VA's alleged policy of denying claims based upon service aboard a C-123 aircraft appear to rest largely upon statements made in the context of VA's consideration of your claim for benefits. OGC provides advice and assistance to the VA officials and offices that adjudicate claims and administer benefits, but OGC generally does not have authority to intervene in the adjudication of individual claims. To the extent you believe VA has committed error in adjudicating your claim, you may appeal VA's determination and present any arguments you wish to make in that appeal. We do not believe the statements to which you refer reflect a blanket policy of denying claims. As with all claims, VA is committed to performing a careful case-by-case review of claims based upon service aboard C-123 aircraft. Indeed, you reference a publicized VA grant of service connection for a Veteran who served post-Vietnam aboard a C-123, reflecting such case-by-case review.

In your letter, you assert that VA improperly conflated the issues of exposure and nexus in your claim. Although we cannot address your specific claim, we can provide general guidance on the applicable law. Typically, the three requirements for establishing entitlement to VA compensation based on a service-connected disability are: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service, i.e., a "nexus." In certain circumstances, the second element may be satisfied by a presumption, such as the presumption of exposure to herbicides for Veterans who served in the Republic of Vietnam between certain dates. *See* 38 C.F.R. § 3.307(a). The third element also may

be satisfied in some circumstances by a presumption, such as the presumption of service connection for certain diseases developing after in-service exposure to an herbicide agent. *See* 38 C.F.R. § 3.309(e). While the second and third of these elements generally involve distinct factual matters, the question of whether VA improperly conflated those issues in your claim – that is, conflated the issues of whether you were exposed to herbicides in service, and, if so, whether there is a nexus between the exposure and your current disability or disease – is an adjudicatory issue that should be raised in any appeal in your claim.

You also assert that VA in your claim improperly considered the issue of bioavailability, which is not referenced in 38 C.F.R. § 3.309(e). As used in your letters and the VA correspondence you enclosed, the terms "bioavailability" and "biologically available" apparently refer to the issue of whether a substance is capable of entering or otherwise affecting the body and, thus, whether an individual was exposed to a substance. As explained above, we cannot intervene in proceedings in your claim for benefits. However, if you wish to assert that VA improperly considered the issue of bioavailability in your claim, you should present that argument in any appeal taken in your case.

I hope this information is helpful to you.

Sincerely yours,

Richard J. Hipolit

Richard J. Hipolit
Assistant General Counsel

Patient Privacy

5 messages

Wes Carter <rustysilverwings@gmail.com> Fri, Feb 14, 2014 at 6:21 PM
To: "Berkowitz, Kenneth A." <Kenneth.Berkowitz@va.gov>

Is it possible for you to help me learn how this outside contractor was able to access the information about me which he cites in the November 2012 attached report, "Investigations?" He refers on page 20 to the Advisory Opinion regarding my own Agent Orange exposure claim, written in Sept 2012 by Mr. Tom Murphy, Director of Compensation and Pension Services. Who provided my information to this contractor, and how was it used after he submitted his report back to Compensation and Pension?

Was Mr. Murphy's summary of the opinion from Dr. Tom Sinks, Deputy Director, that I **was exposed** in any way related to the consultant's conclusion that C-123 veterans like me **were not exposed**?

Why did the consultant, like Mr. Murphy, omit the ATSDR finding from Dr. Sinks' that C-123 veterans' have "a 200-fold greater cancer risk than the screening value? Was that important point left out to better obstruct the claim, and the conclusion that veterans were exposed left out for the same reason?

Did Mr. Murphy's finding that there is no conclusive evidence that TCDD causes adverse effects in any way guide the consultant in reaching his conclusions? The consultant's opinions seem do seem consistent with views already expressed over the decades.

It was my understanding and expectation that such information is private. I authorized no release of information to any outside contractor such as this gentleman. I am concerned with his access to my claims, my SSAN, and other private information, especially as my private information was then utilized in "Investigations" to construct a further barrier to my VA disability claim.

I am also concerned about "Investigations" and the role this report has with claims such as mine. This contractor has referred to veterans of the C-123, including myself, as "trash-haulers, freeloaders, looking for a tax-free dollar from a sympathetic congressman. I have no respect."

I would hope VA could turn to contractors who managed to hold veterans with some respect.

The contractor, in his other capacity as Senior Consultant to the Office of Secretary of Defense, advised the Air Force to destroy the toxic C-123s then stored at Davis-Monthan AFB, mentioning his concern that C-123 veterans might turn to the VA for exposure benefits. The aircraft, now destroyed by AF authorities citing the consultant's concerns as part of their justification, are no longer available for us to test to confirm our exposure claims.

Fortunately, tests over several decades firmly establish the aircraft toxicity, even though already destroyed. Fortunately, also, that the destruction of the C-123s was not quite as "below the radar" as recommended.

I respect the dedication which which VA insures prevention of C-123 veterans' exposure claims, but I believe it inappropriate.

Wes Carter

Wes Carter <rustysilverwings@gmail.com> Fri, Feb 14, 2014 at 7:19 PM
To: Steve Vogel <steve.vogel@washpost.com>
Bcc: "Tucker, Brooks (Burr)" <Brooks_Tucker@burr.senate.gov>, "Bidlack, Hal (Bennet)" <Hal_Bidlack@bennet.senate.gov>, "Will White, (Merkley)" <Will_white@merkley.senate.gov>

sent today to the VA Nat'l Center for Ethics in Health Care

---------- Forwarded message ----------
From: **Wes Carter** <rustysilverwings@gmail.com>
Date: Fri, Feb 14, 2014 at 6:21 PM
Subject: Patient Privacy
To: "Berkowitz, Kenneth A." <Kenneth.Berkowitz@va.gov>

Dear Dr. Berkowitz,

Is it possible for you to help me learn how this outside contractor was able to access the information about me which he cites in his November 2012 attached report, "Investigations?" He refers on page 20 to the Advisory Opinion regarding my own Agent Orange exposure claim, written in Sept 2012 by Mr. Tom Murphy, Director of Compensation and Pension Services. Who provided my information to this contractor, and how was it used after he submitted his report back to Compensation and Pension? How far was my personal information distributed?

Was Mr. Murphy's summary of the opinion from Dr. Tom Sinks, Deputy Director ATSDR, (who concluded that I **was exposed** but which Mr. Murphy opted to not repeat), in any way related to the consultant's conclusion that C-123 veterans like me **were not exposed**?

Why did the consultant, like Mr. Murphy, omit the obviously important ATSDR finding from Dr. Sinks that C-123 veterans' have "a 200-fold greater cancer risk than the screening value?" Was that important point left out to better obstruct the claim, and the ATSDR's conclusion that veterans were exposed left out of both Mr. Murphy's advisory opinion and the "Investigations" report for the same reason?

Did Mr. Murphy's finding that there is no conclusive evidence that TCDD causes adverse effects in any way guide the consultant in reaching his parallel conclusions? The consultant's opinions seem do seem consistent with his views already expressed over the decades. Should VA invite peer review for "Investigations" to better judge its merits for scientific credibility?

It was my understanding and expectation that such information about me is private. I authorized no release of information to any outside contractor such as this gentleman. I am concerned about his access to my claims, my SSAN, and other private information, especially as my private information was then utilized in his "Investigations" to construct a further barrier to my VA disability claim.

I am also concerned about "Investigations" and the role this report has with all C-123 veterans' claims such as mine. This contractor has referred to veterans of the C-123, including myself, as "trash-haulers, freeloaders, looking for a tax-free dollar from a sympathetic congressman. I have no respect."

I would hope VA could turn to contractors who managed to hold veterans with some respect.

The contractor, in his other capacity as Senior Consultant to the Office of Secretary of Defense, advised the Air Force to destroy the toxic C-123s then stored at Davis-Monthan AFB, mentioning his concern that C-123 veterans might turn to the VA for exposure benefits. The aircraft, now destroyed by AF authorities citing the consultant's concerns as part of their justification, are no longer available for us to test to confirm our exposure claims.

Fortunately, tests over several decades firmly establish the aircraft toxicity, even though already destroyed. Fortunately, also, that the destruction of the C-123s was not quite as "below the radar" as recommended.

I respect the dedication which which VA insures prevention of C-123 veterans' exposure claims, but I believe it inappropriate.

Wes Carter

Berkowitz, Kenneth A. <Kenneth.Berkowitz@va.gov> Fri, Feb 14, 2014 at 7:29 PM
To: "rustysilverwings@gmail.com" <rustysilverwings@gmail.com>

I have no idea...

From: Wes Carter [mailto:rustysilverwings@gmail.com]
Sent: Friday, February 14, 2014 08:21 PM Eastern Standard Time
To: Berkowitz, Kenneth A.
Subject: [EXTERNAL] Patient Privacy

[Quoted text hidden]

Wes Carter <rustysilverwings@gmail.com> Fri, Feb 14, 2014 at 7:36 PM
To: "Berkowitz, Kenneth A." <Kenneth.Berkowitz@va.gov>

Thanks...I certainly didn't want to bother you on a Friday evening. The issue is probably not important anyway.

---------- Forwarded message ----------
From: **Wes Carter** <rustysilverwings@gmail.com>
Date: Fri, Feb 14, 2014 at 6:21 PM
Subject: Patient Privacy
To: "Berkowitz, Kenneth A." <Kenneth.Berkowitz@va.gov>

[Quoted text hidden]

Wes Carter <rustysilverwings@gmail.com> Sat, Feb 15, 2014 at 8:02 AM
To: "Berkowitz, Kenneth A." <Kenneth.Berkowitz@va.gov>

I was referred to the privacy office...all set now and thanks again.
[Quoted text hidden]

Al Young Consulting, Inc $600,000 Contract Issued by Department of Veterans Affairs

Comment

Contract Type: Definitive Contract

Signed Date: September 28, 2012

Ultimate Completion Date: September 27, 2014

Product or Service: Research and Development - Applied Research/Exploratory Development

Navigate To...

Overview

The **Department of Veterans Affairs** awarded this **$600,000** contract to **Al Young Consulting, Inc** for Research and Development - Applied Research/Exploratory Development. The contract was signed on September 28, 2012 and will end on September 27, 2014.

Below you will find more detailed information on this contract, Al Young Consulting, Inc, and the Department of Veterans Affairs.

All data is from **USASpending.gov**.

AGREEMENT PARTIES

Agency	Department of Veterans Affairs
Contractor	Al Young Consulting, Inc

PRICING

+ Contract Pricing

Obligation Amount	Current Contract Value	Ultimate Contract Value
$600,000	$600,000	$600,000

The **obligation amount** of this contract is **$600,000**. This is **much higher** than than the median obligation amount ($4,730).

The **current value** of this contract, **$600,000**, is **much higher** than the median for all federal contracts ($4,858).

The **ultimate value** of this contract is **$600,000**, which is **much higher** than than the median ultimate value of all government contracts ($4,856).

+ Pricing Glossary

TRANSACTION

Contractor Name	Description	Signed Date	Obligation Amount
Al Young Consulting, Inc	Closely Associated; R&D Contract For Development Of An Agent Orange Documented I ... Show More	September 28, 2012	$600,000

Contract Information

KEY FACTS

Contract Type	Definitive Contract
Number of Actions	1
Type of Contract Pricing	Firm Fixed Price

OBLIGATION AMOUNT VS. CURRENT VS. ULTIMATE VALUE

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More Project Information and to provide FEEDBACK on the Project

Printer Friendly Version

Meeting Information

Project Title: Evaluating Potential Exposure to Agent Orange/TCDD Residue and Level of Risk of Adverse Health Effects for Aircrew of Post-Vietnam C-123 Aircraft

PIN: IOM-BSP-14-02

Major Unit: Institute of Medicine

Sub Unit: Board on the Health of Select Populations

RSO: Paxton, Mary

Subject/Focus Area: Health and Medicine

Evaluating Potential Exposure to Agent Orange/TCDD Residue and Level of Risk of Adverse Health Effects for Aircrew of Post-Vietnam C-123 Aircraft
June 16, 2014 - June 18, 2014
Keck Center
500 5th Street, NW
Washington D.C. 20001

If you would like to attend the sessions of this meeting that are open to the public or need more information please contact:

Contact Name: Heather Chiarello
Email: hchiarello@nas.edu
Phone:
Fax:

Agenda:
June 16 (Keck 100)
Welcome, Goals, Conduct of Meeting, Introduction of Committee Members

8:30 a.m. Robert Herrick, Committee Chair

Panel 1: Post-Vietnam Handling and Use of the C-123s

8:45 a.m. Wesley Carter, C-123 Veterans Association

8:50 a.m. Alvin L. Young, A.L. Young Consulting, Inc.

8:55 a.m. Comments and Questions from Committee Members

Panel 2: Collection and Analysis of Samples

9:45 a.m. Peter Lurker, Germantown Consultants, LLC

9:50 a.m. Peter C. Kahn, AESOP, Rutgers University

9:55 p.m. Thomas E. McKone, University of California, Berkeley

10:00 a.m. Comments and Questions from Committee Members

10:45 a.m. BREAK

Panel 3: Exposure Modeling with Existing Data

11:00 a.m. Thomas H. Sinks, Deputy Director of NCEH, ATSDR

11:05 a.m. Jeanne M. Stellman, Columbia University

11:10 a.m. Patrick Finley, Sandia National Laboratories

11:15a.m. Jeffrey H. Driver, RiskScience.net

11:20 a.m. Comments and Questions from Committee Members

12:15 p.m. LUNCH

Interpretations of Resulting Exposure Estimates and General Discussion

1:00 p.m. Comments and Questions from Attendees (Make request to staff for a 5-minute slot before lunch)

1:15 p.m. Additional Comments and Questions from Committee Members

1:30 p.m. General Discussion

2:30 p.m. Adjourn Open Session

Closed Session
3:00 - 5:00 p.m.

June 17
Closed Session
8:00 a.m. - 5:00 p.m.

June 18
Closed Session
8:00 a.m. - 1:00 p.m.

Closed Session Summary Posted After the Meeting

June 27, 2014

The Honorable Sloan Gibson
Acting Secretary
United States Department of Veterans Affairs
810 Vermont Avenue
Washington, D.C.

Dear Mr. Secretary,

We write to ask that you take immediate steps to reverse the action of the Veterans Health Administration (VHA), Office of Public Health section, in retaining a certain outside consultant firm regarding Agent Orange.

Having this particular consultant represent VA at the June 16 public meeting of the National Academies of Sciences Institute of Medicine (IOM) Committee on the Exposure of C-123 crews to Agent Orange is nothing short of reprehensible. As you move forward in your efforts to reestablish the trust of veterans in VA (including the strong united support of the nation's veterans service organizations), we caution that employing that particular consulting firm will be seen as an inappropriate, anti-veteran choice.

This consulting firm's decades-long association with the VA and its consistency of obsolete views over the past 40 years, despite all current scientific knowledge, is not what the public expects, as VA meets its own mandate for release of information:

> "VA will ensure and maximize the quality, objectivity, utility, and integrity of information it disseminates to the public."
> (http://www.rms.oit.va.gov/information_quality.asp#Release)

We ask that you review this firm's unique contractual involvement with the VA and make appropriate decisions.

We are alarmed that VA had already assumed a position and that the contractor directly informed the IOM of the VA's position. He made clear he was offering his input as a scientist to insure the integrity of the scientific record. In fact, as his own support documents submitted to the committee make clear, VA contracted with his firm to produce, and then release to the IOM, his reports, some of which targeted veterans' claims directly.

Whether from Young or from other personnel in the Office of Public Health (OPH), the use of the term "bioavailability" is now being used to deny claims. This is a term in the development of pharmaceuticals that is used to refer to how much and how fast the active ingredients reach the

specific part of the body that one is trying to affect. Of course, this has to be measured in a controlled setting. Air missions almost forty years ago do not lend themselves to such measurement. So this is nothing but junk science. If this were the standard used at the Love Canal, NY, or Times Beach, MO, toxic disasters, then one would judge that all those who died were not even sick, as "bioavailability" could not be measured or proven. This is patent nonsense.

This contractor's reports, regardless of any possible partially factual accuracy they may convey, do not meet the appropriate standards of VA nor of any other federal, science-focused agency. The contractor's reports yielded to the VHA/VBA agenda, serving VA rather than science and veterans. These reports could never survive peer review, yet VA selected this person to pressure the IOM into preventing the veterans' exposure claims.

For four decades, this contractor has tried to obfuscate or hide the truth about the deleterious impact of Agent Orange. In fact, he has been paid to hide the truths regarding the negative health effects of Agent Orange and other phenoxy herbicides and organic phosphates used in Vietnam and elsewhere.

In possible violation of ethics, VA's contractor failed to disclose his 2009 recommendation to destroy the stored, toxic C-123's, which was acted on in 2010. He had advised the Air Force, in numerous memoranda, that unless the planes were destroyed, veterans might apply for presumptive service connection because of their exposures. He then congratulated the Air Force for carrying out the destruction in a manner "below the radar." His opposition to C-123 veterans is anything but "below the radar."

The contractor made numerous apparent misrepresentations during his June 16 presentation before the IOM, the most egregious of which was his use of photos of a reconditioned C-123, taken from a civilian owner's website showing what the plane looks like today after the owner had rebuilt it. The consultant used these photos in an attempt to illustrate the 1972 results of Tail #664 and the other C-123s, claiming them to have been thoroughly refurbished after Vietnam. Actually, the photos he "borrowed" show modern cockpit modifications. The cargo deck photo shows equipment used today by the civilian owner for attending airshows. Certainly, these were not photos of modifications performed in 1972, as his report detailed. Of particular concern is the contractor's use of the borrowed photos to challenge other scientists' work, and we are troubled by such apparent deceptions aimed at these veterans.

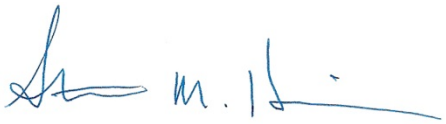
While we would always rather focus on policies than personnel, in the case of this contractor, personnel ***is*** policy. On behalf of our nation's veterans, we have an obligation to share with you the contractor's record of positions, quite contrary to VA's stated position, regarding the deleterious effects of one of the most toxic chemicals ever produced. The consultant's record regarding Agent Orange is antithetical to good science on toxic exposures. Of grave concern are both his employment and the VA's use of his "expertise" to construct obstacles to the delivery of care to veterans suffering from the very real toxic wounds afflicting our members and their families.

We welcome the opportunity to meet with you to discuss this contractor and other major problems of vital interest to our members.

Sincerely,

PETER S. GAYTAN
Executive Director
The American Legion

Homer S. Townsend, Jr.
Executive Director
Paralyzed Veterans of America



STEWART M. HICKEY
National Executive Director
AMVETS (American Veterans)

ROBERT E. WALLACE
Executive Director VFW
Washington Office

GARRY J. AUGUSTINE
Executive Director
Washington Headquarters
DAV (Disabled American Veterans)

RICHARD F. WEIDMAN
Executive Director,
Policy & Government Affairs
Vietnam Veterans of America (VVA)

Contract: VA-101-12-C-0006

Agent Orange Briefs:

Special Topics

- Brief No. 1

Discussion Points Supporting Compensation Service's Position on the UC-123-K Claims

Compensation Service

Department of Veterans Affairs

810 Vermont Ave., NW

Washington, DC 20420

August 21, 2013

A. L .Young Consulting, Inc.

Alvin L. Young, PhD

Kristian L. Young, MA

24 February 2009

TO: Major Carol L. McCrady
Director of Operations
505 Aircraft Sustainment Squadron
Hill Air Force Base, UT

SUBJECT: Decision Memorandum for Contaminated UC-123K Aircraft

FROM: Dr. Alvin L. Young
Professor of Environmental Toxicology
Colonel, USAF, Retired
Senior Executive Level V, Retired

BACKGROUND: There are currently 18 UC-123K aircraft stored at the 309th Aerospace Maintenance and Regeneration Group (AMARG) at Davis Monthan Air Force Base, AR. At least 14 of these aircraft were assigned to Operation RANCH HAND, Vietnam 1962 – 1971. These aircraft were part of the UC-123 aircraft deployed to Vietnam for aerial application of Tactical Herbicides, including Agent Orange. Many of these aircraft were subsequently assigned to the Aerial Spray Flight after returning to CONUS and were used in pesticide programs worldwide. Others were used in transport operations for various Air Force Reserve Units.

ISSUE: Upon departure from Vietnam or after use by the Aerial Spray Flight, some decontamination actions were taken; however, sampling of the internal areas of some of these aircraft in 1996 confirmed the presence of residual 2,3,7,8-tetrachlorodibenzo-*p*-dioxin (TCDD, Dioxin), and chlorophenoxy acetic acid herbicide. Recent actions by the National Institute of Environmental Health Sciences (NIEHS) and the US Environmental Protection Agency (EPA) have established that no level (zero tolerance) of TCDD should be considered safe. **Moreover, the recent worldwide publicity associated with Agent Orange means that any continuing contamination reported in these aircraft will likely draw rapid and intense media coverage. The March/April 2008 issue of Orion Magazine covered a story of the UC-123K aircraft at Davis Monthan AFB (Agent Orange: A Chapter from History that Just Won't End by Ben Quick). In describing why the aircraft were "fenced off", Quick stated because "it is the toxin!" He goes on in the article to describe the plight of the Vietnam veteran and the horror stories of birth defects in Vietnam. Although the Orion Magazine story received little media coverage, any new publicity on the aircraft may trigger a "storm" of articles that will eventually involve the health effects of previous aircrews and mechanics. The Department of Veteran Affairs (DVA) now provides "presumptive compensation" for exposure to Agent Orange and other Tactical Herbicides used in Vietnam. This "presumptive compensation" is no longer focused only on Vietnam veterans, but veterans who can claim exposure in other situations, e.g., testing of the herbicides or aircraft spray systems involving the tactical herbicides in CONUS and OCONUS locations. What this means is that a whole new class of veterans may claim that their exposure was due to the fact they were members of aircrews or**

mechanics associated with the contaminated aircraft that returned from Vietnam and are now located at Davis Monthan AFB. The DVA provides presumptive compensation for such common conditions (in older men) of diabetes and prostate cancer, regardless of cause and effect.

POTENTIAL ACTIONS:

- It should be understood that there are no "win-win" scenarios. Whatever action is taken is going to draw publicity and will incur expenditure of funds.
- No action is unacceptable. Many of the aircraft have been in "***The Boneyard***" for 20 years and a resolution as to their fate is overdue.
- Contract for additional wipe and residue samples to be taken from the aircrafts to establish current levels of contamination. Although this action may result in the findings of "positive" levels of TCDD, any interpretation as to the risks will be very difficult and likely disputed. Nevertheless, this action may be required for any disposal action.
- Sale of functional aircraft, and or sale of parts, via bids to perspective buyers. Even if some of the aircraft can be considered "clean", the extent of sampling will be questioned. If the aircraft had been used in Vietnam to spray Agent Orange, it is likely that even the engines will have some residual contamination. Perspective buyers are going to require some certification that the aircraft or aircraft parts are "safe" to aircrews and mechanics. What organization is prepared to provide such certification?
- The immediate destruction by incineration/smelting of all 18 of the aircraft at Davis Monthan AFB. The spray tanks and spray booms that are in two of the aircraft should be removed and set aside for separate disposal action. Since, any company contracted to destroy the aircraft will want to know if there are handling risks to their employees, or if their employees will need to take hazmat protection, discussions of the extent of sampling will be required. Any additional state or federal regulations that are required for the destruction of aircraft will need to be carefully followed.

RECOMMENDATION: The immediate destruction of the 18 aircraft is likely the best scenario, particularly if this action is selected on the basis that these are old aircraft and have been in storage for many years, and any significant remuneration to the government by their sale will be minimal. Any additional sampling should be in concert with requirements by the contractor, appropriate regulations or regulatory agencies. Because the destruction of these aircraft will likely involve some publicity, the media specialists at both Hill AFB and Davis Monthan AFB should be involved in discussion of the actions and should prepare carefully-worded statements for the media, if any inquiry should occur.

24 February 2009

8. The consultant was asked by the IOM committee to explain why the fleet of desert-quarantined C-123s was destroyed in 2010. He responded with a prevarication, answering it was because the C-123s were obsolete and an embarrassment to the Air Force, given their Vietnam Agent Orange history. He failed to mention eager civilian buyers wanted the sturdy old airplanes.

The consultant failed to mention his own pivotal role in their final solution in 2010. As consultant to the Office of Secretary of Defense, his advice was sought and in 2009 he recommended in three "decision memorandum" that the C-123s all be destroyed immediately and without further testing. He was noted by AF officials as being the "strongest proponent" for this, and his authority cited by AF in seeking Air Staff approval for the consultant's recommended final solution.

9. The consultant is literally a historical figure in Agent Orange issues. In earlier decades he helped develop wartime doctrine for employment of military herbicides, personally applied Agent Orange in various tests, is the historian of the Ranch Hand Association, played a key role in early Administration resistance to evolving veterans' Agent Orange concerns from 1980 on. None of this background was revealed to the IOM as he introduced himself.

Neither did he explain his 1891 business address was at the VA's Washington DC offices, nor his employment by DOD in selection of which exposure sites to recognize in his 2006 report. Neither did he explain that his perspectives on the relative innocence of Agent Orange have remained unchanged for decades, evolving in later years to arguments that no Agent Orange is present, or that no exposure to the Agent Orange which may be present in a particular situation is possible. He evolved the basis for VA's current definition of exposure to include bioavailability, using his extensive list of articles to present the assumption of bioavailability as part of exposure.

In all this, the consultant failed to come before the IOM as an independent scientist whose review of the issue warranted acceptance as factual, the inference he offered during his presentation. In all of this, the consultant failed to reach the ethical standards the VA, IOM, and the veterans as the objects of the study, had the right to demand.

*

Lou, A sad commentary for blaming me. The Air Force did the right thing for the right reason in destroying those aircraft. It would have been a benefit to the tax payer to have sold those aircraft, but **we all knew in time that the Air Reservists would seek presumptive compensation, and those aircraft would become the center of a social (not scientific) controversy, and never be used.** The link just about says it all. **The only reason these men prepared such a story is that they are hoping they can cash in on " tax free money" for health issues that originate from life styles and aging. There was no exposure to Agent Orange or the dioxin, but that does not stop them from concocting exposure stories about Agent Orange hoping that some Congressional member will feel sorry for them and encourage DVA to pay them off.** I can respect the men who flew those aircraft in combat and who made the sacrifices, many losing their lives, and almost all of them receiving Purple Hearts, **but these men who subsequently flew them as "trash haulers", I have no respect for such free loaders. If not freeloading, what is their motive?**

26 June 2009

TO: Mr. Jim Malmgren
Logistics Management Specialist
505th ACSS, Proven Aircraft
Hill Air Force Base, UT

SUBJECT: Decision Memorandum for Contaminated UC-123K Aircraft

FROM: Dr. Alvin L. Young
Professor of Environmental Toxicology
Colonel, USAF, Retired
Senior Executive Level V, Retired
Consultant on Agent Orange to OSD

BACKGROUND: There are currently 18 UC-123K aircraft stored at the 309th Aerospace Maintenance and Regeneration Group (AMARG) at Davis-Monthan Air Force Base, AZ. At least 14 of these aircraft were assigned to Operation RANCH HAND, Vietnam 1962 – 1971. These aircraft were part of the UC-123 aircraft deployed to Vietnam for aerial application of tactical herbicides, including Agent Orange. Many of these aircraft were subsequently assigned to the Aerial Spray Flight after returning to CONUS and were used in pesticide programs worldwide. Others were used in transport operations for various Air Force Reserve units.

ISSUE: Upon departure from Vietnam or after use by the Aerial Spray Flight, some decontamination actions were taken; however, sampling of the internal areas of some of these aircraft in 1996 confirmed the presence of residual 2,3,7,8-tetrachlorodibenzo-*p*-dioxin (TCDD, Dioxin), and chlorophenoxy acetic acid herbicide. Most recently (May 2009), engineers with the 75th Civil Engineering Group/Environmental Compliance Branch (75 CEG/CEVC), Hill AFB, sampled 4 of 18 aircraft at Davis-Monthan AFB, and found that two of the four still had detectable levels, albeit extremely low, of TCDD. These findings essentially commit the 75th Air Base Wing (ABW) to additional samplings and potentially additional decontamination actions.

Recent actions by the National Institute of Environmental Health Sciences (NIEHS) and the US Environmental Protection Agency (EPA) have established that no level (zero tolerance) of TCDD should be considered safe. Moreover, the recent worldwide publicity associated with Agent Orange means that any continuing contamination reported in these aircraft will likely draw rapid and intense media coverage. The March/April 2008 issue of Orion Magazine covered a story of the UC-123K aircraft at Davis-Monthan AFB ***(Agent Orange: A Chapter from History that Just Won't End*** by Ben Quick). In describing why the aircraft were "fenced off", Quick stated because "*it is the toxin*!" He goes on in the article to describe the plight of the Vietnam veteran and the horror stories of birth defects in Vietnam. Although the Orion Magazine story received little media coverage, any new publicity on the aircraft may trigger a "storm" of articles that will eventually involve the health effects of previous aircrews and mechanics. The Department of Veteran Affairs

(DVA) now provides "presumptive compensation" for exposure to Agent Orange and other tactical herbicides used in Vietnam. This "presumptive compensation" is no longer focused only on Vietnam veterans, but veterans who can claim exposure in other situations, e.g., testing of the herbicides or aircraft spray systems involving the tactical herbicides in CONUS and OCONUS locations. What this means is that a whole new class of veterans may claim that their exposure was due to the fact they were members of aircrews or mechanics associated with the contaminated aircraft that returned from Vietnam and are now located at Davis-Monthan AFB. The DVA provides presumptive compensation for such common conditions (in older men) of diabetes and prostate cancer, regardless of cause and effect.

POTENTIAL ACTIONS:

- It should be understood that there are no "win-win" scenarios. Whatever action is taken will draw publicity and will incur expenditure of funds;
- No action is unacceptable. Many of the aircraft have been in "***The Boneyard***" for 20 years and a resolution as to their fate is overdue;
- Contract for additional wipe and residue samples to be taken from the aircraft to establish current levels of contamination. Although this action may result in the findings of "positive" levels of TCDD, any interpretation as to the risks will be very difficult and likely disputed. Nevertheless, this action may be required for any disposal action.
- Provide a number of the "clean" aircraft to museums. However, there must be some certificate or transfer of liability from the Air Force to a museum, and it is unlikely that any museum would be willing to accept liability on the donated aircraft, i.e., to guarantee to the public that the aircraft presents no health hazards if visitors tour the aircraft;
- Sale of functional aircraft, and or sale of parts (e.g., engines), via bids to prospective buyers. Even if some of the aircraft can be considered "clean", the extent of sampling will likely be questioned. If the aircraft had been used in Vietnam to spray Agent Orange, it is likely that even the engines will have some residual contamination. Prospective buyers will require some certification that the aircraft or aircraft parts are "safe" to aircrews and mechanics. What organization is prepared to provide such certification against liability?
- The immediate destruction by incineration/smelting of all 18 of the aircraft at Davis-Monthan AFB. The spray tanks and spray booms that are in two of the aircraft should be removed and set aside for separate disposal action, or if possible destroyed at the time of the aircraft disposal. Since, any company contracted to destroy the aircraft will want to know if there are handling risks to their employees, or if their employees will need to seek hazmat protection, discussions of the extent of sampling will be required. Any additional state or federal regulations that are required for the destruction of aircraft will need to be carefully followed.

RECOMMENDATION: The immediate destruction of the 18 aircraft is likely the best scenario, particularly if this action is selected on the basis that these are old aircraft and have been in storage for many years, and any significant remuneration to the government by their sale will be minimal. Any additional sampling should be in concert with requirements by the contractor, appropriate regulations or regulatory agencies. Because the destruction of these aircraft will likely involve some publicity, the media specialists at both Hill AFB and Davis-Monthan AFB should be involved in discussion of the actions and should prepare carefully-worded statements for the media, if any inquiry should occur.

26 June 2009

POSITION PAPER

ON

IMMEDIATE DISPOSAL/RECYCLE OF 18 UC-123K "AGENT ORANGE" AIRCRAFT

1. BLUF. Recommend immediate disposal/recycle of 18 UC-123K "Agent Orange" aircraft stored at Aircraft Maintenance and Regeneration Group (AMARG), Davis-Monthan AFB. Trace and low levels of contamination found in sampling of four aircraft justify disposal/recycle of all the aircraft immediately, rather than spending additional time and money to sample the remaining 14 aircraft.

2. Background. 18 UC-123K "Agent Orange" aircraft are quarantined at AMARG/Davis-Monthan AFB in Tucson, AZ. Most or all of the aircraft were used in "Operation Ranch Hand" in Vietnam between 1962 and 1971. They were inducted into AMARG between 1980 and 1986. Initial sampling of all 18 aircraft in 1996 confirmed the low level presence of residual herbicides, dioxins and furans from operations in Vietnam and subsequent Aerial Spray Flight operations. These low levels are safe to handle in recycle operations in accordance with (IAW) EPA risk based screening standards and support Phase 1 sampling results from four aircraft in February 2009.

3. In February 2009, Hill AFB 75th Civil Engineering Group/Environmental Compliance Branch (75 CEG/CEVC), sampled four of 18 UC-123K aircraft in Phase 1, at Davis-Monthan AFB and found trace levels and low levels of contamination in the interior of the aircraft. They also sampled inside one of the 15 Agent Orange spray tanks stored with the aircraft and found higher concentrations of contaminants, but they are still considered safe to recycle because exposure to personnel is minimal.

4. In April 2009, 505 ACSS requested $70K of BA01 center funds to execute a contract for Phase 2, sampling the remaining 14 aircraft. The Phase 2 UC-123K Contamination Testing is currently Priority 9 on the center "yes list". Phase 2 sampling and the requested funding is no longer considered necessary if immediate disposal of the aircraft is approved.

5. In July 2009 Phase 1 Sampling Final Report was published. The results indicate the four aircraft are safe for personnel involved in short term recycling operations, which means workers can work in the aircraft all day for a year, IAW EPA risk-based screening standards. Also, Phase 1 results are consistent with 1996 initial sampling which confirm the presence of residual low levels of Agent Orange herbicides, dioxins and furans.

6. On 20-22 July 2009, Dr. Wayne Downs, Hazardous Waste Program Manager, 75 CEG/CEVC Hill AFB, and Mr. Jim Malmgren, 505th Aircraft Sustainment Squadron (505 ACSS) went to Davis-Monthan AFB to discuss details of disposal/recycle of 18 UC-123K "Agent Orange" aircraft. Dr. Downs and Mr. Malmgren also observed actual aircraft disposal/recycle activities at Huron Valley Fritz-West (HVF-West), the contractor used most frequently by AMARG and Defense Reutilization and Marketing Service (DRMS) at Davis-Monthan AFB. No workers handled any parts or pieces of the disposal aircraft. Disposal is accomplished by machinery and equipment operated remotely by the workers at the recycle plant. Consequently, after observing

aircraft being dismantled, crushed and shredded into piles of cell-phone size pieces, both Dr. Downs and Mr. Malmgren concluded that there would be no harmful contamination hazard to workers involved in disposal/recycling of the UC-123K aircraft or of the 15 spray tanks and associated equipment in and around the quarantined aircraft. Additionally, disposal can be done at no cost to the US Air Force. The recycle contractor purchases the aircraft from DRMS as scrap metal and the money goes into the US Treasury.

7. Supporting this document is a Memo For The Record, dated 27 July 2009, from Alvin L. Young, Ph.D. Dr. Young serves as Consultant to the Under Secretary of the Air Force for Installations and Environment and as Consultant on Agent Orange to the Office of the Secretary of Defense. The memo explains why the Air Force should dispose of/recycle the 18 UC-123K "Agent Orange" aircraft as soon as possible to **avoid further risk from media publicity, litigation, and liability for presumptive compensation.**

8. After careful study of Phase 1 sampling data from four aircraft and observing the actual recycle of aircraft by remote equipment, Dr. Wayne Downs, Dr. Karl Nieman (75 CEG/CEVC), and Dr. Young recommend immediate disposal/recycle of all 18 UC-123K "Agent Orange" aircraft with no further sampling of the remaining 14 aircraft.

9. Phase 2 sampling of the remaining 14 aircraft could be beneficial because it would provide complete scientific data for all 18 aircraft, and substantiate future Air Force decisions. However, Dr. Young points out that there are no reasons to suspect that the data would vary significantly if additional samples are collected beyond the first four aircraft. He concludes that the analytical data from Phase 1 is a sufficient statistical representation of all 18 aircraft. Also, there is continued public awareness risk from waiting six to eight more months to receive funding, complete Phase 2 sampling, receive the final sampling results, and await Air Force decision to recycle the 18 aircraft.

10. Dr. Young also pointed out that the storage of UC-123Ks in the Arizona sun for over 20 years has further degraded the contamination. Chopping up the aircraft will also reduce any concentrated dioxin residues to negligible levels.

11. Conclusion. Data from Phase 1 sampling of the first four aircraft, combined with 1996 initial sampling, is sufficient statistical representation for the remaining 14 aircraft to justify immediate disposal/recycling of all 18 aircraft without additional sampling.

12. Recommendation. Recommend no additional sampling of the remaining 14 aircraft. Further recommend immediate disposal/recycling of all 18 UC-123K "Agent Orange" aircraft, and smelting of the entire scrap metal from the aircraft to ensure complete destruction of all dioxins, furans, and herbicides. Recommend personnel from 505 ACSS/GFLA and Hill AFB 75 CEG/CEVC personally observe, witness, and certify recycling of the 18 aircraft at the contractor site in Arizona and also the smelting of the scrap at the smelting facility (location TBD). In response to Dr. Young's recommendation, 75th Air Base Wing Environmental Public Affairs has prepared news releases in preparation for media inquiries at the time of disposal and smelting.

Mr. Buddy Boor/505 ACSS/586-1206/jm/5 Aug 09

DISPOSAL OPTIONS FOR 18 UC-123K AIRCRAFT STORED AT AMARG

505ACSS and 75 CEG have explored the following two options for disposal of 18 UC-123K aircraft in quarantined storage at AMARG.

1. DRMS DISPOSAL OPTION. This is the normal aircraft disposal method used by the Air Force at AMARG/Davis-Monthan AFB. Once an aircraft has been directed for disposal by AF/A8PL via AF Form 913, the aircraft is prepared at AMARG. The aircraft will have all liquids drained, if they have not been drained before. When DRMS takes ownership from the Air Force, the aircraft go through several processes before getting chopped up and shredded at one of the local metal recycle contractors near AMARG. If the aircraft is a fighter aircraft, it will go straight to the metal recycle contractor after all military sensitive equipment is removed. Engines are also usually removed. If the aircraft is not a fighter aircraft, it is made available for commercial sale and commercial parts harvesting through GSA and Government Liquidators. This process of making the aircraft and/or parts available to the public usually takes weeks or months. GSA and Government Liquidators also make the sale public through the internet. After a certain amount of time available to the public, the aircraft will eventually be identified for recycle and disposal. DRMS will contract with one of the local metal recycle contractors, who will bring a flatbed trailer and machinery to the aircraft. The wings will be cut off, the aircraft will be loaded, and taken to the recycle facility. It will be cut up, chopped up and shredded into cell-phone size pieces. The metal is then sold to any vendor looking for recycled metal. DRMS sells the aircraft to the recycle contractor for so many cents per pound. Once the contractor shreds the aircraft, they sell to a buyer and make their profit. The money the contractor paid to DRMS goes directly into the US Treasury. Due to the sensitive nature of these aircraft, we cannot follow normal DRMS procedures outlined above. USAF and DRMS would need to coordinate unique disposal (smelting) requirements with the selected recycle contractor incurring additional time and cost associated with administration, contracting and transportation. These additional efforts could also generate the increase of potential public/media exposure.

2. US NAVY DISPOSAL OPTION. The US Navy has an aircraft disposal office in California. Each year the Navy contracts with a recycle contractor named Huron Valley Fritz-West (HVF-West) who operates a recycle facility next door to AMARG in Tuscon, AZ. The Navy contracts with HVF-West to dispose of aircraft. The Navy contacted Dr. Wayne Downs earlier this year and offered an alternative disposal option for disposing of our 18 UC-123K “Agent Orange” aircraft stored at AMARG. Their process is to charge the Air Force $1000.00 per aircraft. The money is for TDY travel and related expenses for their personnel to be on-site to personally watch the aircraft be trucked into the recycle facility and be chopped up and shredded into cell

phone-size pieces. They officially "certify" and "verify" that the aircraft were destroyed and shredded. The Navy is willing to allow the Air Force to use the Navy contract with HVF-West to have the aircraft destroyed and disposed of. This option can be done discretely. This option avoids all contact with or exposure to the public and the aircraft are not made available for commercial parts harvesting or commercial sale. This option can happen quickly. The Navy can send a team to supervise the disposal event at AMARG and HVF-West. This option also allows the Air Force to maintain complete custody of the aircraft all the way to destruction. This option allows the Navy to modify their existing contract to have the UC-123K aircraft smelted. Smelting is not part of the normal DRMS disposal process. These 18 UC-123K "Agent Orange" aircraft need to be smelted after they are shredded into cell phone-size pieces. Smelting is necessary for these 18 aircraft so the Air Force will no longer be liable for "presumptive compensation" claims to anyone who ever works around this "Agent Orange" metal. The smelting process effectively destroys all remaining low levels and trace levels of Agent Orange herbicides, dioxins and furans in the 18 UC-123K aircraft. If the Air Force wants quick and quiet disposal, the Navy option is preferable. The DRMS option will likely generate publicity and media exposure.

RECOMMENDATION:

505ACSS System Program Office recommends option 2 for the following reasons:

1. Uses standing Navy contract.

2. Single party custody throughout disposal process.

3. Navy provides official "verification" and "certification" of complete destruction IAW contract.

4. Minimizes publicity and media exposure.

5. Streamline/quick disposal.

ISSUES:

Selection of option 2 will require funding of Navy contract at approximately $20-25K vice potential lower cost of option 1. All costs associated with option 1 have not yet been determined due to the unique disposal and custody requirements outside the normal DRMS disposal processes. It is highly feasible that the additional cost associated with administration, contracting and transportation of option 1 will exceed option 2 costs. The System Program Office will require funding for the Navy contract.

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309 MXW/CC	COORD
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OO-ALC/CC	APPROVE

----------STAFF SUMMARY
AO: Mr. Dwight Engle, 505 ACSS/GFLA, DSN 586-3044
SUSPENSE: 12 Feb 10

SUBJECT: A – 505 ACSS – Request OO-ALC/CC Approval to Seek Formal USN Disposal Support

1. PURPOSE: Provide update on disposal of 18 UC-123K aircraft in quarantine storage at AMARG. Obtain approval to formally pursue disposal support from the US Navy.

2. BACKGROUND: In Feb 09, four of 18 UC-123K aircraft were sampled for Agent Orange contamination. The results supplement the Aug 96 initial sampling and confirm the presence of herbicide constituents but show that the contamination is only in trace or low levels. In Jul 09 the 75 CEG performed a Risk Assessment; the results indicate that the aircraft are safe to work in and around daily for 365 continuous days. On 27 Jul 09, Dr. Alvin L. Young, Consultant on Agent Orange to the Office of the Secretary of Defense, recommended immediate destruction of all the UC-123K aircraft with no additional sampling. On 2 Oct 09, in response to an eSSS 505 ACSS submitted with supporting documents, OO-ALC/CC approved disposal of the 18 UC-123K aircraft without additional sampling. Direction was provided that 505 ACSS should contact Defense Reutilization and Marketing Service (DRMS) and advise if difficulties "affect our ability to drive these acft into the disposal process". The 505 ACSS immediately began discussion with DRMS on disposal/recycle options and procedures. Additionally, Aerospace Maintenance and Regeneration Group (AMARG) started preparing the 18 aircraft for disposal by removing all hazardous materials, to include radioactive (radium) items, asbestos clamps, tape, padding, LRUs, PCBs, tubes, etc. To date, AMARG has completed preparation of nine of 18 aircraft and expects to complete the remaining aircraft NLT EOM Mar 10, sooner than the previous estimate of EOM May 10.

3. DISCUSSION: DRMS currently has a contract with "HVF-West", the contractor most frequently used by AMARG for aircraft disposal. However, DRMS is reluctant to dispose of aircraft with HVF-West because they consider all 18 UC-123K aircraft to be hazardous material. Therefore, they recommend USAF contract with a "licensed" hazardous material disposal firm. On 17 Dec 09, DRMS recommended that their "procurement office conduct market analysis to determine potential [qualified environmental] contractors" that can accomplish disposal of the aircraft, which DRMS considers to be hazardous material despite test results and subsequent risk

assessment. DRMS market analysis would require "complete information of the requirement and issuance worldwide." This DRMS recommendation complicates and significantly delays the process which affects our ability to dispose of these aircraft. DRMS has not responded to emails or verbal requests for direction to dispose of the four recently retested UC-123K aircraft.

The US Navy also has a disposal contract in place with HVF-West. Informally, the US Navy has reviewed the August 1996 and February 2009 sampling results and indicated a willingness to dispose of the 18 UC-123K aircraft expeditiously, safely, and cost-effectively. The Navy could provide certification and verification of the disposal and smelting processes. If the US Navy requires any additional testing of the 18 aircraft, the testing can be performed to desired specifications.

4. VIEWS OF OTHERS: On 17 Dec 09, Dr. Young, clarified that the low levels of contamination are not necessarily attributed to Agent Orange, since not all aircraft were used in defoliant operations. Therefore, according to Dr. Young, the aircraft disposal does not have to be publically announced or portrayed as relating to Agent Orange. On 4 Jan 10, Dr. Wayne Downs, 75 CEG Hazardous Waste Program Manager, recommended proceeding with USN disposal support options. Dr. Downs also suggested that OO-ALC personnel witness both the destruction and smelting of the aircraft

5. RECOMMENDATION: Approve pursuit of formal disposal support from the US Navy.

//signed/whb/26 Jan 10//
Mr. William H. Boor, YC-02, USAF
Director, 505th Aircraft Sustainment Squadron