



DEPARTMENT OF VETERANS AFFAIRS
Washington, DC 20420

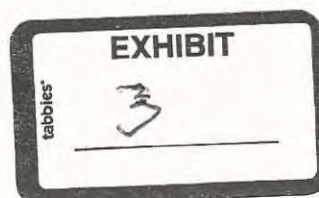
June 20, 2013

Mr. John B. Wells
Executive Director
Military-Veterans Advocacy, Inc.
P.O. Box 5235
Slidell, LA 70469

Dear Mr. Wells:

This is in response to your request regarding the presumption of exposure to Agent Orange to Veterans who "served afloat in the territorial seas of the Republic of Vietnam." The Secretary has asked that I respond on his behalf, and I regret the delay. The Department of Veterans Affairs (VA) is firmly committed to ensuring the accurate, fair, and efficient adjudication of claims for compensation for disabilities, including those related to Agent Orange exposure. Thus, we have considered your request as a petition for rulemaking under 5 United States Code (U.S.C.) § 553(e).

The Agent Orange Act of 1991 requires that a Veteran has "served in the Republic of Vietnam" to be eligible for the presumption of exposure to herbicides. Public Law 102-4, 105 Stat. 11 (codified in relevant part at 38 U.S.C. § 1116(f)). As you know, VA has long interpreted the phrase "served in the Republic of Vietnam" to include "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 CFR § 3.307(a)(6)(iii). In turn, VA has long interpreted the regulatory phrase "duty or visitation in the Republic of Vietnam" to require that a claimant have been present within the land borders of Vietnam at some point in the course of his or her duty. VA interprets service on inland waterways to constitute presence within the land borders of Vietnam. As the U.S.C. Court of Appeals for the Federal Circuit (Federal Circuit) explained in its decisions in *Haas v. Peake*, VA's interpretation is reflected in Veterans Benefits Administration (VBA) adjudication manuals (designated as "M21-1" and "M21-1MR"), a precedent opinion of VA's General Counsel (designated as "VAOPGCPREC 27-97"), and rulemaking notices published in the *Federal Register*. See *Haas v. Peake*, 525 F.3d 1168, 1189 (Fed. Cir. 2008), *rehearing denied*, 544 F.3d 1306 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 1149 (2009); VBA Manual M21-1, part III, paragraph 4.24(e)(1) (Feb. 27, 2002) (stating that a Veteran "must have actually served on land within the Republic of Vietnam [] to qualify for the presumption of exposure to herbicides."); VAOPGCPREC 27-97 (holding that service offshore is not included within the meaning of service "in the Republic of Vietnam" under 38 U.S.C. § 101(29)); VBA Manual M21-1MR IV.ii.2.C.10.b (Dec. 16, 2011) (citing to VAOPGCPREC 27-97 for more information on the definition of service in the Republic of Vietnam); 66 Fed. Reg. 23,166 (May 8, 2001). Veterans with service on inland waterways are known as "brown water" Veterans, and Veterans with service only in the farther territorial waters of Vietnam are known as "blue water" Veterans. See M21-1MR IV.ii.2.C.10.k (Dec. 16, 2011).



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In *Haas v. Peake*, the Federal Circuit upheld VA's interpretation of the statutory phrase "served in the Republic of Vietnam" as requiring presence within the land borders of Vietnam. Accordingly, we do not agree with the contentions in your letter to the extent they assert that VA's interpretation is contrary to 38 U.S.C. § 1116(f) or to the congressional intent reflected in that statute. However, we construe your letter as a request that VA either change its interpretation of section 1116(f) or, independent of section 1116(f), revise 38 C.F.R. § 3.307(a)(6)(iii) to make individuals who served aboard ships in the territorial waters of Vietnam eligible for the evidentiary presumption of exposure to herbicides. As explained below, we decline to make any amendment to 38 C.F.R. § 3.307(a)(6)(iii).

At the outset, we note that the arguments raised in your letter pertain to issues VA has previously considered over the years. We refer you to the Federal Circuit's decisions in the *Haas* litigation and to the other materials cited in those decisions and in this letter for further information regarding VA's consideration of these issues, which we summarize below.

As you mention in your letter, on December 26, 2012, VA published in the *Federal Register* a notice announcing that, after careful review of the 2011 Institute of Medicine (IOM) report titled, "Blue Water Navy Vietnam Veterans and Agent Orange Exposure," the Secretary determined that "the evidence available at this time does not support establishing a presumption of exposure to herbicides for Blue Water Navy Vietnam Veterans [, and that] VA will continue to accept and review all Blue Water Navy Vietnam Veteran claims based on herbicide exposure on a case-by-case basis." 77 Fed. Reg. 76,170, 76,171 (Dec. 26, 2012). As the notice explained, VA "requested the [IOM] study in response to veteran concerns and the recommendations in the IOM report 'Veterans and Agent Orange: Update 2008.' VA tasked the IOM with establishing a committee to determine whether Blue Water Navy Vietnam Veterans experienced exposures to herbicides and their contaminants (focusing on dioxin) comparable to those of ground troops and Brown Water Navy Vietnam Veterans." *Id.* The notice explained that the IOM "reviewed a wide range of data sources including peer-reviewed literature, exposure and transport modeling, interviews with veterans, ship deck logs, and other government documents." *Id.* However, the notice explained, the IOM concluded 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 [dioxin]." *Id.* The notice further explained that "the IOM concluded that ground troops and Brown Water Navy Veterans had qualitatively more pathways of exposure to Agent Orange [] . . . than did Blue Water Navy Veterans." *Id.* Specifically, the 2011 IOM report found that "[a]fter examining a wealth of information on possible routes of exposure, . . . it would not be possible to determine Agent Orange [] 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

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Agent Orange and its associated [dioxin]." Committee on Blue Water Navy Vietnam Veterans and Agent Orange Exposure, Institute of Medicine, *Blue Water Navy Vietnam Veterans and Agent Orange Exposure* 133 (2011) [hereinafter "2011 IOM Report"]. Although the IOM committee also found it impossible to quantify exposures for ground troops and brown water Veterans, the Committee concluded that, as noted above, "qualitatively, ground troops and Brown Water Navy personnel had more pathways of exposure to Agent Orange [] . . . than did Blue Water Navy personnel." *Id.*

In your letter, you reference an Australian law granting benefits to Australians who served on ships during the Vietnam War. Notably, the Australian law was an impetus for VA to request the 2011 IOM study and report. 2011 IOM Report at 26. As explained above, VA recently concluded that the IOM report did not support an expansion of the evidentiary presumption of exposure to herbicides for Blue Water Navy Veterans. In addition, you reference an Australian study examining potential exposure of Australian Navy Veterans to dioxin through consumption of water from a ship's onboard water distillation mechanism. The IOM report explained that the Australian study, which found that the distillation mechanism could involve contamination of ship drinking water with dioxin, "requires the assumption that [dioxin] was present in the marine water used to distill the potable water." 2011 IOM Report at 42. Regarding the onboard water distillation process, the IOM report explained that, "[i]f Agent Orange-associated [dioxin] was present in the marine water, potable water was a plausible route of exposure." 2011 IOM Report at 105. However, the IOM report stated that, "[t]he Committee cannot provide quantitative estimates of exposure by any of the exposure pathways described . . . because of lack of data on environmental concentrations of [dioxin] and activity patterns of military personnel. At best, the Committee can judge whether specific routes of exposure are plausible." *Id.* at 105-06. The IOM ultimately concluded, "without information on the [dioxin] concentrations in the marine feed water, it is impossible to determine whether Blue Water Navy personnel were exposed to [dioxin] via ingestion, dermal contact, or inhalation of potable water." *Id.* at 133.

Regarding an Australian study finding a higher risk of incidence of cancer among Australian Navy Veterans, the IOM found that this study did not address the effects of exposure to other chemicals with potential carcinogenic effects. 2011 IOM Report at 124 ("Confounding factors – such as smoking, alcohol use, and sun exposure – are major contributors to some of the cancers identified as increased in the Australian studies of naval personnel. For example, lung cancer and melanoma were found to be higher in the Australian incidence study. Naval personnel are exposed to some chemicals that have carcinogenic potential, and these were not considered in the analyses of any of the above studies."). Based on flaws in the Australian cancer incidence data and other relevant studies, the IOM concluded that "because of the small number of studies and their limitations, there is no consistent evidence to suggest that Blue Water Navy Vietnam veterans were at higher or lower risk for cancer or other long-term health outcomes than shore-based veterans, Brown Water Navy veterans, or Vietnam veterans in other branches of service." *Id.*

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In your letter, you argue for a revision of VA's regulatory interpretation of "served in the Republic of Vietnam" based on maritime laws that consider a Nation's territorial waters as part of a sovereign Nation's territory. In *Haas v. Peake*, the Federal Circuit explained that there are many ways to define the territory of a sovereign Nation and that "[n]either the language of [38 U.S.C. § 1116(f)] nor its legislative history indicates that Congress intended to designate one of the competing methods of defining the reaches of a sovereign nation." 525 F.3d at 1184. In denying the appellee's rehearing petition, the Federal Circuit observed that including Vietnam's territorial waters as part of the statutory requirement "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." 544 F.3d at 1309. The Federal Circuit noted that some statutory references to presence "in" a country have been understood not to include presence in the airspace or in the territorial waters surrounding the country. 544 F.3d at 1309 (citing *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir.1995) (an alien does not enter the United States until he has touched the soil)). As observed by the Federal Circuit, the "law of the sea" is one approach for defining a sovereign Nation's territory, but Congress did not specify nor otherwise indicate that Vietnam's territorial waters were to be included for purposes of the "service in the Republic of Vietnam" requirement of the Agent Orange Act. 525 F.3d at 1184.

As detailed in the Federal Circuit's decisions in the *Haas* litigation, VA has explained that it interprets the statutory phrase "service in the Republic of Vietnam" as applying only to service within the land borders of Vietnam because that is the area where herbicides would actually have been applied and because VA is not aware of evidence that Veterans who served solely in the waters offshore of Vietnam would have encountered comparable risks of herbicide exposure or that Congress intended the statutory language to encompass offshore service. See *Haas*, 525 F.3d at 1181-83, 1192. The Federal Circuit found that to be a reasonable interpretation of the statute. *Id.* at 1193 ("Drawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable"). VA has considered the issues raised in your letter and has determined that they do not warrant a change in VA's interpretation of 38 U.S.C. § 1116(f) and do not warrant establishing a presumption of herbicide exposure based on blue water service beyond the scope of that statute.

For these reasons, we deny your petition for rulemaking. Significantly, VA's determination not to extend an evidentiary presumption of herbicide exposure to Veterans who served in the territorial seas of Vietnam does not in any way preclude a Veteran from filing a claim for compensation for any condition the Veteran believes was caused by herbicide exposure. VA can and does grant compensation without regard to the absence of a presumption, if the evidence in a particular case, including medical opinions provided by VA or private physicians, shows that it is at least as likely as not that the Veteran's condition was incurred in service or caused by a circumstance of service, such as herbicide exposure.

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Finally, you mention in your letter legislation presently pending in Congress regarding Blue Water Navy Veterans. If Congress enacts legislation expanding the presumption of exposure to herbicides to Veterans with service exclusively aboard ships in the territorial waters of the Republic of Vietnam, VA will of course comply with the statute.

I hope this information is helpful to you.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jose D. Riojas". The signature is fluid and cursive, with a large initial "J" and "R".

Jose D. Riojas
Interim Chief of Staff