



Uploaded to the VFC Website

▶▶▶ May 2015 ◀◀◀

This Document has been provided to you courtesy of Veterans-For-Change!

Feel free to pass to any veteran who might be able to use this information!

For thousands more files like this and hundreds of links to useful information, and hundreds of "Frequently Asked Questions, please go to:

[Veterans-For-Change](#)

If Veterans don't help Veterans, who will?

Note:

VFC is not liable for source information in this document, it is merely provided as a courtesy to our members & subscribers.



Analysis of the CAVC Ruling in Gray v. McDonald

On April 23, the Court of Appeals for Veteran Claims made a ruling in Gray v. McDonald. Mr. Gray's claims were Vacated and Remanded "for further proceedings consistent with this decision." What exactly was the decision? I'm afraid that's a bit disappointing.

Among other things, the CAVC included the following statements or concepts in their write-up:

- "...the Court finds that, with respect to Da Nang Harbor, the manner in which VA defines inland waterways is both inconsistent with the regulatory purpose and irrational."
- "...they do not explain how VA's designation of Da Nang Harbor relates to the probability of exposure based on herbicide use."
- Regarding the IOM Report of 2011 (Blue Water Navy Vietnam Veterans and Agent Orange Exposure), "...the general and inclusive nature of the report falls short of the Secretary's assertion that the report specifically "confirmed" that there was no likelihood of exposure to herbicide in Da Nang Harbor." [Note: This is in keeping with and supports the Blue Water Navy Association's Call for Public Censure of the VA because this was announced in a December 26, 2012 Notice in the Federal Register.]
- "Absent a connection to the probability of exposure based on spraying, the Court finds the rationale supporting VA's designation of Da Nang Harbor is inconsistent with the regulation's purpose of compensation based on the probability of exposure."
- "...the Secretary's concession at oral argument that a river mouth does not have definite boundaries..."
- "The Court declines to usurp the Agency's authority and impose its own line. Rather, the Court will vacate the Board decision on appeal as arbitrary and capricious because the decision was based on VA's flawed interpretation of 38 CFR 3.307(a)(6)(iii). The Court will remand the matter for VA to reevaluate its definition of inland waterways - particularly as it applies to Da Nang Harbor - and exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulations emphasis on the probability of exposure."

So, basically, what comes out of this is:

- 1) The court rejected the VA's definitions and distinctions of inland waterways and river mouths;
- 2) But the Court is allowing VA to rethink and redefine inland waterways and river mouths as based on consistent and well-defined criteria.

At this time, BWNVVA has the following observation: the CAVC acknowledged that the VA's rulings identifying inland water and river mouths based on current definitions are "arbitrary and capricious" but it avoided directing the VA to follow some specific CAVC-defined rules. By handing this back to the VA, they are granting the VA some slack that is, in our opinion, unwarranted. So the VA gets another crack at developing regulations that possibly continue to work against the veteran but are more to the liking of the CAVC.

See the attached CAVC documents: Recent Decisions. 13-3339 - Robert H. Gray vs. Robert A. McDonald

John Rossie, Executive Director
Blue Water Navy Vietnam Veterans Association
navy@bluewaternavy.org

GAME CHANGERS FOR BLUE WATER NAVY - #1 CAVC RULING

On April 23, 2015, the United States Court of Appeals for Veterans Claims (CAVC) published their ruling on GRAY v McDONALD (No. 13.3339). At issue was the question: **“Is Da Nang Harbor an “Inland” body of water?”**

The court came to several important conclusions, but did not create a ruling that defined “inland waters”. It left the final definitions up to the VA to re-write in response to the courts rejection of several aspects of “inland waterways” and “river mouth” identification based on “VA’s flawed interpretation of 38 CFR 3.307(a)(6)(iii).”

Essentially, the court rejected several areas where the VA was using “inconsistent” as well as “arbitrary and capricious” methods of making these assignments. The CAVC found that the definitions used by VA in these matters missed the point of the overruling statutes that the main concern be focused on whether or not the veterans were likely to have been exposed to herbicide rather than a concern for the physical characteristics of the body of water or other physical location. When the VA focused on a distinction between “brown water or blue water,” that definition got “murky” where there was a location where these two type waters mixed, such as in harbors. This led the VA to lose sight of “the likelihood of herbicide exposure.”

The court found fault with several guiding principles used by the VA:

1 The Secretary’s “assertion that the [IOM Report of May, 2011] specifically “confirmed” that there was no likelihood of exposure to herbicides in Da Nang Harbor” was not warranted from a report that was “general and inconclusive [in] nature.” This invalidated the overall denial of exposure to offshore personnel and may have opened to doors for reasoned claims based on probability of exposure for each specific instance of a claim.

2 Definitions used by the VA to determine what constitutes an “inland waterway” were “inconsistent with the regulation’s purpose of compensation based on the probability of exposure.” And “....the documents the Secretary relies upon are devoid of any indication that VA made a fact-based assessment of the probability of exposure in Da Nang Harbor from aerial spraying”.....”or other avenues of herbicide contamination.....”

3 “VA does not have a specific definition for “mouth” of a river”.... and.... “the “borders” of Vietnam may extend well beyond the physical land mass around a river mouth.”

The Court’s final decision was to “remand the matter for VA to reevaluate its definition of inland waterways – particularly as it applies to Da Nang Harbor – and exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulation’s emphasis on probability of exposure.”

WHAT IS THE CURRENT STATUS OF CLAIMS ASSERTING INLAND WATER EXPOSURE?

It appears that the VA adjudication system has been stripped of previously guiding principles, but not given any direction what to substitute those with. Until such time that

the VA submits to the Court new definitions for “inland waterways” and “river mouths,” (and, one would expect, review and acceptance of those definitions by the Court), the Claims Adjudication process is left without specific guidance. Since the principle emphasis is to be on the “probability of exposure to herbicide” rather than on physical location, it would appear that these claims are now left to the persuasion of a claim write-up that such exposure was more likely than not.

1. The status of the “Inland Water Service Ships List”: One would expect that this List remains valid because entries on the list have been vetted for ships that were either “within the geographical boundaries of Vietnam” or refer specifically to individuals who went ashore and require sworn statement to that affect from any such individual.
2. Other than ships within the boundaries of Vietnam, there does not appear to be any restrictions on providing evidence of exposure while in harbors. Harbors are generally always “the mouths of rivers” that flow into them, so the ‘river mouth’ argument is applicable. Additionally, if there is any evidence of contamination of the harbor (e.g., The Da Nang Harbor Report bluewaternavy.org has ample evidence for that location), that should be sufficient to prove exposure.
3. The outflow of rivers create a “plume” that is visible on many satellite photos or possibly even Google Earth. (E.g., the plume of the Mekong River extends over 100 kilometers out into the South China Sea.) That would indicate that a ship within this outflow plume could be considered as being “in the mouth of” that river. Additionally, one could claim that being in or near an outflow plume would indicate that the ships could have taken contaminated particles into the distillation system and the onboard water system was then contaminated with herbicide residue.
4. A documented and convincing write-up should be able to present a reasonable and acceptable claim for herbicide exposure for inland water. Emphasis should be on the probability of exposure for that specific location. Deck Logs of location are required (also cruise book entries or other official documentation).
5. This ruling by CAVC should be used as new and material evidence to re-open previously denied claims that were based on denied river mouth or inland water service.

John Rossie, Executive Director
Blue Water Navy Vietnam Veterans Association
303-762-9540