UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, INC., et. al.

Plaintiffs,

v.

ERIC SHINSEKI, in his official capacity as SECRETARY OF VETERANS AFFAIRS,

Defendant.

Case No. 1:13cv1187-EGS

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND CROSS MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Blue Water Navy Vietnam Veterans Association, Inc. and Military-Veterans Advocacy, Inc. submit the following Opposition to Defendant Eric Shinseki's Motion to Dismiss and cross-motion for Summary Judgment.

INTRODUCTION

This case is before the court seeking declaratory and equitable relief to restore veterans benefits to approximately 174,000 United States Navy veterans and their survivors who were exposed to the Agent Orange dioxin in the bays, harbors and the territorial seas of the Republic of Vietnam during the Vietnam War. These benefits were arbitrarily and capriciously stripped from those sick and dying veterans in 2002. Despite overwhelming scientific evidence to the contrary, the Secretary refuses to recognize that Agent Orange infiltrated the South China Sea and that the shipboard distillation process, which converted salt water to potable drinking water enriched the dioxin. Water was then distributed via a manifold to the shipboard potable water system. The contaminated water was then used for drinking, showering, food preparation and laundry purposes, inducing changes to human DNA which resulted in cancer, ischemic heart disease, diabetes, Parkinson's disease and unknown birth defects. Although many of these veterans have quietly died, their surviving spouses struggle without the benefits the United States legally and morally owes them. This suit is brought to remedy that unconscionable situation.

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). The spraying included the banks of inland rivers and streams. Statement of Facts (SOF) ¶1, 2, 5. The dioxin adhered to dirt, silt and sediment of these rivers and streams, which discharged into the South China Sea in what is known as "plume." SOF ¶6, 7. Although the AO/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 constantly disturbed the sea bottom to be disturbed. This resulted in the sediment and the dioxin rising to the surface. SOF ¶8, 9, 10, 11, 12.

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. Another study showed irrefutable proof that the Agent Orange infiltrated into Da Nang harbor. SOF ¶13.

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), a non-profit organization chartered by the National Academy of Sciences. ¶16, 17, 18.

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. SOF ¶40. 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. 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 NRCET 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. Many Australian ships, especially those on the gun line were built in the United States. All used a similar distillation process.

Although the VA attacked the NRCET findings, they were later validated by two separate committees of the Institute of Medicine (IOM). SOF ¶45, 46.

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.[1] 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," 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 already been granted. In April of 2008, the Department of

[1] That area is delineated by the solid bold line on Exhibit B to Exhibit 7.

Veterans Affairs revised the M21-1 Manual[2] which continued the prohibition against allowing the presumption of exposure to those who served offshore. SOF ¶21, 23, 24, 25, 26.

In June of 2008, BWNVVA officials 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)[3] accepted the proposition that veterans who served on ships off the coast of the RVN were exposed to Agent Orange and recommended that they not be excluded from the presumption of exposure. The Secretary did not accept these recommendations. SOF ¶28, 29, 30.

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)[4] 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, (2) The distillation plants aboard ships at the time which converted salt water to potable water did not remove the Agent Orange dioxin in the distillation process and enriched it by a factor of ten, (3) Based on the lack of firm scientific data and the four decade passage of time, they could not specifically state that Agent Orange was present in the South China sea in the 1960's and 1970's, (4) There was no more or less evidence to support its presence off the coast than there was to support its presence on land or in the internal waterways and (5) Regarding the decision to extend the presumption of exposure "given the lack

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[2] The Department's Adjudication Procedures Manual is known as the M21-1 Manual

[3] Relevant pages of IOM I are attached as Exhibit 6.

[4] IOM II can be found at http://www.iom.edu/Reports/2011/Blue-Water-Navy-Vietnam-Veterans-and-Agent-Orange-Exposure.aspx

of measurements taken during the war and the almost 40 years since the war, this will never be a matter of science but instead a matter of policy." Notably 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. SOF ¶31.

On December 16, 2011, 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. SOF ¶32.

On January 24, 2012, the BWNVVA Director of Legal and Legislative Affairs briefed the VA Chief of Staff, John Gingrich, on many of the matters contained herein. SOF ¶34. 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. No such co-operation ever occurred. *Id*.

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). SOF ¶35. 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).

In other words, the Committee was unable to determine whether it was more or less likely that Blue Water Navy personnel were exposed that those who served in the internal rivers and in-country. Additionally, as noted in Exhibit 4, any exposure was harmful.

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. SOF 39. Exhibit A to Exhibit 7. The bill currently has 158 co-sponsors and is pending before the Subcommittee on Disability Assistance and Memorial Affairs.

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

ARGUMENT

I. Standard of Review

A case may be dismissed for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) on the complaint and when necessary, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981). *See also, Land v. Dollar,* 330 U.S. 731, 735 n. 4 (1947); *Hohri v. United States,* 782 F.2d 227, 241 (D.C.Cir. 1986). Subject-matter jurisdiction cannot be waived because it involves a court's power to hear a case. *United States v. Cotton,* 535 U.S. 625, 630 (2002). All courts have an independent obligation to determine whether subject-matter jurisdiction exists. *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583 (1999).

A plaintiff invokes jurisdiction under 28 U.S.C. § 1331 when he pleads a colorable claim "arising under" the Constitution or laws of the United States. *Bell v. Hood*, 327 U.S. 678, 681-685 (1946). The court should find jurisdiction if it is colorable, *i.e.,* if it is not "immaterial and made solely for the purpose of obtaining jurisdiction" or is not "wholly insubstantial and frivolous." *Bell*, 327 U.S. at 682-683. *See also, Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998).

Here the plaintiff has invoked federal jurisdiction pursuant to § 1331 and specifically invoked the jurisdiction of the Administrative Procedures Act, the Mandamus Act and the Declaratory Judgment Act. Complaint ¶4. The claim is colorable under *Bell*, *supra*. Thus the court should deny the defendants' motion under Rule 12(b)(1).

Summary judgment is appropriate only when there is "no genuine issue as to any material fact" and, viewing the evidence in the light most favorable to the nonmoving party, "the moving party is entitled to a judgment as a matter of law." *McCready v. Nicholson,* 465 F.3d 1, 7 (D.C.Cir.2006) (quoting Fed.R.Civ.P. 56©).

In the instant case no administrative record has been submitted or made available. The plaintiff has submitted sufficient affidavits and exhibits, however, to establish a sufficient factual record for the court to make a determination. Absent any contrary material evidence of record, the court should grant summary judgment for the plaintiffs.

II The Defendant's Motion to Dismiss Should Be Denied.

A. The Veterans Judicial Review Act Does Not Preclude Administrative Procedures Act Review by This Court.

Defendants argue that this Court should dismiss Plaintiffs' complaint for lack of subject matter jurisdiction on the grounds that 38 U.S.C. § 511(a), ~~of~~ the Veterans Judicial Review Act[5] ("VJRA") prohibits review by federal district courts of "all questions of law and fact necessary to a decision by the secretary under a law that affects the provision of benefits." In addressing this statute, the Supreme Court of the United States has held that its purpose is twofold: (1) to ensure that veterans' benefit claims will not burden the courts and VA with expensive and time-consuming litigation, and (2) to ensure that the technical and complex determinations and applications of VA policy regarding such claims will be adequately and uniformly made. *Johnson v. Robison*, 415 U.S. 361, 370, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974).

Plaintiffs do not dispute that 38 U.S.C. § 511 precludes federal district courts from hearing questions regarding individual claims of specific benefits by a particular veteran. However, district court review is not precluded by 38 U.S.C. § 511 where the litigation does not

[5] The law is codified at 38 U.S.C. § 511(a).

involve veterans' benefit claims. *University of Maryland v. Cleland*, 621 F.2d 98 (4th Cir. 1980). In *University of Maryland,* the University sought review of a decision by the Administrator of Veterans' Affairs regarding the disbursement of VA In-Service Educational Benefit checks. *University of Maryland,* at 98. The University conducted an overseas college credit program for military personnel stationed in foreign countries, which involved the assignment of the participant's benefit checks to the University. *Id.* The VA thereafter issued new regulations prohibiting educational institutions from using a power of attorney to negotiate benefit checks and the University filed suit to force the disbursement of checks not yet mailed. *Id.* The district court held that 38 U.S.C. § 211(a)[6] precluded review and therefore dismissed the case for lack of subject matter jurisdiction. *Id.* On appeal, the Fourth Circuit reversed and remanded to the district court for determination on the case merits, noting that the controversy was very different than the judicial review of a denial of benefits, which is clearly precluded by statute. *University of Maryland*, at 100. The court in *University of Maryland* noted that the challenge at issue was to the Administrator's interpretation of his authority under a statute (38 U.S.C. § 3101(a)), and therefore agreed with the University that because the litigation did not involve veterans' benefits claims. Under the rationale of *Johnson v. Robison,* 415 U.S. 361, 94 S. Ct. 1160 (1974) and *Hernandez v. Veterans' Administration,* 415 U.S. 391, 94 S. Ct. 1177 (1974), the purposes of 38 U.S.C. § 211(a) were not served by a refusal to accept jurisdiction.

In both *Johnson* and *Hernandez,* the Plaintiffs were challenging their statutory exclusion from veterans' education benefits. The Supreme Court held that 38 U.S.C. § 211(a) (the precursor to § 511(a)) would not preclude review of challenges to certain VA benefit programs. Although the Circuits vary on whether judicial review of constitutional challenges to VA

[6] 38 U.S.C. § 211(a) has been replaced with 38 U.S.C. § 511(a).

programs is permitted, courts agree that judicial review is not precluded regarding the Administrator's interpretation of his authority under a statute. *See University of Maryland, supra*; *Wayne State University v. Cleland*, 590 F.2d 627 (6th Cir. 1978). In *Wayne*, a university and students brought a class action suit against the Administrator of the Veterans Administration and others, seeking declaratory and injunctive relief to prevent the Administrator from implementing new regulations which would classify veteran students in certain university programs as part-time for purposes of determining educational assistance allowance benefits. On the issue of whether the district court was precluded from reviewing the challenge to the Administrator's authority to promulgate regulations based on 38 U.S.C. § 211(a), the Sixth Circuit held that 38 U.S.C. § 211(a) did not preclude a challenge to the Administrator's authority to promulgate regulations. In support of its decision, the *Wayne* Court noted that suits challenging the authority to promulgate regulations will not involve the federal courts in the day to day operations of the VA. *Wayne State University,* 590 F.2d at 631. The Court further noted that suits challenging the statutory authority of the Administrator will not involve the courts in the complex and technical niceties of VA policy, but rather will seek a determination as to whether regulations have been promulgated pursuant to a congressional grant of authority. *Id.* at 632.

Here, Plaintiffs are not making a claim for veteran benefits, nor are Plaintiffs challenging the denial of such a claim or making a constitutional challenge to a VA program. Defendant argues that the *Johnson* case supports Defendant's position that 38 U.S.C. § 511(a) precludes review in this case. However, at issue in *Johnson* was a constitutional challenge to a VA program. The instant case is distinguishable from *Johnson*, as it does not involve a constitutional challenge, but rather a challenge to an interpretive regulation. Rather, Plaintiffs

are challenging the Secretary's interpretation of 38 C.F.R. § 3.307(a)(6)(iii). It is the M21-1 Manual that currently denies the presumption of exposure to Agent Orange for the crew of ships operating in the bays, harbors and territorial seas of Vietnam. Plaintiffs here seek to have the Secretary's interpretation modified so that the presumption of Agent Orange exposure is granted to those who served aboard ships in bays, harbors and territorial seas of the Republic of Vietnam. In other words, Plaintiffs seek to give 38 C.F.R. § 3.307(a)(6)(iii) its plain meaning.

The government relies on *Broudy v. Mather*, 460 F.3d 106, 114-15 (D.C. Cir. 2006) for the proposition that § 511(a) preempts the field. That is not the teaching of *Broudy*. The *Broudy*, court held that the Secretary did not enjoy exclusive jurisdiction. *Broudy* went on to find that when, as here, the matter has not been decided by the District Court, the legality of VA regulations can be challenged. *Id.* at 112-113.

The *Broudy* court went on to emphasize that a district court lacked jurisdiction to review only the "actual decisions" denying benefits. The court concluded:

> Section 511(a) does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits. Rather, it simply gives the VA authority to consider such questions when making a decision about benefits, ... and, more importantly for the question of our jurisdiction, prevents district courts from reviewing the Secretary's decision once made....

Broudy, 460 F.3d at 112

In *Price v. United States,* 228 F.3d 420 (D.C.Cir.2000) (per curiam), and *Thomas v. Principi,* 394 F.3d 970 (D.C.Cir.2005). the D. C. Circuit found that § 511(a) barred the determination of a claim by individual veterans. That is not the issue here. The suit does not ask for the determination of any single veteran's benefit. Instead it challenges the legality of interpretive regulations, which is within the purview of this Court.

Other Circuits have come to similar conclusions in the wake of the enactment of the VJRA. In *Disabled American Veterans v. U.S. Department of Veterans Affairs,* 962 F.2d 136, 137–38 (2d Cir.1992),the Court concluded that a District Court had jurisdiction to hear an equal protection challenge to a statute that eliminated the availability of veterans' family benefits in certain circumstances.. *Id.* at 140–41; S*ee also Larrabee ex rel. Jones,* 968 F.2d 1497, 1501 (2d Cir.1992); *Zuspann v. Brown,* 60 F.3d 1156, 1159 (5th Cir.1995).

Notably the DC District court case relied upon by defendant, *Van Allen v. U.S. Dept. of Veterans Affairs*, 925 F.Supp.2d 119 (D.D.C. 2013) addressed a case of individual benefits rather than an attack on the regulation. *Van Allen* was also a *res judicata/collateral estoppel* case that implicated the Tucker Act and is generally inapplicable here.

Like the cases discussed above which challenged regulations of the VA Administrator, the case at hand challenges only the interpretive regulations of the Secretary and the General Counsel's opinion. The Agent Orange Act of 1991, codified in 38 U.S.C. § 1116(a)(3) and the substantive regulation provides in pertinent part that a veteran with an enumerated medical condition who 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 the service to Agent Orange. Defendant, acting as Secretary of Veterans Affairs, through his M21-1 Manual has improperly limited the presumption to those veterans who had "boots on the ground" in Vietnam and those who served onboard ships who were in "inland" waters. Excluded are veterans who served in ships in bays or waters landward of the baseline. This interpretive regulation is an arbitrary and capricious action that is unsupported by substantial evidence, Additionally, the interpretive regulation violates both domestic and international law. The Court of Appeals for Veterans Claims and the VJRA lack jurisdiction to adjudicate this challenge.

Absent any remedy within the scope of the VJRA, jurisdiction is proper in the federal district courts under the Administrative Procedures Act.

Plaintiffs challenge the Secretary's interpretation limiting the presumption of exposure. Both the General Counsel's opinion and the M21-1 Manual ignores the fact that Agent Orange entered rivers and streams in Vietnam, flowed out to sea and contaminating harbors in which Navy ships operated. The Secretary's interpretive regulation also ignores the proven fact that the shipboard distillation process enriched the dioxin which then entered the shipboard drinking water.

Defendant seeks to avoid district court review of this issue by hiding behind 5 U.S.C. § 511(a). However, as discussed herein, 38 U.S.C. § 511(a) does not insulate the Secretary from judicial review of a challenge to an interpretive regulation.

Moreover, the purposes of 38 U.S.C. § 511(a) would not be served by a refusal to accept jurisdiction in this case. VA policy concerning the presumption of exposure to Agent Orange cannot be adequately and uniformly made under the existing M21-1 Manual's interpretation. The Secretary's interpretation of the statute and 38 C.F.R. § 3.307(a). is irrational, arbitrary and capricious, unsupported by substantial evidence and in violation of domestic and international law. Review of the existing studies and evidence clearly shows the urgent need for a change to the current interpretive regulation. The challenge in this case does not fall within the reach of the types of claims 38 U.S.C. § 511(a) was designed to exclude from judicial review. A decision on the issue here will further VA policy by providing clear, uniform and rational application of its regulations to Vietnam veterans adversely exposed to and affected by Agent Orange.

B. 38 U.S.C. § 502 Does Not Preclude Review.

In their Motion to Dismiss at 17, Defendants contend that "Plaintiffs' complaint challenges the established meaning of 38 C.F.R. § 3.307(a)(6), an existing regulation VA promulgated through notice-and-comment rulemaking." That is not the case. Nothing in the Complaint challenges the wording of that regulation which states:

> 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). Plaintiff concurs with the plain meaning of that substantive regulation and believes it is a fair substantive interpretation of the statute.

Defendant argues that Plaintiffs' claims are barred because they challenge the established meaning of 38 C.F.R. § 3.307(a)(6). However, as clearly set forth in Plaintiffs' Complaint, this action does not deal with rulemaking or a request for rulemaking. Rather it concerns an interpretive regulation (M21-1R) and a precedential General Counsel Opinion (VA Op. Gen. Counsel Prec. 27-97 (1997)). Complaint ¶5. *See, also,* Exhibit 3. Plaintiffs only challenge the Secretary's interpretation of the substantives regulation, via the VA General Counsel's Opinion and the M21-1 Manual interpretation, not the substantive regulation itself. Exhibit 3, Complaint ¶s 5, 21, 23-25, 40, 53, 117-127, and 138.

A VA General Counsel Opinion is not a regulation. The United States Court of Appeals

for Veterans Claims has stated that although it defers to a regulatory construction of a statute that is adopted by the Secretary, if the construction is consistent with the language of the statute and is a reasonable interpretation of the law, a VA General Counsel opinion is not a regulation. *Cottle v. Principi*, 14 Vet.App. 329, 335 (2001) *emphasis added*. The *Cottle* Court noted that although the Board of Veterans' Appeals is bound by General Counsel precedent opinions, the Court is not. *Id.* The Court further stated that it does not owe any deference to an opinion prepared exclusively for adjudication or litigation of a particular claim, as was done in G.C. Prec. 14-97. *Id.,* citing *Sabonis v. Brown*, 6 Vet.App. 426, 429 (1994); *see also Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212-23, 109 S.Ct. 468 (1988); *Alaniz v. OPM,* 728 F.2d 1460, 1465 (Fed.Cir.1984). As General Counsel Opinion 27-97 is an interpretation of the substantive regulation, presumably issued to limit the cost of benefits, it is not within the scope of 38 U.S.C. § 502.

The General Counsel Opinion at issue here was incorporated into a 2002 change to the M21-1 Manual (now M21-1MR Manual). By authorization of the Secretary in December 2011, the current M21-1 Manual provides listed conditions where exposure to herbicides is established on a presumptive basis including evidence that the ship docked on the shores or piers of the Republic of Vietnam, operated temporarily on the inland waters or operated on close coastal waters with evidence that crew members or smaller vessels from the ship went ashore. Complaint, ¶ 40. SOF 32. The notes to the provision specifically state that service aboard a ship that anchored in an open deep-water harbor, such as Da Nang, Vung Tau, or Cam Ranh Bay, along the Republic of Vietnam coast does not constitute inland waterway service or qualify as docking to the shore and is not sufficient to establish presumptive exposure to herbicides, unless the Veteran served as a coxswain aboard ship and reports going ashore during anchorage.

Complaint, ¶ 40. This prohibition operates against allowing the presumption of exposure to soldiers who served offshore. As with previous changes to the manual, the 2011 change to the M21-1 Manual was not a substantive change but an interpretation of the existing statute and regulation. *Haas v. Peake*, 525 F.3d 1168, 1195 (Fed.Cir. 2008). No notice or rule making was required. *Id*. Accordingly, Plaintiffs' challenge to the M21-1 Manual is permissible in this Court and is not barred by statute.

The provisions of 38 U.S.C. § 502 provides that an action of the Secretary under section 552(a)(1) or 553 of title 5 (or both) is subject to judicial review under the exclusive jurisdiction of the United States Court of Appeals for the Federal Circuit. 38 U.S.C. § 502. Here the Complaint does not challenge any substantive regulation adopted by the rulemaking provisions of 5 U.S.C. § 553. Complaint ¶30. The Federal Circuit may only review the VA's procedural and substantive regulations, and the process by which those regulations are made or amended pursuant to 38 U.S.C. § 502. *Paralyzed Veterans of America v. Secretary of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir.2003). The Federal Circuit may not review the rulings of the VA General Counsel. *Paralyzed Veterans of America v. Secretary of Veterans Affairs* 308 F.3d 1262, 1265 (Fed. Cir. 2002).

Since the M21-1 Manual in an interpretive regulation, it is not required to be enacted pursuant to the rulemaking provisions of 5 U.S.C. § 553. *Haas v. Peake* 525 F.3d at 1196. Interpretive rules are not substantive rules having the force and effect of law and are not subject to the statutory notice-and-comment requirements of § 553 . *Id*. at 1195. *See, also, Shalala v. Guernsey Mem'l Hosp.,* 514 U.S. 87, 88, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995).

In their opposition at 17, the Defendant quotes dicta from *Vietnam Veterans of America v. Shinseki* 599 F.3d 654, 657 (D.C. Cir. 2010) for the proposition "that challenges to VA

regulations may only be brought in the Federal Circuit." To the extent that the regulations are substantive, the Defendant would be correct. In the case of VA General Counsel opinions and interpretive regulations, such as the instant case, they are not. A court is the best judge of its own jurisdiction and this court should follow the dictates of the Federal Circuit in ascertaining whether or not this case falls under the provisions of 38 U.S.C. § 502. Here as discussed *supra,* .the Federal Circuit has explained that the challenges to a General Counsel's opinion and an interpretive regulation are not within the scope of 38 U.S.C. § 502.

Plaintiffs challenge the VA's interpretation of the statute and 38 C.F.R.§ 3.307(a)(6)(iii) in their M21-1 Manual as irrational, arbitrary, capricious, unsupported by substantial evidence and in violation of both domestic and international law. Plaintiffs do not wish to change the substantive regulation at issue by rulemaking, but instead challenge the VA's interpretation of the substantive regulation as erroneous. Accordingly, 38 U.S.C. § 502 does not bar Plaintiffs' claims.

Plaintiffs collectively challenge the interpretation of the phrase "service in the Republic of Vietnam" by the VA General Counsel and the Secretary's interpretive M21-MR Manual as arbitrary and capricious. The United States Supreme Court has noted that interpretive doubt is to be resolved in the veteran's favor. *Cottle, supra.* at 335 (citing *Brown v. Gardner,* 513 U.S. 115, 118, 115 S.Ct. 552 (1994)). In interpreting the regulation at issue here, it appears neither the Secretary, VA General Counsel nor the Manual considered *Gardner* in its interpretation. The current interpretation leaves veterans who undoubtedly deserve the presumption at a severe disadvantage, as they were exposed to the same dangerous Agent Orange as those who incidentally had a "boot on the ground" and are entitled to the presumption. The veterans discriminated against by the current M21-1 interpretation were exposed to Agent Orange via run

off into the bays, harbors and territorial seas, via the distilling plants on the ship which contaminated their drinking water and all water used on the ship for cooking, laundry, bathing, etc. Allowing such interpretation to continue results in nothing other than injustice to those who risked their lives in the bays, harbors and territorial seas of the Republic of Vietnam, unfairly forcing those veterans to prove exposure several decades after the fact, while allowing their counterparts the entitlement of the presumption.

C. Plaintiffs Have Standing.

Defendant alleges that Plaintiffs are similar to the organizational Plaintiffs in *Vietnam Veterans of America v. Shinseki,* 599 F.3d 654 (Fed.Cir. 2010) and therefore Plaintiffs lack standing to sue. In *Vietnam Veterans of America,* the United States Court of Appeals for the D.C. Circuit held that the Plaintiff association did not have standing because they were presenting a claim for an unidentified group of others and noted that one cannot have standing in federal court by asserting an injury to someone else. *Vietnam Veterans of America,* at 662 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 108-09, 103 S.Ct. 1660 (1983).

The Supreme Court has held that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

Blue Water Navy Vietnam Veterans Association, Inc., (BWNVVA) is a non-profit corporation organized under the laws of Colorado who has been granted tax exempt status under § 501c(3) of the Internal Revenue Code. BWNVVA's purpose is to promote public awareness

of Blue Water Navy Vietnam Veteran issues and to obtain the presumption of exposure to Agent Orange for members of the Armed Forces of the United States who served afloat off the coast of the Republic of Vietnam during the Vietnam War. BWNVVA members include both those who have been denied benefits despite their exposure to Agent Orange as well as the survivors of those who were denied benefits and later died from complications of Agent Orange. Accordingly, BWNVVA clearly had standing to bring this suit.

It is not necessary to review MVA's standing since it is well settled in this Circuit that: "[I]f one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." *Noel Canning v. N.L.R.B.* 705 F.3d 490, 514-515 (D.C. Cir. 2013). *See also*, Ry. *Labor Execs.' Ass'n v. United States,* 987 F.2d 806, 810 (D.C.Cir.1993) (per curiam); *Doe v. Bolton,* 410 U.S. 179, 189, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). In an abundance of caution, however, MVA's basis for standing is discussed below.

Military-Veterans Advocacy, Inc. (MVA) is a non-profit § 501c(3) corporation organized under the laws of the State of Louisiana. The mission of MVA is to provide legal services, education and defense to members of the armed forces, counseling and assistance to veterans in obtaining veterans benefits and both judicial and legislative advocacy on the federal, state and local level to benefit military personnel and veterans. Its members would have standing to sue in their own right because they are veterans who have been directly injured by being denied the presumption of exposure to herbicides. Here, Military-Veterans Advocacy, Inc. is expending its scarce resources to advocate for a clarification of the law in HR 543. Additionally, it represents, through advocacy, the BWNVVA. As such, it is clear that the interests MVA seeks to protect – those of Vietnam veterans who served offshore – are germane

to the organizations purpose of advocating for legislation and providing legal assistance to veterans in obtaining veterans benefits.

MVA also has standing under the doctrine of "associational standing." The D.C. Circuit has recently reviewed this concept in *American Trucking Associations, Inc. v. Federal Motor Carrier Safety Admin.*, 724 F.3d 243 (D.C. Cir 2013). In *American Trucking*, the court stated that associational standing is proper when as here, the association was created to protect a certain interest. *Id.* at 247. In the case of *American Trucking*, the organization as crated to "protect the interests of the trucking industry." *Id.* In the instant case, MVA was created to protect the interests of military personnel and veterans, including the Blue Water Navy veterans.

Neither MVA nor BWNVVA is presenting a claim for an unidentified group of others as the Plaintiff in *Vietnam Veterans of America* did. Here, Plaintiffs represent a group of identifiable veterans – those who served in inland bays, harbors and the territorial seas of the Republic of Vietnam during the Vietnam war. As such, Plaintiffs have standing to pursue their claim to obtain the presumption of exposure to Agent Orange.

III The Court Should Grant Summary Judgment in Favor of the Plaintiffs.

A. The Actions of The Secretary Are Contrary to Law

1. The Secretary's Interpretation Conflicts With the 1958 Treaty on the Territorial Seas and the Contiguous Zones

Vietnam claims a 12 mile territorial sea. SOF 48. That is consistent with the limitations of the United Nations Convention on the law of the Sea Article 3 and the Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U.S.T. 1607, T.I.A.S. No. 5639 (hereinafter 1958 Treaty). This is also in consonance with current claims by the United States. *See,* Presidential Proclamation No. 5928 issued on Dec. 27, 1988, and published in the Federal Register at 54 F.R. 777 (January 9, 1989).

The threshold question is what constitutes the territorial seas. Due to indentations along the coast and a fringe of islands along the coast, Vietnam is able to use the baseline method. 1958 Treaty Article 4. Under the baseline method, nations draw a baseline from their farthest islands and the territorial sea is formed seaward of the baseline. *See,* 1958 Convention, *supra* at Article 6. This forms the beginning point of the territorial sea. See Red Line on Exhibit B to Exhibit 7. Vietnam claims as internal or inland waters the landward side of the baseline. United States Department of State *Bureau* of *Intelligence and Research, Limits in the Seas No. 99* Straight Baselines: Vietnam, (1983). The territorial seas are part of the sovereign territory of the nation. 1958 Treaty Article 1. The territorial seas, 12 nautical miles from the baseline, are shown on Exhibit B to Exhibit 7 as the dashed line. *See also*, Exhibit 8. Thus, under the treaty, any ship entering the territorial seas is within the sovereign territory of Vietnam.

The Court of Appeals for Veterans Claims found that the M21-1 Manual provisions limiting the presumption of exposure to those who served in country were "inconsistent with longstanding agency views, plainly erroneous in light of legislative and regulatory history, and unreasonable." *Haas v. Nicholson* 20 Vet.App. 257, 279 (Vet.App. 2006), The Veterans Court stopped short of finding that the territorial seas were part of the Republic of Vietnam. *Id*. at 268. The Veterans Court did not analyze or refer to the Supreme Court decisions discussed below specifically incorporating the provisions of the 1958 Treaty into domestic law.

The Veterans Court was overruled in a split decision by *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). The *Haas* Court danced around the question of whether or not the territorial seas[7] constituted sovereign territory, but did not decide the issue. The *Haas* court noted that the

[7] The *Haas* court improperly referred to the area as "territorial waters." The correct term is "territorial seas."

Veterans Court had addressed some other "definitions" but that Mr. Haas had not explained why they were not relevant. *Id*. at 1184. The Veterans Court had compared 38 C.F.R. § 3.311a(a)(1) (1985)[8] (defining "service in the Republic of Vietnam" as "includ[ing] service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam"), with 38 C.F.R. § 3.313 (1990) (entitled "Claims based on service in Vietnam" and defining "service in the Republic of Vietnam" as including "service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam"). *Haas v. Nicholson* 20 Vet.App. 257, 264 (Vet.App.,2006). The Veterans Court found that the omission of the comma in one definition after the word "locations" as sufficient to make the statute and regulation ambiguous. Plaintiffs submit, on the other hand, that the incorporation of the treaty into domestic law make the comma placement irrelevant.

In a denial of a request for rehearing, the *Haas* Court argued that there are some circumstances when the sovereign territory does not include the territorial seas. *Haas* argued that in light of *Zhang v. Slattery,* 55 F.3d 732, 754 (2d Cir.1995), which held that statutory references to presence "in" a country do not to include presence in the airspace or in the territorial waters surrounding the country, the words "service in the Republic of Vietnam" could be described as ambiguous. *Haas*, 544 F.3d at 1309. In actuality, the Second Circuit in *Zhang*, did not question whether the territorial seas constituted sovereign territory. The *Zhang* court noted that the issue dealt with regulation of human habitats by immigration law, which is on land rather than sea, and that because a person is restrained on a vessel and cannot move directly ashore he or she is not considered to have a physical presence in the country. *Id*. at 754. *Zhang*

[8] This provision, now redesignated 38 C.F.R. 3.309(e), authorizes benefits for Non Hodgkins Lymphoma. Blue Water Navy veterans are eligible for benefits under this provision.

actually noted that 8 C.F.R. § 287.1(a)(1) defined the external boundary of the United States as:

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

The *Haas* court goes on to argue that since territorial seas are sometimes included in the definition of the United States and sometime not, depending upon which portion of the United States Code is referenced, that it cannot be said that the territorial seas were part of the RVN. *Haas* 544 F.3d at 1309-1310. This is incorrect. Under the 1958 Treaty, the United States can limit its own jurisdiction for a particular internal purpose. It cannot limit the jurisdiction of another nation. In other words, even if *arguendo* there is ambiguity in the application of the Treaty to United States waters, that does not translate into ambiguity concerning the territorial seas of Vietnam.

Under the Supremacy Clause, Art. VI, cl. 2. of the Constitution, the Constitution, laws and treaties of the United States "shall be the supreme Law of the Land." *Mutual Pharmaceutical Co., Inc. v. Bartlett* 133 S.Ct. 2466, 2472 -2473 (2013). Consequently no regulation can limit the application of the 1958 Treaty that has been signed and ratified by the United States Senate.

The *Haas* Court specifically noted that their decision did not include consideration of the long accepted canon of statutory interpretation holding that ambiguity in a veteran's benefits statute should be resolved in favor of the veteran. *Brown v. Gardner, supra*., 513 U.S. at 117-18. The Federal Circuit noted that that argument was waived because it was not raised in the court below. *Haas*, 544 F.3d at 1308. In the instant case, Plaintiffs have carefully protected that argument. Under the accepted "pro-claimant" provisions of *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. At a minimum, this should require that the Treaty provisions be given their plain meaning.

One thing not considered or even mentioned by *Haas* is the fact that bays and harbors such as Da Nang and Nha Trang Harbors are considered inland waters. The Secretary has agreed that ships entering the inland waters are presumed to be exposed to Agent Orange. *Haas* 525 F.3d at 1199. The Secretary has unilaterally, and without any authority, limited inland waters to river systems, specifically excepting the bays and harbors from the presumption. SOF 32.

Article 5, Section 1,of the 1958 Treaty defined inland waters[9] as follows:

> 1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

The definition of a bay in the 1958 Convention was is codified in Article 7(2) of the Convention sets forth the following geographic criteria for deciding whether a body of water qualifies as a bay:

> For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation. 15 U.S.T., at 1609.

Exhibit K to Exhibit 7 is a Google Earth view of Da Nang Harbor. It is surrounded on three sides by land with at least two rivers discharging into it. The harbor itself partially contained and concentrated the Agent Orange dioxin. The depth of water in Da Nang Harbor

[9] The Supreme Court in the decisions cited herein used the definition of internal waters to specify inland waters.

was 27-42 feet. In this shallow water, the Agent Orange adhered to the sea bed and was disturbed by repeated anchoring and weighing anchor as ships entered and sortied from the harbor. Without question it meets the definition of "bay" under the 1958 Convention. Consequently, the Secretary should not be allowed to exclude these areas and other qualifying bodies of water from the presumption of exposure. As discussed below, not including these areas is simply irrational. Moreover, the accepted definition of inland waters includes the bays and harbors of Vietnam.

2. The Secretary's Interpretation Conflicts With Binding Judicial Precedent

The Supreme Court of the United States has specifically adopted the definitions of the 1958 Treaty, incorporating it into domestic law. *United States v. California,* 381 U.S. 139, 165, 85 S.Ct. 1401, 1415–1416, 14 L.Ed.2d 296 (1965); *United States. v. Alaska* 521 U.S. 1, 8, 117 S.Ct. 1888, 1894 (1997). This includes the specific definition of "inland waters.[10]" 381 U.S. at 161-68 and of bays. 521 U.S. at 11. Thus, pursuant to Supreme Court precedent. any ship entering the territorial seas of Vietnam has entered that nation's sovereign territory. As such, these ships had service "in the Republic of Vietnam" for purposes of domestic law. This determination is and should be binding on the Secretary, especially in light of the pro-claimant canons discussed in *Gardner, supra.*

The rights are even more pronounced for ships entering bays or harbors. In *Boumediene v. Bush* 553 U.S. 723, 832, 128 S.Ct. 2229, 2296 (2008), the Supreme Court of the United States noted that Guantanamo Bay was located within the sovereign territory of Cuba. This, again, was based on Article 7 of the 1958 Convention which the Supreme Court relies upon in coastal

[10] The Supreme Court used the definition of internal waters to specify inland waters. There is no separate definition of inland waters in the treaty.

disputes. *United States v. Maine,* 475 U.S. 89, 94, 106 S.Ct. 951, 954 (1986). The Supreme Court has noted that the 1958 Convention contains "the best and most workable definitions available." *United States v. California, supra.,* 381 U.S. at 165, 85 S.Ct. at 1415).

This is consonance with prior international law, which was previously incorporated into domestic law. In *Louisiana v. Mississippi,* 202 U.S. 1, 52 (1906), the Supreme Court held that the Mississippi Sound was internal waters, were under the category of "bays wholly within [the Nation's] territory not exceeding two marine leagues in width at the mouth." Inland, or internal waters are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory. *United States v. Louisiana*, 394 U.S. 11 (1969). The same would hold true for the bays and harbors of Vietnam.

Here the Secretary has improperly carved out an exception to Supreme Court jurisprudence. He has arbitrarily ruled that inland or internal waters consists only over rivers and streams. There is no legal basis for the Secretary's action. The Secretary is not free to redefine or otherwise modify the law promulgated by Supreme Court precedent. Like any other agency head he is bound by the jurisprudence of the nation's High Court.

Consequently, the Secretary's limitations are void *ab initio* and must be set aside.

B. The Actions of the Secretary are Irrational.

The Secretary claims to all who will listen that there is no proof or evidence that Agent Orange entered the South China Sea or the bays and harbors of Vietnam. This claim is simply irrational. The Secretary continues to live in a fantasy world where the laws of nature do not apply.

Exhibit C to Exhibit 7 shows the discharge of silt and dirt from the Mekong River into the South China Sea. This forms a discharge plume caused by the mixture of salt and fresh

water. Exhibit D to Exhibit 7 at page 3. In two weeks, the plume could be expected to travel several hundred kilometers. Exhibit F to Exhibit 7 at page 1 and Exhibit D to Exhibit 7 at page 4. The sediment discharge of the Mekong is similar to that of the Mississippi. Exhibit E to Exhibit 7 at page 1. In fact the sediment discharge is larger than the Amazon and about 85% of the Yangtze. *Id*. Suspended sediment which can be shown in the picture is discharged downriver. *Id*. at 3. The Mekong is one of the largest rivers in the world, discharging 475 cubic kilometers of water annually. Exhibit D to Exhibit 7 at 5. This discharge plume would have gone to the anchorages of Navy ships who operated close to shore. Exhibit D to Exhibit 7 at 8-9.

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

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

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

IOM II at 105.

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

Exhibit B to Exhibit 7 represents the 10 fathom[11] curve, an area where most ships anchored. The maximum anchorage area was approximately 30 fathoms, an area that somewhat parallels the territorial seas. The Vietnam War occurred prior to the age of digital computing and most fire control computers were analog. Ships would tend to anchor to help stabilize their fire control solution. As the IOM noted, anchoring and weighing anchor would disturb the shallow sea bottom and result in resuspension. IOM II at 77-78. The cavitation of ships travelling at high speeds in response to call for fire missions would also disturb the sea bottom causing resuspension.

The initial IOM report found that "it is generally acknowledged that estuarine waters became contaminated with herbicides and dioxin as a result of shoreline spraying and runoff from spraying on land." Exhibit 6 (IOM I at 54). The Committee also noted that it was not unreasonable to presume that personnel on ships operating closest to shore were exposed to Agent Orange. Exhibit 6 (IOM I at 55).

In light of the two IOM reports, which should be read *in para materia*, there is no rational basis for the Secretary's position that Agent Orange did not enter the South China Sea or the bays and harbors. Notably IOM I found "members of the Blue Water Navy should not be excluded from the set of Vietnam-era veterans with presumed herbicide exposure." Exhibit 6, IOM I at 656.

In addition, the presence of Agent Orange was confirmed in Nha Trang Harbor. Exhibit H to Exhibit 7. That report studied the effects of Agent Orange on coral in the harbor. Their findings are as follows:

[11] A fathom is 6 feet

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

Exhibit H to Exhibit 7 at 49. Notably the study concluded that the infiltration occurred via runoff from the Kay River into the harbor. *Id*.

In Da Nang Harbor, there was a direct pathway from the Airport, where massive quantities of Agent Orange was stored, via a ditch and culvert into the Harbor. Exhibits 4, 5 and 9. The C-123 planes used in Operation Ranch Hand to spray the dioxin were routinely washed down on the tarmac. This waste water, along with any leakage and/or spillage eventually ran off into the Harbor area. Additionally Da Nang was heavily sprayed to eliminate foliage used by enemy mortar forces. Planes routinely sprayed over the harbor. Exhibit 5. Additionally, as in other parts of the country, the Agent Orange was sprayed over the Han River (Sông Hàn) which empties into the Harbor. *See also,* Exhibit K to Exhibit 7.

Without question Agent Orange entered the South China Sea and the harbors of Vietnam. This has been generally accepted and involves the science of hydrology and pure common sense. To believe that Agent Orange did not enter the South China Sea or the harbors is to imagine a giant invisible Agent Orange filter installed at the discharges of all rivers and streams. Such nonsense is absurd yet it appears to represent the Secretary's position. Consequently, the Secretary's position is irrational.

C. The Actions of the Secretary Are Arbitrary and Capricious.

To find that a decision was arbitrary and capricious, the "Court must review whether a

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

A reviewing court must evaluate the agency action to determine whether it was based on the consideration of all relevant factors and whether there was a clear error of judgment. *Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). Additionally, the agency must articulate an explanation for its decision that rationally connects the facts and the decision. *Id*. The general standard to determine whether the actions of an agency are arbitrary and capricious, was announced in *Milena Ship Management Company v. R. Richard Newcomb*, 995 F.2d 620 (5th Cir. 1993). In *Milena Ship*, the Fifth Circuit held that the decision must be reviewed to determine whether the agency acted within its authority, adequately considered all the relevant factors, and provided a reasoned basis for its decision. *Id.* at 623.

This court has adopted the definition outlined by the Fourth in *Hughes River Watershed Conservancy v. Johnson,* 165 F.3d 283, 287-88 (4th Cir.1999), which it cited as follows:

> The arbitrary and capricious standard has been defined this way:
>
> > An agency's rule would be arbitrary and capricious if the agency relied on factors that 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.

Michigan Gambling Opposition (MichGO) v. Norton 477 F.Supp.2d 1, 8 (D. D.C.,2007). The actions of the Secretary are arbitrary and capricious in several ways. As a threshold matter, the fact that the Secretary ignored a ratified treaty and Supreme Court precedent constitutes arbitrary

and capricious behavior. Obviously, Congress would want the Secretary to rely upon treaties signed by the President and ratified by Congress since constitutionally, they are part of the Supreme law of the land. Additionally, the Congress would expect the Secretary to rely upon established Supreme Court precedence that incorporated the 1958 Treaty into domestic law.

The failure of the Secretary to recognize the presence of the Agent Orange in the harbors, not only violates the 1958 Treaty but is simply absurd. The Secretary has chosen to ignore the Nha Trang study, documented as Exhibit H to Exhibit 7 and the strong evidence of contamination in Da Nang Harbor, Exhibits 4, 5 and 9. The Secretary remains in rejection mode, failing to consider any evidence of contamination, no matter how strong, This is certainly a failure to consider an important part of the problem, runs counter to the evidence and is so implausible that it cannot be ascribed to agency expertise or a difference in view. Additionally, the agency really has no expertise in this area. Individuals assigned to negotiate with plaintiffs had no naval, engineering or hydrology experience. Rather than discussing issues, VA officials were only prepared to deny and stonewall reasoned attempts to communicate with them.

As described above, the irrational action of the Secretary in ignoring accepted scientific principles of hydrology constitutes arbitrary and capricious behavior. Here the Secretary has ignored the hydrological effects as documented in Exhibits D, E and F to Exhibit 7 and the report of IOM II concerning the longevity of the dioxin when attached to sediment. The Secretary further ignored the effects of cavitation in the busy harbors and estuarine waters as the Australian and American ships anchored,[12] weighed anchor and made high speed runs up and

[12] When a ship anchors the anchor digs into the seabed, disturbing the bottom and causing resuspension of any suspended solids. The ship will reverse engines to set the anchor The cavitation from the propeller wash churns up the bottom. The ship also places three times the depth of anchor chain on top of the anchor to help hold it in place. Obviously, retrieving the

down the coast.[13] Finally they have chosen to ignore the report prepared by the State of New Jersey documenting the dioxin's presence in seafood 150 nautical miles off the east coast of the United States after an unauthorized dumping in the Atlantic.

The presence of Agent Orange in the harbors and bays and territorial seas of Vietnam does not in itself prove exposure. Established science, however, shows how the crew of Australian and American ships were exposed. Faced with an increase in cancer incidence among Royal Australian Navy personnel significantly greater than among Army personnel who fought in-country, the Australian Department of Veterans Affairs sought the answer. The cancer incidence increase (22-26% above the norm for Navy compared with 11-13% for Army) is documented in Exhibit I to Exhibit 7.

In August of 1998 Dr. Keith Horsley of the Australian Department of Veterans Affairs met Dr. Jochen Mûeller of the University of Queensland's National Research Centre for Environmental Toxicology (hereinafter NRCET) in Stockholm at the "Dioxin 1998" conference. Horsley shared this disturbing trend with Mûeller. Based on that meeting, the Australian Department of Veterans Affairs commissioned NRCET to determine the cause of the elevated cancer incidence in Navy veterans.

In 2002, as the American Department of Veterans Affairs (VA) was beginning to deny the presumption of exposure to Navy veterans, NRCET published the result of their study. Their report, entitled the *Examination of The Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins And Polychlorinated Dibenzofurans Via Drinking*

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chain and weighing the anchor also disturbs the bottom causing further resuspension.

[13] When ships come to high speed in shallow water, the stern settles in a phenomenon known as "squat." This causes a more direct impingement on the sea bottom again churning up the sediment and causing resuspension.

Water, (hereinafter NRCET study). The Executive Summary is attached hereto as Exhibit I to Exhibit 7.

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

Many Australian ships were built to American design and the distillation system used in ships world wide prior to the 1990's was essentially the same. The world wide shipboard distilling process used water injected from the sea. We passed through the distilling condenser and air ejector condenser where it acts as a coolant for the condensers. It is then sent through the vapor feed heater into the first effect chamber and into the second effect chamber where it is changed to water vapor. Vapor then is passed through a drain regulator into a flash chamber and passed through baffles and separators into the distilling condenser where it is condensed into water and was pumped to the ship's water distribution system. Sea water not vaporized, brine and sediment was pumped over the side by the brine pump. The dioxin co-distilled with the water vapor and was pumped into the shipboard water distribution system.

The Secretary has misconstrued the findings of IOM II at 105 to argue that ships did not distill potable water close to shore.[14] While efforts were made to reduce potable water distillation in port or close to land, that was not always possible - especially if the ship was

[14] The regulation cited by the IOM was published in 1990 long after the end of the War. Similar restrictions were in effect during the war but allowed distillation to potable water at the Commanding Office's discretion,

anchored in the near shore waters for long periods providing gunfire or other support. IOM II noted that the guidelines on distilling potable water near shore were sometimes ignored. Additionally, there was no prohibition on distilling water for the boilers (known as feed water) and the same distillation system was used for feed water as for potable water. As a result the internals of the system were contaminated with Agent Orange even if the ship distilled only to feed water while near shore. The same system was used until the water reached the final distribution manifold. Exhibit 1. More important, given the fact that the hydrological "plume" traveled for hundreds of kilometers, it would have also reached the ships far outside the mouths of rivers. Exhibits D, E, F, and G o Exhibit 7.

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

Commencing in late 2003 and accelerating in 2005 the Australians began granting benefits to those who had served (I) on land in Vietnam, (ii) at sea in Vietnamese waters, or (iii) on board a vessel and consuming potable water supplied on that vessel, when the water supply had been produced by evaporative distillation in Vietnamese waters, for a cumulative period of at least thirty days. They have defined Vietnamese waters as an area within 185.2 kilometers from land (roughly 100 nautical miles). In reliance upon the NRCET Study, they began promulgating Statements of Principles, similar to our Code of Federal Regulations, covering

various cancers. For several years now, Australian Navy veterans have been receiving benefits denied to their American counterparts. *See, e.g.* *http://www.hmassydney.com/sops.html* (last visited November 30, 2013).

The Secretary's arguments against the NRCET report were delineated in the Federal Register as follows:

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

73 Fed.Reg. 20,566, 20,568 (Apr. 16, 2008).

The Secretary's position is simply incorrect. While the author of the Australian report did not measure the concentration of dioxin in the near shore waters, that was never their intent or the purpose of their study. The presence of the dioxin in the harbors and bays and the near shore waters have been established by Exhibits D, E, F and H to Exhibit 7 and Exhibits 4, 5 and 9. The presence in the near shore water was accepted by IOM 1. Exhibit 6.

As discussed *supra*., IOM II found that it was impossible to quantify the amount of dioxin present on and or in the water, which countermands the second portion of the Secretary's position.

Thirdly, since the 1940's all ships used a similar distillation process. IOM II Appendix A at 135. The description of the process in the NRCET report is similar to the distillation process

used aboard American ships. Some Australian ships were actually made in the United States.

The VA also criticized the NRCET study as "not peer reviewed." It actually was peer reviewed at the 21st International Symposium on Halogenated Environmental Organic Pollutants and POPs and is published in the associated peer reviewed conference proceedings: Müller, J.F., Gaus, C., Bundred, K., Alberts, V., Moore, M.R., Horsley, K., 2001. Co-distillation of TCDD and other POPs during distillation of water - a potential source for exposure. Organohalogen Compounds 52, 243-246. It was also presented at the IXth International Congress of Toxicology; and the abstract is published in: Mueller, J.F., Gaus, C., Bundred, K., Moore, M.R., Horsley, K., 2001. Water volatility of dioxins - exposure through consumption of distilled water. Toxicology 164, 157-158. More importantly, it was also reviewed by both IOM I and IOM II who validated the study. For a detailed review of the NRCET study see IOM II Appendix.

The Secretary's position is also arbitrary and capricious since it did not apply the pro-claimant canons of statutory construction required for veterans benefits programs. Congress has designed the VA's adjudicatory process "to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 311, 105 S.Ct. 3180 (1985). A unanimous Supreme Court of the United States has upheld "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). Although the D.C. Circuit has apparently not weighed in on this matter, the Federal Circuit has also recognized the paternalistic non-adversarial intent of the system designed by Congress. *Gambill v. Shinseki*, 576 F.3d 1307, 1317 (Fed. Cir.2009). The *Gambill* court described the process as uniquely pro-claimant." *Id*. at 1316. See*, also*, *Hodge v. West,*

155 F.3d 1356, 1362 (Fed. Cir.1998)

Here the Secretary has viewed the issue with a jaundiced, anti-veteran eye. All evidence, no matter how strong has been rejected or mischaracterized. The soon to be 12 year saga to restore these benefits has been met with resistance and even contempt. Viewing the evidence delineated herein, even if the light most favorable to the Secretary shows that the BWNVVA veterans have established their claim to the presumption of exposure when serving in the harbors, bays and territorial sea of the RVN. Viewing it with the pro-veteran bias required by Congress demonstrates beyond all doubt that the Secretary has acted arbitrarily and capriciously. Consequently, this Court should grant summary judgment for the plaintiffs.

D. The Actions of the Secretary Are Unsupported By Substantial Evidence.

The deferential standard of review owed to agency decisions does not excuse the Secretary from considering all of the relevant evidence and proffering an explanation that establishes a "rational connection between the facts found and the choice made." *Bowen v. American Hosp. Ass'n,* 476 U.S. 610, 626 (1986); *see also*, *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, (1989) A court "must consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* "Substantial evidence has been defined innumerable times as more than a scintilla, but less than a preponderance." *Thomas v. Celebrezze,* 331 F.2d 541, 543 (4th Cir. 1964). The findings of the administrative agency should not be "mechanically accepted" and the review under 5 U.S.C. § 706 does not require or contemplate the rubber stamping of the agency's decision. *Flack v. Cohen,* 413 F.2d 278, 279 (4th Cir. 1969). Substantial evidence constitutes such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971). While the reviewing court cannot substitute its judgment for the agency, it must take into account the weight of countervailing evidence to ascertain whether the fact finder reached a reasonable conclusion. *Renicker v. United States*, 17 Cl. Ct. 611 (1989).

In the instant case, IOM I said it best.

> The evidence that this committee has reviewed makes limiting *Vietnam service* to those who set foot on Vietnamese soil seem inappropriate. The ongoing series of hearings and appeals in the US Court of Appeals for Veterans Claims (*Haas v. Nicholson*) reflect the controversy. As discussed in Chapter 3, there is little reason to believe that exposure of US military personnel to the herbicides sprayed in Vietnam was limited to those who actually set foot in the Republic of Vietnam. Having reviewed the Australian report (NRCET, 2002) on the fate of TCDD when seawater is distilled to produce drinking water, the committee is convinced that this use of seawater would provide a feasible route of exposure of personnel in the Blue Water Navy, which might have been supplemented by drift from herbicide spraying.
>
> The epidemiologic evidence itself supports a broader definition of *Vietnam service* to serve as a surrogate for presumed exposure to Agent Orange or other herbicides sprayed in Vietnam. For instance, the Centers for Disease Control and Prevention (CDC, 1990) study of selected cancers in Vietnam veterans found that the risk of the "classic AO cancer" NHL was highest and most significant in Blue Water Navy veterans. More recently, the Air Force Health Study (AFHS) has demonstrated that TCDD concentrations in Vietnam-era veterans deployed to Southeast Asia, not just the "Vietnam veteran" Ranch Hand subjects, are generally higher than US background concentrations (although notably lower than in Ranch Hand sprayers themselves). (Emphasis in original).

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

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

To characterize this case as a "substantial evidence" case is misleading. The Secretary has no evidence to support his position. All he has done is criticize evidence put forward by the veterans and ignore both direct and circumstantial evidence of Agent Orange infiltration into the

harbors, bays and territorial seas. He has twisted or ignored the international and domestic law of the sea to deny benefits to this group of veterans. He has not proffered substantial evidence, of even any evidence other than his own conjecture to support his position. His position is not pro-claimant. Instead it is distinctly anti-veteran.

ORAL ARGUMENT

Due to the many applications of thermodynamic theory, naval engineering, navigation, seamanship, hydrology and the law of the sea, Plaintiffs suggest that oral argument may be of assistance to the Court in resolving factual issues, and urges the Court to grant oral argument for that purpose.[15]

CONCLUSION

For the reasons delineated herein, the Secretary's Motion to Dismiss should be denied and the Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully Submitted:

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[15] Counsel for Plaintiffs is a retired Navy Commander who served as Chief Engineer on three Navy ships and second in command of a maintenance ship. He was also certified as a navigator, surface warfare officer and Mechanical Engineering Subspecialist and was qualified for command at sea. He may be able to assist the court withy technical expansions concerning the naval service.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the within was served on opposing counsel by EC/CMF this 3rd day of December 2013.

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