

War Legacies Project

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Appeal for the Agent Orange Lawsuits to be heard

On June 18, 2007 the Second Circuit Court of Appeals in Manhattan will hear oral arguments against Dow, Monsanto and 35 other companies that produced Agent Orange and related herbicides used during the Vietnam War. Sixteen appeals by American veterans will be heard in the morning. An appeal by the Vietnam Association for Victims of Agent Orange/Dioxin will be heard in the afternoon. The US veterans and Vietnamese citizens are seeking the reinstatement of lawsuits dismissed by Judge Jack Weinstein in federal court in Brooklyn in March 2005.

Judge Weinstein dismissed the lawsuits of the US veterans, which asserted claims of negligence and product liability under US domestic law, on the grounds that the sovereign immunity enjoyed by the US government extends to the chemical companies because they acted as government contractors. Lawyers for the US veterans will argue that the chemical companies failed to produce what the government specified: herbicides that had a certain purity and were not harmful to people or animals.

Judge Weinstein dismissed the Vietnamese case, ruling that the use of herbicides during the Vietnam War did not violate international norms prohibiting the use of poison and the indiscriminate targeting of civilians in warfare. Constantine Kokkoris, lawyer for the Vietnamese plaintiffs explains "We will argue that Judge Weinstein was wrong; that the chemical companies did violate international norms by supplying over 21 million gallons of herbicides which they knew to contain excessive amounts of dioxin and which they knew would be sprayed over vast, populated areas in southern Vietnam over extended periods of time. The companies could have avoided producing high levels of dioxin in the herbicides they manufactured by using lower temperatures and slowing down the manufacturing process but they chose not to do so in order to maximize their productivity and profit."

Weinstein also dismissed the claims for negligence and product liability brought by the Vietnamese citizens under NY State Law, for the same reason the US veterans case was dismissed, that is, that the companies as government contractors cannot be sued for damages. Weinstein did acknowledge, however, that if the actions of the contractors were shown to have violated the laws of war, they would no longer be able to invoke sovereign immunity to shield themselves from victims' lawsuits.

Plaintiffs have received favorable rulings and settlements in similar cases addressing Vietnam War era herbicides:

- In 1984 Judge Weinstein brokered a \$184 million settlement between US veterans and the chemical companies in the first wave of Agent Orange lawsuits; the U.S. Veterans Administration now pays disability benefits to Vietnam War veterans who were exposed to Agent Orange and suffer from one of numerous diseases and defects presumptively linked to dioxin;
- In 2005 a federal court in New York ordered the Army Corps of Engineers to re-evaluate a plan to connect New York Harbor to Newark Bay because of the severe dioxin contamination left behind by the Diamond Alkali plant which manufactured Agent Orange during the Vietnam War.
- In 2006 a Korean Appellate court upheld a \$65 million judgment against Dow and Monsanto in a lawsuit brought by 20,000 Korean Viet Nam War veterans for exposure to Agent Orange;
- In April 2007 the US Supreme Court ruled that Hercules must reimburse the US government \$120 million for the costs of cleaning up the Jacksonville, AK Superfund site where they produced Agent Orange.
- A Michigan court has recently certified a class action by property owners whose land has been contaminated by Dow Chemical's Agent Orange plant in Midland, Michigan;
- In addition, within the last two years there have been controversies and charges brought against the governments of Canada and New Zealand because of the use of Agent Orange at a Canadian military base, and exposure of Vietnam War veterans from New Zealand.

Susan Hammond, director of the War Legacies Project observes "Whatever the outcome, the case has been extremely important for raising the issue of Agent Orange both here and abroad, and for galvanizing public sympathy. Unfortunately, the lawsuit, which was filed in January 2004, may not be resolved for years. Meanwhile, there are tens of thousands of Vietnamese who are struggling every day to care for their sick and disabled family members. They need our help now, from US government, foundation and private sources. A humanitarian response does not have to wait for a court decision."

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