

APPELLANT'S BRIEF

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

15-4082

ALFRED PROCOPIO,
Appellant,

v.

ROBERT MCDONALD,
Secretary of Veterans Affairs,
Appellee.

Original Brief of Appellant

Submitted by:

John B. Wells
LA Bar #23970
P. O. Box 5235
Slidell, LA 70469-5235 (mail)
769 Robert Blvd., Ste 201D
Slidell, LA 70458 (physical)
985-641-1855
985-649-1536 (fax)
JohnLawEsq@msn.com

March 27, 2016

Counsel for Appellant

Table of Contents

Table of Authorities..... iii

Citations to the Record Before the Agency..... vii

Statement of the Issues..... vii

Statement of the Case..... 1

Nature of the Case. 1

History of the Blue Water Navy Controversy..... 2

Statement of Facts..... 4

Summary of the Argument..... 7

Argument..... 8

I. The Federal Circuit Decision in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) *reh’g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008) is Not Controlling and Must Be Limited to its Facts Because it Was Not Decided in Accordance with the Accepted Canons of Construction for Veteran’s Cases Pursuant to *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct. 1197, 1206 (2011)..... 8

II. The BVA’s reliance upon 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)] in Reaching Their Decision Was Clear Error since That Notice Misstates the Facts of Naval Operations off of Vietnam and Has Been Repeatedly Debunked..... 13

III. The BVA Failed to Consider the Issue of Direct Exposure Based on the Presence of Agent Orange in the Waters, Including the Territorial Sea, Off the Mekong River, Through Which the Veteran’s Ship Transited. . . . 16

IV. In Light of *Gray v. McDonald*, 27 Vet. App. 313 (2015), the Secretary of Veterans Affairs' Interpretation That the Territorial Seas of the Republic of Vietnam Was Excluded from Regulatory Definition of Inland Waterway, Service That Would Give Rise to Presumption That Navy Veteran Seeking Disability Benefits Was Exposed to Herbicide, Was Arbitrary and

Capricious.	27
Conclusion.	30
Certificate of Service.	31
Appendix (RBA)	

Table of Authorities

Cases

<i>Am. Farm Lines v. Black Ball Freight Serv.</i> , 397 U.S. 532 (1970).....	21
<i>Bucklinger v. Brown</i> , 5 Vet.App. 435 (Vet.App.1993).....	27
<i>Combee v. Brown</i> , 34 F.3d 1039 (Fed.Cir.1994).....	17
<i>Gambill v. Shinseki</i> , 576 F.3d 1307 (Fed. Cir.2009).....	8
<i>Godwin v. Derwinski</i> , 1 Vet.App. 419 (1991).....	26
<i>Gray v. McDonald</i> , 27 Vet. App. 313 (2015).	I, 1, 4, 12, 27, 28, 29
<i>Haas v. Nicholson</i> , 20 Vet. App. 257 (2006).....	3, 10, 23
<i>Haas v. Peake</i> , 525 F.3d 1168 (Fed. Cir. 2008).....	I, 1, 4, 8,9
<i>Haas v. Peake</i> , 544 F.3d 1306 (Fed. Cir 2008).....	I, 1, 5, 8, 9, 11
<i>Henderson ex rel. Henderson v. Shinseki</i> 131 S.Ct. 1197 (2011).	I, 1, 8
<i>Hodge v. West</i> , 155 F.3d 1356 (Fed. Cir.1998)	8
<i>Impresa Construzioni Geom. Domenico Garufi v. United States</i> , 238 F.3d 1324 (Fed. Cir. 2001).	21
<i>Madden v. Gober</i> , 125 F.3d 1477 (Fed.Cir.1997).....	15
<i>Milena Ship Management Company v. R. Richard Newcomb</i> , 995 F.2d 620 (5th Cir. 1993).	21
<i>Moore v. Derwinski</i> , 1 Vet.App. 401 (1991).....	26
<i>Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).	21
<i>O'Hare v. Derwinski</i> , 1 Vet.App. 365 (1991).	26
<i>Owens v. Brown</i> , 7 Vet.App. 429 (1995).....	15

<i>Procopio v. Shinseki</i> , 26 Vet. App. 76 (2012).....	2
<i>Renicker v. United States</i> , 17 Cl. Ct. 611 (1989).....	23
<i>United States v. Alaska</i> , 521 U.S. 1 (1997).....	12
<i>United States v. California</i> , 381 U.S. 139 (1965).....	12
<i>United States v. Louisiana</i> , 394 U.S. 11 (1968).....	12
<i>United States v. U.S. Gypsum Co.</i> , 333 U.S. 364 (1948).....	16
<i>Walters v. National Assn. of Radiation Survivors</i> , 473 U.S. 305 (1985).....	8
<i>Wynn v. Gober</i> 17 Vet.App. 460 (Vet.App. 2000).....	16
<i>Zhang v. Slattery</i> , 55 F.3d 732 (2d Cir.1995).....	11
 <u>Statutes</u>	
Agent Orange Act of 1991.....	3
Submerged Lands Act 43 U.S.C. § 1301 <i>et. seq.</i>	12, 13
38 U.S.C. § 1113.....	16
 <u>Code of Federal Regulations</u>	
8 C.F.R. § 287.1.....	11
38 C.F.R. § 3.307.....	2
38 C.F.R. § 3.311.....	10
38 C.F.R. § 3.313.....	10
73 Fed.Reg. 20,566, 20,568 (Apr. 16, 2008).....	2, 22
 <u>Other</u>	
1954 Geneva Accords.....	7, 9, 11
1973 Paris Peace Treaty.....	7, 10, 11

Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U.S.T. 1607, T.I.A.S.
No. 5639.. 9, 11, 12, 22, 29

Department of Veterans’ Affairs and Australian Institute of Health and Welfare *The Third Australian Vietnam Veterans Mortality Study* (2005). 14

D. S. Pavlov et. al, *Present-Day State of Coral Reefs of Nha Trang Bay (Southern Vietnam) and Possible Reasons for the Disturbance of Habitats of Scleractinian Coral* (2003).. 28

IOM (Institute of Medicine) 2009. *Veterans and Agent Orange: Update 2008*. Washington, DC: The National Academies Press (IOM I). 5, 14, 19, 23, 24

IOM (Institute of Medicine) 2011. *Blue Water Navy Vietnam Veterans and Agent Orange Exposure*. Washington, DC: The National Academies Press (IOM II). 5, 14, 18, 19, 23

IOM (Institute of Medicine) 2012. *Veterans and Agent Orange: Update 2010*. Washington, DC: The National Academies Press (IOM III). 6, 7, 19, 21

IOM (Institute of Medicine) 2014. *Veterans and Agent Orange: Update 2012* Washington, DC: The National Academies Press (IOM IV). 7

The Joint Chiefs of Staff and the War in Vietnam 1960-1968, Part II 10

Mueller, J, Gaus, C et. al. University of Queensland’s National Research Centre for Environmental Toxicology (NRCET) *Examination of The Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins And Polychlorinated Dibenzofurans Via Drinking Water* (2002). 3, 13, 14, 15, 25

Müller, J.F., Gaus, C., Bundred, K., Alberts, V., Moore, M.R., Horsley, K., Organohalogen Compounds 52, 243-246. 2001. 13

Mueller, J.F., Gaus, C., Bundred, K., Moore, M.R., Horsley, K., 2001. Water volatility of dioxins - exposure through consumption of distilled water. *Toxicology* 164, 157-158. . 13

VAOPGCREC 27-97. 3

Record Before the Agency Citations

Record Citation

Page

RBA at 2 (2-23) (Board Decision).....	2
RBA 14-15 (2-23) (Board Decision).....	24
RBA 15 (2-23) (Board Decision).....	7
RBA 18 (2-23) (Board Decision).....	7
RBA 19 (2-23) (Board Decision).....	15
RBA 34 (30-48) (BVA Hearing transcript 11/13/14).	5
RBA 38-46 (30-48) (BVA Hearing transcript 11/13/14).....	17
RBA 74-92 (BVA Hearing transcript 11/13/14).	2
RBA 77 (74-92) (BVA Hearing transcript 11/13/14).	7
RBA 78 (74-92) (BVA Hearing transcript 11/13/14).	22
RBA 90 (74-92) (BVA Hearing transcript 11/13/14).	26
RBA 91 (74-92) (BVA Hearing transcript 11/13/14).	26
RBA 157-164 (154-66) (Counsel ltr 4/1/15 including Vet’s designation of 3 rd VLJ and <i>Procopio v. Shinseki</i> , 26 Vet App 76).	7
RBA 188-416 (188-416) (Memo in Support of Claim with Exhibits).....	2
RBA 193 (188-210) (Memo in Support of Claim).	10
RBA 226-239 (226-239) (Exhibit B Deck Logs USS <i>Intrepid</i>).	5
RBA 227 (226-239) (Exhibit B Deck Logs USS <i>Intrepid</i>).	2
RBA 234 (226-239) (Exhibit B Deck Logs USS <i>Intrepid</i>).	2
RBA 235 (226-239) (Exhibit B Deck Logs USS <i>Intrepid</i>).	2
RBA 237 (226-239) (Exhibit B Deck Logs USS <i>Intrepid</i>).	2

RBA 240-44 (240-44) (Caldbeck and Mueller Affidavits Exhibits C & D).	5, 7, 16
RBA 285 (285-286) (Gaus statements to Fed Reg Notice Exhibit F).	14, 15
RBA 286 (285-286) (Gaus statement to Fed Reg Notice Exhibit F).	14, 15
RBA 287-300 (Wells statement to Fed Reg Notice Exhibit G).	5
RBA 290 (285-300) (Wells statement to Fed Reg Notice Exhibit G).	14
RBA 291-92 (285-300) (Wells statement to Fed Reg Notice Exhibit G).	15
RBA 301-310 (301-10) (Wells c-v Exhibit H).	16
RBA 311-23 (311-23) Military-Veterans Advocacy letter 4/30/13 to Secretary Shinseki.	5, 7
RBA 329-31 (329-31) Military-Veterans Advocacy letter 4/30/13 to Secretary Shinseki.	7
RBA 332-36 (332-36) (Affidavits from Rossie & May).	7
RBA 337-40 (337-40) (Excerpt from 2008 IOM Study (IOM II)).	5, 14, 19
RBA 338 (337-40) (Excerpt from 2008 IOM Study (IOM II)).	18
RBA 340 (337-40) (Excerpt from 2008 IOM Study (IOM II)).	19
RBA 347 (347) (Chart showing baseline and territorial seas of South Vietnam).	29
RBA 348 (348) (Picture of the Mekong River discharge plume).	17
RBA 348-92 (348-92) (Affidavits and learned treatises on hydrological effects).	7, 28
RBA 349-55 (349-55) (Hoirdoir affidavit).	17, 30
RBA 356 (356-60) (Oceanography of the Mekong River Estuary treatise).	17
RBA 358 (356-60) (Oceanography of the Mekong River Estuary treatise).	17
RBA 361 (361-72) Signature of the Mekong River Plume.	17
RBA 374 (373-92) (Effect of TCDD on Blue Crabs).	23

RBA 393-400 (393-400) (Nha Trang Harbor Report).	19, 22, 23, 28
RBA 399 (393-400) (Nha Trang Harbor Report).	20
RBA 401-405 (401-05) (2005 Cancer Incidence Study).	25
RBA 406 (406) (Belanger Affidavit).	30
RBA 407-10 (407-10) (Gibson affidavit).	7, 20, 22
RBA 415-16 (415-16) (Excerpt from IOM Study (IOM II)).	7, 19
RBA 618-21 (BVA decision 11/26/13 (Remand)).	2
RBA 866-78 (BVA decision).	2
RBA 972-78 (NRCET study article).	3

Statement of the Issues

- I. The Federal Circuit Decision in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008) is Not Controlling and Must Be Limited to its Facts Because it Was Not Decided in Accordance with the Accepted Canons of Construction for Veteran's Cases Pursuant to *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct. 1197, 1206 (2011).
- II. The BVA's reliance upon 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)] in Reaching Their Decision Was Clear Error since That Notice Misstates the Facts of Naval Operations off of Vietnam and Has Been Repeatedly Debunked.
- III. The BVA Failed to Consider the Issue of Direct Exposure Based on the Presence of Agent Orange in the Waters, Including the Territorial Sea, Off the Mekong River, Through Which the Veteran's Ship Transited.
- IV. In Light of *Gray v. McDonald*, 27 Vet. App. 313 (2015), the Secretary of Veterans Affairs' Interpretation That the Territorial Seas of the Republic of Vietnam Was Excluded from Regulatory Definition of Inland Waterway, Service That Would Give Rise to Presumption That Navy Veteran Seeking Disability Benefits Was Exposed to Herbicide, Was Arbitrary and Capricious.

Statement of the Case

Nature of the Case.

This matter is an appeal from the action of the Board of Veterans Appeals (BVA) denying Appellant's claim for prostate cancer, diabetes mellitus and coronary artery

disease due to herbicide exposure. RBA 2 (2-23).

The Appellant had served aboard the *USS Intrepid* (CV-11) from November 1964 until July of 1967. These service included July 8, 1966. RBA 227 (226-239). He was onboard the ship on July 8, 1966 when the *Intrepid* entered the territorial seas of the Republic of Vietnam. RBA 78 (74-92), 227, 234, 235, 237 (226-239).

This case originally came before the Board of Veterans Appeals on appeal from a denial of benefits by the St. Paul Minnesota Regional Office in April of 2009. The Board denied the veteran's appeal in March of 2011 RBA 866-878 and an appeal was filed in the Court of Appeals for Veterans Claims. In October of 2102, the Court of Appeals for Veterans Claims reversed and remanded the case. *Procopio v. Shinseki*, 26 Vet. App. 76 (2012). RBA 157-164. The case was remanded in November of 2013. RBA 618-621.

A hearing was held before the BVA on November 13, 2014 by video teleconferencing. RBA 74-92.

The Board refused to consider evidence of direct exposure presented at the hearing and relied on the often debunked VA notice in the Federal Register, 73 Fed.Reg. 20,566, 20,568 (April 16, 2008). Although contrary evidence debunking the Federal Register notice was included in the RBA the Board chose to ignore it. RBA 188-416.

This is a "Blue Water Navy" case and Appellant asks the court to ascertain whether he should be given the presumption of exposure and rated for any and all diseases consistent with Agent Orange exposure pursuant to 38 C.F.R. § 3.307(e).

History of the Blue Water Navy Controversy.

Faced with an increase in cancer incidence among Royal Australian Navy personnel, significantly greater than among Army personnel who fought in-country, the Australian Department of Veterans Affairs commissioned the National Research Centre for Environmental Toxicology (NRCET) to determine why there was elevated cancer incidence in Navy veterans who did not touch shore. RBA 313-314 (311-323).

In 2002, as the American Department of Veterans Affairs (VA) was beginning to deny the presumption of exposure to Navy veterans, NRCET published the result of their study (hereinafter NRCET study). *See generally*, RBA 972-78.

The study noted that ships in the near shore marine waters collected water that was contaminated with the runoff from areas sprayed with Agent Orange. NRCET Report at 10. The shipboard distillers, that converted the salt water into water for the boilers and potable water, co-distilled the dioxin and enhanced the effect of the Agent Orange.

Commencing in late 2003 and accelerating in 2005 the Australians began granting benefits to those who served at sea in Vietnamese waters.

Until 2002, the American VA granted the presumption of exposure to the crews of those ships operating within the Vietnam Service Medal Area. In that year, the VA implemented a precedential General Counsel's opinion that stated the 1991 Agent Orange Act only applied to those who performed air, land or naval service in the Republic of Vietnam. VAOPGCREC 27-97.

A case with similar issues came before this Court in 2006. *Haas v. Nicholson*, 20 Vet. App. 257. The *Haas* court found that the veteran who was operating off the

shoreline, was within the scope of the statutory definition and invalidated the VA “boots on the ground” policy. The Federal Circuit reversed in *Haas v. Peake*, 525 F.3d 1168, 1196 (Fed. Cir. 2008) *reh’g denied Haas v Peake*, 544 F.3d 1306, 1309 (Fed. Cir. 2008).

A similar issue came before this Court earlier this year in *Gray v. McDonald*, *supra*. The *Gray* Court found the Secretary’s exclusion of Da Nang from their inland waterways definition was arbitrary and capricious. *Gray*, 27 Vet. App. at 313.

The *Gray* Court went on to note that the VA failed to address their rationale in excluding areas where brown water and blue water mix, such as Da Nang Harbor. *Gray*, *supra*, 22 Vet.App. at 322. Stopping short of supplying a definition of inland waters, the *Gray* Court ruled that they would vacate the BVA decision and remand the matter to the VA to reevaluate its definition of inland waterways. The Court also directed the VA use “its fair and considered judgment to define inland waterways in a manner consistent with the regulation's emphasis on the probability of exposure.” *Gray, supra*, at 326-27. The nullified rationale was the same policy used to deny Mr. Procopio’s benefits.¹

Statement of Facts.

The Veteran served on active duty from September 1963 to August 1967. RBA 3. The veteran was assigned to the *USS Intrepid* from November 1964 through July of 1967.

¹ Although *Gray* deal with harbors and bays, the basic thrust of the case, that the VA must ascertain where the river discharge, known in hydrological circles as the discharge plume, actually ends. The fresh water from the inland rivers, which is presumed to contain the Agent Orange dioxin, mixes with the salt water from the sea. In the instant case the veteran’s ship entered the territorial seas off the Mekong River which discharges its plumes for several hundred kilometers.

RBA 34 (30-48). In July of 1966, the *Intrepid* was deployed off the coast of Vietnam. *Id.* RBA 226-239. The ship was on *Dixie Station* which is located off of South Vietnam. Operations included various incursions into the territorial seas of the Republic of Vietnam off the Mekong Delta. RBA 226-239.

The evaporation distillation system in use on the *Intrepid* was the same as used by the Royal Australian Navy. Exhibits RBA 240-44, 287-300, 311-23.

In June of 2008, the Institute of Medicine (IOM) Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides (Seventh Biennial Update) considered the Blue Water Navy matter. That Committee report accepted the proposition that veterans who served on ships off the coast of the Republic of Vietnam were exposed to Agent Orange and recommended that they **not be excluded** from the presumption of exposure. The Committee reviewed the Australian distillation report and confirmed its findings based on Henry's Law. IOM (Institute of Medicine). 2009. *Veterans and Agent Orange: Update 2008*. Washington, DC: The National Academies Press. (hereinafter IOM I). RBA 337-40.

The VA did not accept these recommendations. Instead then Secretary Shinseki ordered another IOM study, "Blue Water Navy Vietnam Veterans and Agent Orange Exposure." IOM (Institute of Medicine). 2011. *Blue Water Navy Vietnam Veterans and Agent Orange Exposure*. Washington, DC: The National Academies Press. (Hereinafter IOM 2011). (hereinafter IOM II). They concluded: (1) There was a plausible pathway for some amount of Agent Orange to have reached the South China Sea through drainage

from the rivers and streams of South Vietnam as well as wind drift; (2) The distillation plants aboard ships at the time which converted salt water to potable water did not remove the Agent Orange dioxin in the distillation process and enriched it by a factor of ten; (3) Based on the lack of firm scientific data and the four decade passage of time, they could not specifically state that Agent Orange was present in the South China sea in the 1960's and 1970's; (4) There was no more or less evidence to support its presence off the coast than there was to support its presence on land or in the internal waterways and (5) Regarding the decision to extend the presumption of exposure “given the lack of measurements taken during the war and the almost 40 years since the war, this will never be a matter of science but instead a matter of policy.” Notably this report did not contradict the findings of the Seventh Biennial report that the Blue Water Navy personnel should not be excluded from the presumption of exposure.

The IOM’s Eighth Biennial Update recognized that “it is generally acknowledged that estuarine waters became contaminated with herbicides and dioxin as a result of shoreline spraying and runoff from spraying on land.” IOM (Institute of Medicine). 2012. *Veterans and Agent Orange: Update 2010*. Washington, DC: The National Academies Press at 62. (hereinafter IOM III). The follow on study two years later stated that “ it is generally acknowledged that estuarine waters became contaminated with herbicides and dioxin as a result of shoreline spraying and runoff from spraying on land, particularly in heavily sprayed areas that experienced frequent flooding.” IOM (Institute of Medicine). 2014. *Veterans and Agent Orange: Update 2012* Washington, DC: The

National Academies Press at 55. (hereinafter IOM IV).

Debris discharged from the Mekong River into a hydrological plume would have affected Dixie Station and other areas of the bays, harbors and territorial seas of Vietnam. RBA 240-44, 311-23, 329-31, 332-36, 348-92, 407-10. See *also*, IOM III. RBA 415-16.

The Board conceded that the veteran's prostate cancer issues and diabetes. RBA 15. (2-23). He also has been diagnosed with ischemic heart disease. RBA 77 (74-92).

The veteran did not set foot in Vietnam. RBA 18. He is what is known colloquially as a Blue Water Navy veteran. This class of veterans enjoyed the presumption of exposure until the General Counsel's office, without regard to national or international law, stripped the presumption from those who did not set foot on land.

Summary of the Argument

The Secretary has ignored international and domestic law in irrationally finding that veterans operating within the territorial seas of the Republic of Vietnam were not exposed to Agent Orange. This flies in the face of the United States' recognition of Vietnam's territorial seas in the 1954 Geneva Accords and the 1973 Paris Peace Treaty.

The BVA erred in not considering the direct exposure effects of the Agent Orange contamination off the Mekong River. Hydrologists agree that the dioxin would have flowed out from the rivers as part of the discharge plume and into the South China Sea. Off the Mekong River, the plume traveled for hundreds of kilometers past the territorial

seas. Shipboard evaporation distillers² contaminated their distillation and distribution systems with Agent Orange resulting in dioxin infiltration into the potable water system.

Additionally any reliance upon the decision in *Haas v. Peake*, 525 F.3d 1168, 1196 (Fed. Cir. 2008) *reh'g denied Haas v Peake*, 544 F.3d 1306, 1309 (Fed. Cir. 2008) is misplaced. *Haas* failed to use the accepted pro-veteran canons of construction.

Argument

I. The Federal Circuit Decision in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir. 2008) is Not Controlling and Must Be Limited to its Facts Because it Was Not Decided in Accordance with the Accepted Canons of Construction for Veteran's Cases Pursuant to *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct. 1197, 1206 (2011).

Congress has designed the VA's adjudicatory process "to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985). A unanimous Supreme Court held "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct. 1197, 1206 (2011). The Federal Circuit has also recognized the paternalistic non-adversarial intent of the system designed by Congress. *Gambill v. Shinseki*, 576 F.3d 1307, 1317 (Fed. Cir.2009). The *Gambill* court described the process as uniquely pro-claimant." *Id.* at 1316. See, also, *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir.1998)

² The *USS Intrepid* used a evaporation distillation process common on steam powered ships during this time period.

The *Haas* Court specifically noted that they did not consider the long accepted canon of statutory interpretation holding that ambiguity in a veteran's benefits statute should be resolved in favor of the veteran. *Haas*, 544 F.3d 1308. Under the accepted "pro-claimant" provisions of *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) defense of an agency's interpretation must be balanced against the Congressional intent that any ambiguity be resolved in favor of the veterans.

Here the *Haas* court found ambiguity in the statutory phrase "served in the Republic of Vietnam" as applied to service in the waters adjoining the landmass of Vietnam. *Haas* 525 F.3d at 1184. In denying the Petition for Rehearing, the *Haas* court found that the failure to apply the accepted statutory canons was waived because it was not raised in this Court. *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008). In the instant case, Plaintiffs have carefully protected that argument.

Irrespective of whether there is ambiguity in the statute or the regulation, the application of the pro-veteran canons of construction require the most favorable interpretation of the statutory phrase "served in the Republic of Vietnam" as applied to service in the waters adjoining the landmass of Vietnam.

Vietnam claims a 12 mile territorial sea as allowed by the Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U.S.T. 1607, T.I.A.S. No. 5639 (hereinafter 1958 Treaty). The United States has specifically recognized Vietnamese sovereignty over their territorial seas. *See*, Geneva Accords Article 4.

<https://www.mtholyoke.edu/acad/intrel/genevacc.htm> (last visited June 6, 2014). During

the war, the United States specifically recognized a twelve rather than three mile limit.

The Joint Chiefs of Staff and the War in Vietnam 1960-1968, Part II which can be found at dtic.mil/doctrine/.../jcsvietnam_pt2.pdf at 358 (last visited June 6, 2014). Again, in 1973, after extensive negotiations, the United States recognized Vietnamese sovereignty over the territorial seas in Paris Peace Treaty that ended the war.

http://www.upa.pdx.edu/IMS/currentprojcts/TAHv3/Content/PDFs/Paris_Peace_Accord_1973.pdf (last visited June 6, 2014). See, RBA 193.

In *Haas v. Peake*, decision, *supra.*, the Court danced around the question of whether or not the territorial seas constituted sovereign territory, but did not decide the issue. The *Haas* court noted that the Veterans Court had addressed some other “definitions” but that Mr. Haas had not explained why they were not relevant. *Id.* at 1184. The Veterans Court had compared 38 C.F.R. § 3.311a(a)(1) (1985)³ (defining “service in the Republic of Vietnam” as “includ[ing] service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam”), with 38 C.F.R. § 3.313 (1990) (entitled “Claims based on service in Vietnam” and defining “service in the Republic of Vietnam” as including “service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam”). *Haas v. Nicholson* 20 Vet.App. 257, 264 (Vet.App. 2006).

In a denial of a request for rehearing, the Federal Circuit in *Haas* argued that there

³ This provision, now redesignated 38 C.F.R. 3.309(e), authorizes benefits for Non Hodgkins Lymphoma victims, including Blue Water Navy veterans.

are some circumstances when the sovereign territory does not include the territorial seas. The *Haas* majority argued that in light of *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir.1995), which held that statutory references to presence “in” a country do not include presence in the airspace or in the territorial waters surrounding the country, the words “service in the Republic of Vietnam” could be described as ambiguous. *Haas*, 544 F.3d at 1309. In actuality, the Second Circuit in *Zhang*, did not question whether the territorial seas constituted sovereign territory. The *Zhang* court noted that the issue dealt with regulation of human habitats by immigration law, which applied on land rather than sea, and that because a person is restrained on a vessel and cannot move directly ashore they are not considered to have a physical presence in the country. *Id.* at 754. *Zhang* actually noted that 8 C.F.R. § 287.1(a)(1) defined the U. S. external boundary as:

“the land boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law.”

Additionally, the *Haas* Court did not consider the Geneva Accords, the Paris Peace Treaty or the JCS position that the United States had recognized sovereignty over the territorial seas out to the twelve mile limit. .

The *Haas* court majority went on to argue that since territorial seas are sometimes included in the definition of the United States and sometime not, depending upon which portion of the United States Code is referenced, that it cannot be said that the territorial seas were part of the RVN. *Haas* 544 F.3d at 1309-1310. This is incorrect. Under the 1958 Treaty, the United States can limit its own jurisdiction for a particular internal

purpose. It cannot limit the jurisdiction of another nation. In other words, even if *arguendo* there is ambiguity in the application of the Treaty to United States waters, that does not translate into ambiguity concerning the territorial seas of Vietnam. More importantly, the United States has recognized Vietnamese sovereignty over the territorial seas in two treaties and through its enforcement of that sovereignty during the Vietnam War.

Accordingly, the Treaty provisions should be given their plain meaning.

Additionally, the Supreme Court has adopted the definitions of the 1958 Treaty, incorporating it into domestic law. *United States v. Alaska* 521 U.S. 1, 8 (1997).

Accordingly, any ship entering the natural bays and harbors or the territorial seas of Vietnam has entered that nation's sovereign territory. Since they operated within the boundaries, these ships were within the national boundaries and served "in the Republic of Vietnam" for purposes of domestic law. Even if the United States had not recognized sovereignty over the territorial seas, this determination is and should be binding on the Secretary, especially in light of the pro-claimant canons discussed in *Gardner, supra*.

In *Gray, supra.*, at 326, the Court noted that the 1958 Treaty was adopted for purposes of the Submerged Lands Act in *United States v. California*, 381 U.S. 139, 165 (1965) and *United States v. Louisiana*, 394 U.S. 11 (1968) but that the Court did not signal a general intent to adopt the definition for all determinations of inland waters. The boundaries of internal or inland waters, territorial seas and the contiguous zone usually only arise in the course of disputes over submerged lands. Since sovereignty is conceded

over inland waters and the territorial seas, the only question is where to draw the line. It obviously cannot be drawn on the water but only on the underlying submerged land.⁴

Applying the appropriate canons of statutory construction in veterans cases, the *Haas* case, which did not embrace those canons, must be limited to its facts.

II. The BVA's reliance upon 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)] in Reaching Their Decision Was Clear Error since That Notice Misstates the Facts of Naval Operations off of Vietnam and Has Been Repeatedly Debunked.

The Federal Register notice relied upon by the Board and to at least some extent by the *Haas* court has been a roundly debunked misrepresentation of facts punctuated with fatal leaps of logic that failed to connect facts to conclusions.

As an initial matter, the VA notice falsely claimed that the NRCET study “was not peer reviewed or published and, to our knowledge, has never been cited in any subsequent reputable study concerning herbicide exposure.” Dr. Caroline Gaus, one of the authors of the NRCET study, in her response to the VA, noted that:

The study was accepted for presentation at the 21st International Symposium on Halogenated Environmental Organic Pollutants and POPs and is published in the associated peer reviewed conference proceedings: Müller, J.F., Gaus, C., Bundred, K., Alberts, V., Moore, M.R., Horsley, K., 2001. Co-distillation of TCDD and other POPs during distillation of water - a potential source for exposure. *Organohalogen Compounds* 52, 243-246. The results of the study were also accepted for presentation at the IXth International Congress of Toxicology; the abstract is published in: Mueller, J.F., Gaus, C., Bundred, K., Moore, M.R., Horsley, K., 2001. *Water*

⁴ The Submerged Lands Act was passed by Congress to *inter alia*, define the boundaries of State sovereignty over submerged lands under navigable waters. 43 U.S.C. § 1301 *et. seq.*

volatility of dioxins - exposure through consumption of distilled water. Toxicology 164, 157-158.

The study was cited in "*The Third Australian Vietnam Veterans Mortality Study*" published in 2005 by the Department of Veterans' Affairs and Australian Institute of Health and Welfare and resulted in the Department's consideration of Royal Australian Navy Vietnam Veterans as potentially exposed Vietnam Veterans. RBA 285.

Based on the acceptance of the report by the Australian VA, there was no need for further peer review. RBA 290 (285-300). Nonetheless, the IOM reviewed and later replicated the Australian study and validated the results. IOM I (RBA 337-40) and IOM II (Appendix). The VA then went on to cast a red herring by stating that "VA's scientific experts have noted many problems with this study that caution against placing significant reliance on the study. In particular, the authors of the Australian study themselves noted that there was substantial uncertainty in their assumptions regarding the concentration of dioxin that may have been present in estuarine waters during the Vietnam War."

Dr. Gaus responded as follows:

The problem referred to in this comment is associated with estimating the exposure level of Vietnam Veterans, not with the study's primary finding that exposure to dioxins was likely if i) drinking water was sourced via distillation and ii) the source water was contaminated.

As highlighted by the authors, the exact level of exposure via this pathway is uncertain due to the lack of data on contaminant levels in the source water during the Vietnam War. The attempt made by the study to estimate the level of exposure serves only as an indication that exposure may have been considerable (and depends on the concentrations in the source water). Hence, the problem lies in the lack of exposure information, not with the study. The study clearly demonstrates that if source water is contaminated, dioxins are expected to co-distil with drinking water.

The study attempted to provide an estimate on the concentrations of dioxins in source water (0.043-0.69 ng/L). While the uncertainty around this value is large (approximately in the order of a factor of 10 or more), it cannot be determined whether it represents an over- or underestimate (which would also depend on location). Hence, it would be difficult to determine whether the level of exposure was similar, higher or lower compared to veterans who served on land. However, the study demonstrates that exposure is likely to have occurred if source water was contaminated and suggests that exposure may have been considerable. RBA 285-86.

Given the enrichment factor found by NRCET and confirmed by the IOM, the exposure would have indeed been considerable. The culmination effect of the repeated inflow of the dioxin would have concentrated the contaminants in the piping, equipment and potable water tanks. RBA 291.

The VA notice went on to question whether the ships of the Royal Australian Navy used the same systems as American built ships. Many Australian ships were American built, especially the gun ships of the *Charles F. Adams* class. RBA 292. (287-300). All used the same type of evaporation distillation system, RBA 240-42, 292 (287-300). The VA Notice seemed to imply that the ships did not distill their own water and that sailors did not drink distilled water. That is preposterous. RBA 291-92 (287-300).

Despite the fact that there was voluminous evidence contesting this Federal Register notice, the Board gave it undue weight. RBA 19 (2-23).

The Board must assess and weigh the evidence. *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed.Cir.1997); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995). This is not just a right, it is a responsibility. The Board's assessment of the weight of the evidence must be plausible and understandable in order to facilitate judicial review. If on the other hand,

when the supportive evidence leaves the reviewing court with a definite and firm conviction that a mistake has been committed.” the action is clearly erroneous. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). That is the case here.

Initially, the so called VA scientists and experts were never identified or made available for interview. The author of the VA note does not even use proper nautical terminology. Many of the conclusions are false (as with the peer review) or simply ludicrous (such as questioning whether or not the sailors, deployed for months on end, drank water). The failure to recognize basic facts such as the common use of the evaporation distillation system and the fact that the Australian gun ships were designed and built in the United States further calls the credibility into question.

The preposterous conclusions of the VA Notice were then decimated by the evidence of one of the NRCET report’s authors and two retired Navy Commanders with engineering experience to include the water distillation and distribution system. RBA 240-44, 285-310. No qualifications for the VA experts and scientists was presented to the Board. Presumably no pertinent qualifications exist.

The actions of the Board in weighing the evidence were clearly erroneous. The Court should vacate and remand to the Board to conduct a proper balancing test.

III. The BVA Failed to Consider the Issue of Direct Exposure Based on the Presence of Agent Orange in the Waters, Including the Territorial Sea, Off the Mekong River, Through Which the Veteran’s Ship Transited.

It is well settled that under 38 U.S.C. § 1113(b) a veteran may establish service connection with proof of actual direct causation. *Wynn v. Gober* 17 Vet.App. 460

(Vet.App. 2000). Such evidence is established by satisfactory proof of direct service connection. *See Combee v. Brown*, 34 F.3d 1039 (Fed.Cir.1994). The direct exposure argument was fairly raised before the Board, RBA 38-46 (30-48). The Board's failure to review and analyze the veteran's direct exposure argument was clearly erroneous.

The hard fact, which the Secretary has failed to grasp, is that the Agent Orange, which was mixed with petroleum to improve its adherence to plant life, floated down the rivers and streams and out to sea. There was no magic invisible Agent Orange filter to prevent the dioxin from transiting to the open sea. Despite these common knowledge facts, the Secretary irrationally claims that there is no proof or evidence that Agent Orange entered the South China Sea. The Secretary continues to live in a fantasy world where the laws of nature do not apply.

RBA 348 shows the discharge of silt and dirt from the Mekong River into the South China Sea. This forms a discharge plume caused by the mixture of salt and fresh water. 349-55. In two weeks, the plume could be expected to travel several hundred kilometers. RBA 349-55, 361 (361-72). The sediment discharge of the Mekong is similar to that of the Mississippi. RBA 356 (356-60). In fact the sediment discharge is larger than the Amazon and about 85% of the Yangtze. *Id.* Suspended sediment which can be shown in the picture is discharged down river. RBA 358 (356-60). The Mekong is one of the largest rivers in the world, discharging 475 cubic kilometers of water annually. RBA 349-55. The amount of river water present in the territorial seas would vary based on time of year, direction of the wind, water runoff, currents, tides and other

factors. Dr. Robinson Hoirdoi,⁵ the author of Mekong River studies notes that the range would never be lower than 20% and could be as high as 51-72%. The depth of the barocline current containing the Mekong River water could be from 5-10 meters, which is well below the distillate plant's sea intake. RBA 351 (349-55).

The IOM found that the TCDD dioxin would adhere to sediment and that any half life deterioration of the dioxin in water would be hampered by the adherence to sediment. IOM II at 75. While photolysis would cause half-life deterioration of the dioxin mixed in the water in between 21 hours and 118 hours, IOM II at 75, this would not be true with the dioxin that adhered to the sediment. Studies showed that the TCDD half life in sediment was as high as 600 days. IOM II at 74.

The IOM established that there was direct spraying of Agent Orange along riverbanks. IOM II at 52 and 63. Agent Orange also washed into rivers, especially during the monsoon season. IOM II at 79. The IOM went on to conclude:

Plausible pathways and routes of exposure of Blue Water Navy personnel to Agent Orange-associated TCDD include inhalation and dermal contact with aerosols from spraying operations that occurred at or near the coast when Blue Water Navy ships were nearby, contact with marine water, and uses of distilled water prepared from marine water.

IOM II at 105.

The IOM further found that resuspension of the sediment with the dioxin attached could occur, especially in the shallow waters off the coast of Vietnam.

⁵ Dr. Hoirdoi's qualifications can be found at RBA 353-55.

The Vietnam War occurred prior to the age of digital computing and most fire control computers were analog. Ships would tend to anchor to help stabilize their fire control solution. As the IOM noted, anchoring and weighing anchor would disturb the shallow sea bottom and result in resuspension. IOM II at 77-78. The cavitation of ships traveling at high speeds in response to call for fire missions or to launch and recover aircraft would also disturb the sea bottom causing resuspension.⁶

The initial IOM report found that “it is generally acknowledged that estuarine waters became contaminated with herbicides and dioxin as a result of shoreline spraying and runoff from spraying on land.” RBA 337 (337-40). The Committee also noted that it was not unreasonable to presume that personnel on ships operating closest to shore were exposed to Agent Orange. RBA 338 (337-40).

In light of the two IOM reports, which should be read *in para materia*, there is no rational basis for the Secretary’s position that Agent Orange did not enter the South China Sea or the bays and harbors. Notably IOM I found “members of the Blue Water Navy should not be excluded from the set of Vietnam-era veterans with presumed herbicide exposure.” RBA 340 (337-40). This was reconfirmed by IOM III. RBA 415-16.

In addition, the presence of Agent Orange was confirmed in Nha Trang Harbor although the harbor itself was not sprayed. RBA 393-400. That report studied the effects

⁶ In order to increase the wind over the deck while launching or recovering aircraft, ships, including carriers, will turn into the wind and increase to maximum speed. This increases the relative wind which helps to support the aerodynamic features of the aircraft.

of Agent Orange on coral in the harbor. Their findings are as follows:

The results of chromatographic and mass spectrometric analyses revealed the presence of persistent congeners PCDD and PCDF in bottom sediment samples from the bay. The spectrum and distribution pattern of congeners in all samples were close to those of the defoliant “Agent Orange” (predominantly 2,3,7,8-TCDD, 1,2,3,4,6,7,8-HpCCD, OCCD, and 1,2,3,7,8,9-HxCDF, OCDF). The total amounts of dioxins in the bottom sediments at sampling stations varied from 0.409 to 20.806 ng/kg in I-TEQ (Table 2), which is several orders of magnitude higher than the accepted sanitary standards.

RBA 399 (393-400). Notably the study concluded that the infiltration occurred via runoff from the Kay River into the harbor. *Id.* If the Agent Orange flowed into Nha Trang Harbor there is no reason to doubt that it flowed from the Mekong into the South China Sea. Given the hydrological events associated with that river the Agent Orange would have been discharged out to Dixie Station and beyond.

In Da Nang Harbor, there was a direct pathway from the Airport, where massive quantities of Agent Orange was stored, via a ditch and culvert into the Harbor. RBA 332-36, 407-10. The C-123 planes used in Operation Ranch Hand to spray the dioxin were routinely washed down on the tarmac. This waste water, along with any leakage and/or spillage eventually ran off into the Harbor area. Additionally Da Nang was heavily sprayed to eliminate foliage used by enemy mortar forces. Planes routinely sprayed over the harbor. RBA 336. Additionally, as in other parts of the country, the Agent Orange was sprayed over the Han River (Sông Hàn) which empties into the Harbor. The same type of effects would have happened off the Mekong.

Without question Agent Orange entered the South China Sea and the harbors of

Vietnam. This has been generally accepted (See IOM III and IV) and involves the science of hydrology and pure common sense. To believe that Agent Orange did not enter the South China Sea or the harbors is to imagine a giant invisible Agent Orange filter installed at the discharges of all rivers and streams. Such nonsense is absurd yet it appears to represent the Secretary's position. Consequently, the Secretary's position is arbitrary and capricious.

To find that a decision was arbitrary and capricious, the "Court must review whether a rational basis for the agency's decision was lacking or a violation of an applicable regulation or procedure. . . ." *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324,1333 (Fed. Cir. 2001). Agency action amounts to arbitrary and capricious conduct when it contravenes rules "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." *See, Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970).

A reviewing court must evaluate the agency action to determine whether it was based on the consideration of all relevant factors and whether there was a clear error of judgment. *Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Additionally, the agency must articulate an explanation for its decision that rationally connects the facts and the decision. *Id.* The general standard to determine whether the actions of an agency are arbitrary and capricious, was announced in *Milena Ship Management Company v. R. Richard Newcomb*, 995 F.2d 620 (5th Cir. 1993). In *Milena Ship*, the Fifth Circuit held that the decision must be reviewed

to determine whether the agency acted within its authority, adequately considered all the relevant factors, and provided a reasoned basis for its decision. *Id.* at 623.

The actions of the Secretary are arbitrary and capricious in several ways. As a threshold matter, the fact that the Secretary ignored a ratified treaty, formal United States recognition of sovereignty and Supreme Court precedent constitutes arbitrary and capricious behavior. Obviously, Congress would want the Secretary to rely upon treaties signed by the President and ratified by Congress. Additionally, Congress would expect the Secretary to rely upon established Supreme Court precedent.

The failure of the Secretary to recognize the presence of the Agent Orange in the harbors, not only violates the 1958 Treaty but is simply absurd. The Secretary has chosen to ignore the Nha Trang study, RBA 393-400, and the very persuasive evidence of contamination in Da Nang Harbor, RBA 332-36, 407-10. The Secretary remains in rejection mode, failing to consider any evidence of contamination, no matter how strong. This is certainly a failure to consider an important part of the problem, runs counter to the evidence and is so implausible that it cannot be ascribed to agency expertise or a difference in view. Additionally, the agency really has no expertise in this area.

As discussed *supra*, individual decision makers had no naval, engineering or hydrology experience. The lack of experience is evident in the 73 Fed.Reg. 20,566, 20,568 (Apr. 16, 2008) which took a nonsensical approach to the problem even to the point of referring to ships as “boats.” Rather than discussing issues, VA officials were

only prepared to deny and stonewall reasoned attempts to communicate with them.

The irrational action of the Secretary in ignoring accepted scientific principles of hydrology constitutes arbitrary and capricious behavior. Here the Secretary has ignored the hydrological effects as documented in RBA 349-372 and the report of IOM II concerning the longevity of the dioxin when attached to sediment. The Secretary further ignored the presence of Agent Orange in Nha Trang Harbor two decades after the end of the war. RBA 393-400. Finally they have chosen to ignore the report prepared by the State of New Jersey documenting the dioxin's presence in seafood 150 nautical miles off the east coast of the United States after an unauthorized dumping. RBA 374 (373-92).

Here the Secretary has viewed the issue with a jaundiced, anti-veteran eye. All evidence, no matter how strong has been rejected or mischaracterized. The 14 year saga to restore these benefits has been met with resistance and even contempt. Viewing the evidence delineated herein, even if the light most favorable to the Secretary shows that the veteran has established his direct exposure claim.

While the reviewing court cannot substitute its judgment for the agency, it must take into account the weight of countervailing evidence to ascertain whether the fact finder reached a reasonable conclusion. *Renicker v. United States*, 17 Cl. Ct. 611 (1989).

In the instant case, IOM I said it best.

The evidence that this committee has reviewed makes limiting *Vietnam service* to those who set foot on Vietnamese soil seem inappropriate. The ongoing series of hearings and appeals in the US Court of Appeals for Veterans Claims (*Haas v. Nicholson*) reflect the controversy. As discussed in Chapter 3, there is

little reason to believe that exposure of US military personnel to the herbicides sprayed in Vietnam was limited to those who actually set foot in the Republic of Vietnam. Having reviewed the Australian report (NRCET, 2002) on the fate of TCDD when seawater is distilled to produce drinking water, the committee is convinced that this use of seawater would provide a feasible route of exposure of personnel in the Blue Water Navy, which might have been supplemented by drift from herbicide spraying.

IOM I at 655. Notably the final conclusion of IOM I was:

Given the available evidence, the committee recommends that members of the Blue Water Navy should not be excluded from the set of Vietnam-era veterans with presumed herbicide exposure.

The Secretary has no evidence to support his position. All he has done is criticize evidence put forward by the veterans and ignore both direct and circumstantial evidence of Agent Orange infiltration into the harbors, bays and territorial seas. He has twisted or ignored the international and domestic law of the sea to deny benefits to this group of veterans. He has not proffered any evidence other than his own conjecture to support his position. His position is not pro-claimant. Instead it is distinctly anti-veteran.

The Board also ejected key medical evidence that supported the veteran's claim of direct exposure. RBA 14-15 (2-23). The diagnosis was consistent with Agent Orange exposure and the VA physician found that it was "at least as likely as not" that the diabetes and prostate (and now ischemic heart disease) was caused by the dioxin if the veteran was exposed to Agent Orange.

The presence of Agent Orange in the harbors and bays and territorial seas of Vietnam does not in itself prove exposure. Established science, however, shows how the

crew of Australian and American ships were exposed. Faced with an increase in cancer incidence among Royal Australian Navy personnel significantly greater than among Army personnel who fought in-country, the Australian Department of Veterans Affairs sought the answer. The cancer incidence increase (22-26% above the norm for Navy compared with 11-13% for Army) is documented RBA 401-405. In 2002, as the American Department of Veterans Affairs (VA) was beginning to deny the presumption of exposure to Navy veterans, NRCET published the result of their study. (NRCET study).

The study noted that ships in the near shore marine waters collected water that was contaminated with the runoff from areas sprayed with Agent Orange. NRCET Report at 10. The distilling plants aboard the ship, which converted the salt water into water for the boilers and potable drinking water, according to the study, co-distilled the dioxin and actually enhanced the effect of the Agent Orange. NRCET Report at 7.

As confirmed by the NRCET report, the co-distillation of the Agent Orange caused it to contaminate the distillers and the water supply. Hydration is important in the tropics and potable water tanks were replenished daily. Sailors would have ingested a significant amount of water from the ship's tanks. Additionally they would have showered in it and brushed their teeth with it. Their clothes would have been washed in it. This water would also have been used to prepare food and wash dishes. Consequently, crew members were directly exposed to Agent Orange.

Here the Board did not address the direct exposure claim other than to say that the

scientific treatises showing evidence of Agent Orange infiltration into the bays, harbors and territorial seas of the Republic of Vietnam as being too general. Since samples were not obtained by the ship as it transited these contaminated waters, the Board has set the bar too high for any veteran to meet. This confirms the Board's rejection of the pro-veteran canons of construction required by law. The scientific evidence shows that the discharge plume, containing the Agent Orange mixed with petroleum, flowed through the territorial seas at its widest point. The *Intrepid* did enter the territorial seas off the Mekong Delta where the discharge plume was at its most pronounced. Even the VA conceded under question before the United States Senate that the evaporation distillation process would have enriched the dioxin. *See, supra.*, footnote 2.

Notably the "Veterans Law Judge" called the presentation to the board on direct exposure "fascinating" and "interesting." RBA 90 (74-92). He acknowledged that direct exposure was the "crux" of the claim. RBA 91 (74-92). Curiously, in light of his opinion which stated the evidence was too general, he also indicated that evidence "and stuff" had been collected and presented to prove the claim. *Id.* Nowhere does he show why, under the pro-veteran canons of construction why he later rejected the evidence.

It is well settled that when records are unavailable through no fault of the veterans own, the BVA bears a heightened obligation to "explain its findings and conclusions and to consider carefully the benefit-of-the-doubt rule." *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991); *see also Moore v. Derwinski*, 1 Vet.App. 401, 405-06 (1991), *Godwin v.*

Derwinski, 1 Vet.App. 419, 426 (1991). The Board failed on both counts.

Here the records the Board so wistfully required simply did not exist. No samples of the discharge plume were taken by the navy and no tests were performed. There was no explanation by the Board why the strong circumstantial case of Agent Orange infiltration was not sufficient. The facts and evidence presented were not challenged. There was no effort to show the evidence or the methodology was faulty. It is uncontested that Agent Orange from the rivers was present in the South China Sea.

Nor did the Board apply the benefit of the doubt rule. Under this rule, when the Board has made its determinations as to credibility and probative value of all pertinent evidence of record and there is approximate balance of positive and negative evidence, veteran prevails. *Bucklinger v. Brown*, 5 Vet.App. 435 (Vet.App.1993).

Consequently the Board erred in its rather paltry analysis of the direct exposure claim and the decision should be reversed and vacated.

IV. In Light of *Gray v. McDonald*, 27 Vet. App. 313 (2015), the Secretary of Veterans Affairs' Interpretation That the Territorial Seas of the Republic of Vietnam Was Excluded from Regulatory Definition of Inland Waterway, Service on Which Would Give Rise to Presumption That Navy Veteran Seeking Disability Benefits Was Exposed to Herbicide, Was Arbitrary and Capricious.

The Secretary irrationally claims that there is no proof or evidence that Agent Orange entered Vietnamese bays and harbors or territorial seas. This is simply incorrect.

The *Gray v. McDonald* case has redefined the Blue Water Navy problem for the VA. The *Gray* court has found that the Secretary acted irrationally in excluding the bays

and harbors from the presumption of exposure. The VA had historically argued that spraying took place only over land and not over the water areas. In doing so, they limited the presumption of exposure to those who set foot on the ground or entered the rivers.

The *Gray* Court went on to note that the VA excluded bays and harbors because: “open deep-water harbors are not similar to the rivers, canals, and estuaries that make up the inland waterway system.” *Gray*, 27 Vet.App. At 322.

As discussed *supra*, the VA ignores the fact that Agent Orange, mixed with petroleum, would float down the rivers and streams to the harbor. Runoff from the monsoon would wash the Agent Orange into the rivers or directly into the harbor. This is confirmed by the following: Pavlov et. al, *Present-Day State of Coral Reefs of Nha Trang Bay (Southern Vietnam) and Possible Reasons for the Disturbance of Habitats of Scleractinian Coral* (2003). RBA 393-400.

Gray gives rise to the question of where the inland river ends. Certainly there is an area where the fresh water of the river mixes with the salt water of the sea. While the salinity will increase as the river discharge (known as a plume) goes farther and farther from land, the VA failed to ascertain the point where the river discharge ceases. That plume can be significant and actually can extend for miles.

As discussed *supra.*, the Mekong River and other rivers in Vietnam discharge silt and dirt into the South China Sea. The river discharge, especially off the Mekong, extends for hundreds of kilometers. RBA 348-72.

In *Gray*, this Court found the VA definition of inland waters irrational. *Gray*, 27 Vet.App. At 326. The *Gray* court went on to vacate the regulation and direct the Secretary to ‘exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulation's emphasis on the probability of exposure.’ *Id* at 327. The Secretary defied this invitation and doubled down on his previous exclusions. Accordingly the rule today remains “boots on the ground” without any rational analysis of where the river discharge ends.

The definitions of arbitrary and capricious actions are discussed *supra*. Certainly the Secretary’s action meets that standard. He failed to address an important aspect of the problem by refusing to explore the limits of the probability of exposure. He failed to consider evidence showing the discharge plume’s encroachment into the South China Sea. He did not provide a proper explanation of their reasoning, if such reasoning actually occurred. They certainly acted against the will of this Court and the desires of Congress.

Although this Court declined to provide a definition of inland waters in *Gray*, Appellant urges them to do so now. Further remands to the Secretary appear to be futile as he would merely triple down on his irrational actions. Inland, sometimes called internal waters are clearly defined by international law. Article 5 of the 1958 treaty defines these waters as: “ 1.Waters on the landward side of the baseline of the territorial sea form part of the internal waters.” The territorial seas of the Republic of Vietnam are shown by the dashed line on the map included in the record. RBA 347. Waters inward of

the territorial seas should be included in the inland waters definition.⁷

Additionally, since the evidence shows that the Mekong River discharge plume extends for several hundred kilometers, the Court should require the inclusion of the territorial seas within the presumption of exposure.

As discussed *supra.*, the Court is free to do this, even in light of *Haas*, by applying the pro-veteran canons of construction. This is consistent with the findings of the hydrologists in the treatises and the affidavit at RBA 349-55.

Consequently, the current regulation excluding those who served in the bays, harbors and territorial seas must be vacated and this case reversed for further proceedings.

Conclusion

For the reasons delineated herein, the Court should find for the veteran.

Respectfully Submitted,
//s// John B. Wells
John B. Wells
Attorney for Appellant
LA Bar #23970
P. O. Box 5235
Slidell, LA 70469-5235
769 Robert Blvd, Suite 201D
Slidell, LA 70458
985-641-1855
985-649-1536 (fax)

⁷ The red solid line on the map immediately landward of the dashed line marks the baseline or the outermost demarcation of internal waters. *See* 1958 Treaty Article 4 § 1. The bold line seaward of the territorial seas was the Vietnam Service Medal demarcation line. NOTE: The RBA chart is less than clear. A clear color copy was provided to the Board and attached hereto as Exhibit A. Authentication for the plotting is provided at RBA 406.

CERTIFICATE OF SERVICE

I, John B, Wells, do hereby certify that I have this date served via the Court's EC/CMF system, a true and exact copy of this brief to the court and to counsel for Appellee this 27th day of March, 2016.

//s// John B. Wells
John B. Wells

APPENDIX

RBA 347

STRAIGHT BASELINES

VIETNAM

Scale 1:500,000
Vertical Datum: Mean Sea Level
Horizontal Datum: WGS 84
Projection: UTM
Zone: 48N

Legend:
1. Straight Baseline
2. Limit of Territorial Sea
3. VN Service Medal

- 1. Straight Baseline
- 2. Limit of Territorial Sea
- 3. VN Service Medal

Solid Red Line - Baseline
Dashed Line - Limit of Territorial Seas
Solid Blue Line - VN Service Medal

