



Military-Veterans Advocacy, Inc.

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Admitted to practice:
Louisiana
Pennsylvania
District of Columbia

April 30, 2013

Hon. Eric Shinseki
Secretary of Veterans Affairs
810 Vermont Ave. NW
Washington, DC 20420

Re: Blue Water Navy

Dear Mr. Secretary:

The Military-Veterans Advocacy Inc. (MVA), on behalf of itself and the Blue Water Navy Vietnam Veterans Association, Inc (BWNVVA) hereby demand that you immediately restore the presumption of Agent Orange exposure to the veterans who served afloat in the territorial seas of the Republic of Vietnam. Fulfilling this demand would constitute an implementation of HR 543 presently pending before the 113th Congress. (Exhibit A). The territorial seas are those claimed by Vietnam as documented in the December 1983 Department of State Bureau of Intelligence and Research Pamphlet No. 99, Straight Baseline: Vietnam. The enclosed nautical chart, Exhibit B, shows the territorial seas landward of the dark dashed line. These waters are plotted twelve miles outward of the baseline which is marked in red on the chart. Your failure to order the expansion of the presumption will result in action being taken pursuant to the Declaratory Judgment Act, the Administrative Procedures Act and the Mandamus Act.

Historical Background

In the 1960's and the first part of the 1970's the United States sprayed over 12,000,000 gallons of a chemical laced with 2,3,7,8-Tetrachlorodibenzodioxin (TCDD) and nicknamed Agent Orange over southern Vietnam. This program, code named Operation Ranch Hand, was designed to defoliate areas providing cover to enemy forces. Spraying included coastal areas and the areas around rivers and streams that emptied into the South China Sea. By 1967, studies initiated by the United States government proved that Agent Orange caused cancer and birth defects. Despite this finding the aerial defoliation continued without pause. Estimates of hundred of thousands of deaths and birth defects among the Vietnamese population were confirmed by the Vietnamese government. Similar incidence of cancer development and birth defects have been documented in members of the United States and Allied armed forces who served in and near Vietnam.

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Throughout the war, the United States Navy provided support for combat operations ashore. This included air strikes and close air support, naval gunfire support, electronic intelligence, interdiction of enemy vessels and the insertion of supplies and troops ashore. Most operations were conducted within the territorial seas.

The South China Sea is a fairly shallow body of water and the thirty fathom curve (a fathom is six feet) extends through much of the territorial seas. The gun ships would operate as close to shore as possible. The maximum effective range of the guns required most operations to occur within the territorial seas as documented in Exhibit B. Often ships would operate in harbors or within the ten fathom curve to maximize their field of fire. The maximum range on all guns (except the Battleship) required the ship to operate within the territorial seas in order to support forces ashore.

It was common practice for the ships to anchor while providing gunfire support. Digital computers were not yet in use and the fire control systems used analog computers. By anchoring the ship's crew was able to achieve a more stable fire control solution, since there was no need to factor in their own ship's course and speed. It was also common for ships to steam up and down the coast at high speeds to respond to call for fire missions, interdict enemy sampans, etc.

Supplies and personnel were offloaded pierside or from an anchorage within the territorial seas. Small boat transfers were conducted within the territorial seas often quite close to land. Most but not all fueling operations took place outside the territorial seas. Some but not all replenishments via helicopter took place outside the territorial seas. Others occurred at anchor within the territorial seas. Small boat or assault craft launches of Marine forces always took place within the territorial seas.

Flight operations from aircraft carriers often occurred outside of the territorial seas. As an example, Yankee station was outside of the territorial seas of the Republic of Vietnam. Dixie Station was on the border of the territorial seas. Some carriers, especially in the South, entered the territorial seas while launching or recovering aircraft, conducting search and rescue operations and racing to meet disabled planes returning from combat. Aircraft carriers also entered the territorial seas for other operational reasons. A study by the Blue Water Navy Vietnam Veterans Association showed that less than half of the carriers sampled entered the territorial seas at some point during their deployment.

Hydrological Effect

It is well settled that rivers and streams run into larger bodies of water. Even the Nile River, which is reputed to run "backwards" empties into the Mediterranean. In adopting the Comprehensive Environmental Response Compensation and Liability Act, the United States Congress recognized that pollutants discharged from shore will contaminate the navigable waters, waters of the contiguous zone, and the oceans. 33 U.S.C. § 1251(a)(6). The topography of Vietnam is no different from any other location on the planet. Rivers run out to sea!

The Agent Orange that was sprayed over South Vietnam was mixed with petroleum. The mixture washed into the rivers and streams and discharged into the South China Sea. Additionally, the riverbanks were sprayed continuously resulting in direct contamination of the rivers. Exhibit C shows the discharge from the Mekong River into the South China Sea. The dirt and silt that washed into the river can be clearly seen entering the sea. This is called a discharge “plume” and in the Mekong, like the Mississippi, is considerable. Exhibit D. Declaration of Robinson Hordoir. Although the Mekong has a smaller drainage area than other large rivers, it has approximately 85% of the sediment load of the Mississippi. Exhibit E Wolanski and Nhan, *Oceanography of the Mekong River Estuary*. In two weeks, the fresh water of the Mekong will travel several hundred kilometers. Exhibit F. Chen, Liu et. al, *Signature of the Mekong River plume in the western South China Sea revealed by radium isotopes*, JOURNAL OF GEOPHYSICAL RESEARCH, Vol. 115, (Dec. 2010). Notably, the Agent Orange dioxin dumped off the east coast of the United States was found in fish over one hundred nautical miles from shore. Exhibit G. Belton, et. al, *2,3,7,8-Tetrachlorodibenzo-p-Dioxin (TCDD) and 2,3,7,8-Tetrachlorodibenzo-p-Furan (TCDF)*, In *Blue Crabs and American Lobsters from the New York Bight*, New Jersey Department of Environmental Protection (November 12, 1988).

By coincidence, the baseline and territorial seas are further out from the mainland off the Mekong River. This was due to the location of the barrier islands owned by Vietnam. Given the more pronounced effect of the Mekong plume, however, the broader area off the Mekong Delta is appropriate. The force of the water in this area is greater than the river discharge in other parts of the country.

Eventually, the Agent Orange/petroleum mixture would emulsify and fall to the seabed. Evidence of Agent Orange impingement was found in the sea bed and coral of Nha Trang Harbor. Exhibit H. Pavlov, et, al, *Present-Day State of Coral Reefs of Nha Trang Bay (Southern Vietnam) and Possible Reasons for the Disturbance of Habitats of Scleractinian Corals*, RUSSIAN JOURNAL OF MARINE BIOLOGY, Vol. 30, No. 1 (2004). During the Vietnam War, the coastline, especially in the harbors and within the thirty fathom curve was a busy place with military and civilian shipping constantly entering and leaving the area in support of the war effort. Whenever ships anchored, the anchoring evolution would disturb the shallow seabed and churn up the bottom. Weighing anchor actually pulled up a small portion of the bottom. The cavitation of military ships moving along the coast line, especially within the ten fathom curve, at high speeds, further impinged on the sea bottom. This caused the Agent Orange to constantly rise to the surface.

Accordingly, Navy ships within the South China Sea were constantly steaming through a sea of Agent Orange molecules.

The Australian Factor and the Distillation Process

In August of 1998 Dr. Keith Horsley of the Australian Department of Veterans Affairs met Dr. Jochen Mueller of the University of Queensland’s National Research Centre for

Environmental Toxicology (hereinafter NRCET) in Stockholm at the "Dioxin 1998" conference. Horsley shared a disturbing trend with Mueller. Australian VA studies showed a significant increase in Agent Orange related cancer incidence for sailors serving offshore over those who fought ashore. 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 the United States 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 Water*, (hereinafter NRCET study). The Executive Summary is attached hereto as Exhibit I.

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.

Although the VA tried to argue that there was no evidence that ships distilled waters off Vietnam or that the United States used different systems, those arguments have been dismissed as ludicrous. 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. It is 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 passes through baffles and separators into the distilling condenser where it is condensed into water and pumped to the ship's water distribution system. Sea water not vaporized is 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 VA has also weakly argued that ships did not distill potable water close to shore. 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 anchored in the near shore waters for long periods providing support. The Institute of Medicine also found that guidelines on distilling potable water near the mouth of rivers were widely ignored. 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. Additionally, since the same distillation system was used for boiler water as for potable water, the internals of the system would be contaminated with Agent Orange even if the ship did not distill to potable water while anchored.

As confirmed by the University of Queensland, 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.

In 2005, the Australian Department of Veterans Affairs published a cancer incidence study. The *Cancer Incidence in Vietnam Veterans 2005* (hereinafter the 2005 Cancer Study), whose Executive Summary is attached as Exhibit I, found that Royal Australian Navy veterans had the highest rate of cancer, higher than expected by 22-26%, followed by Army veterans, higher than expected by 11-13% and Air Force veterans with a 6-8% higher than the expected rate of cancer. Navy and Army veterans showed a higher than the expected incidence of cancers of the colon, oral cavity, pharynx and larynx and cancers of the head and neck and the gastrointestinal system. Whereas Navy veterans demonstrated a higher than the expected incidence of gastrointestinal cancer, Army and Air Force veterans showed higher than the expected incidence of Hodgkin's disease and prostate cancer. The cancers unique to the Navy would appear to support the ingestion of the dioxin orally rather than nasally.

The fact remains that the distillation process co-distilled and enhanced the effects of Agent Orange. Sailors aboard those ships received a substantial toxic dosage of Agent Orange into their drinking water. The repeated refusal of the VA to recognize this proven fact borders on the malevolent.

Law of the Sea

The Agent Orange Act of 1991 provides that:

... [A] veteran who, *during active military, naval, or air service in the Republic of Vietnam* during the period beginning on January 9, 1962, and ending on May 7, 1975, and has ...[Diabetes Mellitus (Type 2)] shall be presumed to have been exposed during such service to an herbicide agent containing dioxin ... unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during service.

38 U.S.C. § 1116(a)(3). (Emphasis added).

Vietnam claims a 12 mile territorial sea. 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. *United States v. Alaska* 521 U.S. 1, 62 (1997) (Thomas, J. et. al. Concurring in part and dissenting in part). Earlier, in *United States v. State of California*, 381 U.S. 139 (1965), the Supreme Court also relied upon the 1958 Convention to define the term “inland waters.” *Id* at 161-68.

Article 5, Section 1, of the 1958 Convention defined inland¹ waters as follows:

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

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). Additionally, bays such as Da Nang Harbor are considered part of inland waters and are the sovereign territory of the nation.

The Secretary has recognized the presumption for those who served onboard ships who were in “inland” waters. They have failed to include those who served in ships in bays or waters landward of the baseline. The Secretary has irrationally interpreted inland waters to include only landward from the mouth of rivers. This interpretation does not comport with binding Supreme Court precedent.

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 11. This forms the beginning point of the territorial sea. *See* Red Line on Exhibit B,

In *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906), the Supreme Court held that the Mississippi Sound, and by analogy, the waters surrounding Da Nang as 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). When moored or anchored in a harbor, the ship and its crew were within the sovereign territory of Vietnam. The closer a ship was to shore, the higher the possibility that they steamed through waters contaminated with Agent Orange. As discussed *supra*., anchoring in those waters would have disturbed any Agent Orange contaminated sludge that had fallen to the seabed. The constant cavitation caused by ships entering and leaving the harbor and making fast along side of the piers would have also disturbed the sea bottom.

¹ The Supreme Court in the decisions cited herein used the definition of internal waters to specify inland waters.

The definition of a bay in the 1958 Convention was again adopted by the Supreme Court:

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.

Alaska v. United States. 545 U.S. 75, 93, 125 S.Ct. 2137, 2151 - 2152 (2005).

Exhibit K² is an aerial view of Da Nang Harbor. It is surrounded on three sides by land with at least two rivers discharging into it. The harbor itself would partially contain and concentrate the Agent Orange dioxin. Depth of water in Da Nang was 27-42 feet, which would have resulted in the disturbance of the Agent Orange adhering to the sea bed by repeated anchoring and weighing anchor. Without question it meets the definition of “bay” under national and international law. Bays and harbors have been found to constitute sovereign territory.

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 is based on Article 7 of the 1958 Convention which the Supreme Court relies upon in coastal 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).

Dan Nang, Vung Tau, Nha Trang Harbors and Cam Ranh Bay certainly meet this legal requirement. Without question, these areas constitute bays under the 1958 Convention. There can be no argument that these bays are part of the sovereign territory of the nation and well within the scope of Article 1 of the 1958 Convention. Consequently, under both national and international law, ships entering these harbors and bays served in the Republic of Vietnam and should be afforded the presumption.

Additionally, the territorial seas are sovereign territory and any ship that entered that area should be covered by the presumption of exposure. Subject to the right of innocent passage, the coastal state, in this case Vietnam, has the same sovereignty over its territorial sea as it has with

² After seeing this picture, VA Chief of Staff John Gingrich agreed that the policy of excluding harbors from the presumption of exposure did not make sense. In fact, until he was shown an excerpt from his own M 21-1R Manual, Gingrich thought that the exposure presumption encompassed Da Nang Harbor.

respect to its land territory. *See*, 1958 Convention, *supra*, Article 1-2; Law of the Seas Convention, Article 2. Any time a ship was within twelve miles of the baseline, they would have had to have been within the internal waters or territorial seas of Vietnam. As discussed *supra*., the range of the guns forced most ships on the gun line to operate within the territorial seas.

Procedural History

In 1991, the 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. This federal law required VA to award benefits to a veteran who manifests a specified disease and 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.” Specified diseases included Non-Hodgkin's lymphoma soft-tissue sarcoma other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma, chloracne or another acneform disease consistent with chloracne, Hodgkin's disease, porphyria cutanea tarda, respiratory cancers (cancer of the lung, bronchus, larynx, or trachea), multiple myeloma, Diabetes Mellitus (Type 2) and other diseases designated by the Secretary.

The Agent Orange Act of 1991 further required the Secretary to “take into account reports received by the Secretary from the National Academy of Sciences and all other sound medical and scientific information and analyses available to the Secretary.” The Secretary is further required to consider whether the results are statistically significant, are capable of replication, and withstand peer review. The responsibility to prepare a biennial report concerning the health effects of herbicide exposure in Vietnam veterans was delegated to the Institute of Medicine (IOM), a non-profit organization which is chartered by the National Academy of Sciences.

The Department of Veterans Affairs (hereinafter VA) drafted regulations to implement the Agent Orange Act of 1991 and defined “service in the Republic of Vietnam” as “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 C.F.R. § 3.307(a)(6)(iii) (1994). This was in contrast to a previous definition which defined “service in Vietnam” as “service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.” 38 C.F.R. § 3.313 (1991). These regulations allowed the presumption of exposure throughout the Vietnam Service Medal area, the dark solid line marked on Exhibit B. Under this definition, a ballistic missile submarine was covered as were the aircraft carriers on Yankee Station and submarines conducting operations in the Gulf of Tonkin in an area of the coast where no Agent Orange was sprayed. These ships would not be covered under HR 543.

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) not to apply to service members whose service was on ships and who did not serve within the borders of the Republic of Vietnam during a portion of the “Vietnam era.” The opinion stated that the definition of the phrase “service in the Republic of Vietnam” in the Agent Orange

regulation, 38 C.F.R. § 3.307(a)(6)(iii), “requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there,” and that for purposes of both the Agent Orange 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). This opinion was authored by Mary Lou Keener. She later became the wife of Hershel Gober who served as Acting Secretary of the Department from 2000-2001.

After lying dormant for a few years, VA Op. Gen. Counsel Prec. 27-97 (1997) was incorporated into a policy change that was published in the Federal Register during the last days of the Gober tenure. 66 Fed.Reg. 2376 (January 11, 2001). The final rule was adopted in Federal Register in May of that year. 66 Fed. Reg. 23166. Comments by the VA concerning the exposure presumption recognized it for the “inland” waterways but not for offshore waters or other locations only if the conditions of service involved duty or visitation within the Republic of Vietnam.

Historically the VA’s Adjudication Manual, the M21-1 Manual, allowed the presumption to be extended to all veterans who had received the Vietnam service medal, in the absence of “contradictory evidence.” In a February 2002 revision to the M21-1 Manual, the VA incorporated the VA General Counsel Opinion and the May 2001 final rule and required a showing that the veteran has set foot on the land or entered an internal river or stream. This “boots on the ground” requirement is in effect today.

On August 16, 2006, the Court of Appeals for Veterans Claims ruled that Navy sailors who served in the near shore waters off Vietnam were entitled to benefits whether or not they set foot on land. *Haas v. Nicholson*, 20 Vet.App. 257 Vet.App., 2006.

In April of 2008, the Department of Veterans Affairs published a notice rescinding the previous section of the M 21-1 Manual allowing the presumption of exposure to be extended to recipients of the Vietnam Service Medal. This rescision was based on a rejection of the NRCET report. The VA conclusions were widely criticized. See Exhibit L Comment of John B. Wells, and Exhibit M Comment of Dr. Caroline Gaus. No final rule rescinding the M 21-1 report was ever promulgated.

On May 8, 2008, the Federal Circuit overturned the Court of Appeals for Veterans Claims based on administrative law grounds. *Haas v. Peake*, 525 F.3d 1168, 48 A.L.R. Fed. 2d 787 (Fed.Cir. 2008). The decision noted that the M 21-1 Manual was an interpretive rather than substantive regulation and that prior notice and comment was not required. *Id* at 1195. This decision, in *dicta*, criticized the NRCET report based on the Department’s Federal Register preliminary notice. *Id.* at 1194. Reconsideration was denied on October 9, 2008. *Haas v. Peake*, 544 F.3d 1306 (Fed.Cir. 2008). This reconsideration, in *dicta*, criticized the application of the law of the sea while noting that the issue was not decided since it was not raised in the court below. *Id.* at 1309-10.

In June of 2008, I traveled to San Antonio to present to the Institute of Medicine's (IOM) Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides (Seventh Biennial Update) in San Antonio Texas. I provided the IOM with copies of the NRCET report and testified as to its applicability and authenticity. The IOM Committee conducted an exhaustive review of the NRCET study and requested an independent review by Dr. Steve Hawthorne who is the Senior Research Manager of the Energy & Environmental Research Center (EERC), University of North Dakota. Dr. Hawthorne validated the findings of the NRCET study.

In July of 2009, the IOM Seventh Biennial Committee produced their report which included the blue water navy issues I raised. Relevant pages of this report are 54-55 and 655-56. See, http://www.nap.edu/openbook.php?record_id=12662&page=R1. The IOM report accepted the proposition that Navy veterans off the coast were exposed and recommended that they be given the presumption of exposure. In their recommendation, the IOM committee stated: "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." *Id* at 656.

Although you accepted many recommendations of that committee, you did not accept the recommendation concerning the Blue Water Navy veterans. Instead you ordered another study.

On May 3, 2010, I 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." This was the new study you ordered. The Committee reported out on May 20, 2011. Their report had four major conclusions. They found that 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. Secondly they replicated the NRCET report and found the conclusions by the University of Queensland were sound. Their only criticism was that the Australians may have underestimated the toxic effect of the co-distillation process. Third, they indicated that 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. The indicated that 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. Fourth, they stated that the decision to extend the presumption of exposure should be based on policy and not science.. Notably the most recent IOM report (2011) did not contradict the findings of the previous Committee report (2009). They did not disagree with that Committee's finding that the blue water Navy personnel should not be excluded from the presumption of exposure.

On January 24, 2012, while still serving as Director of Legal and Legislative Affairs for the BWNVVA, I briefed your Chief of Staff, John Gingrich, on many of the matters contained herein. He agreed that it did not make sense to exclude the harbors from the presumption,

especially Da Nang Harbor. He 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.

Instead, 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). This Notice misinterpreted the conclusions of the IOM and omitted findings favorable to the Blue Water Navy Veterans. The Notice contained the following statement: "After careful review of the IOM report, 'Blue Water Navy Vietnam Veterans and Agent Orange Exposure,' the Secretary has determined that the evidence available at this time does not support establishing a presumption of exposure to herbicides for Blue Water Navy Vietnam Veterans." There was no opportunity for comment on the determination.

Conclusion.

It is the position of MVA and BWNVVA, that the "boots on the ground" policy, as reiterated in the December 26, 2012 notice, is arbitrary and capricious, unsupported by substantial evidence and in violation of current federal and international law.

The past forty to fifty years has seen changes in the seascape surrounding Vietnam. Some of the dioxin has been carried out to sea where it has been spread across the Pacific. Emulsified dioxin has been covered by the shifting sea bottom. While the presence of dioxin has been confirmed in Nha Trang, no other studies have been conducted to confirm its presence. Logic and common sense, however, indicates that not only the harbors but the territorial seas and beyond were inundated with the dioxin.

BWNVVA does not have the resources to conduct core samples and coral inspections along the entire coast of what was once the Republic of Vietnam. Certainly the VA could, with proper diplomatic clearance, order such a study, but the cost would probably exceed the cost of paying benefits. The individual veteran, however, should not be required to shoulder such an arduous task.

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 unanimous³ 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), *citing*, *8St. Vincent's Hospital*, 502 U.S. 215, 220-221, n. 9, 112 S.Ct. 570, (1991); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196, 100 S.Ct. 2100 (1980);

³ Justice Alito wrote the opinion in which seven Justices joined. Justice Kagan took no part in this case.

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285, 66 S.Ct. 1105 (1946).

The Federal Circuit has also recognized the paternalistic non-adversarial intent of the system designed by Congress. *Gambill v. Shinseki*, *supra*, 576 F.3d at 1317. The *Gambill* court described the process as follows:

“[T]he character of the veterans' benefits statutes is strongly and uniquely pro-claimant.” *Hodge v. West*, 155 F.3d 1356, 1362 (Fed.Cir.1998) . The relationship between the veteran and the government is nonadversarial, *Jaquay v. Principi*, 304 F.3d 1276, 1282 (Fed.Cir.2002) (en banc), and because of the paternalistic nature of DVA proceedings, the DVA is required “to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits,” *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed.Cir. 2009); *McGee v. Peake*, 511 F.3d 1352, 1357 (Fed.Cir. 2008). The process is “designed to function throughout with a high degree of informality and solicitude for the claimant.” *Walters*, 473 U.S. at 311, 105 S.Ct. 3180. Then-Chief Judge Mayer put the point succinctly when he stated, “Viewed in its entirety, the veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus.” *Farce v. Principi*, 284 F.3d 1335, 1360 (Fed.Cir. 2002) (*en banc*) (Mayer, C.J., dissenting).

Id at 1316.

It is well settled that the VA has a duty to assist a claimant in the development of their claim. 38 U.S.C. § 5103A(a)(1), 38 C.F.R. § 3.159. *Godwin v. Derwinski*, 1 Vet.App. 419, 425 (1991). The duty to assist the veteran does not end with the rating decision but continues while the claim is pending before the BVA. The statute imposes a continuing obligation upon the VA to assist the claimant in developing the facts of his claim throughout the entire administrative adjudication. *Murincsak v. Derwinski*, 2 Vet.App. 363, 373 (1992). Yet here the VA has never worked to assist the Blue Water Navy veterans. If anything, the actions of the VA have been confrontational and obstructionist.

Congress has expressed an interest in resolving this matter. HR 3612, introduced midway through the last Congress had 128 co-sponsors. HR 543, introduced in this Congress already has 98 co-sponsors. Many Members are awaiting a final Congressional Budget Office Score. A preliminary ten year estimate of \$2.8 billion is expected to be revised downward.

You do not have to wait for Congress, however. You can grant the presumption of exposure with a stroke of a pen.

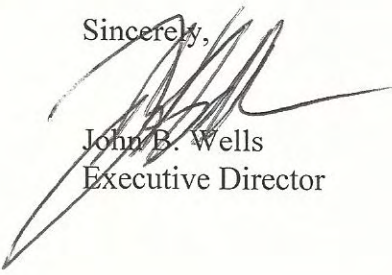
Despite the lack of assistance and the active opposition of the VA, we have built a strong circumstantial evidence case. We know the Agent Orange went into the rivers and streams. We know the rivers and streams flow out to sea. We know that at least one harbor was contaminated and if one harbor was contaminated all harbors were probably contaminated. We know the silt

and sediment traveled hundreds of kilometers. We know that Navy ships were in the harbors and the territorial seas. We know the distilling plants co-distilled and enhanced the dioxin. We know that the dioxin went into the ship's potable water tanks. We know that the crew was exposed through the drinking water.

Frankly, there is no excuse for the VA position. At best it is arbitrary and capricious. Evidence does not support your position and it is contrary to law. I urge you to grant the presumption of exposure to ships that operated in the harbors, inland waters and the territorial seas of Vietnam. This will prevent litigation and future embarrassment for your Department. More importantly, I urge you to take positive action because it is the right thing to do.

Pursuant to 5 U.S.C. § 555(e), if you refuse to accede to this demand, provide a brief statement of reasons for each point delineated herein that you have rejected. I will take no further action until May 30, 2013 to allow you sufficient time to consider this demand.

Sincerely,



John B. Wells
Executive Director