

**In the
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

13 - 3339

ROBERT H. GRAY,
Appellant,

v.

ROBERT MCDONALD,
Secretary of Veterans Affairs,
Appellee.

Brief of Amicus Curiae, Blue Water Navy Vietnam Veterans Association, and
Military-Veterans Advocacy

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Interest of the Amicus Curiae

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. BWNVVA has advocated for legislation in Congress to correct the VA intransigence on this matter. Accordingly, BWNVVA has a clear interest in this appeal.

Military-Veterans Advocacy (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 legislative advocacy on the federal, state and local level to benefit military personnel and veterans. The premier legislation in this case is the Blue Water Navy Vietnam Veterans bill that would restore the presumption of exposure to those who served in the bays harbors and territorial seas of the Republic of Vietnam.

Both BWNVVA and MVA have sued the Secretary in the United States District Court for the District of Columbia (Case No. 1:13cv1187-TSC) on issues which include the infiltration of Agent Orange into the harbor and the arbitrary and capricious interpretations of the Secretary concerning blue water Navy functions.

The two organizations believe that they can provide some history and perspective to the VA policy in the instant case.

Statement of Issues.

- I. The Finding That Da Nang Harbor Was Not Part of Inland or Internal Waters Was Arbitrary and Capricious, Unsupported by Substantial Evidence and in Violation of International Treaties and Supreme Court Jurisprudence.
- II. The BVA Erred in Not Finding that the Veteran Suffered Direct Exposure to Herbicides.
- III. The BVA Finding that the Veteran's Departure from the Ship Was Not Documented in the Deck Log was Irrational.

Statement of the Case

The veteran served on active duty with the United States Navy from 1971 through 1975. R-547. He was assigned to the *USS Roark* (DE (later FF) 1053). From February to August 1972 the *Roark* served in the Western Pacific in support of United States military operations in Vietnam. In April 1972 Mr. Gray earned the Combat Action Ribbon when the *Roark* came under fire from enemy guns. R-981. Deck Logs for the *Roark* dated in April 1972 show that the ship regularly entered Da Nang Harbor and either set her anchor in the harbor or moored alongside the Destroyer Tender *U.S.S. Samuel Gompers* (AD 37) which was moored to a pier in Da Nang harbor. R-611-617. The *Gompers* was effectively an extension of the pier.

In June 2007 Mr. Gray submitted his claim to the Dallas VA regional office (“RO”) for disability compensation, including for several dioxin-related conditions, diabetes mellitus and neuropathy of the bilateral lower limbs. R-942. His VA medical records show that he receives treatment for these conditions. R-762-779.

In March 2008 the RO issued a rating decision deferring final adjudication of Mr. Gray’s dioxin-related diabetes claim pending the outcome of the Secretary’s appeal in the case of *Haas v. Nicholson*. See R-632-634 (deferred rating decision and notice letter). His other claims were denied by the RO in May 2008. R-622-627.

In February 2009 the RO denied Mr. Gray’s dioxin-related diabetes and other claims based on the assertion that his Vietnam service did not include being “on the ground” in Vietnam. R-412-417. He submitted his notice of disagreement shortly

thereafter. R-408. The statement of the case was issued in September 2009 (R-340-357).

In January 2010 Mr. Gray submitted a claim for his ischemic heart disease based on presumptive exposure to dioxin in Vietnam. R-300; *see also* R-292-299. The RO issued a rating decision in May 2011 denying Mr. Gray's ischemic heart disease claim. R-196-201. The basis for the denial was that the deck logs "do not confirm you stepped foot on the ground in the Republic of Vietnam or the *USS Roark* docked or transited the inner waterways of Vietnam." R-200.

The RO issued a supplemental statement of the case in July 2012 that re-affirmed the denial of Mr. Gray's § 1116 claims on grounds that he did not have the required physical presence in the "inland waters" of Vietnam. R-126-129. His claims on appeal were certified to the Board in May 2013. R-86.

The Board issued its final adverse decision on November 6, 2013. R-321.

Summary of the Argument

The Secretary of the VA has ignored international law and Supreme Court precedent to justify an irrational decision not to include traditional bays and harbors in the term inland waters. They also refuse to acknowledge that the bays, harbors and territorial seas are sovereign territory. This flies in the face of recognition of Vietnam's territorial seas in the 1954 Geneva Accords and the 1973 Paris Peace Treaty.

The BVA erred in not considering the direct exposure effects of the Agent Orange contamination of Da Nang Harbor. Hydrologists agree that the dioxin would have flowed into the harbor and into the territorial seas. Ships using the evaporation distillation

methods¹ contaminated their distillation and water distribution systems with Agent Orange resulting in the dioxin infiltrating into the potable water system.

The finding that the deck logs did not show that the veteran departed the ship is simply irrational since the guidelines only required a log entry when the Commanding Officer embarked or debarked.

History of the Blue Water Navy Controversy

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. They commissioned the University of Queensland's National Research Centre for Environmental Toxicology (NRCET) to determine why there was 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 Water*, (hereinafter NRCET study).

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

¹ The *USS Roark* used a flash type evaporation distillation process common on steam powered ships during this time period.

boilers and potable drinking water, according to the study, co-distilled the dioxin and actually enhanced the effect of the Agent Orange.

Many Australian ships were built to American design and the same distillation system was used in ships world wide prior to the 1990's. This distilling process used water injected from the sea. NRCET found that the dioxin co-distilled with the water vapor and was pumped into the shipboard water distribution system.

Although there were guidelines concerning distillation to potable water in harbors, there was no such limitation in distilling feed water for the boilers. The same distillation system was used for both potable and feed water and contamination would have carried over into the potable water distilled after the ship left the harbor. Additionally, hydrological studies have shown that the hydrological plume containing dirt and debris contaminated with the dioxin would have discharged for several hundred kilometers into the South China Sea. Hydration is important in the tropics and sailors would have ingested a large amount of water from the ship's tanks. They would have showered in it. It would have been used in the laundry and to prepare prepare food and wash dishes.

Commencing in late 2003 and accelerating in 2005 the Australians began granting benefits to those who had) at sea in Vietnamese waters. They have defined Vietnamese waters as an area within 185.2 kilometers from land. 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).

Until 2002, the American VA granted the presumption of exposure to the crews of

those ships operating within the Vietnam Service Medal Area. In that year, the VA implemented a precedential General Counsel's opinion that stated the 1991 Agent Orange Act only applied to those who performed air land or naval service in the Republic of Vietnam. The General Counsel found:

the regulatory definition in 38 C.F.R. § 3.307(a)(6)(iii), which permits certain personnel not actually stationed within the borders of the Republic of Vietnam to be considered to have served in that Republic, requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there, through inclusion of the requirement for duty or visitation in the Republic. Thus, the definition of "[s]ervice in the Republic of Vietnam" in section 3.307(a)(6)(iii) is not inconsistent with our interpretation of the reference to service in the Republic of Vietnam in section 101(29)(A).

VAOPGCREC 27-97. The General Counsel went on to hold that ships serving offshore were not to be considered "service in the Republic of Vietnam" but did not specify the distance offshore or address natural bays and harbors such as Da Nang.

An issue with some similarities to the instant case came before this court in 2006. *Haas v. Nicholson*, 20 Vet. App. 257. The *Haas* court found that the veteran who was operating off the shoreline, was within the scope of the statutory definition and invalidated the VA "boots on the ground" policy. The basis of this decision was that the VA did not follow proper notice and comment procedures. The Federal Circuit reversed in *Haas v. Peake*, 525 F.3d 1168, 1196 (Fed. Cir. 2008) *reh'g denied Haas v Peake*, 544 F.3d 1306, 1309 (Fed. Cir. 2008). The *Haas* decision did not address bays and harbors and was specifically not viewed through the "pro veteran" prism of statutory construction.

Argument

I. The Finding That Da Nang Harbor Was Not Part of Inland or Internal Waters Was Arbitrary and Capricious, Unsupported by Substantial Evidence and in Violation of International Treaties and Supreme Court Jurisprudence.

Vietnam claims a 12 mile territorial sea as allowed by 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 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). *See, also*, Geneva Accords Article 4. <https://www.mtholyoke.edu/acad/intrel/genevacc.htm> (last visited June 6, 2014); *The Joint Chiefs of Staff and the War in Vietnam 1960-1968*, Part II which can be found at dtic.mil/doctrine/.../jcsvietnam_pt2.pdf at 358 and Article 1 of the Paris Peace Treaty. http://www.upa.pdx.edu/IMS/currentprojects/TAHv3/Content/PDFs/Paris_Peace_Accord_1973.pdf (last visited June 6, 2014).

The threshold question is what constitutes inland waters, sometimes referred to as internal waters. Natural bays and harbors and the territorial seas are part of the sovereign territory of the nation. 1958 Treaty Article 1. Thus, under the treaty, any ship entering the territorial seas is within the sovereign territory of Vietnam. The United States recognized this sovereignty in the Geneva Accords and the Paris Peace Agreement.

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 seas² constituted sovereign territory, but did not decide the issue. The *Haas* court noted that the 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)³ (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).

In a denial of a request for rehearing, the Federal Circuit in *Haas* argued that there

² The *Haas* court improperly referred to the area as “territorial waters.” The correct term is “territorial seas.”

³ 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.

are some circumstances when the sovereign territory does not include the territorial seas. The *Haas* majority 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 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 applied is on land rather than sea, and that because a person is restrained on a vessel and cannot move directly ashore they are not considered to have a physical presence in the country. *Id.* at 754. *Zhang* actually noted that 8 C.F.R. § 287.1(a)(1) defined the U. S. external boundary 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.”

Additionally, the *Haas* Court did not consider the Geneva Accord, the Paris Peace Treaty or the JCS position that the United States had recognized sovereignty over the territorial seas out to the twelve mile limit. Additionally and perhaps more importantly, *Haas* did not address the status of natural bays and harbors which are part of inland or internal waters and not considered part of the territorial seas.

The *Haas* court majority 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., 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 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*, 513 U.S. 115, 117-18 (1994). The Federal Circuit noted that the 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. Accordingly, the Treaty provisions should be given their plain meaning.

The Supreme Court has 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 (1965); *United States. v. Alaska* 521 U.S. 1, 8, 117 S.Ct. 1888, 1894 (1997).

Accordingly, any ship entering the natural bays and harbors or the territorial seas of Vietnam has entered that nation's sovereign territory. Since they operated within the boundaries, these ships were within the national boundaries and served "in the Republic of Vietnam" for purposes of domestic law. Even if the United States had not recognized sovereignty over the territorial seas, this determination is and should be binding on the Secretary, especially in light of the pro-claimant canons discussed in *Gardner, supra*.

Consequently, the Secretary's limitations are void *ab initio*.

II. The BVA Erred in Not Finding that the Veteran Suffered Direct Exposure to Herbicides

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 Mekong River and other rivers in Vietnam discharge silt and dirt into the South China Sea. This forms a discharge plume caused by the mixture of salt and fresh water. In two weeks, the plume could be expected to travel several hundred kilometers. Weifang Chen and Qian Liu, *Signature of the Mekong River Plume in the Western South China Sea Revealed by Radium Isotopes* (December 2010). The sediment discharge of the Mekong is similar to that of the Mississippi. Eric Wolaski and Nguyen Huu Nhan entitled *Oceanography of the Mekong River Estuary*. In fact the sediment discharge is larger than the Amazon and about 85% of the Yangtze. *Id.* Suspended sediment

discharged down river. *Id.* at 3. The Mekong is one of the largest rivers in the world, discharging 475 cubic kilometers of water annually. This discharge plume would have gone to the anchorages of Navy ships who operated close to shore such as the *Roark*. *Id.*

The Institute of Medicine in their report *Blue Water Navy Vietnam Veterans and Agent Orange Exposure*, established that there was direct spraying of Agent Orange along riverbanks. IOM *Blue Water* at 52 and 63. Agent Orange also washed into rivers, especially during the monsoon season. IOM *Blue Water* at 79. The IOM concluded:

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 *Blue Water* 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. 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 *Blue Water* at 77-78. Cavitation caused by ships traveling at high speeds in response to call for fire missions would also disturb the sea bottom causing resuspension.

A previous IOM study 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.” Institute of Medicine’s Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides (Seventh Biennial Update)

Update 2008. at 54). The IOM noted that it was reasonable to presume that personnel on ships operating close to shore were exposed to Agent Orange. IOM 2008 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 2008 found 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. Subsequent IOM reports have found that it is generally accepted that the dioxin entered the near shore waters, which includes Da Nang, harbor.

In addition, the presence of Agent Orange was confirmed in Nha Trang Harbor. D. S. 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 Coral* (2003). That findings of the report are as follows:

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.

Notably the study concluded that the infiltration occurred via runoff from the Kay River into the harbor. *Id.* If the Agent Orange flowed into Nha Trang Harbor there is no reason to doubt that it flowed into Da Nang Harbor and from the Mekong into the South China Sea. Given the hydrological events associated with that river the Agent Orange would

have been discharged out to territorial seas and beyond.

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. Attached affidavits. 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 forces. Planes routinely sprayed over the harbor. Agent Orange was sprayed over the Han River which empties into the Harbor.

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 held "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). 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)

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, are generally higher than US background concentrations. IOM 2008 at 655. Notably the final conclusion of this committee 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.

While the presence of Agent Orange does not prove exposure, established science, however, shows how the crew of Australian and American ships were exposed.

Both NRCET and IOM *Blue Water* confirmed that the evaporation distillation process, which would have been used in Da Nang Harbor, contained the distillers, the piping and the water used for the boilers and for drinking.

Since the BVA did not consider direct exposure, the matter should be remanded to the BA for review pursuant to 38 U.S.C. § 1113(b) .

III. The BVA Finding that the Veteran’s Departure from the Ship Was Not Documented in the Deck Log was Irrational.

Here the Veterans Law Judge complained that the Deck Log did not show that any of the crew went ashore. The Veterans Law Judge should have been familiar with OPNAVINST 3100.7 series which does not require such entries. Only the departure and

return of the Commanding Officer, unauthorized absentees or the transfer/receipt of personnel is required.

As a practical matter, it would be impossible to document every person who left the ship. Sailors leave the ship for working parties for supplies, to inspect mooring lines, shore power connections and water hoses. Portable damage control equipment is often tested on the pier. Pier sentries are deployed for protection. Sailors connect and disconnect fuel oil and lubricating oil hoses. Others take draft readings and visually inspect the hull and overboard discharges. The fact that the ship was actually brought alongside a Tender was strong evidence that cargo was offloaded since it is easier to do that pier side than at anchorage. Cargo offloads would have required a working party made up of non-rated personnel such as the veteran.

Conclusion

For the reasons delineated herein, the Court should find for the veteran.

Respectfully Submitted:

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Certificate of Service

The undersigned certifies that the within was served on all counsel via the Court's EC/CMF system this 29th day of January 2015.

//s// John B. Wells
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