

## Background on Agent Orange

### Agent Orange in South Vietnam

The jungles of South Vietnam were ideally suited for providing enemy cover for the guerilla tactics employed by troops battling South Vietnamese, American, and other allied forces during the Vietnam War. To offset ambush attacks and protect allied forces, the U.S. military sought to defoliate combat areas by developing and using the herbicide Agent Orange.

The defoliant — sprayed between 1965-1970 — was a 50/50 mixture of the herbicides 2,4,5-T and 2,4-D. U.S. military research developed Agent Orange, and the product was formulated based on military specifications.

Code named by the orange identification band painted on the 55-gallon storage drum, Agent Orange was usually sprayed from fixed wing C-123 military aircraft. The total amount of Agent Orange used during the Vietnam War herbicide program is estimated at approximately 11 million gallons.

### The Development of Agent Orange

As a nation at war, the U.S. government compelled a number of companies to produce Agent Orange under the Defense Production Act. Companies supplying Agent Orange to the government included The Dow Chemical Company, Monsanto Company, Hercules Inc., Diamond Shamrock Chemicals Company, Uniroyal Inc., Thompson Chemical and T-H Agriculture and Nutrition Company.

Agent Orange was only manufactured for delivery to the U.S. government for military use. The product was never manufactured or sold for commercial purposes. After Agent Orange was manufactured and packaged as ordered by the U.S. government, the U.S. military took immediate and complete control of Agent Orange at the government contractors' manufacturing facilities in the U.S.

The U.S. military had sole control and responsibility for the transportation of Agent Orange to Vietnam, and for its storage once the defoliant reached Vietnam. The U.S. military controlled how, where, and when Agent Orange would be used.

### Agent Orange and Dioxin

Much of the source of the resulting public controversy over Agent Orange was an unwanted trace impurity that was present in one of the product's ingredients. The unwanted contaminant was the dioxin compound 2,3,7,8-tetrachlorodibenzo-para-dioxin, commonly known as 2,3,7,8 or dioxin. It should be noted that dioxin was not a commercial product, but rather was an unavoidable manufacturing process contaminant in the 2,4,5-T process. Considerable controversy surrounds dioxin even today, primarily because of its high acute toxicity in animals. Dioxin has been shown to cause a number of serious conditions in laboratory animals, including birth defects and cancer. Dioxin's effects on humans, however, are not nearly so clear. Dioxin has been shown to cause a serious skin disorder known as chloracne and reversible signs of toxicity in workers accidentally exposed to extremely high levels on the job. In spite of the acknowledged toxicity to animals, there continues to be much scientific controversy and varying scientific opinion about what harm it

may or may not have caused people — especially at the trace levels present in herbicides. Today, the scientific consensus is that when the collective human evidence is reviewed, it doesn't show that Agent Orange caused the veterans' illnesses.

It should also be noted that no increase in the risk of cancer has been observed among the most highly exposed veterans. Despite this, the U.S. Department of Veterans Affairs accepts several "presumptively service-connected" diseases or conditions associated with Agent Orange exposure.

### Agent Orange and the 1984 Class-Action Settlement

Beginning in 1978, hundreds of individual suits and class actions were brought in the U.S. on behalf of the 2.5 million veterans who served in Vietnam and their families against the companies that manufactured Agent Orange. Those lawsuits claimed that exposure to Agent Orange had caused a number of veterans to suffer a wide variety of illnesses. In time, these cases were consolidated before Federal Judge Jack Weinstein of the Eastern District Court in New York . In May 1984, on the eve of the trial, Judge Weinstein facilitated a settlement between the companies and the veterans. As the Eastern District Court later explained, the plaintiffs were facing near-certain defeat. The veterans were unable to prove that Agent Orange was likely to cause any disease and they were unable to establish the level of any individual veteran's exposure to Agent Orange.

Despite the weakness of the plaintiffs' claims, defendants were willing to pay \$180 million to settle the lawsuit to end years of potential litigation and globally resolve the issue for less the cost of defense. In addition, the settlement included all potential future Agent Orange claims. The district court then held a number of settlement hearings throughout the U.S. and approved the settlement as fair, reasonable and adequate.

### Post 1984 Settlement

Since the 1984 Agent Orange settlement, all suits brought by veterans in the U.S. , including those who opted out of the class action settlement, had been routinely dismissed at the trial court level in favor of the manufacturers. For 17 years, U.S. appellate courts had upheld all such dismissals.

However, in November 2001, the U.S. 2nd Circuit Court reversed and remanded an Eastern District Court decision involving two plaintiffs — Joe Isaacson and Daniel Stephenson — who were seeking status outside the Agent Orange class action settlement. These plaintiffs argued that it would be unfair to enforce the settlement in their cases as they claim their illnesses were manifested after the 1984 settlement, and after the settlement funds were exhausted. Finally, these plaintiffs argued that their claims were unique and that they were inadequately represented in the 1984 class action settlement.

Left unchallenged, this ruling meant finality and certainty in the context of class action settlements could not be obtained and complex legal matters could never be fully resolved. Settlements are compromises intended to secure legal peace. This decision meant no settlement would ever be lasting and the mechanism of using class action settlements to end future claims would be lost. For this reason, the manufacturers who had previously settled this dispute in 1984 sought review by the U.S. Supreme Court. The Court granted the manufacturers' request with a hearing on

February 26, 2003 and subsequent decision on June 9, 2003.

In the 4-4 split decision, the Supreme Court allowed a lower court ruling to stand that says a 1984 global settlement involving the companies the U.S. military asked to make Agent Orange during the Vietnam War does not bar a Vietnam veteran (Daniel Stephenson) from pursuing claims against those companies. The Court also vacated a second veteran's (Joe Isaacson) case and remanded the case to determine if it could be heard in U.S. Federal Court.

The case is now proceeding in the trial court, with U.S. District Court (Eastern District of New York ) Judge Jack Weinstein presiding.

#### Post 2003 Supreme Court Ruling

The Supreme Court ruling means that some veterans who claim they developed illnesses after the 1984 funds were exhausted may file claims against the manufacturers. It is important to note that the U.S. Supreme Court ruling was on a procedural matter concerning whether or not future claims of Agent Orange class members were barred from bringing any claims against the manufacturers versus a ruling on the merits of Agent Orange claims and the manufacturers' defenses. Isaacson and Stephenson claimed that they had never had the opportunity to benefit from the settlement and that their interests could not have been adequately represented when the settlement was negotiated. U.S. District Court (Eastern District of New York ) Judge Weinstein found that there was no real conflict of interest between presently injured class members and those who might develop injuries in the future because all such claims were without merit and would have been dismissed.

The Second Circuit Court concluded that the post-1994 (when the funds were exhausted) future claimants had not been adequately represented because the settlement "only provided for recovery for those whose death and disability was discovered prior to 1994." The Supreme Courts 4-4 split, in essence, failed to decide this case and allows the Second Circuit Court's decision to stand.

However, any new claims would be subject to dismissal under the government contract defense and on other legal grounds such as inability to prove causation. Judge Weinstein of the U.S. District Court for the Eastern District of New York has ruled in the past that the manufacturers are entitled to summary judgment on the government contract defense and the Court of Appeals has affirmed. The manufacturers are confident that this litigation will ultimately be dismissed.

#### In Conclusion

War damages people, lives, and the environment. Nations, and the militaries of nations, are responsible for war. The U.S. government and the Vietnamese government are responsible for military acts in Vietnam and the use of Agent Orange as a defoliant. The manufacturers feel that in 1984 they took part in a good-faith settlement aimed at healing and bringing closure to this issue. Any future issues involving Agent Orange should be the responsibility of the respective governments as a matter of political and social policy.