UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, INC., and MILITARY-VETERANS ADVOCACY, INC.,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:13cv1187-EGS**
ERIC K. SHINSEKI, Secretary of Veterans Affairs, in his official capacity,	)	
Defendant.	)	

DEFENDANT'S COMBINED MOTION FOR SUMMARY JUDGMENT, OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO PLAINTIFFS' STATEMENT ON ORAL ARGUMENT

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INTRODUCTION

Based on the findings of a report specifically examining whether available evidence demonstrated that Vietnam Veterans who served in deep-water naval vessels off the coast of Vietnam had been exposed to certain herbicides during their service, the Secretary of Veterans Affairs determined that available evidence did not support establishing a legal presumption that these Veterans had been exposed to these herbicides. Because that conclusion was reasonable, if the Court reaches the merits here, it should uphold the Secretary's determination.

In response to concerns about possible exposure of Vietnam Veterans to herbicides used in Vietnam, including the defoliant Agent Orange, Congress passed the Agent Orange Act of 1991. The Act established a presumption of exposure to certain herbicide agents for Veterans who "served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975 . . . unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service." 38 U.S.C. § 1116(f). The Act also enumerated a list of diseases that would be considered to have been incurred in or aggravated by such service for purposes of disability compensation by the U.S. Department of Veterans Affairs ("VA"). Id. § 1116(a)(2). Additionally, the Act directed the VA to issue regulations establishing a presumption of service connection for purposes of entitlement to disability compensation whenever the agency determines that a positive association exists between exposure to an herbicide agent and a particular disease. In short, the Act created two legal presumptions: one that affords Veterans with qualifying service a presumption of exposure to herbicides, and a second that affords Veterans a presumption of service connection for certain diseases the agency has determined to have a positive association with herbicide exposure.

Accordingly, on several occasions, the VA has established a disease-specific presumption-of-service connection for diseases determined to have a positive association with exposure to herbicide agents. For example, in 1996, the Secretary of Veterans Affairs established such a connection for prostate cancer and acute and subacute transient peripheral neuropathy. In 2003, the agency created a presumption of service connection for chronic lymphocytic leukemia. And in 2010, the VA established a presumption of service connection for ischemic heart disease, Parkinson's disease, and chronic B-cell leukemias.[1]

Although not required to do so by law, the VA asked the Institute of Medicine of the National Academies to undertake a special study to determine whether Vietnam Veterans who served in deep-water naval vessels off the coast of Vietnam ("Blue Water Veterans") had experienced exposures to herbicides comparable with those of Veterans who served on inland waters in Vietnam ("Brown Water Veterans") and those who served as ground troops in Vietnam. In 2011, the Institute issued a study concluding that it could not find enough data to determine whether or not Blue Water Veterans had been exposed to herbicides and their contaminants. Consequently, based on this report, the VA determined that the available evidence did not support establishing a presumption of exposure to herbicides for Blue Water Veterans.

Plaintiffs are two advocacy organizations that disagree with the VA's decision, and have challenged that decision. As explained in Defendant's motion to dismiss, the Court lacks jurisdiction over Plaintiffs' claims. The Court should therefore dismiss this case on that basis. But even if the Court were to determine that it has jurisdiction, and proceed to address the merits of Plaintiffs' challenge, it should uphold the agency decision because that decision was based on

[1] See Final Rule, 61 Fed. Reg. 57,586 (Nov 7, 1996); Final Rule, 68 Fed. Reg. 59,540 (Oct. 16, 2003); Final Rule, 75 Fed. Reg. 53,202 (Aug. 31, 2010).

reasonable deductions made in light of the available evidence before the agency. The Administrative Procedure Act, under which Plaintiffs assert their claims, does not authorize courts to set aside agency action if they disagree with a policy judgment made by the agency. Instead, review under the Act looks to whether the agency articulated a reasonable connection between the facts before it and the decision it made. Here, as explained below, the agency reasonably determined that the available evidence did not warrant establishing a presumption of herbicide exposure for Veterans who did not serve as ground troops or on inland waters in Vietnam. Thus, even if the Court were to determine that it has jurisdiction to review Plaintiffs' claims, the Court should uphold the agency's decision.

BACKGROUND

Between 1962 and 1971, the United States and Republic of Vietnam militaries used several herbicides in Vietnam for tactical purposes, namely, to defoliate areas to reduce cover for enemy forces, to improve visibility on the perimeters of military compounds, and to destroy crops that could be used by enemy forces. Comm. on Blue Water Navy Vietnam Veterans and Agent Orange Exposure, Inst. of Med. of the Nat'l Acad. of Sciences, Blue Water Navy Vietnam Veterans and Agent Orange Exposure ("Blue Water Report") at 47, 49, Administrative Record ("AR") at 0769, 0771. By far the most widely herbicide used was a substance known as Agent Orange. Id. The primary active ingredient in Agent Orange was a compound known as "2,4,5-T."[2] Blue Water Report at 48, AR at 0770. During the production of 2,4,5-T, it was contaminated with a toxic compound known as "TCDD."[3] Id. The magnitude of TCDD contamination in the herbicides used in Vietnam remains a subject of controversy. Id.

[2] The chemical name for 2,4,5-T is 2,4,5-trichlorophenoxyacetic acid. Blue Water Report at 48, AR at 0770.
[3] The chemical name for TCDD is 2,3,7,8-tetrachlorodibenzo-p-dioxin. Blue Water Report at 48, AR at 0770.

In 1991, Congress enacted the Agent Orange Act, Pub. L. No. 102-4, 105 Stat. 11. Under both the Act and the VA's implementing regulations, a Veteran who "served in the Republic of Vietnam" during the Vietnam era[4] receives a presumption that he or she was exposed during that service to herbicide agents such as those found in Agent Orange, unless there is evidence to the contrary. See 38 U.S.C. § 1116(f); 38 C.F.R. § 3.307(a)(6). Service members who are not entitled to the presumption of herbicide exposure may still provide evidence showing that they were actually exposed to herbicides during their service. See 38 C.F.R. § 3.309(e). Veterans entitled to the presumption of herbicide exposure, or who directly establish herbicide exposure, are entitled to a presumption of service connection for certain enumerated diseases. 38 U.S.C. §§ 1116(a)(1), (a)(2).

The Act also directs the VA to identify any other diseases associated with herbicide exposure. 38 U.S.C. §§ 1116(a)(1)(B), (b)(1). Specifically, "[w]henever the Secretary [of Veterans Affairs] determines, on the basis of sound medical and scientific evidence, that a positive association exists between . . . the exposure of humans to an herbicide agent, and . . . the occurrence of a disease in humans, the Secretary shall prescribe regulations providing that a presumption of service connection is warranted for that disease" for purposes of the Act. Id. § 1116(b)(1). In making such a determination, the Secretary must "take into account [certain] reports received by the Secretary from the National Academy of Sciences . . . , and . . . all other sound medical and scientific information and analyses available . . ." Id. § 1116(b)(2). Within 60 days of receiving such a National Academy of Sciences report, the agency determines whether a presumption of service connection is warranted for each disease covered by the report.

[4] As used in the Act, the term "Vietnam era" means "[t]he period beginning on February 28, 1961, and ending on May 7, 1975, in the case of a veteran who *served in the Republic of Vietnam* during that period." 38 U.S.C. § 101(29)(A) (emphasis added).

Id. § 1116(c)(1)(A). If the Secretary determines that such a presumption is warranted, the agency issues regulations setting forth that determination. Id. However, if the Secretary determines that a presumption is not warranted, the agency publishes a Federal Register notice of that determination, including an explanation of its scientific basis. Id. § 1116(c)(1)(B).

In 1997, the VA Office of General Counsel issued a precedential opinion[5] construing the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 101(29)(A) not to apply to service members whose service was on ships and who did not serve within the borders of the Republic of Vietnam during the "Vietnam era." VA Op. Gen. Counsel Prec. 27-97 (1997).[6] The opinion noted that the definition of the phrase "service in the Republic of Vietnam" in the VA's Agent Orange Act regulations, 38 C.F.R. § 3.307(a)(6)(iii), "requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there," and that for purposes of both the Agent Orange Act regulation and 38 U.S.C. § 101(29)(A), service "in the Republic of Vietnam" does not include service on ships that traversed the waters offshore of Vietnam, absent the service member's presence at some point on the land mass of Vietnam. VA Op. Gen. Counsel Prec. 27-97, at 4-5.

In Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008), reh'g denied, 544 F.3d 1306 (Fed. Cir. 2008), cert. denied, 555 U.S. 1149 (2009) ("Haas I"), a Navy service member who had served on an ammunition supply ship in the Pacific Ocean during the Vietnam War contended that he was eligible for the presumption of herbicide exposure, despite the fact that he had never set foot on

[5] A precedential opinion of the VA's General Counsel is a written opinion addressing a question of law that will likely have significance beyond the particular case or matter in which the issue arose, such as an opinion that interprets a statute or regulation as a matter of first impression or that necessitates a regulatory change. 38 C.F.R. § 14.507(b). Opinions designated as precedential are binding on all VA adjudicators. See 38 U.S.C. § 7104(c); 38 C.F.R. § 14.507(b).

[6] *Available at* http://www.va.gov/ogc/opinions/1997precedentopinions.asp; see 62 Fed. Reg. 63,603, 63,604 (Dec. 1, 1997) (notice of the opinion's holding).

the physical landmass of the Republic of Vietnam. Id. at 1173. The Federal Circuit held that "the agency's requirement that a [benefits] claimant have been present within the land borders of Vietnam at some point in the course of his duty constitutes a permissible interpretation of the [Agent Orange Act] and its implementing regulation." Id. at 1172.

At the request of the VA, the National Academy of Sciences' Institute of Medicine established a committee to study whether Blue Water Veterans had experienced exposures to herbicides and their contaminants comparable to those of service members who had served in the Republic of Vietnam's inland waterways or on the ground. Blue Water Report at ix, 2, AR at 0715, 0724. "Because of the paucity of data available, the committee decided that it would be necessary to approach its task by evaluating whether Blue Water Navy personnel were or were not exposed to Agent Orange and its associated TCDD, and whether it is possible to state with certainty that exposure of Blue Water Navy personnel, taken as a group, was qualitatively different from that of their Brown Water Navy and ground counterparts." Id. at x, AR at 0716. Though the committee "could not clearly delineate whether there were overlapping exposures between personnel categories," nevertheless, "the committee could not find enough data to determine whether or not Blue Water Navy personnel were exposed to Agent Orange-associated TCDD." Id.

Following his review of the Institute's report, the Secretary of Veterans Affairs determined that the available evidence did not support establishing a presumption of exposure to herbicides for service members who had served in deep-water naval vessels off the coast of Vietnam. Notice, Presumption of Exposure to Herbicides for Blue Water Navy Vietnam Veterans Not Supported, 77 Fed. Reg. 76,170, 76,170 – 71 (Dec. 26, 2012), AR at 1701-02.

However, the VA reiterated that the agency would continue to accept and review individual benefits claims asserted by these service members on a case-by-case basis. Id. at 76,171, AR at 1702.

In letters to the VA dated April 30 and June 29, 2013, counsel for Plaintiffs sought reconsideration of the Secretary's determination. Letters from John B. Wells, Executive Director, Military-Veterans Advocacy, Inc., to Eric Shinseki, Secretary of Veterans Affairs (April 30 and June 29, 2013), AR at 1703-15, 1721-23. The agency responded to these letters on June 20 and July 19, 2013, respectively. See Letter from Jose D. Riojas, Interim Chief of Staff, U.S. Department of Veterans Affairs, to John B. Wells, Executive Director, Military-Veterans Advocacy, Inc. (June 20, 2013), AR at 1716-20; Letter from Will A. Gunn, General Counsel, U.S. Department of Veterans Affairs, to John B. Wells, Executive Director, Military-Veterans Advocacy, Inc. (July 19, 2013), AR at 1724-26.

ARGUMENT

I. If the Court Reaches the Merits, It Should Enter Summary Judgment for Defendant.

As explained below, see infra part II.C, the VA reasonably determined that available evidence did not support establishing a presumption of herbicide exposure for service members who had served in deep-water naval vessels off the coast of Vietnam. Therefore, if the Court determines that it has jurisdiction, and proceeds to assess the merits of this case, it should enter summary judgment for Defendant.

II. The Court Should Deny Plaintiffs' Cross-Motion for Summary Judgment.

A. As an Initial Matter, Plaintiffs Cannot Challenge Agency Manual Provisions Under the APA Because Those Provisions Do Not Constitute Final Agency Action.

Plaintiffs' complaint challenges certain provisions in the VA's Veterans Benefits Administration Adjudication Manuals. See Compl. ¶¶ 28-31, 40-41. As explained in Defendant's reply supporting his motion to dismiss [ECF No. 16], the Court lacks jurisdiction to review such claims. But even if the Court had jurisdiction, it should still dismiss for failure to state a valid claim for relief because the manual provisions challenged by Plaintiffs do not represent "final agency action," and thus are not subject to review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA").

Suit against a federal agency can be maintained under the APA only with respect to "final agency action." 5 U.S.C. § 704. The Supreme Court has established a two-part test for determining whether agency action is "final" under the APA. "As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision-making process . . . . And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citation omitted). Neither of these conditions applies to the manual provisions cited by Plaintiffs. The manual provisions, which are used by agency adjudicators as guidance in making determinations with respect to benefits claims by Veterans, cannot be said to mark the consummation of the VA's decisionmaking process with respect to any individual Veteran. Any specific decision with respect to a benefits claim from an individual Veteran will be adjudicated on the basis of that Veteran's specific

circumstances. Additionally, the manual provisions do not themselves create or alter any rights or obligations, or give rise to any legal consequences. Notably, Plaintiffs fail to name any specific, identifiable Veteran with respect to whom the manual provisions have been applied in any specific benefits decision. Because these provisions do not represent final agency action, Plaintiffs cannot maintain a claim under the APA for review of these provisions, as an abstract matter.[7]

B. In an APA Record Review Case, Plaintiffs Can Neither Rely on Materials Outside the Administrative Record nor Submit Statements of Allegedly Material Facts Referring to Such Extra-Record Materials.

Congress has provided that in reviewing agency action under Section 706 of the APA, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The APA specifically contemplates that judicial review of agency action will be undertaken on the basis of the record compiled by the agency even in the course of informal proceedings in which a hearing has not been held. Fla. Power & Light v. Lorion, 470 U.S. 729, 743-44 (1985). "The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking." Id. at 744. Instead, a reviewing court's task is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision "*based on the record the agency presents to the reviewing court*." Id. at 743-44 (emphasis added) (citation omitted); accord Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990).

Thus, "[i]t is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its

[7] Although the Court lacks jurisdiction to review these manual provisions, and they do not constitute final agency action, in an abundance of caution, Defendant has included them in the administrative record in case the Court were to determine that these provisions could nevertheless be subject to APA review. In any event, these provisions are plainly reasonable on their face, for the reasons presented below.

decision was made." IMS, P.C. v. Alvarez, 129 F.3d 618, 623 (D.C. Cir. 1997). As established over forty years ago in Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam), "the focal point for judicial review" of agency action "should be the administrative record already in existence, not some new record made initially in the reviewing court." See also Lorion, 470 U.S. at 743-44; Bates v. Donley, 935 F. Supp. 2d 14, 26 (D.D.C. 2013).

Furthermore, the existence of any inadequacies in an agency's administrative decision or in the record supporting it are not bases for permitting extra-record evidence. Where an agency's decision is supported by an administrative record that is insufficient to permit judicial review, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Lorion, 470 U.S. at 744. The D.C. Circuit has explained that "the familiar rule that judicial review of agency action is normally to be confined to the administrative record . . . exerts its maximum force when the substantive soundness of the agency's decision is under scrutiny." Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989). While the D.C. Circuit in Esch stated that extra-record evidence might be reviewable if it fell within one of eight exceptions, id. at 991, "[s]ince then, the Circuit appears to have narrowed these exceptions to four: (1) when the agency failed to examine all relevant factors; (2) when the agency failed to explain adequately its grounds for its decision; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior." Nat'l Mining Ass'n v. Jackson, 856 F. Supp. 2d 150, 156-57 (D.D.C. 2012) (citing IMS, 129 F.3d at 624; Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior, 667 F. Supp. 2d 111, 115-16 (D.D.C. 2009)). These exceptions are to only be applied in limited circumstances, see Calloway v. Harvey, 590 F. Supp. 2d 29, 38 (D.D.C. 2008), and "in order to invoke one of these exceptions, a party seeking a court

to review extra-record evidence must first establish that the agency acted in bad faith or otherwise behaved improperly, or that the record is so bare that it prevents effective judicial review." Cnty. of San Miguel v. Kempthorne, 587 F. Supp. 2d 64, 79 (D.D.C. 2008) (internal quotations omitted) (citing Fund for Animals v. Williams, 245 F. Supp. 2d 49, 57-58 (D.D.C. 2003)); see also Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 514-15 (D.C. Cir. 2010).

Plaintiffs filed a cross-motion for summary judgment in this case containing nine attachments. See ECF Nos. 11-3 to 11-13 (also filed as ECF Nos. 10-3 to 10-13); see also ECF No. 11-14 (describing the attachments). These attachments consist of three letters (ECF Nos. 11-3 to 11-5); five declarations with sub-attachments (ECF Nos. 11-6, 11-7, 11-9, 11-10, 11-11, 11-12, and 11-13);[8] and a selected four-page excerpt of a 682-page report (ECF No. 11-8). Responding to Plaintiffs' summary judgment motion, the agency has compiled an administrative record. See ECF No. 17 (listing contents of record). Because the administrative record compiled by the agency includes the three letters submitted as ECF Nos. 11-3 to 11-5, as well as the entire report excerpted by Plaintiffs as ECF No. 11-8, these materials constitute record evidence. But the rest of these materials (ECF Nos. 11-6 to 11-7, 11-9 to 11-13) are not part of the administrative record. As explained above, this is a case involving APA review, which (absent unusual circumstances not present here) is based solely on the administrative record. Consequently, these materials cannot be cited or relied on by the parties in their briefs. Moreover, if the Court determines that it has jurisdiction here and proceeds to address merits-

[8] One declaration [ECF No. 11-9] includes eleven sub-attachments as "Exhibits A-I" [ECF Nos. 11-10 and 11-11].

related issues, it is well established that the Court should not consider these materials, as explained above.

Furthermore, with respect to cases based on review of an administrative record, the Local Civil Rules for this District provide that the general requirement that summary judgment motions are to be accompanied by a statement of material facts as to which the movant contends no genuine issue, with references to supporting evidence, "shall not apply." Local Civ. R. 7(h)(2). Rather, "[i]n such cases, motions for summary judgment and oppositions thereto shall include a statement of facts with references to the administrative record." Id.[9] Plaintiffs did not comply with this Rule, but instead submitted a statement of allegedly material facts supported by evidence outside the administrative record [ECF No. 10-1]. Under Local Civil Rule 7(h)(2), if the Court determines that it has jurisdiction, and proceeds to address merits-related issues, the document submitted by Plaintiffs purporting to be a statement of material facts should not be considered by the Court.

C. The VA Reasonably Decided in 2012 That Available Evidence Did Not Support Establishing a Presumption of Herbicide Exposure for Vietnam Veterans Who Did Not Serve in the Republic of Vietnam on the Ground or on Its Inland Waterways.

1. Under the Governing Standard for APA Review of Agency Action, an Agency Decision Must Be Upheld If It Examines the Relevant Data and Articulates a Satisfactory Explanation for Its Action.

This Court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The arbitrary and

[9] Under Local Civil Rule 7(n)(1), in cases involving review of agency action, a certified list of contents of the administrative record is to be filed simultaneously with a dispositive motion (or within 30 days following service of an answer, if that event occurs first). This provision obviously refers to dispositive motions that implicate the administrative record. Now that Plaintiffs have filed such a motion, Defendant is filing the certified list of contents.

capricious standard is "[h]ighly deferential" and "presumes the validity of agency action." AT&T Corp. v. FCC, 220 F.3d 607, 616 (D.C. Cir. 2000). "The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). The agency's decision must be upheld as long as it "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Id. (citation and internal punctuation omitted). "Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." Sierra Club v. Mainella, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (quotation marks omitted).

Plaintiffs' articulation of the relevant standard of review includes citations to cases that do not support the propositions for which Plaintiffs cite them. See Pl. Cross-MSJ to Def. Mot. to Dismiss and Cross-MSJ [ECF No. 10] ("Pl. Cross-MSJ") at 30-31. First, Plaintiffs represent as a direct quotation from Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1333 (Fed. Cir. 2001), the following statement: that the "Court must review whether a rational basis for the agency's decision was lacking or a violation of an applicable regulation. . ." Pl. Cross-MSJ at 30-31. But this purported quotation is nowhere to be found in that case. Instead, what the Court actually states is: "Under the APA standards that are applied in the Scanwell [Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970)] line of cases, a bid award may be set aside if either: (1) the procurement official's decision lacked a rational basis; or (2) the

procurement procedure involved a violation of regulation or procedure." Impresa Construzioni, 238 F.3d at 1332. Because the present case does not involve review of a bid award or procurement decision, Impresa Construzioni is not relevant here.

Second, contrary to Plaintiffs' representation, American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970), did not set forth a standard for APA review of agency action under the arbitrary-and-capricious standard. See Pl. Cross-MSJ at 31. In that case, a motor carrier had applied to the Interstate Commerce Commission for "temporary operating authority," a status that Congress permitted the Commission to grant without a hearing if the authority related to a service for which an immediate and urgent need existed. 397 U.S. at 533-35. The Commission denied the motor carrier's application in an order, applying its rules implementing the statutory power in question, because the Commission concluded no such immediate need existed. Id. at 535. One issue the Supreme Court addressed in reviewing the Commission's order was whether the Commission had failed to require strict compliance with its own procedural rules. Id. at 537. In finding that the Commission was permitted to relax or modify its procedural rules, the Supreme Court noted: "The rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as in Vitarelli v. Seaton, 359 U.S. 535 [(1959)]; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so." Id. at 538-39 (internal citation truncated and citation omitted). But contrary to Plaintiffs' representation, in thus explaining under what circumstances an agency may relax or modify compliance with certain procedural rules, the Supreme Court never made any connection to the standard for arbitrary-and-capricious review under the APA. American Farm Lines is thus irrelevant here.

2. The VA Reasonably Determined That the Blue Water Report Did Not Support Establishing a Presumption of Herbicide Exposure for Vietnam Veterans Who Did Not Serve in the Republic of Vietnam on the Ground or on Its Inland Waterways.

Stripped of invective, Plaintiffs' primary argument is that the VA's conclusion that the available evidence did not support establishing a presumption of herbicide exposure for service members who had served in deep-water naval vessels off the coast of Vietnam was arbitrary and capricious. Pl. Cross-MSJ at 27-38. That argument fails because Plaintiffs fail to show that their contrary conclusion is the only one that a reasonable decisionmaker could make.

a. The Blue Water Report Was Unable to State with Certainty That Blue Water Veterans Were or Were Not Exposed to TCDD from Agent Orange.

Under the Agent Orange Act, "[w]henever the Secretary determines, on the basis of sound medical and scientific evidence, that a positive association exists between . . . the exposure of humans to an herbicide agent, and . . . the occurrence of a disease in humans, the Secretary shall prescribe regulations providing that a presumption of service connection is warranted for that disease for the purposes of" the Act. 38 U.S.C. § 1116(b)(1). The Act requires the VA to evaluate scientific evidence and to consider establishing presumptions concerning whether specific diseases are related to herbicide exposure. Importantly, *no* statute directs the VA to consider establishing any presumption regarding *who* was exposed to herbicides. Indeed, in 38 U.S.C. § 1116(f), Congress prescribed such a presumption for Veterans who served "in the Republic of Vietnam," and the Federal Circuit has held that the VA reasonably interpreted that presumption to apply only to service on land or on inland waterways. Haas I, 525 F.3d at 1192-93. The fact that VA, on its own initiative, commissioned a report regarding the potential for herbicide exposure by Blue Water Veterans and evaluated whether the report's findings

warranted a new presumption of herbicide exposure does not establish that the VA's actions were required or governed by any statute. Hence, even if Plaintiffs could demonstrate error in the VA's analysis of the Blue Water Report, they cannot show that VA was required to establish a presumption or to take any other specific action based on that report.

In any event, Plaintiffs fail to show any such error in VA's actions concerning the report. With respect to the standard in section 1116(b)(1) for evaluating potential disease presumptions, the Federal Circuit has explained that "[u]nder the unusual statutory scheme here involved, with the function of reviewing and evaluating the scientific evidence given to a non-governmental, independent scientific entity, an extremely strong showing of error would be required before [a court] properly could reverse the Secretary's determination." LeFevre v. Sec'y, Dep't of Veterans Affairs, 66 F.3d 1191, 1199 (Fed. Cir. 1995).[10] With respect to the VA's determination here, which is likewise based on an assessment by a non-governmental, independent scientific agency and is not required by statute, Plaintiffs' burden certainly could be no less.

At the VA's specific request, the National Academy of Sciences' Institute of Medicine established the Committee on Blue Water Navy Vietnam Veterans and Agent Orange Exposure ("Committee") to study whether Blue Water Navy personnel had experienced exposures to herbicides and their contaminants comparable to those of service members who had served on the ground or of Brown Water Veterans. Blue Water Report at ix, 2, AR at 0715, 0724.

[10] In LeFevre, the court reviewed the Secretary's determination with respect to a report that the National Academy of Sciences was required to transmit to the Secretary under the Agent Orange Act. See 66 F.3d at 1193-96. Issuance of the Blue Water Report by the National Academy of Sciences was not required by law; rather, the VA specifically requested the Academy to study the issue of whether Blue Water Veterans had experienced exposures to herbicides and their contaminants comparable to those of ground troops or of Brown Water Veterans. Blue Water Report at ix, 2, AR at 0715, 0724. However, nothing in LeFevre suggests that this same standard would not apply in reviewing the Secretary's determination with respect to a report specifically requested by the VA, rather than a report mandated by law.

The Committee conducted a risk-assessment study consisting of several steps. Id. at 3, AR at 0725. First, the Committee gathered data about how Agent Orange had been used in Vietnam. Id. The data sources the Committee relied on included peer-reviewed literature, models for assessing environmental concentrations of Agent Orange and TCDD, interviews with Veterans, written and published accounts of the Vietnam War, government documents, and ship deck logs. See id. at 4, 15-59, AR at 0726, 0737-81. Second, the Committee assessed the fate of Agent Orange after its release into the environment, paying special attention to TCDD transport to coastal waters and atmospheric drift, and to modeling efforts to estimate environmental concentrations of TCDD. Id. at 61-85, AR at 0783-807. Third, the Committee evaluated possible pathways of exposure to Agent Orange and TCDD to ground troops, Brown Water Veterans, and Blue Water Veterans, to determine whether it was plausible that people in these groups could have been exposed to these compounds via these pathways. Id. at 87-107, AR at 0809-29. Finally, the Committee examined health-related studies regarding individuals who served in Vietnam. Id. at 109-25, AR at 0831-47.

While the Committee tried to "collect as much scientific and historical information as possible to shed light on the question of possible herbicide exposure by Blue Water Navy veterans," it was nevertheless "surprised and disheartened to find a dearth of information on environmental concentrations of TCDD during the Vietnam War, in spite of the large volumes of Agent Orange sprayed throughout South Vietnam." Blue Water Report at ix-x, AR at 0715-16. As the Committee explained, such information was "vital to determining possible exposures" of service members who had served in deep-water naval vessels off the coast of Vietnam during the Vietnam War. Id. at x, AR at 0716.

The Committee reported that it "struggled with how to deal with the lack of scientific data on which to base its conclusions." Blue Water Report at x, AR at 0716. Ultimately, "[b]ecause of the paucity of data available, the committee decided that it would be necessary to approach its task by evaluating whether Blue Water Navy personnel were or were not exposed to Agent Orange and its associated TCDD, and whether it is possible to state with certainty that exposure of Blue Water Navy personnel, taken as a group, was qualitatively different from that of their Brown Water Navy and ground counterparts." Id. at x, 128, AR at 0716, 0850.

The Committee reported its findings in its report's final chapter, entitled "Summary and Conclusions." Blue Water Report at 127-34, AR at 0849-56. The Committee explained that because of the dearth of relevant data, it "was not able to estimate even a range of environmental concentrations of TCDD that might be present in Vietnamese coastal waters or the amount of TCDD that might reach Blue Water Navy ships as a result of spray drift from [military herbicide-spraying] missions flown near the coast." Id. at 131-32, AR at 0853-54. Because of the lack of exposure data, the Committee determined that it was not possible to make actual quantitative exposure comparisons of Agent Orange and TCDD among ground troops, Brown Water Veterans, and Blue Water Veterans. Id. at 132, AR at 0854. Instead, the Committee "evaluat[ed] the *plausibility* of exposure of the[se] three populations to Agent Orange and TCDD via various mechanisms and routes." Id. (emphasis in original).

The Committee concluded that "qualitatively, ground troops and Brown Water Navy personnel had more pathways of exposure to Agent Orange-associated TCDD than did Blue Water Navy personnel." Blue Water Report at 133, AR at 0855; see also id. at 91 fig. 5-1, AR at 0813. It noted one plausible exposure mechanism specific to Blue Water Navy ships: namely,

possible TCDD contamination of drinkable water from shipboard distillation plants. Id. These plants produced drinkable water by distilling marine water. Id. at 104, AR at 0826. However, though the water-distillation system on these ships "had the potential" to enrich concentrations of TCDD from the marine water to the distilled drinking water, "without information on the TCDD concentrations in the marine feed water," the Committee concluded that it was "impossible to determine whether Blue Water Navy personnel were exposed to TCDD via ingestion, dermal contact, or inhalation of potable water." Id. at 133, AR at 0855; see also id. at 104-05, AR at 0826-27.

Ultimately, the Committee determined that "it would not be possible to determine Agent-Orange-associated TCDD concentrations in the Vietnamese environment." Blue Water Report at 133, AR at 0855. In turn, this lack of information "ma[de] it impossible to quantify exposures for Blue Water and Brown Water Navy sailors and, so far, for ground troops as well." Id. Consequently, the Committee reported that it was "unable to state with certainty whether Blue Water Navy personnel were or were not exposed to Agent Orange and its associated TCDD." Id.; see also id. ("Indeed, the committee felt that the paucity of scientific data makes it impossible to determine whether or not Blue Water Navy veterans were exposed to Agent Orange-associated TCDD during the Vietnam War."). As a result, "[t]he committee's judgment is that exposure of Blue Water Navy Vietnam veterans to Agent Orange-associated TCDD cannot reasonably be determined." Id. at 14; AR at 0736.

Based on the Committee's conclusions, the VA determined that the available evidence did not support establishing a presumption of exposure to herbicides for Blue Water Veterans. 77 Fed. Reg. at 76,170 – 71, AR at 1701-02. Specifically, the agency explained that the Blue

Water Study had "concluded that ground troops and Brown Water Navy Veterans had qualitatively more pathways of exposure to Agent Orange-associated TCDD than did Blue Water Navy Veterans," and that "a paucity of scientific data concerning potential exposures for Blue Water Navy Veterans made it impossible to determine whether these veterans were exposed to Agent Orange-associated TCDD," and thus, "exposure of Blue Water Navy Vietnam Veterans to Agent Orange-associated TCDD cannot be reasonably determined." Id. at 76,171, AR at 1702. However, the VA also stated that the agency would continue to accept and review all claims by Blue Water Veterans based on herbicide exposure on an individualized, case-by-case basis. Id.[11]

In short, the VA examined the relevant data – the Blue Water Report – and articulated a satisfactory explanation for its action – that the Committee had rationally concluded, based on the available data, that whether Blue Water Veterans had been exposed to Agent Orange and TCDD could not reasonably be determined. Under the governing standard for review of agency action, the VA's decision should be upheld.

[11] As the Federal Circuit explained in upholding a similar decision by the VA, "[t]here are no doubt some instances in which the 'foot-on-land' rule will produce anomalous results." Haas I, 525 F.3d at 1193. But this is "not surprising" because "[l]ine-drawing in general often produces instances in which a particular line may be overinclusive in some applications and underinclusive in others." Id. And "just because some instances of overinclusion or underinclusion may arise does not mean that the lines drawn are irrational." Id. (citing Vance v. Bradley, 440 U.S. 93, 108 (1979), and Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976)); see also Nat'l Shooting Sports Found. v. Jones, 716 F.3d 200, 214 (D.C. Cir. 2013) ("An agency has 'wide discretion' in making line-drawing decisions.") (quoting WorldCom, Inc. v. FCC, 238 F.3d 449, 462 (D.C. Cir. 2001)); ExxonMobil Gas Mktg. Co. v. FERC, 297 F.3d 1071, 1085 (D.C. Cir. 2002) ("We are generally unwilling to review line-drawing performed by the [agency] unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.") (internal punctuation omitted). Here, "[d]rawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable." Haas I, 525 F.3d at 1193. Moreover, "the line drawn by the agency does not cut off all rights of sea-going veterans to relief based on claims of herbicide exposure, in that even servicemembers who are not entitled to the presumption of exposure are nonetheless entitled to show that they were actually exposed to herbicides. . ." Id.

b. To the Extent That Plaintiffs' Contentions Cite or Rely on Extra-Record Evidence, Those Contentions Should Not Be Considered Here.

The vast majority of Plaintiffs' arguments with respect to the reasonableness of the agency's decision consist of contentions founded solely on materials outside the administrative record. See Pl. Cross-MSJ at 3-4, 27-28, 29-30, 32-34, 34-37 (citing materials submitted by Plaintiffs as ECF Nos. 11-6 to 11-7, and 11-9 to 11-13).[12] As explained above, see supra part II.B, because APA review is confined to the administrative record compiled by the agency, Plaintiffs cannot present contentions based on extra-record evidence. Nor can Plaintiffs advance arguments premised on those contentions. Thus, to the extent that Plaintiffs have made contentions or based arguments on materials located outside the administrative record, those contentions and arguments should not be considered as part of this review of agency action under the APA.

c. The Portions of Plaintiffs' Arguments That Do Rely on Materials in the Administrative Record Fail to Demonstrate That the Secretary's Decision Was Unreasonable.

Selected portions of Plaintiffs' arguments that the agency action taken here was arbitrary and capricious advance contentions based on materials contained in the administrative record. See Pl. Cross-MSJ at 5-7, 28-29, 32, 36, 37-38, 39. These arguments are not persuasive.

[12] Additionally, Plaintiffs also purport to challenge a statement in a 2008 notice of proposed rulemaking. See Pl. Cross-MSJ at 36 (quoting Proposed Rule, Definition of Service in the Republic of Vietnam, 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)); see also id. at 34 (arguing that this notice "misconstrued [certain] findings"). But this statement is contained in a notice of proposed rulemaking for a rule that was never adopted by the VA. As the Notice explains, following a decision by the U.S. Courts of Appeals for Veterans Claims, the VA proposed to amend certain regulations embodying the agency's definition of "service in the Republic of Vietnam," as contained in the Agent Orange Act. 73 Fed. Reg. at 20,566 (citing Haas v. Nicholson, 20 Vet. App. 257 (2006)). Because this proposed amendment was rendered moot by the Federal Circuit's reversal of that decision, the agency withdrew its proposed rule and no final rule was ever issued. See Withdrawal of Proposed Rule, 74 Fed. Reg. 48,689 (Sept. 24, 2009). And Plaintiffs cannot mount an APA challenge, in the abstract, to "arguments," Pl. Op. at 36, contained in a notice of proposed rulemaking that were never embodied in any final agency decision or action.

First, while it is correct that a 2009 Institute of Medicine report included among its recommendations that the VA should not exclude Blue Water Veterans from the presumption of herbicide exposure, see Pl. Cross-MSJ at 5-6, 29, 39, unlike the Blue Water Report, that earlier report did not focus on the specific issue of whether Blue Water Veterans were exposed to herbicides during their service. Instead, that earlier report attempted to determine broader issues: namely, whether a statistical association existed between herbicide exposure and specific health outcomes in Vietnam Veterans, whether risk of disease increased among service members exposed to herbicides, and whether a plausible biological mechanism or other evidence of a causal relationship existed between herbicide exposure and specific diseases. Comm. to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, Inst. of Med. of the Nat'l Academies, Veterans and Agent Orange: Update 2008 (July 24, 2009) ("Agent Orange Study") at 2, AR at 0026. Indeed, it was this earlier report, together with concerns raised by Veterans, that prompted the VA to request the Institute of Medicine to conduct a study examining the specific issue of "whether Blue Water Navy Vietnam Veterans experienced exposures to herbicides and their contaminants . . . comparable to those of ground troops and Brown Water Navy Vietnam Veterans." 77 Fed. Reg. at 76,171, AR at 1702.

Moreover, the Agent Orange Study based its recommendation in large part on the results of a study commissioned by the Australian Department of Veterans Affairs finding that the water-distillation system used on Australian Navy ships increased concentrations of TCDD in the drinkable water produced on these ships. Agent Orange Study at 655, AR at 0679; see also id. at 54-55, AR at 0078-79. And the language of the earlier study makes clear that application of this finding to U.S. vessels involves conjecture. Specifically, the earlier study noted that because

"[n]o measurements of dioxin concentrations in seawater were collected" during the Vietnam War, "it is *not possible to ascertain* the extent to which drinking water on US vessels *may have been* contaminated through distillation processes." Id. at 55, AR at 0079 (emphasis added). Nevertheless, the study stated, "it *seems likely* that vessels with such distillation processes that traveled near land or even at some distance from river deltas would periodically collect water that contained dioxin." Id. (emphasis added). But when the Committee later examined the Australian study and conducted experiments simulating the water-distillation system used on U.S. Navy ships, the most the Committee could conclude was that the system "had the potential" to increase concentrations of TCDD in the drinkable water produced on the ships. Blue Water Report at 133, AR at 0855. As the Committee explained, "without information on the TCDD concentrations in the marine feed water" that served as the source of the water processed by the system, "it is *impossible to determine* whether Blue Water Navy personnel were exposed to TCDD via ingestion, dermal contact, or inhalation of potable water." Id. (emphasis added). In light of the Committee's additional analysis, it is reasonable to conclude that available evidence does not establish that Blue Water Veterans were actually exposed to herbicides, and that the most that the earlier study indicates is a possibility of such exposure, rather than evidence that such exposure actually occurred. See also id. at 137, AR at 0859 (noting that "[t]he significance of [the Australian] study's findings for contaminant exposures on Blue Water Navy ships is highly uncertain").

Second, while Plaintiffs include two block quotations from the Blue Water Report, see Pl. Cross-MSJ at 7, the second of Plaintiffs' quotations is truncated, omitting the very next sentence of the report: "Indeed, the committee felt that the paucity of scientific data makes it impossible to

determine whether or not Blue Water Navy veterans were exposed to Agent Orange-associated TCDD during the Vietnam War." Blue Water Report at 133, AR at 0855. The omitted sentence is, of course, consistent with the VA's determination that the lack of this data rendered it impossible to conclude whether these Veterans were exposed to TCDD. 77 Fed. Reg. at 76,171, AR at 1702. And importantly, the omitted sentence is the concluding sentence of the Report.

Third, Plaintiffs misplace their emphasis on the Blue Water Report's findings that TCDD adheres to soil. Pl. Cross-MSJ at 28-29, 32. Though Plaintiffs seek to draw an inference that if soil-bound TCDD found its way into water, substantial contamination would result, the Blue Water Report provides several reasons why such an inference would be unfounded. As the Report explains, though "it is logical to conclude that some fraction of TCDD and other herbicides applied in heavily sprayed areas would reach inland and coastal waters from soils, . . . the amount of TCDD that entered water courses would be subject to enormous dilution from river flows." Blue Water Report at 75, AR at 0797; see also id. at 80, AR at 0802 (concluding that while "Agent Orange and TCDD could have entered rivers from spraying along riverbanks (although this was a small fraction of the total Agent Orange applied in Vietnam) or from soil runoff, particularly in heavily sprayed areas that experienced frequent flood," nonetheless, "[r]iver loading would be highly diluted by river flows"). And though the Report concluded that amounts of TCDD could have entered coastal waters because of spray drift, atmospheric deposition, direct spraying, or river discharge, id. at 76, AR at 0798, it also concluded that river discharge would have contained only "a very small load," that TCDD depositing "due to spray drift could have occurred but would have been minimal," and that atmospheric deposition "would have been greatly diluted in these waters." Id. at 80, AR at 0802. As to direct spraying,

the Committee "was unable to locate much documentation of the practice or to determine how much Agent Orange or other herbicides were applied." Id. at 52, AR at 0774 (internal citation omitted). Ultimately, the Report determined, "[g]iven the paucity of information and the variability and uncertainty in the available information, the committee concludes that it is *not possible* to estimate the likely concentrations of TCDD in marine waters and air at the time of the Vietnam War." Id. at 80, AR at 0802 (emphasis added). Though the Report did acknowledge that pathways and routes of exposure of TCDD to Blue Water Veterans was "plausible," id. at 105, AR at 0827, it did not conclude that any such exposure had actually occurred.

Finally, Plaintiffs' arguments based on the canon of statutory interpretation construing ambiguity in a Veterans benefits statute in favor of a Veteran, Pl. Cross-MSJ at 24, 26, 37-38, rehashes an argument previously rejected by the Federal Circuit in the Haas litigation. While the Federal Circuit observed that the issue had been waived because it was raised for the first time in a petition for rehearing, it nevertheless determined that "[i]n any event, application of the pro-claimant canon of statutory construction in this case is not as simple as Mr. Haas's petition suggests." Haas v. Peake, 544 F.3d 1306, 1308 (Fed. Cir. 2008) ("Haas II"). First, Haas II cited Federal Circuit precedent that courts may not "invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case." Id. (quoting Sears v. Principi, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003)); see also Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (deferring to agency's reasonable interpretation of ambiguous statute despite pro-claimant canon). Second, the Federal Circuit noted that application of the pro-claimant principle to the legal issue before it "would present a practical difficulty in determining what it means for an

interpretation to be 'pro-claimant'" because "[w]hile Mr. Haas contends that veterans who served offshore, but never came to land, should be covered by [the Agent Orange Act provision establishing a presumption of herbicide exposure for Vietnam Veterans] the [agency] has already interpreted the statute in a pro-claimant manner by applying it to *any* veteran who set foot on land, even if for only a very short period of time." 544 F.3d at 1308-09 (emphasis added). Moreover, the Court noted:

> Although Mr. Haas advocates defining "in the Republic of Vietnam" to include the territorial seas adjacent to the Vietnamese mainland, adopting that standard would raise new questions of interpretation and present new difficulties in application. For example, Mr. Haas's interpretation would raise the question whether the statute applies to claimants who flew through Vietnamese airspace (including the airspace above the territorial seas) but never landed in Vietnam. In addition, while Mr. Haas argues that the panel's interpretation is "absurd" because it requires the [agency] "to make individualized inquiries into whether the veteran set foot on land or traversed inland waters in Vietnam," the task of determining whether a particular veteran's ship at any point crossed into the territorial seas during an ocean voyage would seemingly be even more difficult. Thus, even if the argument that Mr. Haas now raises had not been waived, it is by no means clear that its application would have required that the statute cover Mr. Haas's case, or that the "pro-claimant" canon would have provided clear construction and easy application for the statute in question.

Id. at 1309. Because the same considerations are true with respect to the central legal issue presented here, the application of the pro-claimant canon in this case is not outcome-determinative, as Plaintiffs claim.

* * * * * *

In sum, the Secretary reasonably determined that available evidence did not support establishing a presumption of herbicide exposure under the Agent Orange Act for Blue Water Veterans. Plaintiffs have failed to show that this determination was not reasonable, Motor Vehicle Manufacturers Association, 463 U.S. at 43, much less that it displays "an extremely

strong showing of error" by the Secretary. LeFevre, 66 F.3d at 1199. Thus, if the Court reaches the merits of this case, it should uphold the Secretary's determination.

D. Because Neither of the Two International Conventions Cited by Plaintiffs Constitute Operative Domestic Law, Neither Can Serve as the Basis of an APA Challenge to Agency Action.

1. Neither the United Nations Convention on the Law of the Sea nor the Convention on the Territorial Sea and the Contiguous Zone Constitute Operative Domestic Law.

While the APA allows courts to set aside agency action that is "not in accordance with law," 5 U.S.C. § 706(2)(A), "the APA does not grant judicial review of agencies' compliance with a legal norm that is not otherwise an operative part of domestic law." Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 943 (D.C. Cir. 1988). Plaintiffs cite the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 ("UNCLOS"), and the Geneva Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 ("1958 Convention"), as sources of norms applicable in this case. But neither of them constitutes operative domestic law. Thus, neither can serve as the basis for an APA claim.

The Supreme Court has "long recognized the distinction between treaties that automatically have effect as domestic law, and those that – while they constitute international law commitments – do not by themselves function as binding federal law." Medellin v. Texas, 552 U.S. 491, 504 (2008). The relevant distinction is between a treaty that is "equivalent to an act of the legislature, and hence self-executing, when it operates of itself without the aid of any legislative provision," and "treaty stipulations [that] are not self-executing [because] they can only be enforced pursuant to legislation to carry them into effect." Id. at 505 (internal citations

and punctuation omitted). A "self-executing" treaty is one that "has automatic domestic effect as federal law upon ratification." Id. at 505 n.2. By contrast, a "non-self-executing" treaty "does not by itself give rise to domestically enforceable federal law," and thus, "[w]hether such a treaty has domestic effect depends upon implementing legislation passed by Congress." Id. In short, although treaties "may comprise international commitments[,] they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." Id. at 505 (citation and internal punctuation omitted).

Because the Supremacy Clause of the U.S. Constitution provides that treaties "shall be the supreme Law of the Land," U.S. Const. art. VI, cl. 2, "[a]t first blush, it may seem strange, given the explicitness of this constitutional language, that there are treaties that do not bind courts[;]" nevertheless, "such treaties are without domestic effect because they do not obligate the United States to give them domestic effect." Gomez v. Quarterman, 529 F.3d 322, 329 n.4 (5th Cir. 2008). "Thus, when ratified, [such treaties] do become part of 'the supreme Law of the land,' and they are respected according to their terms, but those terms do not require automatic judicial enforcement." Id.; see also Medellin, 552 U.S. at 525-26 ("The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. As this Court has explained, when treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.") (internal citations and punctuation omitted). "A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force." Medellin, 552 U.S. at 527.

The United States has not ratified UNCLOS. United States v. Alaska, 503 U.S. 569, 588 n.10 (1992); United States v. Dire, 680 F.3d 446, 459 (4th Cir. 2012). By definition, then, that convention cannot give rise to enforceable federal law. And though the United States has ratified the 1958 Convention, that treaty "does not create any privately enforceable rights and therefore is not self-executing." United States v. Thompson, 928 F.2d 1060, 1066 (11th Cir. 1991). Because the 1958 Convention is not self-executing, and because Plaintiffs cite no law enacted by Congress to enforce the specific provisions of the convention cited by Plaintiffs, those provisions are not domestic law. Nor does Presidential Proclamation 5928, cited by Plaintiffs, constitute binding law with respect to the issues here. See Proclamation No. 5928, 54 Fed. Reg. 777, 777 (Dec. 27, 1988) (declaring that the territorial sea of the United States extends to 12 nautical miles from United States baselines, but that "[n]othing in this Proclamation . . . extends or otherwise alters existing Federal or State law").

Moreover, the Federal Circuit specifically rejected UNCLOS and the presidential proclamation cited by Plaintiffs as determinative that the phrase "served in the Republic of Vietnam," as used in the definitions section of the Agent Orange Act, 38 U.S.C. § 101(29)(A), was unambiguous. See Haas I, 525 F.3d at 1184. As the Federal Circuit explained, although the definitions in UNCLOS and the proclamation both "include the nation's 'territorial sea,'" other competing definitions of the boundaries of the Republic of Vietnam do not include the nation's territorial seas, and "[n]either the language of the statute nor its legislative history indicates that Congress intended to designate one of the competing methods of defining the reaches of a sovereign nation." Id. Consequently, for purposes of Chevron U.S.A. v. Natural Resources

Defense Council, 467 U.S. 837 (1984), the Court determined that the statute was ambiguous. Haas I, 525 F.3d at 1184.

Finally, Plaintiffs' remaining arguments under this rubric fail because their contentions about the content of the territorial seas of the Republic of Vietnam, Pl. Cross-MSJ at 22, and about the appropriate designation of a specific harbor in Vietnam, id. at 25-26, are both based on materials that are not part of the administrative record. As explained above, see supra part II.B, absent unusual circumstances not present here, APA review is confined to the administrative record compiled by the agency, and Plaintiffs cannot base their arguments on extra-record evidence.

In sum, because neither UNCLOS nor the 1958 Convention constitutes an operative part of domestic law, the APA does not authorize review of agency compliance with norms contained in these conventions. Comm. of U.S. Citizens, 859 F.2d at 943.

2. None of the Supreme Court Cases Cited by Plaintiffs Incorporated UNCLOS or the 1958 Convention as Binding, Operative Domestic Law.

Additionally, contrary to Plaintiffs' contentions, Pl. Cross-MSJ at 26-27, the Supreme Court has not held that UNCLOS or the 1958 Convention constitutes operative domestic law, the only kind of law that sets binding principles as to which the APA permits review of agency compliance. Comm. of U.S. Citizens, 859 F.2d at 943. Instead, the case law cited by Plaintiffs stands for, at most, the proposition that provisions in these conventions have been recognized as customary international law. In cases involving boundary disputes between the United States and a State, or between States, the Supreme Court has occasionally adopted provisions of such customary international law to serve as a rule of decision. Importantly, however, none of these

cases incorporated any provision of either convention as operative domestic law. Because, as described above, UNCLOS has not been ratified by Congress and the 1958 Convention is non-self-executing, the Supreme Court would have been usurping a critical legislative function – the enactment of operative domestic law – had it purported to do so in any of these cases. But, as a careful examination of these cases will demonstrate, the Supreme Court has not done so.

United States v. California, 381 U.S. 139 (1965) ("California II"), arose in a complicated factual and legal setting. The United States had brought suit against California to determine ownership of submerged lands and mineral rights under the three-mile belt of sea off California's coast. Id. at 142. In 1947, the Supreme Court had determined that the United States held title to submerged lands and mineral rights under the three-mile belt extending seaward three miles from the "ordinary low-water mark on the coast of California, and *outside* of the *inland waters*." United States v. California, 332 U.S. 804, 805 (1947) (per curiam) ("California I") (emphasis added). Importantly, this 1947 opinion "clearly indicated that [the term] 'inland waters' was to have an international content since the outer limits of inland waters would determine the Country's international coastline," but it did "not particularize the definition" of that term. California II, 381 U.S. at 162. Instead, the Court appointed a special master to define in greater detail the relevant boundary lines. Id. at 142. After the special master issued his report, but before the Court took any action, Congress enacted the Submerged Lands Act, 43 U.S.C. § 1301 et seq. California II, 381 U.S. at 144-45. That Act "effectively grant[ed] each State on the Pacific coast all submerged lands shoreward of a line three geographical miles from its 'coast line,' [which Congress] derivatively defined in terms of 'the seaward limit of inland waters.'" Id. at 148. However, Congress did not define the term "inland waters." Id.

Thus, the "focal point" of California II was "the interpretation to be placed on 'inland waters' as used in" the Submerged Waters Act. California II, 381 U.S. at 149. After examining the Act's legislative history, id. at 150-57, the Court concluded that Congress intended the question to be decided, in the first instance, by the judiciary. Id. at 157-60. Because California I had "clearly indicated that 'inland waters' was to have an international content," id. at 162, the Court examined whether customary international law had reached a consensus on that content. Id. at 163-64. The Court explained that following the ratification of the 1958 Convention by the United States and other nations, "it may now be said that there is a settled international rule defining inland waters." Id. The Court then adopted this customary international legal principle as a rule of decision for interpreting the term "inland waters" in the Submerged Lands Act. Id. at 165.

Crucially, however, California II did not incorporate any provision of the 1958 Convention as part of operative domestic law. As explained above, because that convention "does not create any privately enforceable rights and therefore is not self-executing," Thompson, 928 F.2d at 1066, its provisions cannot constitute operative domestic law unless Congress has implemented those provisions through legislation. Plaintiffs have identified no such implementation by Congress, and without such legislative action, the Court could not have incorporated any provision of the Convention. The limited effect of California II was to recognize the definition of "inland waters" in the 1958 Convention as customary international law, and to adopt that definition as a rule of decision for interpreting the term "inland waters" in cases involving the Submerged Lands Act. See United States v. Alaska, 521 U.S. 1, 8 (1997) ("In cases in which the Submerged Lands Act does not expressly address questions that might

arise in locating a coastline, we have relied on the definitions and principles of the Convention on the Territorial Sea and the Contiguous Zone.") (citing California II, 381 U.S. at 165). And though in California II, the Supreme Court opined that the 1958 Convention contained the "best and most workable definitions" of certain terms, including the term "inland waters," the context of that statement makes clear that the Court was "adopt[ing]" those definitions only "for purposes of the Submerged Lands Act." 381 U.S. at 165. Because this is not a case involving the Submerged Lands Act, California II is not relevant here. Nor is Alaska, which simply recognized the 1958 Convention's definition of "bays" as customary international law, and adopted it as a rule of decision in a case construing the Submerged Lands Act. Alaska, 521 U.S. at 8, 11.

The crucial point is that customary international law does not constitute operative domestic law, absent congressional legislation enacting customary legal principles as binding domestic law. See Medellin, 552 U.S. at 505 ("[W]hile treaties may comprise international commitments[,] they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms.") (citation and internal punctuation omitted). California II is thus irrelevant here because the APA does not grant judicial review of agency compliance with customary international law that is not operative domestic law, Comm. of U.S. Citizens, 859 F.2d at 943, and because Plaintiffs fail to show in enacting the law at issue here – the Agent Orange Act – Congress intended to incorporate customary international law on the definition of "inland waters" as determinative of the statutory term "service in the Republic of Vietnam" in that Act.

Nor does Boumediene v. Bush, 553 U.S. 723 (2008), cited by Plaintiffs, advance Plaintiffs' contrary argument. Pl. Cross-MSJ at 26-27. Plaintiffs fail to state that the cited portion of Boumediene is from the *dissenting* opinion, which lacks precedential value. See Boumediene, 553 U.S. at 832 (Scalia, J., dissenting). Additionally, contrary to Plaintiffs' representation, Boumediene contains no mention of the 1958 Convention. The case is thus irrelevant here.

Also irrelevant is United States v. Maine, 475 U.S. 89 (1986). Like California II and Alaska, Maine involved a dispute between the United States and a State regarding State boundaries – specifically, whether Nantucket Sound constituted "internal waters" within Massachusetts or instead consisted partly of territorial sea and partly of high seas. Id. at 90. In rejecting Massachusetts' claim of title to the Sound, the Court explained that it "has consistently followed principles of international law in fixing the coastline of the United States," in particular, provisions of the 1958 Convention. Id. at 93-94. But the Court never represented that it was adopting any part of that convention as operative domestic law. Moreover, unlike Maine, California II, and Alaska, this case is not a suit between the United States and a State that involves "fixing the coastline of the United States." Maine, 475 U.S. at 93. And Plaintiffs identify no authority for incorporating provisions of the 1958 Convention as a rule of decision for determining the boundaries of foreign nations. Moreover, customary international principles that might be useful as providing the source of a rule of decision in cases determining boundaries between the United States and a State, or between States, are less useful where, as here, Congress gave no intention of incorporating such principles to interpret the statutory term "service in the Republic of Vietnam" in the Agent Orange Act.

Finally, in neither Louisiana v. Mississippi, 202 U.S. 1 (1906) ("Louisiana I"), nor United States v. Louisiana, 394 U.S. 11 (1969) ("Louisiana II"), did the Supreme Court incorporate international law regarding the boundaries of States or of foreign nations as binding, operative domestic law. At issue in Louisiana I was the boundary line between Louisiana and Mississippi. 202 U.S. at 33. In its analysis, the Court quoted Manchester v. Massachusetts, 139 U.S. 240 (1891), as having stated: "'We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast [and] that bays wholly within its territory, not exceeding 2 marine leagues in width at the mouth, are within this limit.'" Id. at 52 (quoting Manchester, 139 U.S. at 258). But even if Louisiana I were understood as having recognized this statement as a principle of customary international law, and as adopting this principle as a rule of decision in the State boundary dispute before it, the case neither incorporated that principle as operative domestic law nor included it as part of a more general holding about boundary lines between States or nations. Moreover, Plaintiffs cite no authority to suggest that Congress intended any such principle of customary international law to control the definition of the term "service in the Republic of Vietnam" in the Agent Orange Act. Similarly, at issue in Louisiana II was the boundary between lands under the Gulf of Mexico owned by the United States and those owned by Louisiana. 394 U.S. at 15. In its analysis, the Court observed that "[u]nder generally accepted principles of international law," "inland, or internal waters" are "subject to the complete sovereignty of the nation." Id. at 22. Again, however, while Louisiana II drew on this principle of customary international law as a rule of decision in the specific boundary dispute before it, the Court did not purport to adopt it as operative domestic law.

In sum, in none of the cases cited by Plaintiffs did the Supreme Court incorporate provisions of the 1958 Convention, or any other provisions of customary international law, as operative domestic law. Instead, these cases simply recognized provisions of that convention – and other customary international legal principles – as statements of customary international law, and used them as rules of decision in the particular U.S.-State or interstate boundary disputes at issue. But because Congress has not enacted these provisions of the 1958 Convention into legislation, they do not constitute operative domestic law. And APA review does not permit an agency decision to be set aside as "not in accordance with law," 5 U.S.C. § 706(2)(A), if the decision is not consistent with customary international law.

E. By Its Terms, the "Substantial Evidence" Standard of APA Section 706(2)(E) Does Not Apply Here.

In addition to challenging the agency's decision as not in accordance with law, and as arbitrary and capricious, Plaintiffs also allege that its decision was "unsupported by substantial evidence." Pl. Cross-MSJ at 38-40. While the discussion above demonstrates that the agency decision was, in fact, supported by "substantial" evidence and clearly warranted, this is not the proper standard to apply in this case. The phrase "unsupported by substantial evidence" comes from Section 706(2)(E) of the APA, which by its terms only applies "in a case subject to sections 556 and 557 of [Title 5] or otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706(2)(E). Sections 556 and 557 establish procedures for hearings required under formal agency rulemaking and adjudications. See id. §§ 556, 557. Because this case is neither subject to one of these sections nor reviewed on the record of an agency hearing provided by statute, the appropriate standard of review here is the arbitrary-and-capricious standard set forth in 5 U.S.C. § 706(2)(A).

Nor does the case law cited by Plaintiffs, Pl. Cross-MSJ at 38-39, suggest to the contrary. Thomas v. Celebrezze, 331 F.2d 541 (4th Cir. 1964), involved review under Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), not the APA. 331 F.3d at 543. Similarly, both Richardson v. Perales, 402 U.S. 389 (1971), and Flack v. Cohen, 413 F.2d 278 (4th Cir. 1969), involved review of a denial of disability benefits under the Social Security Act, rather than the APA. See 402 U.S. at 390; 413 F.2d at 279. And because Renicker v. United States, 17 Cl. Ct. 611 (1989), was an action for military disability compensation challenging a decision by the U.S. Army Board for Correction of Military Records, id. at 612-13, not an action for judicial review of agency action under the APA, it is not relevant here. Thus, the substantial evidence standard of APA Section 706(2)(E) does not apply here.

III. Response to Plaintiffs' Statement on Oral Argument

As explained in Defendant's reply brief supporting his motion to dismiss [ECF No. 16], the Court should assess whether it has subject matter jurisdiction before addressing any merits-related issues. Because the issues presented by Defendant's Rule 12(b)(1) motion are relatively straightforward, Defendant does not believe that oral argument is necessary here. Of course, Defendant has no objection to presenting oral argument if the Court would deem argument useful. However, Defendant would object to any attempt by Plaintiffs' counsel to present his own testimony during oral argument on "applications of thermodynamic theory, naval engineering, navigation, seamanship, hydrology and the law of the sea" or on any other scientific, technical, or other specialized knowledge, as he apparently is asking for an opportunity to do. Pl. Cross-MSJ at 40 & n.15. With limited exceptions, only an expert witness may present opinion testimony on scientific, technical, or other specialized knowledge. See Fed.

R. Evid. 701, 702. Moreover, any such testimony would constitute evidence beyond the administrative record, and (absent extraordinary circumstances not present here) APA review of agency action is based on the record compiled by the agency.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant Defendant's motion for summary judgment, and deny Plaintiffs' cross-motion for summary judgment.

Dated: March 28, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2014, I caused the foregoing document to be served via electronic case filing.

/s/ Daniel Riess
Daniel Riess