**APPELLANT'S BRIEF**

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

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15-4082

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ALFRED PROCOPIO,
Appellant,

v.

ROBERT MCDONALD,

Secretary of Veterans Affairs,
Appellee.

Original Reply Brief of Appellant

**Submitted by:**

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## Statement of the Case

The parties generally agree on the facts of the case. The Secretary did not address the "History of the Blue Water Navy Controversy" and presumable agrees it is accurate.

The Secretary also notes that some of the evidence submitted in this case was also used in the case of *Blue Water Navy Vietnam Veterans Association v. McDonald*, 82 F.Supp. 3d 43 (2015) which was dismissed on **jurisdictional** grounds. The court did not make any determination on the merits. Oral argument on the appeal was held on March 10, 2016 and the decision as to whether the district court can hear the matter is pending.

## Summary of the Argument

The Secretary in his brief never squarely addresses the arguments of Procopio. Instead he tried to lay a false trail full of red herrings by claiming that the Appellant is asking the Court to overrule *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) *aff'd* 544 F.3d 1306 (Fed. Cir 2008). He summarily rejects the distinguishing features of *Haas* as well as the well accepted hydrology principles that were recognized in *Gray v. McDonald*, 27 Vet. App. 313 (2015). Rather than presenting a concise legal argument to contest the issues raised by Procopio, perhaps because he cannot, the Secretary engages in a frolic down the path of irrelevancy.

Appellee does not contest the strong pattern of circumstantial evidence presented by Procopio. Like the Board, he merely ignores or dismisses it. The Secretary falsely claims that Procopio's case relies only upon the Australian evaporation distillation report, when, in fact, this validated and now generally accepted report, is but one piece of the

puzzle. The evaporation distillation process certain enriched the Agent Orange dioxin, but it was the hydrological evidence that demonstrated how that dioxin reached the *Intrepid* as it steamed through the territorial seas of the Republic of Vietnam.

Recognizing that this Court cannot overrule *Haas*, the legal evidence concerning Vietnamese sovereignty over the territorial seas, when viewed through the prism of the pro-veteran canons of construction, results in a conclusion distinguishable from *Haas*. As *Haas* noted that their decision did not consider that canon. Accordingly, it is an issue ripe for consideration.

Nor is the discussion of the Federal Register notice at 73 Fed.Reg. 20,566, 20568 inappropriate. Procopio is not asking this Court to review rulemaking since this notice was not a final rule and no final rule was ever promulgated. Rather the discussion is relevant because it was relied upon by the Board, despite strong contrary evidence that was also presented to the Board.

## 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 (2011).

In his brief at 27, the Secretary states that Procopio "fails to specifically identify these canons or explain, based on the specific facts of this case, how any further consideration of such canons would be determinative in this case." They did not challenge the existence of the pro-claimant canons or claim that they are inapplicable to

this case. Instead they claim that the matter was not plead with sufficient particularity.

As plainly stated in the articulation of the issue and carefully explained in the opening brief beginning at page 9, the *Haas* Court specifically stated that they did not make their decision under the pro-claimant canon holding that ambiguity in a veteran's benefits statute should be resolved in favor of the veteran. *Haas*, 544 F.3d 1308. The Supreme Court requires the agency's interpretation to be balanced against the Congressional intent with any ambiguity resolved in the veteran's favor. *Brown v. Gardner,* 513 U.S. 115, 117-18 (1994). The *Haas* court did not apply the pro-veteran canons because it was not raised before the Court of Appeals for Veterans Claims. *Haas v. Peake*, 544 F.3d at1308. Since the *Haas* court did not apply this pro-veteran canon, this Court is free to come to a different decision if it is applied to the instant case.

The proper application of this canon is critical. The *Haas* court applied the deference required by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 844 (1984).[1] Historically the application of this pro-veteran canon has run aground in the shoal water of *Chevron* deference. The Federal Circuit noted that:

> Where, as here, a statute is ambiguous and the administering agency has issued a reasonable gap-filling or ambiguity-resolving regulation, we must uphold that regulation. No adjudicatory scheme can produce perfect results in every case, and the law does not require that, to be valid, an agency

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[1] The reign of *Chevron* deference may be nearing an end. Congress is currently debating whether court's should review agency decisions *de novo*. HR 4768 which will require a *de novo* reviewed passed the House on July 16, 2016 and is pending before the Senate. https://www.congress.gov/bill/114th-congress/house-bill/4768/text?q=%7B%22search%22%3A%5B%22separation+of+powers+restration+act%22%5D%7D&resultIndex=1.

regulation do so. The applicable standard is merely reasonableness . . .

*Sears v. Principi*, 349 F.3d 1326, 1332 (Fed. Cir. 2003).

In light of Sears, the question therefore becomes whether or not the Secretary's interpretation was reasonable and whether it "conflict[s] with the spirit of the veterans' benefits scheme in any substantial way." *Id*. at 1332. If this Court finds that the Secretary's interpretation is unreasonable or in conflict with the spirit of the veteran's benefits scheme it must discount *Chevron* and apply the pro-veteran's canon. The *Haas* court left this matter open. *Haas,* 544 F.3d at 1308.

The proper application of these pro-claimant canons are important because it effectively gives this court a *de novo* look at the issue, especially if it finds the Secretary's actions unreasonable. As carefully explained in the opening brief, Procopio should have the benefit of the pro-veteran canon of construction to 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.

It is undisputed and the record reflects that Procopio served in the territorial seas. RBA 78 (74-92), 227, 234, 235, 237 (226-239). While not contesting this proven fact, Appellee argued weakly that Procopio is trying to ask the Court to overrule *Haas*. That is not the case. Procopio is asking this Court to review the definition under the accepted canons of statutory construction to ascertain whether the Secretary's decisions are irrational, arbitrary and capricious, unsupported by substantial evidence or contrary to the Constitution, laws and treaties of the United States. The Secretary is free to argue that

even under those pro-veteran canons his decision was reasonable. He chose not to do so and that argument should be deemed waived.

Nor did the Appellee deny that Vietnamese sovereignty extended over the territorial seas or that the United States recognized this sovereignty and that it extended twelve miles from the baseline. *See, generally,* Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U.S.T. 1607, T.I.A.S. No. 5639, Geneva Accords Art. 4 and the 1973 Paris Peace Treaty that ended the war. These documents and their relevant application were all cited in the opening brief.

Given the Secretary's underlying concessions that Procopio entered the sovereign territory of Vietnam, this Court now must determine whether the Secretary's decision excluding him from the presumption of exposure was unreasonable.

The current policy of the Secretary is that the right to the presumption ends at the mouth of the rivers and other waterways at the point they discharge into the bays, harbors and territorial seas. The Secretary has drawn a line across the mouth of the Vietnamese rivers and presumed that a magic and invisible Agent Orange filter stopped the petroleum and dioxin from discharging into the bays and harbors. He has provided no hydrological or other scientific evidence to support the position. Basically he has said that the Secretary, a former Army Captain with no legal or naval experience, could draw the line at the mouth of the river because he is the Secretary.

This Court, in *Gray*, has already found that policy arbitrary and capricious:

Unlike in *Haas v. Peake,* the seemingly arbitrary and inconsistent results

> here are not a tolerable by-product of line-drawing. *Haas* deferred to VA's line-drawing as a proxy for exposure and acknowledged that line-drawing necessarily led to over- and under-inclusiveness, which alone did not render the line unreasonable. However, here, the arbitrary outcomes are not the result of a clear consistent rule anchored to the regulation. The inconsistent application of the presumption to waterways that open to the ocean flows from VA's improper reliance on factors unrelated to the regulation—like ease of entry—to draw the line. The Court appreciates that VA faces a difficult task. However, VA is not free to label bodies of water by flipping a coin, yet the outcomes here appear just as arbitrary.

*Gray v. McDonald*, 27 Vet. App. At 325.

Notably the Secretary chose not to appeal *Gray* and it remains good law today. While *Gray* addressed the Secretary's exclusions of the bays and harbors, it **applied to the exact same policy as in the instant case**.[2] Since the policy affecting Procopio also is based on an arbitrary line rather than the potential for exposure, *Gray,* along with common sense, requires that it be found to be arbitrary, capricious and irrational. The potential for exposure and Procopio's direct exposure will be discussed below.

Here, the Board erred, however, in not finding that the territorial seas are part of the Republic of Vietnam and that Procopio's duty took him to the Republic of Vietnam. The finding is clearly erroneous and must be vacated.

## 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

[2] In response to *Gray*, the Secretary issue a new policy on 5 February 2016 which effectively "doubled down" on the same policy. The new policy, like the old, failed to address the likelihood of exposure and merely drew an arbitrary line. It is currently being challenged pursuant to 38 U.S.C. § 502 in the Court of Appeals for the Federal Circuit. *Blue Water Navy Vietnam Veterans Association v. McDonald,* docket 2016-1793.

**Debunked.**

As a threshold matter, the Secretary argues that this is an improper attempt to ask this Court to conduct a review of rulemaking pursuant to 38 U.S.C. § 502. That is incorrect and an apparent "red herring." No court could conduct judicial review of this notice under a rulemaking provision since this was not a final rule - nor was one ever promulgated. This Court can and should examine the validity of the article when balanced against countervailing evidence, to determine whether the Board gave it improper weight. Here, the Secretary was unable to dispute the fact that the Federal Register article in question should have been given little or any weight, so he attempts to collaterally attack the issue as being outside of the Courts jurisdiction.

Here the Secretary did not dispute the fact that the Secretary's notice in 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008) was in fact inaccurate and has been debunked. There was no effort to refute the strong evidence that it was error for the Board to even consider it. The applicability of the Federal Register notice was an issue in Mr. Procopio's previous case before this Court and was relied upon by the Board. *Procopio v. Shinseki*, 26 Vet. App. 76, 85 (2012).[3]

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[3] The specific issue was a statement that the VA was "unable to obtain official confirmation ... from the Department of Defense" that *any* U.S. Navy ships used that process. *Procopio v. Shinseki*, 26 Vet. App. at 85. A request for the pertinent technical manual was made RBA 8 (2-23), but abandoned due to the overwhelming evidence that the same process was used. RBA 240-244 (240-244), 285-286 (285-286), 287-300 (287-300), 311-323 (311-323).

Although the Secretary tries to minimize the Board's reliance on the inaccurate Federal Register notice, the record reflects that the Board placed heavy emphasis on it. RBA 18 (2-23) (the Board places little weight on these submissions [the Australian distillation study] and they are outweighed by other evidence of record as outlined above. [the Federal Register notice]). The Board quoted as follows at RBA 19 (2-23):

> First, as the authors of the Australian study themselves noted, there was substantial uncertainty in their assumptions regarding the concentration of dioxin that may have been present in estuarine waters during the Vietnam War.... Second, even with the concentrating effect found in the Australian study, the levels of exposure estimated in this study are not at all comparable to the exposures experienced by veterans who served on land where herbicides were applied.... Third, it is not clear that U.S. ships used distilled drinking water drawn from or near estuarine sources or, if they did, whether the distillation process was similar to that used by the Australian Navy.

The first VA objection is simply a misrepresentation. What the authors of the Australian study actually said was:

> TCDD exposure via drinking water may have been substantial, and it is likely that solely the consumption of drinking water resulted in exposure levels that exceeded the recommended Total Monthly Intake (TMI) values . . . significantly.

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) (hereinafter NRCET study) at 7. Author Dr. Caroline Gaus in her response to this Federal Register article stated:

> 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).

RBA 285 (285-286). Notably the calculations to estimate exposure was based upon "the first analytical results from fish samples that were caught during the early 1970's in contaminated waters from Vietnam and analyzed in the 1970's for TCDD." NRCET at 7.

The second objection claiming that even with enrichment, the concentration found at sea was less than on land is not correct. Dr. Gaus noted:

> 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 286 (285-286). Notably the Institute of Medicine also found that:

> [T]he committee concluded that it could not state with certainty that exposures to Blue Water Navy personnel, taken as a group, were qualitatively different from their Brown Water Navy and ground troop counterparts.

IOM (Institute of Medicine) 2011. *Blue Water Navy Vietnam Veterans and Agent Orange Exposure.* Washington, DC: The National Academies Press (hereinafter IOM II) at 233. The Committee went on to note that due to the passage of time, the exposure of Blue Water veterans such as Procopio should be a matter of policy rather than science. *Id*. at x.

The third objection, must be dismissed as frivolous. Water distillation did occur

within the estuarine waters in order to meet the requirements of the boilers and the needs of the crew. RBA 240-42 (240-244), 287-300 (287-300). Water was a constant problem aboard steam ships and distillation occurred around the clock.[4]

Probably the most damning critique of the Federal Register article was that two separate committees of the IOM found that the science was correct. RBA 340 (337-340) and IOM II at 133. This information was either in the RBA or argued at the hearing. Notably the IOM recommended that Blue Water Navy personnel not be excluded from the presumption.[5] RBA 338 (337-340).

The Board is required to consider all evidence of record and to consider, and discuss in its decision, all "potentially applicable" provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 592–93 (1991). The Board's reliance upon the Federal Register notice was clearly erroneous given the weight of the evidence against its accuracy. The Court should vacate the decision and remand with orders to consider the evidence without reliance on this article or at least to properly balance the Federal Register notice with subsequent evidence showing that it was incorrect.

## 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.

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[4] Even when distilling to reserve feed water rather than potable, the same system was used and the internals of the evaporation distillation system would be contaminated by the dioxin and would in turn contaminate potable water when it was distilled.

[5] All of these IOM studies were completed post-*Haas* and were not available to that court.

As discussed *supra*., the *Haas* Court recognized that a veteran can successfully make a claim for Agent Orange benefits based on direct exposure. Theoretically, if the veteran can prove that he was exposed anywhere, he should qualify for benefits.

The question is what standard of proof os required to confirm direct exposure. The Secretary argues that the bar must be set very high and the veteran should prove that his ship actually was contaminated with Agent Orange via the drinking water. That is an unreasonable standard. No tests for the dioxin were conducted aboard ship. There was no way to even determine whether the Agent Orange molecules floated alongside the ship as it plowed through the discharge plume from the Mekong River. Because of the absence of any evidence half a century after Procopio was exposed, the Board found and the Secretary argued, that the direct exposure argument must fail.

The Secretary weakly argues that the Board "found that Appellant's statements regarding exposure to Agent Orange were "outweighed by the more probative evidence to the contrary—namely, the responses from NPRC and review of the deck logs of the U.S.S. Intrepid showing no exposure to tactical herbicides, included Agent Orange." Appellee Brief at 24. The NPRC response, detailed at RBA 15 (2-23), merely stated that there was no evidence of any in-country service (which was never claimed). Nor would the deck logs show any evidence of exposure to tactical herbicides. First of all, no program existed to test for the dioxin. Secondly no instruments to test for the dioxin would have been installed on the ship. Thirdly, any test results would not normally be entered onto the deck logs since they are designed to memorialize navigation and

seamanship evolution which concern the operation and safety of the ship. *See*, OPNAVINST 3100.7 series. Accordingly, the evidence considered by the Board was no evidence at all.

The absence of corroborative records does not, in itself, render the lay evidence incredible. The Federal Circuit has examined that issue and noted:

> Rather, the Board, as fact finder, is obligated to, and fully justified in, determining whether lay evidence is credible in and of itself, i.e., because of possible bias, conflicting statements, etc. Nor do we hold that the Board cannot weigh the absence of contemporaneous medical evidence against the lay evidence of record. Under the correct interpretation of the relevant statutory and regulatory provisions, however, the Board cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence. If the Board concludes that the lay evidence presented by a veteran is credible and ultimately competent, the lack of contemporaneous medical evidence should not be an absolute bar

*Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006),

Here the instant case is even stronger than the appeal in *Buchanan.* The countervailing evidence is not lay evidence but expert treatises and affidavits. The Board must balance this evidence against the lack of documentary evidence. Since no documentary evidence could be expected to have been retained or even produced, the only fair finding is that the lay evidence is credible. The statements are buttressed by the development of an Agent Orange related diseases. Certainly, the veteran should be given the benefit of the doubt in this case. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). Here the veteran exceeds the *Gilbert* standard since he has presented credible and substantial evidence of Agent Orange dioxin contamination in the territorial seas and the Secretary

has produced no evidence to the contrary.

The evidence, although circumstantial is quite compelling. There is nothing that suggests that circumstantial evidence cannot be credible supporting evidence. *Sinopoli v. W.*, 17 Vet. App. 364 (2000). The evidence when read as the whole, proved the following points which did not receive due consideration by the Board.

The Mekong River discharges into the South China Sea. This discharge "plume" contains sediment. RBA 348 (348). The Mekong has similar attributes to the Mississippi River, RBA 356 (356-360) and the discharge plume can extend out for several hundred kilometers in two weeks. RBA 361 (356-60), RBA 370, 371 (361-372). The half life of the Agent Orange attached to sediment was greater than 600 days. IOM II at 74. Agent Orange dioxin would have traveled throughout the territorial seas and ships operating there would have been exposed. RBA 350-352 (349-355). The greatest exposure would be off the Mekong River where the *Intrepid* was operating on and around Dixie Station. RBA 350-51 (349-355). Additional evidence that the dioxin would travel far out to sea is found at RBA RBA 374 (373-392), where lethal levels of the dioxin was found in fish.

It has been conclusively proven that the dioxin traveled past the mouth of the river. A study has shown toxic levels of the dioxin in Nha Trang Harbor, which unlike most harbors is open to the sea. RBA 393-400 (393-400). Strong evidence also shows infiltration into Da Nang harbor. RBA 332-336 (332-336), 407-410 (407-410).

As discussed *supra*., the evaporation distillation system would have enriched the dioxin. Mr. David R. McLenachen, then Acting Deputy Under Secretary for Disability

Assistance, Veterans Benefits Administration, U.S. Department of Veterans Affairs conceded at a hearing before the Senate Veterans Affairs Committee that the evaporation distillation system would have enriched the Agent Orange dioxin if it was present. http://www.veterans.senate.gov/hearings/exposures09292015 at 1:33 to 1:34 (last visited October 18, 2015).

The Board conceded that Procopio has presented evidence to support and prove direct exposure. RBA 46-48 (30-48). Absent any evidence to the contrary showing that the dioxin dd not infiltrate to the South China Sea, and no such evidence exists to the knowledge of the Appellant and his Counsel, the Court should find that the Board's finding was clearly erroneous and vacate the decision.

## 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.

Other than claiming that *Gray* has no bearing on this case because it applies only to bays and harbors, the Secretary failed to address the issue. The salient matter here is not what body of water the rivers discharged into, but the fact that the Secretary, in his policy, does not consider the fact that they do discharge into other bodies of water. For this reason, as taught by *Gray*, the Secretary's policy, including his renewed "double down" policy is arbitrary, capricious and unsupported by substantial evidence.

The *Gray* Court, *supra*., specifically found that the regulation "both inconsistent

with the regulatory purpose and irrational. *Gray*, 27 Vet. App. at 326. While *Gray* distinguished *Haas* because the facts of that case did not consider bays and harbors, it did not limit the effect of the discharge plume to bays and harbors.

The most important teaching of *Gray* is that river water did not stop at the mouth of the river. This is in consonance with IOM II that found:

> 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*. (Emphasis added).

IOM II at 105.

All of the evidence points to contamination and the pathway to contamination was recognized by *Gray* and the IOM. The Secretary has done nothing to address this issue. Consequently the Secretary's policy needs to be invalidated. Accordingly, the Board's decision is clearly erroneous and must be set aside.

## **Conclusion**

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

Respectfully Submitted,
//s// John B. Wells
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## 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 25th day of July, 2016.

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