UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, INC., et. al. Plaintiffs, v. SLOAN GIBSON,[1] in his official capacity as SECRETARY OF VETERANS AFFAIRS, Defendant.	Case No. 1:13cv1187-TSC **PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Blue Water Navy Vietnam Veterans Association, Inc. and Military-Veterans Advocacy, Inc. submit the following Reply to Defendant's Opposition to Plaintiff's Cross Motion for Summary Judgment and Plaintiff's Opposition to Defendant's Motion for Summary Judgment.

TABLE OF CONTENTS

[1] Original Federal Defendant Eric Shinseki has since resigned as Secretary of Veterans Affairs. As Shinseki was sued only in his official capacity, he is no longer a proper defendant in this case. Pursuant to Fed. R. Civ. P. 25(d), current Acting Secretary of Veterans Affairs Sloan Gibson is automatically substituted for former Secretary Eric Shinseki.

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

INTRODUCTION

Upon the completion of a study by the Institute of Medicine (IOM) of the National Academies regarding whether "Blue Water Veterans" had experienced exposures to herbicides in Vietnam, the VA made a final decision retaining regulations denying the presumption of exposure to herbicides for Blue Water Veterans. Defendants focus on their argument that the IOM's study concluded it could not find enough data to determine whether or not Blue Water Veterans had been exposed to the herbicides. However, this was not the entire finding of the IOM report. A deeper look into the report reveals additional crucial information, which should have led the VA to resolve the presumption question in favor of the Blue Water Veterans. Additionally, two other IOM reports, one prior to and one subsequent to the study relied upon by the Secretary, found that Agent Orange entered the estuarine or near shore waters including the bays and harbors of South Vietnam. AR 78, 956. Notably the IOM also recommended that "members of the Blue Water Navy should not be excluded from the set of Vietnam-era veterans with presumed herbicide exposure." This recommendation has never been rescinded. AR 680.

Moreover, the VA Office of General Counsel's precedential opinion issued in 1997, ignored the fact that the territorial seas are within the borders of the Republic of Vietnam. *See, 1954 Geneva Accords* Articles 4 and 24, as reported in Committee on Foreign Relations, 90th Congress, 1st Session, *Background Information Relating to Southeast Asia and Vietnam* (3d Revised Edition) (Washington, DC: U.S. Government Printing Office, July 1967), pp. 50-62 (hereinafter 1954 Geneva Accords). *See,* https://www.mtholyoke.edu/acad/intrel/genevacc.htm (last visited June 2, 2014). Therefore, the phrase "served in the Republic of Vietnam" must be construed, pursuant to Vietnamese law and the enabling treaty that established the country, to include the Blue Water Veterans who served on ships within the territorial seas. As set forth

herein, in consideration of all of the evidence at hand, the agency decisions made were not based on reasonable deductions in light of the available evidence. The agency did not make a reasonable connection between the facts before it and the decision it made in denying the presumption of exposure to Blue Water Veterans.

FACTUAL BACKGROUND

In the 1960's and the first part of the 1970's as part of Operation Ranch Hand, the United States sprayed millions of gallons of a defoliant chemical, mixed with petroleum and laced with 2,3,7,8-Tetrachlorodibenzodioxin (TCDD) known as Agent Orange (AO) over the Republic of Vietnam (RVN). AR 71, 1703, 1705. The spraying included the banks of rivers and streams discharging into the South China Sea. Id. Hordoir affidavit. The dioxin adhered to dirt, silt and sediment in these rivers and streams, which discharged into the South China Sea in what is known as "plume." AR 786, 1715-004, 1515-024-025, 1705. Although the Agent Orange petroleum mixture would eventually emulsify and fall to the seabed, constant high speed runs and anchoring within the thirty fathom curve in support of the war effort caused the sea bottom to be disturbed resulting in the sediment and the dioxin rising to the surface. AR 799-800, 1704.

In a Russian study conducted in the 1990's, evidence of Agent Orange impingement was found in the sea bed and coral of Nha Trang Harbor. AR 1705, 1715-056-063, 722. Another study showed that the AO infiltrated into Da Nang harbor. AR 1709, ECF 11-5. Agent Orange was stored at Da Nang Airport, AR 774 which was located near the harbor. AR 1715-092.

In 1991, Congress passed and President George H. W. Bush signed, the Agent Orange Act of 1991, Pub.L. 102–4, Feb. 6, 1991, 105 Stat. 11(codified at 38 U.S.C. § 3316. This law required the Department of Veterans Affairs to award benefits to a veteran manifesting a specified disease who "during active military, naval, or air service, served in the Republic of

Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." The Agent Orange Act of 1991 further required the Secretary to favorably consider research from the Institute of Medicine (IOM).

In the late 1990's, the Australian Department of Veterans Affairs, who unlike the United States tracks the health of every discharged veteran, noted a disturbing trend among Navy veterans. Their studies showed a higher incidence of cancer in Navy personnel than Army personnel. AR 1705, 1715-067. They contracted with the University of Queensland, through the National Research Centre for Environmental Toxicology and Queensland Health Services (hereinafter NRCET) to determine the cause. AR 858. After eliminating other potential sources, the University of Queensland examined the water distillation process that converts salt water into drinking water and water for the boilers. The study revealed that the distillation process, which was the same process used on U. S. Navy ships, did not remove the dioxin but actually enriched it. AR 1705-06, 1715-069 –1715-090 Many Australian ships, especially those on the gun line, were built in the United States. All used a similar distillation process. AR 1706, 1715-098. Caldbeck affidavit. Although the VA attacked the NRCET findings, they were later validated by two separate committees of the Institute of Medicine (IOM).

Prior to 2002, crew members of ships entering the Vietnam Service Medal area, approximately 100 nautical miles from the mainland, were granted the presumption of exposure to Agent Orange. *See* bold line drawn on AR 1715-003 and EFC Doc 11-12. In 1997, the VA General Counsel issued a precedential opinion excluding service members who served offshore but not within the land borders of Vietnam. The opinion construed the phrase "served in the Republic of Vietnam" as defined in 38 U.S.C. § 101(29)(A) and 38 C.F.R. § 3.307(a)(6)(iii) to require "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 regulation and section 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 landmass of Vietnam." VA Op. Gen. Counsel Prec. 27-97 (1997). The VA then stopped granting the presumption of exposure to those who served in the waters offshore Vietnam and rescinded some benefits that had previously been granted. In April of 2008, the Department of Veterans Affairs revised the M 21-1 Manual, which continued the prohibition against allowing the presumption of exposure to those who served offshore. AR 1710-11.

In June of 2008, BWNVVA representatives presented to the IOM's Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides (Seventh Biennial Update) in San Antonio, Texas. That Committee report (IOM I)[2] accepted the proposition that veterans who served on ships off the coast of the Republic of Vietnam were exposed and recommended that they not be excluded from the presumption of exposure. AR 679-80. The Secretary did not accept the recommendations concerning the Blue Water Navy veterans.

On May 3, 2010, BWNVVA officials testified before the Institute of Medicine's Board on the Health of Special Populations in relation to the project "Blue Water Navy Vietnam Veterans and Agent Orange Exposure." The Committee reported out on May 20, 2011 (IOM II)[3] with the following conclusions: (1) There was a plausible pathway for some amount of Agent Orange to have reached the South China Sea through drainage from the rivers and streams of South Vietnam as well as wind drift, AR 732-733; (2) The distillation plants aboard ships at the time which converted salt water to potable water did not remove the Agent Orange dioxin in the

[2] The report for IOM I is shown at AR 1-706.
[3] The report for IOM II is shown at AR 707-864.

distillation process but enriched it AR 735; (3) Based on the lack of firm scientific data and the four decade passage of time, they could not specifically state that Agent Orange was present in the South China sea in the 1960's and 1970's, AR 735; (4) There was no more or less evidence to support its presence off the coast than there was to support its presence on land or in the internal waterways AR 736 and (5) Regarding the decision to extend the presumption of exposure, "given the lack of measurements taken during the war and the almost 40 years since the war, this will never be a matter of science but instead a matter of policy." AR716. *See generally,* AR 1712. Notably IOM II did not contradict the findings of IOM I. Specifically they did not disagree with IOM I's finding that the Blue Water Navy personnel should not be excluded from the presumption of exposure. Subsequent to IOM II, another Committee, IOM III[4] reported their findings. As with IOM I *supra*., IOM III found that Agent Orange entered the estuarine or near shore waters including the bays and harbors of South Vietnam. AR 78, 956.

On July 20, 2009, the Secretary authorized a change to the M21-1MR Manual which is currently in effect and specifically excludes ships who entered inland waters, such as harbors and bays, unless the veteran could prove that his ship entered an inland river or that he went ashore. AR 1737, 1759-60.

On January 24, 2012, the then BWNVVA Director of Legal and Legislative Affairs briefed the VA Chief of Staff, John Gingrich, on many of the matters contained herein. Initially, Gingrich thought that the harbors, including Da Nang Harbor, were included in the presumption of exposure. Gingrich ordered an inquiry into the reason for the original General Counsel's opinion and promised that the VA would work with the BWNVVA in ascertaining whether or not the current policy should be modified or rescinded. This did not occur. AR 1722.

[4] The report for IOM II is shown at AR 865-1700.

On December 26, 2012, without any kind of notice to BWNVVA, the Department published a Federal Register Notice, 77 Fed. Reg. 76170 (December 26, 2012). AR 1701-02. In their Background statement, the Defendants quote from the Federal Register Notice as follows:

> In 2011, the Institute issued a report entitled "Blue Water Navy Vietnam Veterans and Agent Orange Exposure." *Id*. After reviewing and analyzing the available data, the Institute concluded that ground troops and service members who had served in the inland waterways of Vietnam had more pathways of exposure to Agent Orange-associated contaminants than did service members who had served in deep-water naval vessels off the coast of Vietnam. *Id*. The Institute found that a paucity of scientific data concerning potential exposures for this latter group of service members made it impossible to determine whether they had been exposed to Agent Orange-associated contaminants. *Id.*

This Notice misinterpreted the conclusions of the IOM and omitted findings favorable to the Blue Water Navy Veterans. In regards to the pathways for exposure, what the Committee really said at IOM II pages 105-06 was:

> The committee identified several plausible exposure pathways and routes of exposure to Agent Orange–associated TCDD in the three populations, including Blue Water Navy personnel (see Figure 5-1). 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.

Concerning the Federal Register assertion that a paucity of scientific data concerning potential exposures for this latter group of service members made it impossible to determine whether they had been exposed to Agent Orange-associated contaminants, what the Committee actually said at IOM II page 133 was:

> After examining a wealth of information on possible routes of exposure, the committee concluded that it would not be possible to determine Agent Orange–associated TCDD concentrations in the Vietnamese environment. This lack of information makes it impossible to quantify exposures for Blue Water and Brown Water Navy sailors and, so far, for ground troops as well. Thus, the committee was unable to state with certainty whether Blue

> Water Navy personnel were or were not exposed to Agent Orange and its associated TCDD. *Moreover, the 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.* (Emphasis added). AR 855.

In other words, the Committee was unable to determine whether it was more or less likely that Blue Water Navy personnel were exposed than those who served in the internal rivers and in-country.

On February 6, 2013, Congressman Chris Gibson of New York introduced HR 543 which would extend the presumption of exposure to the Territorial Seas of the Republic of Vietnam. AR 1715-001 to 1715-002. The bill currently has more than 200 co-sponsors and is pending before the Subcommittee on Disability Assistance and Memorial Affairs. AR 1715-001-002.

Despite amicable demand, the Secretary has refused to rescind the General Counsel's Opinion or the interpretive limitations in the M21-1MR Manual. AR 1716-20, 1724-26.

ARGUMENT

I Standard of Review.

The parties generally agree on the standard of review.

Summary Judgment based on the administrative record does not require the fact finding normally required in a summary judgment motion. What it does require is that the court ascertain whether the administrative record supports the agency's decision. *North Carolina Fisheries Ass'n, Inc. v. Gutierrez* 518 F.Supp.2d 62, 79 (D. D.C., 2007). In other words, Rule 56c does not apply because the court has a limited role in reviewing the administrative record. *Sierra Club v. Mainella* 459 F.Supp.2d 76, 89 (D. D.C.,2006). Accordingly, summary judgment serves as the means of adjudicating "whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id. See, also*,

Richards v. INS, 554 F.2d 1173, 1177 & n. 28 (D.C. Cir.1977).

The Secretary complains about the misquote in *Impresa Construzioni Geom. Domenico Garufi v. United States,* 238 F.3d 1324,1333 (Fed. Cir. 2001), however this is a distinction without a difference. The thrust of the holding is the same but the case excerpt was not an exact quotation. Plaintiffs regret the error; however the impact of *Impressa* remains. Agencies must make a rational decision and follow their own regulations. Although *Impressa* was a contract review case, the general principles remain the same for all APA actions.

II. The Plaintiff's Cross-Motion for Summary Judgment Should Be Granted

A. The Complaint Addresses Final Agency Action.

Defendants argue in their opposition that the actions challenged by Plaintiff do not represent "final agency action," but rather are used for guidance, and therefore are not subject to review under the Administrative Procedures Act ("APA"). Defendants further argue that the provisions do not create or alter rights or obligations or give rise to any legal consequences. Agency action is defined in 5 U.S.C. § 551(13) as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act…" *Brown & Williamson Tobacco Corp. v. F.T.C.,* 710 F.2d 1165, 1170 (6 Cir. 1983).

However, as set forth in Plaintiff's Complaint, on December 26, 2012, without any notice to Plaintiff, Defendant published Federal Register Notice, 77 Fed. Reg. 76170 (December 26, 2012). (Complaint, ¶ 46). The Notice misinterpreted the conclusions of the Institute of Medicine and omitted specific findings in favor of Plaintiff. The Notice further set forth the following "After careful review of the IOM report, 'Blue Water Navy Vietnam Veterans and Agent Exposure,' the Secretary has determined that the evidence available at this time does not support establishing a presumption of exposure to herbicides for Blue Water Navy Vietnam

Veterans."

Additionally, the VA General Counsel's opinion was published as a final rule in the Federal Register 66 Fed. Reg. 23166 (May 8, 2001). The relevant portions of the General Counsel's opinion were incorporated as a final rule. "VA's General Counsel has concluded that service in a deepwater vessel in waters offshore the Republic of Vietnam does not constitute service ''in the Republic of Vietnam.'' (See VAOPGCPREC 27–97)." *Id.* This issue was discussed in the original demand letter to the Secretary. AR 1711.

In *Brown,* the United States Court of Appeals for the Sixth Circuit considered whether the FTC's proposed publication in the Federal Register constituted final agency action. *See Brown & Williamson Tobacco Corp. v. F.T.C.,* 710 F.2d 1165 (6 Cir. 1983). The District Court in *Brown* held that the proposed publication was not final agency action. *Id.* Upon review, the Court of Appeals reversed the District Court's finding based on the principles of judicial intervention set forth by the Supreme Court in *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S. Ct. 1507, 18 L.Ed.2d 681 (1967). *Id., see also Toilet Goods Ass'n v. Gardner,* 387 U.S. 158, 87 S. Ct. 1520, 18 L.Ed.2d 697 (1967), *Gardner v. Toilet Goods Ass'n,* 387 U.S. 167, 87 S. Ct. 1526, 18 L.Ed.2d 704 (1967). In *Abbott,* the Supreme Court's opinion serves as the leading authority on pre-enforcement judicial review, setting forth a two-prong test for determining such issues: (1) is the issue fit for judicial determination; and (2) how great is the hardship to the parties of refusing jurisdiction at this time.

Without question, this issue is fit for judicial review. In this case, the General Counsel's Opinion and the provisions of the M21-1 Manual were published in the May 8, 2001 and December 26, 2012 issues of the Federal Register. Further, the manual provisions have remained unchanged and the Defendants have made clear that they will not be revised. AR

1716-20, 1724-26. As such, the issue is not premature for judicial determination. Both publications, make it evident that the Secretary has erroneously determined that the evidence available does not support establishing a presumption of exposure to herbicides for Blue Water Navy Veterans. *See* 77 Fed. Reg. 76170 (December 26, 2012). Moreover, in responses to two separate letters sent by Plaintiff's counsel to the Secretary, it was made abundantly clear to Plaintiff that no further action would be taken by Defendants on this issue. Accordingly, absent judicial review, no changes are anticipated to the existing publication and the presumption of exposure will continue to be denied to Blue Water Veterans.

The VA General Counsel's opinion, in itself, constituted final agency action. This is not a case where the opinion from the General Counsel's Office was merely advisory. As a precedential opinion it is binding on Regional Offices and the Board of Veterans Appeals. 38 C.F.R. § 14.507(b). Thus it is more than just the opinion of the General Counsel's Office. This is especially true since the opinion was incorporated into the May 8, 2001 rule published in the Federal Register.

This court has called for a flexible review of the term "final agency action" in *Student Loan Mktg. Ass'n v. Riley*, 907 F. Supp. 464, 472-73 (D.D.C. 1995) *aff'd and remanded*, 104 F.3d 397 (D.C. Cir. 1997). The opinion itself, as codified in both versions of the Federal Register and the M21-1 Manual represent strong corroboration of the fact that the Secretary concurs. The December 26, 2012 Fed. Register publication confirms and unequivocally affirmed his adoption and ratification of the General Counsel's opinion and the M21-1 Manual. Additionally, there is no limitation in either document or in either issue of the Federal Register that there are any limitations nor any suggestions that the documents were preliminary. The two letters to Military-Veterans Advocacy confirm the fact that there is nothing preliminary about the

Secretary's opinion. Accordingly, it constitutes final agency action." *See Nat'l Automatic Laundry & Cleaning Council v. Shultz,* 443 F.2d 689, 702 (D.C.Cir.1971) (identifying one indicia of "final action" as the absence of language indicating the opinion is "tentative or otherwise qualified by arrangement for reconsideration").

As this Court found in *Riley*, when the opinion is binding and when it becomes attributable to the Secretary, it constitutes "final agency action" within the meaning of § 10 of the APA, 5 U.S.C. § 704. *Riley*, 907 F.Supp.2d at 472-73.

In maintaining this flexible interpretation of the term final agency action, the relevant considerations in determining finality are whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences flow from agency action. *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 71, 91 S.Ct. 203, 209–10, 27 L.Ed.2d 203 (1970). Here the decision making process is complete. There is no indication that the Secretary or the VA will reconsider. Accordingly, both the General Counsel's Opinion and the M21-1 Manual, as incorporated into the Federal Register, constitute final agency action.

Moreover, the hardship factor set forth as the second prong of the test supports judicial review in this case. Similar to *Abbott,* the impact here of the agency action is "direct and immediate." *Brown,* at 1172, *see also Abbott,* 387 U.S. at 152, 87 S. Ct. at 1517. Although the publication claims the VA will continue to review and accept all Blue Water Veteran claims on a case-by-case basis, the direct effect of the publication is to deny the presumption of exposure to 174,000 Blue Water Veterans, thus leaving thousands of Vietnam Veterans with no realistic hope for recovery of exposure claims. Considering the location of the evidence, the scant

existence of evidence, and the time passed since their service, the Blue Water Veterans face a virtually impossible obstacle in any attempt to overcome the presumption. The IOM report itself notes it would be impossible for most Vietnam veterans to prove they had been exposed to Agent Orange or other herbicides during the war.[5] The publication and resulting regulations have a direct effect on the health of the Blue Water Navy population and their dependents by denying the presumption to their exposure related claims, despite their service within the bays, harbors and territorial seas of Vietnam. Accordingly, the hardship is undoubtedly direct and immediate as to render this issue appropriate for judicial review by this Court. Veterans are dying every day leaving their families destitute.

The Institute of Medicine has concluded that veterans are at increased risk for a specific health consequence if there is evidence of a positive association between one or more of the chemicals of interest and the outcome. AR 59, 660-61. Due to the early onset of illness, many Blue Water Navy veterans were forced to leave the work force early with reduced retirement accounts. Spouses also left work early to act as caregivers. In many cases, retirement accounts were raided to pay medical bills or to provide support for day to day living. Blue Water Navy veterans are dying now, leaving smaller annuities, and sometime no annuity at all, to support their surviving spouses. Across the country, veterans who fought for their country in the bays, harbors and territorial seas of Vietnam, and their survivors, will be left destitute if this Court does not hear this case.

Although Congressional action could resolve the problem, and may do so eventually, the

[5] IOM II noted that: "Because of the impossibility that most Vietnam veterans could prove that they had been exposed to Agent Orange or other herbicides in Vietnam during the war, the 1991 Agent Orange Act created a presumption of service connection; that is, exposure to herbicides in Vietnam was presumed for any Vietnam veteran who became ill with a disease found to be associated with TCDD exposure." A.R. 0728.

sometimes archaic rules governing Congressional bills are hindering the process. As discussed in the original letter to the Secretary, Congressman Chris Gibson introduced a bill to restore the presumption of exposure to encompass all ships that served in the territorial seas of the Republic of Vietnam. AR 1703, 1715-001-02. The bill currently has 209 co-sponsors. http://beta.congress.gov/bill/113th-congress/house- bill/543?q=%7B%22 search %22%3A%5B%22hr+543%22%5D%7D (last visited June 4, 2014). Under House rules, the bill must be scored by the Congressional Budget Office and offset by other mandatory spending provisions. Currently, there is a paucity of data showing the location of the ships deployed to Vietnam. A bill that would require the Secretary of Defense to plot the location of ships deployed to Vietnam has passed the House and is pending in the Senate. § 301 of HR 2189. http://beta.congress.gov/bill/113th-congress/house-bill/2189/text?q=%7B%22search %22%3A%5B%22hr+2189%22%5D%7D (last visited June 4, 2014). Informal liaison with sponsors indicate that similar provisions will be offered as part of the House and Senate versions of the National Defense Authorization Act of 2015. The provision, once enacted will allow the Secretary of Defense one year to complete the study.

Assuming this "ship count" provision remains intact and is passed and signed into law by the end of the year, it will be the end of 2015 before the study will be complete. The results will then be sent to the Congressional Budget Office to compute a final score. Even with the bi-partisan support for this bill, it is likely that Congress will not formally extend the presumption before the end of 2016. Given the uncertainties of a Presidential election year, action may not be taken until 2017.

During the anticipated time it will take before Congress acts, tens of thousands of Blue Water Navy veterans will die or see rapid deterioration in their health. Many will be deprived of

medical care and their ability to support their families will be severely restricted. So that even if Congress acts favorably, these veterans and their families will be deprived of their earned benefits for at least an additional two and possibly three years. Without question, the delays to await Congressional action represent the type of harm envisioned by *Abbott, supra.* This Court has the power to immediately right the despicable harm suffered by these elderly veterans who left home to fight in an unpopular war. They acquitted themselves with honor. They should not be abandoned now.

Furthermore, the provisions challenged by Plaintiff satisfy the two part test set forth in *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) , cited by Defendants. The provisions in the VA's Veterans Benefits Administration Manuals, constitute final agency action regarding the presumption of exposure. Defendants argue that the manual provisions are "used by agency adjudicators as guidance in making determinations with respect to benefits claims by Veterans" and "cannot be said to mark the consummation of the VA's decision making process with respect to any individual Veteran." A review of the wording of the manual itself paints a very different picture. Specifically, section (h) of the M21-1, entitled "Developing Claims Based on Herbicide Exposure in the Republic of Vietnam (RVN)", specifically sets forth the following clarifications regarding exposure:

> Service aboard a ship that *anchored* in an open deep-water harbor, such as Da Nang, Vung Tau, or Cam Ranh Bay, along the RVN coast *does not constitute inland waterway service or qualify as docking and is not sufficient to establish presumptive exposure to herbicides. Evidence of shore docking is required* in order to concede the possibility that the veteran's service involved duty or visitation in the RVN.
>
> Brown water Navy and Coast Guard veterans receive the same presumption of herbicide exposure as veterans who served on the ground in the RVN.

See A. R. 1733 –1737, *emphasis added.* This language represents express and conclusive rules

for developing claims of herbicide exposure. This language is clearly mandatory and not merely suggestive. It is patently obvious from the language that the presumption of exposure may not be granted to the Blue Water Veterans. This mandatory determination limits the rights of this class of Veterans. Accordingly, the case meets the second prong of the test. It is readily apparent that the actions required by the M21-1 Manual constitute "rights or obligations have been determined," or from which "legal consequences will flow." AR 1737. Defendants cannot reasonably argue that the manual provisions do not create or alter any rights or obligations or give rise to any legal consequences, when the language unambiguously mandates that the presumption not be granted to Blue Water Veterans, directly affecting their rights and obligations to benefits under its terms.[6]

Additionally, Plaintiff has identified a specific group of Veterans to whom the manual provisions have been applied in benefits decisions. Since the issuance of the mandatory language set forth in the precedential General Counsel Opinion, the Federal Register Notices and the VA manuals, Blue Water Veterans have been denied the presumption of exposure to herbicides, which directly affects their benefits decisions. As a result, tens of thousands of Blue Water Veterans have been denied benefits and care for herbicide related illnesses due to the simple fact that the presumption has been denied to them. These Blue Water Veterans suffer each day as they are left to live with the illnesses caused by their service in Vietnam with no relief or compensation from the VA, while their Brown Water and land based counterparts enjoy

[6] In their Brief at 9, the Secretary argues that the Plaintiffs did not identify any specific veteran to whom the Manual was applied in any specific benefits decision. Actually, Plaintiffs did cite to the *Haas* case. Additionally and more recently, the M21-1 Manual provisions were applied to a Blue Water veteran who was denied benefits. *McKinney v. Shinseki*, 12-2790, 2014 WL 647249 (Vet. App. Feb. 20, 2014) *adhered to*, 12-2790, 2014 WL 1660374 (Vet. App. Apr. 28, 2014)

the privileges and rights of the presumption of exposure.

In consideration of the foregoing, the VA's conclusion based on the IOM report, that the evidence available at this time does not support establishing a presumption of exposure to herbicides for Blue Water Navy Vietnam Veterans is certainly fit for judicial determination. The VA's steadfast refusal to take further action regarding the manual provisions and publication distinctly represent final agency action.

B. The Administrative Record.

In alleging that Plaintiff's rely on materials outside the administrative record, Defendants fail to acknowledge that many of these documents were in front of the agency. In a letter dated April 30, 2013, Plaintiff's counsel John B. Wells, wrote to Hon. Eric Shinseki on behalf of the Military-Veterans Advocacy, Inc. and the Blue Water Navy Vietnam Veterans Association, to demand that the presumption of Agent Orange exposure be restored to the veterans who served afloat in the territorial seas of the Republic of Vietnam.

Attached to the letter were several exhibits, consecutively marked "A" through "M". These attachments have been before the agency since the receipt of the April 30, 2013 letter, and should have been included within the administrative record.

After their brief was filed, the Secretary belatedly filed those exhibits as AR 1715-001 through 1715-108. The exhibits contains crucial information for the Court's consideration including, but not limited to, evidence regarding the exposure to herbicides in Vietnam, the Da Nang harbor report and personal affidavits of the events which took place in Vietnam. Without question, these supplements to the record should be considered.

Affidavits submitted by Plaintiff not included in the administrative record (ECF Nos. 11-

4, 11-5, 11-7,[7] 11-12[8] and 11-13) should also be considered by the Court. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989), cited by Defendants sets forth several exceptions to the general rule barring extra-record evidence into a case. Subsequent jurisprudence has narrowed the exceptions to the following: (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) An exception should apply in the instant case as the agency failed to consider all relevant factors before it and additionally failed to provide an adequate explanation for its decision. These actions imply bad faith on the part of Defendants in making their decision. Relevant evidence was ignored by the agency despite having access to the information. Moreover, even after Plaintiff requested Defendants to provide justification and reasoning for its decision, pursuant to 5 U.S.C. § 555(e). Defendants failed to specifically address all factors raised in the demand letters. Nothing in their responses discussed the concepts of wind drift, over-spray or runoffs into the harbor.

In a January 2012 meeting between BWNVVA officials and then VA Chief of Staff John Gingirch, the circumstances surrounding Da Nang Harbor were discussed. AR 1722. This included discussion of a Google Earth photo of the harbor. AR 1715-092. The location of the Da Nang airport is clearly marked on the south shore of the bay and just west of the river that is discharging into the harbor. Discussed but not clearly shown on the picture were the drainage ditches and canals running from the airport to the river and directly into the harbor. Wind drift

[7] ECF 11- 7 is merely a custodian's certification of the exhibits to the initial demand letter that are now part of the administrative record.

[8] ECF 11-12 is merely a certification of the process used to mark the Veterans Service Medal area and territorial seas found on the chart of Vietnam which is now part of the Administrative Record at AR 1715-003.

over the harbor was also discussed. Chief of Staff Gingrich actually thought that the harbors were within the presumption exposure until he was shown the M21-1 Manual. AR 1722.

The second Hordoir affidavit attached hereto is a merely a more focused expression of the opinions manifested in AR 1715-005-1715-015. While the original affidavit is specifically directed to one ship, the attached Hordoir affidavit addressed the same hydrological concerns in general. The second affidavit was not submitted to the Secretary because Dr. Hordoir was not located until after the litigation was filed. As the VA failed to address the hydrological issues raised in the record, this clarification does not prejudice the Secretary and should be considered.

The Caldbeck affidavit corroborates items in the administrative record and the Mueller affidavit clarifies potential questions since raised by the VA in the Australian distillation report. It is appropriate for the Court to consider these affidavits.

The affidavits at ECF 11-6 and 11-13 merely confirm the existence of these drainage ditches and canals. ECF 11-6 also refers to the Da Nang Harbor report, which was not included in the demand but which was previously provided to the Department of Veterans Affairs. The affidavit at ECF 11-7 merely confirms that some of the herbicide was sprayed over the harbor. Wind drift contamination of ships operating within a few kilometers of shore was confirmed by IOM II. AR 813, 815-16. This would include bays such as Da Nang harbor, surrounded on three sides by land. The Court of Appeals for Veterans Claims has recognized that ships were exposed due to wind drift. *Haas v. Shinseki*, 22 Vet. App. 385, 389 (2009).

This gives rise to the question of bad faith and improper behavior. Since the Blue Water Navy veterans first raised the issue of the Australian report, the VA has adopted an inelastic and arbitrary position. They viciously attacked the Australian distillation report 73 Fed.Reg 20363 (April 15, 2008). Among other things they claimed it was never peer reviewed. That was

simply untrue. AR 1715-095, 1715-097. Mueller affidavit. The report was also cited by the Australian government and was the relied upon by Australia in their decision to grant the presumption of exposure within approximately 100 nautical miles of the mainland coast of Vietnam. AR 1715-096-097. The VA also questioned whether the ships distilled water off the coast of Vietnam. Yet the limited potable water capacities coupled with increased consumption in the tropical environment required almost daily replenishment of the water supply.[9] Caldbeck affidavit. AR 826. 1715-097. Potable water was used for drinking, showering, laundry, cooking and dish washing.

Additionally the higher sea injection temperature resulted in a less efficient engineering system which required more feed water. Consequently, the distillation plants would have been in constant operation. AR 1705-097-098. VA further postulated that there was no evidence that the same distillation system was used. In fact many Australian ships were constructed in the United States to the same specifications as American ships. Caldbeck affidavit. AR 1715-098. Since the 1940's distillation systems used at the time were common among all steam ships. *Id*. AR 0857. The three types of systems used the same general principles. AR 0857-858. The system studied by the Australians was the same type used aboard U. S. Navy ships at the time. AR 1715-098. Caldbeck affidavit. Beginning in the 1990's the system was replaced by another

[9] The VA has been known to argue that ships were prohibited from distilling potable water within ten miles from land. As noted in IOM II this policy was often ignored. AR 826. The actual directive gave some leeway to the Commanding Officer who normally delegated the authority to the Chief Engineer. This argument is actually irrelevant since no restrictions applied to the distillation of feed water used for the boilers. The same distillation system was used for feed and potable water and the distillation of feed water would have thoroughly contaminated the entire system down to the distribution manifold. Accordingly when the system began to make potable water, even far out to sea, that dioxin would still have been present in the demisters flash chambers and piping. Additionally, tainted feed water would have contaminated the water sides of the boilers and freshwater side of the Main Condensers and other machinery. Caldbeck affidavit.

system known as "reverse osmosis," This system was not in use during the Vietnam War by either the United States or Australia.[10] AR 859, 1715-098. Caldbeck affidavit.

The 2008 Federal Register article had no basis in fact and this criticism of the Australian report was negated by the findings of IOM I, II and III. After replicating the Australian study, IOM II stated that: "This demonstrates an enrichment of TCDD from the feed water into the product water with a product water concentration of 40 ng/0.1 L or 400 ng/L." AR 862.

As another sign of bad faith on the part of the Department, the 2008 Federal Register article was submitted to the court in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), as a supplemental brief post-oral argument. No opportunity was provided to refute the publication prior to the *Haas* decision being issued.

This entire controversy has been riddled with bad faith on the part of the Department. There was no valid reason for depriving the veterans of their benefits in 2002. They have consistently ignored scientific evidence to the contrary. Even in their briefing they have cherry picked statements out of context in the IOM II report to try to convince the court that no dioxin entered the South China Sea. This is despite the fact that the IOM II actually said:

> Thus, the committee was unable to state with certainty whether Blue Water Navy personnel were or were not exposed to Agent Orange and its associated TCDD. Moreover, the 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. AR 855.

From a review of the affidavits, it is clear that Defendants did not consider all of the evidence before it prior to issuing the regulations. The existence of the drainage ditches and

[10] The Australians did use the reverse osmosis system to achieve a base sample of pure water. They then added the Agent Orange dioxin and salt and other contaminants and other suspended solids to equate the composition of the water in the South China Sea. AR 858-59. Mueller affidavit. The VA has tried to claim that the distillation process used by the Australians was a reverse osmosis system. This is not the case. AR 1705-085.

canals was well known to the Secretary. Contamination of the near shore waters including the bays and harbors had also been an issue before the agency in both scientific studies and litigation. The refusal of the Secretary to consider these issues in rendering their decision justifies the introduction of these affidavits. Reliable and scientific information on the exposure to herbicides was in Defendants' possession but nonetheless was not considered by Defendants in making the arbitrary decision regarding the presumption. Further, the material facts submitted by Plaintiff are based on facts set forth in the exhibits and therefore in the administrative record before the court. Such facts can and must be considered by the court in this motion.

Additionally, another exception to the general rule that courts are limited to the administrative record exists. The case of *U.S. v. Akzo Coatings of America, Inc.,* 949 F.2d 1409 (6 Cir. 1991) is illustrative. *Akzo* involved the appeal of a consent decree between the Environmental Protection Agency (EPA) and potentially responsible parties to engage in remedial work to clean up hazardous waste site pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980. Similar to the APA, the *Akzo* court noted that the appropriate standard of review applied to a consent decree reached by the EPA was judicial review of the administrative record under the arbitrary and capricious standard, with evaluation of the fairness and reasonableness of the EPA's decision. *Akzo,* 949 F. 2d at 1426. The *Akzo* court stated it must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citing *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 823–24, 28 L.Ed.2d 136 (1971) (applying the arbitrary and capricious test of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)).

In *Akzo*, the State of Michigan had submitted an affidavit from a Professional Geologist

who studied relevant subsurface soils, but the district court refused to consider the affidavit because it was not part of the administrative record. *Id.* at 1427. In discussing its reasons for allowing the affidavit to be considered, the Court of Appeals for the Sixth Circuit noted that other courts have similarly held that a reviewing court evaluating agency action on the administrative record may consider additional evidence as either background information to aid the court's understanding, or to determine if the agency examined all relevant factors or adequately explained its decision. *U.S. v. Akzo Coatings of America, Inc.,* 949 F. 2d at 1428 (citing *Missouri Coalition for the Environment v. Corps of Engineers of the U.S. Army,* 866 F.2d 1025 (8th Cir.1989); *Love v. Thomas,* 858 F.2d 1347 (9th Cir.1988); *Abington Memorial Hosp. v. Heckler,* 576 F.Supp. 1081 (E.D.Pa.1983), *aff'd,* 750 F.2d 242 (3d Cir.1984)). The court further noted that the reviewing court "must be careful not to allow such evidence to change the character of a hearing from one of review to a trial de novo." *Id.,* (citing *Town of Burlington v. Dep't. of Educ.,* 736 F.2d 773, 791 (1st Cir.1984), *aff'd on other grounds,* 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)).

Here, the *Akzo* case can be compared to the instant affidavits as the standards of review used in the *Akzo* case are the same as those used for APA review. In this case, the affidavits offered provide additional background and clarification information for the court to understand the context of the information before the Secretary. They will further aid the court in determining whether the agency examined all relevant factors and adequately explained its decision. The affidavits have not been offered to introduce new material or to change the character of this hearing and their consideration will not prejudice the Secretary.

III. The VA's Decision was not a Reasonable Determination in Light of the Evidence Before It.

A. The Agency Decision Failed to Examine Relevant Data and Articulate a

Satisfactory Explanation for its Action.

"Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983). In reaffirming the principle requiring agency explanation, the Supreme Court noted that it has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner" *Motor Vehicle Mfrs. Ass'n.,* at 49 (citing *Atchison, T & S.F.R. Co. v. Wichita Bd. Of Trade,* 412 U.S. 800, 806, 93 S. Ct. 2367, 2374, 37 L.Ed.2d 350 (1973); *FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 249, 92 S. Ct. 898, 907, 31 L.Ed.2d 170 (1972); *NLRB v. Metropolitan Ins. Co.,* 380 U.S. 438, 443, 85 S. Ct. 1061, 1064 (1965).

In the instant case, the administrative record reveals several problems with the agency decision. The agency here has failed to consider important aspects of the problem, has failed to offer an explanation for its decision based on the available evidence and is implausible given the evidence at hand. Rather, the agency was quick to dismiss the presumption of exposure to Blue Water Veterans despite an abundance of information and evidence in favor of the presumption. The decision does not appear to be the product of a well-reasoned decision based on the evidence. Instead, it appears that the agency gave absolutely no consideration to the information provided to it by Plaintiff in its demand letters and accompanying exhibits. The Institute of Medicine reports and Plaintiff's demand letter do not support the decision made by Defendants. To make matters worse, Defendants failed, despite repeated requests to do so, to provide any explanation, let alone a reasonable explanation, for its decision-making, leaving behind even

more uncertainty. Defendants fail to offer an explanation for the absence of a rational and satisfactory explanation.

B. The VA Did Not Reasonably Determine that the Presumption of Exposure would not apply to Blue Water Navy Veterans.

1. The Secretary ignored the hydrological evidence.

Throughout his brief, the Secretary blatantly states that there is no proof that the Agent Orange infiltrated into the South China Sea. It is true that there is no possible way, 40-50 years later, to identify the presence of the dioxin in any particular molecule of water. Likewise, as the IOM II noted, there is no possible way, 40-50 years later, to identify the presence of the dioxin in any particular grain of sand. The standard here is not proof to an absolute certainty. As discussed in the Plaintiffs Motion for Summary Judgment, "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct. 1197, 1206 (2011). In determining whether summary judgment should be granted, the court should apply this pro-veteran canon of construction to all aspects of the case – including the actions taken by the Secretary.

IOM II has noted that there was a plausible pathway for Agent Orange dioxin to reach the near estuarine waters. IOM I and III also found that the dioxin entered the estuarine or near shore waters including the bays and harbors of South Vietnam. AR 78, 956. The Australian Department of Veterans Affairs has also determined that Royal Australian Navy personnel who served offshore were exposed to Agent Orange. AR 733.

As well as viewing the issues in this case through a pro-veteran rather than anti-veteran prism, the Secretary should have used basic common sense. The admission by the former Chief of Staff that denying benefits to those who entered bays and harbor "made no sense" was a fair summarization of the obvious. Mr. Gingrich's belief that the bays and harbors were covered by

the presumption was certainly reasonable if not accurate. AR 1709, 1722. The repudiation of this position in the December 26, 2012 Federal Register was unreasonable. AR 1701-02.

A fair review of this matter must begin with the nautical chart at AR 1715-003. As explained in ECF doc. 11-12, the bold line, marking the Vietnam Service Medal area, represents the limits of the presumption from 1991-2002. Any ship landward of that line was awarded the presumption.[11] The dashed line represents the territorial seas. Under HR 543 and the relief prayed for to this Court, any ship landward of that area would be entitled to the presumption. This represents a significantly reduced area than the original presumption area and is designed to exclude ships stationed off North Vietnam where no spraying took place. Although the territorial seas are wider in the Southern portion of the area, this is hydrologically appropriate since the Mekong River is considerably more powerful than the rivers in the central and northern part of the former Republic of Vietnam.

The picture at AR 1715-004 represents a photograph of the Mekong River discharging into the South China Sea, which was taken from the International Space Station on October 24. 2006. ECF 11-9. It is conceded that the river banks were sprayed with Agent Orange and could also have entered the river and streams through runoff from sprayed areas. AR 772, 787. As much as five percent of the total amount used may have been applied to river banks. AR 787. A quick review of the picture at AR 1715-004 demonstrates that dirt, sediment and debris flows as part of a "discharge plume" into the South China Sea. AR 1715-008. Hordoir affidavit. The sediment load in the Mekong is equivalent to the Mississippi River. AR 1715-09. Much sediment is sequestered in the estuary and the Mekong estuary will suffer major future siltation. AR 1715-022. Yet in two weeks, the plume will still have traveled several hundred kilometers,

[11] Notably the VA has never explained how they could have made such a huge error.

taking with it the dirt, sediment and dioxin. AR 1715-024. Notably, the plume flows southward in winter and northward in summer in response to changes in the monsoon winds. AR 1715-025.

Eventually, the petroleum mixed dioxin will emulsify and fall to the seabed. Constant high speed runs and anchoring within the thirty fathom curve in support of the war effort disturbed the sea bottom. This resulted in the sediment and the dioxin rising to the surface. AR 800, 1705. Hordoir affidavit ¶16.

As indicated in the Hordoir affidavit, the Agent Orange dioxin did reach the bays, harbors and estuarine waters. Ships in the territorial seas would have been within the plume of the Mekong Delta. Hordoir affidavit page ¶6, 14. It is highly probable that Mekong water would have been disbursed throughout the territorial sea. Hordoir affidavit ¶14-16. The situation off the coast of the United States was similar. Studies show that after the Agent Orange Dixon was dumped off of New Jersey, marine life were found to contain the dioxin 150 nautical miles offshore from the New York bight. AR 1715-037.

The case for the bays and harbors is even stronger. A review of the picture at AR 1715-092 shows a Google Earth depiction of Da Nang Harbor. As discussed *supra*., the air field was to the south of the shore. A river runs to the east of the airport and discharges into the harbor. A smaller stream slightly above the center of the photograph also empties into the harbor. Da Nang was a major storage location for the herbicide. AR 774. Yet under the current VA rules, a ship anchored in the harbor would not be considered to have been exposed. A ship entering the mouth of the river by two or three feet would be covered by the presumption. If the ship was anchored two or three feet outside of the mouth of the river it was not covered. A ship anchoring in the little inlet at the northeast section of the picture would not be covered, but someone on the little island, seaward of the inlet, watching the ship anchor, would be covered.

The existence of the drainage ditches and canals running from the airfields to the harbor and river show a clear pathway for the Agent Orange to have reached the harbor. ECF 11-6, 11-13. Additionally, the dioxin drifted over the harbor and even a hospital ship where brave casualties laid dying. ECF 11-7. Yet the VA refuses to allow even the bays, harbors and anchorages to be covered. The policy is irrational and just does not make sense.

The VA demands a smoking gun to show herbicide infiltration, but when provided one ignores it. Russian scientists were commissioned to study the coral deterioration in Nha Trang Harbor. Their studies were conducted between 1990 and 2002. AR 1715-056. Their report in 2003 revealed that the trigger for the coral deterioration was contaminated by the Agent Orange dioxin. AR 1715-056 –1715-063. The chemicals associated with Agent Orange were found in the bottom sediment of Nha Trang Harbor. AR 1715-062. This is two to three decades after the last spraying. Ships anchoring in that harbor would have disturbed the bottom sediment constantly churning up the dioxin and causing it to rise to the surface where it contaminated the distillation system. If this occurred in Nha Trang Harbor, and without question it did, it would have occurred in harbors up and down the Vietnamese coast. Anchorages within the 10 fathom[12] curve (blue area on AR 1715-003) would have undergone the same phenomenon. Ships could anchor out to the 30 fathom curve so the same effect could have taken place out to that distance which would have encompassed most of the territorial seas. The effect of anchoring and high speed runs would be reoccurring resulting in continuous contamination throughout the year and not just when spraying occurred.

Despite the "smoking gun" the Secretary has tried to impose an unreasonable and even impossible standard on the veterans community. Given the totality of the evidence, which has

[12] A fathom is six feet

been ignored by the VA it is certainly at least as likely as not that the dioxin entered the South China Sea as well as the bays and harbors of Vietnam. The veterans have met the preponderance standard and circumstantially have proven this fact beyond any reasonable doubt. Consequently, this Court should agree with the Australian Department of Veterans Affairs, two separate committees of the Institute of Medicine, the Russian study and the hydrological experts that the dioxin entered the bays, harbors and South China Sea.

2. The Secretary ignored medical evidence.

Unlike the Australian Department of Veterans Affairs, who proactively checks the health of every veteran from discharge to grave, the United States Department of Veterans Affairs has come under recent criticism for its service to veterans. [13] This has led to the recent resignation of Secretary Shinseki. It was the Australians who first noticed the higher than normal cancer incidence and mortality among Royal Australian Navy sailors and took positive action to determine the cause. AR 78. Australian studies showed a 22-26% increase in cancer incidence above expectations among Navy veterans, compared with an 11-13% increase among the ground forces. AR 1715-067. This led to the Australian distillation study and the recognition of benefits for Naval personnel by the Australian government.

As discussed *supra*., the VA has consistently attacked the Australian studies, noting for

[13] In their brief at 15, the Secretary attempted to denigrate Plaintiff's criticism of VA actions by using the term "stripped of its invective." Plaintiff merely has commented on the factual experience with this bloated bureaucracy. Recent media stories, Congressional tstimony and an internal VA investigation have confirmed the fact that the VA has routinely neglected and mistreated veterans, kept secret waiting lists, falsified records and lied to Congress, all while collecting exorbitant bonuses. The Plaintiff's cross-motion used terms such as irrational, absurd, arbitrary and capricious. In one place Plaintiff indicated that the Secretary lived in a "fantasy world" when discussing the fact that the Secretary ignores the laws of nature. Plaintiff stands by this language while noting that this "invective" is mild compared to the language generated by the Congress and the media in response to the latest VA scandals.

example that the cancer morality and incidence studies did not discuss smoking. [14] Until the IOM II replicated the Australian distillation study, the VA continued to attack it, despite the fact that IOM I found the process consistent with Henry's Law of Thermodynamics. AR 79.

Until 2002, the VA recognized the Blue Water Navy veterans as part of the presumption of exposure. The VA had also included those who served offshore in their charge to the original Agent Orange Committee. AR 79. All of these reasons led to the original IOM recommendation that the Blue Water Navy personnel not be excluded from the presumption of exposure. AR 680. That recommendation has never been rescinded.

3. Defining the Territorial Seas.

It is not the place of the United States or the Department of Veterans Affairs to define the sovereign territory of a nation. A nation defines its own sovereignty and the United States at its discretion can recognize it or not. Without question, the United States recognized the Republic of Vietnam and its sovereignty. The issue here is the limits of the United States' recognition of the sovereignty of the Republic of Vietnam. An understanding of the Vietnam territory only begins to reveal the unreasonable determination by the VA.

Since its founding, the Republic of Vietnam has claimed sovereignty over territorial seas and the bays as well as other inland waters. Article 4 of the Agreement on the Cessation of Hostilities in Vietnam, (hereinafter 1954 Geneva Accords) issued July 20, 1954 provides:

> The provisional military demarcation line between the two final regrouping zones is extended into the territorial waters by a line perpendicular to the general line of the coast. All coastal islands north of this boundary shall be evacuated by the armed forces of the French union, and all islands south of it

[14] Smoking was prevalent among all branches of the service during the Vietnam War. Cheap, tax free, cigarettes were available on ships at sea and four cigarettes were provided free as part of the ration kits known as Meal Combat Infantry (MCI) as part of its "accessory pack." http://en.wikipedia.org/wiki/Meal,_Combat,_Individual_ration (last visited June 6, 2014).

shall be evacuated by the forces of the People's Army of Viet-Nam.

Geneva Accords Article 4. https://www.mtholyoke.edu/acad/intrel/genevacc.htm (last visited June 6, 2014).

Article 24 of the 1954 Geneva Accords Confirms the sovereignty of the territorial:

> The present Agreement shall apply to all the armed forces of either party. The armed forces of each party shall respect the demilitarized zone and the territory under the military control of the other party, and shall commit no act and undertake no operation against the other party and shall not engage in blockade of any kind in Viet-Nam.
>
> For the purposes of the present Article, the word "territory" includes territorial waters and air space.

Id. Accordingly, the founding document of the Republic of Vietnam recognizes sovereignty over the territorial seas.

The next question that must be answered is whether the United States recognized the territorial seas, Vietnamese sovereignty over those seas and the breadth of the territorial seas. Initially, as documented in the history of the Joint Chiefs of Staff, the United States recognized a three mile sovereign territorial seas:

> The Saigon government would announce that it had asked the United States for help in countering sea infiltration. It would further declare its territorial waters up to the three-mile limit a "Defensive Sea Area" in which it would, with US help, stop and search any vessel of any nation suspected of supporting the Viet Cong.
> .

The Joint Chiefs of Staff and the War in Vietnam 1960-1968, Part II at page 256 http://www.dtic.mil/doctrine/doctrine/history/jcsvietnam_pt2.pdf.

The Secretary of Defense, acting on behalf of the President, later expanded the United States recognition of the sovereign territorial seas to twelve miles.

> Whereas the earlier rules had established a three-mile limit for territorial waters, the Secretary changed this limit to 12 miles. He appreciated the Joint Chiefs' "concern over

> the apparent recognition of a twelve-mile territorial limit but, solely for the purpose of these rules," he believed it was "not desirable" to "bring these claims to issue with State now.

Id. at 358. The unilateral action of the Secretary of Defense recognized the 12 mile limit for the territorial seas of the Republic of Vietnam.

The matter was formally ratified by the United States in the Agreement On Ending The War And Restoring Peace In Viet-Nam, executed and entered into force on January 27, 1973. http://www.upa.pdx.edu/IMS/currentprojects/TAHv3/Content/PDFs/Paris_Peace_Accord_1973.pdf (last visited June 6, 2014). Article 1 of that agreement provides that:

> The United States and all other countries respect the independence, sovereignty, unity, and territorial integrity of Viet-Nam as recognized by the 1954 Geneva Agreements on Viet-Nam.

Id. In other words, the United States formally recognized the sovereignty of the territorial seas of both the Republic of Vietnam and the Democratic Republic of Vietnam. The Secretary cannot now claim that his interpretation supersedes the formal declaration of the Republic of Vietnam or United States recognition of that declaration of sovereignty. To the extent that the Secretary maintains this position – it is irrational.

As explained in Plaintiff's Motion, the 1958 Convention on the Territorial Seas and the Contiguous Zone ("1958 Convention") provides clarity about the definition of territorial seas and waters. *See* 1958 Convention, 106 Cong.Rec. 11196, 44 State Dept.Bull. 609). Vietnam claims a 12 mile territorial sea using the straight baseline method which is allowed under the 1958 Convention, the 1954 Geneva Accords and recognized by the United States Secretary of Defense and the Paris Peace Accords. Had their claim violated the 1958 Convention or not been formally recognized by the United States, then the Secretary might have had legitimate cause to object. That was not the

case here. Notably the Secretary has put forth no justification for his irrational interpretation or even any law or regulation that would allow him to make that interpretation. Surely he does not claim that he can overrule the Secretary of State and the Secretary of Defense. Nor has he cited any statue, treaty or court decision to show why his interpretation is not irrational. Instead, he continues to maintain his position in opposition to both domestic and international law.

The Secretary's reliance on *Haas v. Peace*, 525 F.3d 1168 (Fed. Cir. 2008) is misplaced since the *Haas* court merely questioned the applicability of the 1958 Convention's interpretation of the definition of territorial seas but did not rule it invalid. *Haas*, 544 F.3d 1306, 1309 (Fed. Cir. 2008). More importantly, the *Haas* court did not address Vietnam's own definition of their territorial seas or the United States recognition of that sovereignty. Nor did the *Haas* Court address the definition of the Vietnamese sovereignty over the bays and harbors which are at issue in the instant case. Finally, *Haas* itself recognized that their decision did not apply the pro-veteran canon of statutory construction.

The latter point is especially important since *Haas* preceded the Supreme Court action in *Henderson v. Shinseki, supra.* which found that "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 1209. Additionally, the Supreme Court has acted to limit the discretion agencies may by given in interpreting their regulations. *Christopher v. Smith Kline Beecham Corp.*, 132 S.Ct. 2156 (2012). In C*hristopher*, the High Court held that:

> Deference is undoubtedly inappropriate, for example, when the agency's interpretation is " 'plainly erroneous or inconsistent with the regulation.' " *Id.,* at 461, 117 S.Ct. 905 (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 359, 109 S.Ct.

> 1835, 104 L.Ed.2d 351 (1989)). And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Auer, supra,* at 462, 117 S.Ct. 905; see also, *e.g., Chase Bank, supra,* at ——, 131 S.Ct. at 881. This might occur when the agency's interpretation conflicts with a prior interpretation, see, *e.g., Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 515, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994), or when it appears that the interpretation is nothing more than a "convenient litigating position," *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), or a " '*post hoc* rationalization[n]' advanced by an agency seeking to defend past agency action against attack,"

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166, 183 L. Ed. 2d 153 (2012).

The instant case is on all fours with *Christopher*. It cannot be said, given the overwhelming evidence to the contrary that the VA has made a fair and considered judgment. Instead they consistently reject strong and documented evidence to strengthen their litigation position and engage in post hoc rationalizations. As indicated in the Plaintiff's Motion, their interpretation is not really consistent with the plain language of the regulation:

> A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. The last date on which such a veteran shall be presumed to have been exposed to an herbicide agent shall be the last date on which he or she served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. *''Service in the Republic of Vietnam'' includes service in the waters offshore* and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. (Emphasis added)

38 C.F.R. § 3.307(a)(6),(iii).

Word smithing and spin aside, the Plaintiff's interpretation of the plain language of this regulations is more consistent than the Secretary's.

Contrary to the Secretary's argument, the 1958 Convention is self-executing because no legislation was necessary to authorize executive action pursuant to its

provisions. *Cook v. United States,* 288 U.S. 102, 119, 53 S.Ct. 305, 311 (1933). The actions of the United States in confirming the sovereignty over the territorial seas, as established in the 1954 accords, further supports the binding effect of the 1958 Convention. The declaration of the United States in the Paris Peace Accords cannot be contravened by the Secretary of Veterans Affairs. This is the type of "prior interpretation" on the part of the United States that was foreseen by *Christopher*.

The question does not end there. As discussed in the Motion, the Supreme Court has used the 1958 Convention in resolving all matters of litigation concerning sovereignty and property rights. The Secretary has conceded that these decisions, incorporate the 1958 Convention as "customary international law." *United States v. California*, 381 U.S. 139 (1965); *United States v. Alaska*, 521 U.S. 1, 8 (1997). The Secretary does not suggest, however, why his interpretation can be justified as an exception to the 1958 Convention and Supreme Court jurisprudence.

Notably, the United States also enforces its own laws within the territorial seas. *See, e.g.* 33 U.S.C. §3801 (13), 33 U.S.C. § 1401, 43 U.S.C. § 1301. If the United States recognizes the territorial sovereignty of its own waters,[15] it would seem to be an abuse of discretion to deny Vietnam sovereignty over theirs, especially after recognizing it in the Paris Peace Accords.

Therefore, under the 1958 Convention and controlling Supreme Court precedent, waters landward of the baseline were inland or internal waters, which are part of the sovereign territory of a nation including the Republic of Vietnam. As a result, Defendants' actions of declining to extend the presumption of exposure to Blue Water

[15] Additionally, by Presidential Proclamation No. 5928, issued on December 27, 1988 and published in the Federal Register at 54 F.R. 777, the United States recognized sovereignty over territorial seas, defined as 12 nautical miles from the baseline as determined by international law.

Veterans who served within the bays and inland waters of Vietnam is both irrational and unreasonable in light of the 1958 Convention and controlling Supreme Court precedent. Ships entering these harbors and bays and twelve miles landward of the baseline served in the internal waters of the Republic of Vietnam and should be afforded the presumption. Additionally, ships within twelve miles seaward of the baseline, or within the dashed line on AT 1715-003, were within the territorial seas and the sovereign territory of Vietnam. The Secretary's refusal to grant the presumption of exposure to ships that operated in the harbors, bays, internal waters and territorial seas of Vietnam is unreasonable and irrational.

4. Ambiguity in a Veterans Benefits Statute Should be Resolved in Favor of the Veteran.

As discussed *supra,* the canons of construction require regulations concerning veterans benefits to be construed in favor of the claimant. Defendants cite to *Haas,* where the Federal Circuit held that the VA reasonably interpreted the presumption to apply only to service or inland waterways. However, the *Haas* Court specifically noted that their decision did not include consideration of the ruling under the canon of statutory interpretation that ambiguity in a veterans benefits statute should be resolved in favor of the veteran. *Henderson, supra.*; *Brown v. Gardner,* 513 U.S. 115, 117-18, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994). The Federal Circuit found that the argument was waived because it was not raised in the court below. *Haas,* 544 F.3d at 1308. Accordingly, *Haas* can be distinguished from the present case as Plaintiff has carefully protected that argument. Under the accepted "pro-claimant" provisions of *Henderson*, *Brown* and other cases, defense of an agency's interpretation must be balanced against

the Congressional intent that any ambiguity be resolved in favor of the veteran, or in this case the 174,000 veterans and their survivors who might be affected by exposure to herbicides.

Additionally, the instant case differs from *Haas*, as more information has become available concerning herbicide exposure than existed at the time of *Haas.* None of the Institute of Medicine reports in the Administrative Record were complete at the time of *Haas.* The reclama and comments to the 2008 Federal Register had not been filed, Additionally, at the time of *Haas,* the *Haas* court did not have a list of ships that entered the territorial seas. Circumstances have since changed. The hydrology evidence was never presented to the *Haas* court. Nor did they have access to the Russian Nha Trang study or the Da Nang report showing infiltration into the harbors.

Finally, in light of the Supreme Court's rulings in H*enderson* and *Christopher*, it is highly unlikely that the *Hass* court would have come to the same decision.

5. The Institute of Medicine's Findings.

Defendants attempt to rationalize the Secretary's determination based on the findings of IOM II. The evidence and facts actually illustrates that the Secretary's determination was arbitrary and capricious.

The Secretary did not take into account all facts, but rather used an incomplete analysis, which led to his irrational determination. In claiming that there is no proof that the Agent Orange actually entered the South China Sea, the Secretary misconstrued the findings of the report. IOM II, as discussed *supra*., noted that there was a plausible pathway for such exposure via the rivers and streams. The Nha Trang Report (AR 1705, 1715-056-063) and the exhibits to the Plaintiff's Motion (ECF 11-6, 11-7, 11-8 and 11-

13) prove that the dioxin actually discharged into bays, harbors and the sea. The visual effects of the photograph of the Mekong River are illustrative. AR 1715-004. The various hydrological studies are conclusive on the effect of the rivers and streams emptying into the sea.

IOM I and IOM III both indicated it was generally accepted that the Agent Orange dioxin had entered the South China Sea. IOM II must be interpreted in *para materia* as each Committee shares a common purpose and subject. Nowhere have the finding of the other two IOM reports or the recommendation of IOM I been repudiated. Instead, any findings unfavorable to the Secretary's position were merely ignored.

Moreover, as discussed above, Defendants do nothing to justify the irrational determination that allows the presumption to be extended to the ground forces and brown water veterans but denies it to the Blue Water Navy veterans. IOM II specifically found that there was no more or less evidence to support the presence of Agent Orange off the coast (relating to the blue water veterans) than there was to support its presence on land or in the internal waterways (relating to the brown water veterans) or ground troops. Accordingly, the wholesale disenfranchisement of one group of veterans is irrational.

The only argument that the Secretary could put forth was that there were more pathways for ground forces than Blue Water Navy personnel. IOM II's conclusion 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," does not affect whether there was exposure to the Blue Water Navy personnel. The number of pathways to exposure simply does not make a difference. The salient point is

that the Blue Water Navy personnel were subjected to exposure. If the Secretary is merely trying to count numbers and take a vote then this was truly an arbitrary and capricious action. There were numerous pathways of exposure for all Vietnam veterans. AR 813. Some pathways were unique to ground troops. Others such as the distilled water, were unique to Blue Water Navy veterans. The table shows seven plausible pathways of exposure for the Blue Water Navy sailors. This makes the Secretary's argument not only weak, but irrelevant. It is not the quantity of the exposure pathways that is at issue since a single pathway could cause exposure.

Based on this finding, the Secretary's determination cannot be said to be reasonable as a contrasting determination for each group of veterans has been made based on the same amount of evidence. Notably, the IOM I and IOM III reports were actually required by law. No subsequent Committee has ever questioned the earlier finding of IOM I that the ships in the territorial seas were exposed to the dioxin.

Additionally, the report also found that the Blue Water Navy personnel were exposed to a pathway unique to their troops - through the rivers and streams. AR 826-27. Defendants rely on various quotations from the report which indicated that the committee cannot determine the exposure to Blue Water Navy Vietnam veterans and that they could not state with certainty whether the Blue Water Navy personnel were exposed. However, an important consideration is that the report could not confirm the exposure to the Brown Water Navy personnel due to the lack of scientific data and passage of time. This also held true for the ground troops. Given the state of the evidence, excluding the Blue Water Navy veterans is not rational.

Additionally, IOM II conducted its own independent analysis of the Australian

study regarding co-distillation, in order to determine the likelihood of co-distillation of TCDD (Agent Orange and its contaminant, 2, 3, 7, 8,-tetrachlorodibenzo-p-dioxin), using conditions identical to those of the Australian distillation study experiments and TCDD as the contaminant. A.R. 859. IOM II simulated the NRCET study and found that TCDD is readily co distilled and thus will be present in the product water of distillation systems using water that contains TCDD.[16] A.R. 860. Therefore, the report actually makes the reasonable conclusion that there was another likely pathway to exposure: through the ships' co distillation process. In other words, IOM II validated the Australian study that had been repeatedly trashed by the VA.

Defendants further argue that the Agent Orange and TCDD could have been diluted. The level of concentration of TCDD is irrelevant as the presence of TCDD itself is the factor that must be considered. This highly dangerous chemical combination could not reasonably be said to be safe at any level of exposure. Any amount of TCDD is significant and must be considered in determining the reasonableness of the determination. Moreover, the hydrological reports have different conclusions regarding the dilution levels. Notably, the IOM could not estimate the dilution factor due to the "paucity of monitoring information and the variability and uncertainty in the fate and transport information on TCDD as it pertains to Vietnam AR 732. As discussed *supra*, however it was found in the sediment of Nha Trang Harbor over two decades later (AR 1715-062) and widespread contamination across the continental shelf 150 miles from

[16] Specifically, the report concluded that a concentration of 40 ng/ TCDD/L in 1 L feed water would result in all 40 ng TCDD being distilled into the 0.1 L of product water, assuming 10% of the feed water is distilled. This demonstrates an enrichment of TCDD from the feed water into the product water with a product water concentration of 40 ng/0.1L or 400 ng/L. A.R. 862.

the New York bight. AR 1715-037. In a report published four years after the discovery of a dump site, sixty percent of the sediment samples contained the dioxin. *Id.* Thus the dilution argument is without merit.

ORAL ARGUMENT

Defendant objects to oral argument based on a fear that Plaintiffs' counsel might 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." Plaintiff's counsel does not intend to testify but as an advocate is prepared to explain the applications of these matters to the instant case. Additionally, Defendant has ignored may aspects of the administrative record and only recently supplemented the record with the scientific documentation that was originally presented to the agency. Plaintiff's counsel is qualified to explain the relevance and applicability of this evidence to his case, however any "testimony" is limited to the administrative records as supplemented by affidavits. Plaintiff believes that oral argument may be helpful to the Court in considering the record.

CONCLUSION

Recent news stories and internal independent VA Inspector General investigations have called into question whether the VA has acted properly in the administration of their duties. The documented lack of honesty in dealing with Congress, veterans organizations, veterans themselves and the American people must be considered in evaluating the credibility of the VA position. While the initial failure to include exhibits in the Administrative record may well have been an accidental

oversight, other issues concerning VA credibility have come to the forefront. This includes their inaccurate attacks on the Australian distillation study, their "cherry-picking" of statements in the IOM reports, the dismissal of the Australian medical evidence and their rejection of the hydrological evidence as well as their irrational interpretation of international law. The VA's credibility record has not been acceptable and absent strong, proof to the contrary, their bald assertions and conclusionary arguments should be given little credence or deference. The lives and well being of 174,000 Navy veterans and their dependents are at stake. Looking at this case through the pro-veteran lens as required by Congress and the Supreme Court, the Court should find for the Plaintiffs and grant their Motion for Summary Judgment while denying the Secretary's Motion to Dismiss and Motion for Summary Judgment,

Respectfully Submitted:

MILITARY VETERANS ADVOCACY

//s// John B. Wells
John B. Wells
LA Bar #23970
P. O. Box 5235
Slidell, LA 70469-5235 (mail)
769 Robert Blvd. Suite 201D
Slidell, LA 70458 (physical)
Phone: (985) 641-1855
Fax: (985) 649-1536
Email: JohnLawEsq@msn.com

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the within was served on opposing counsel by the court's EC/CMF system the 14th day of June 2014.

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