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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BLUE WATER NAVY VIETNAM VETERANS)
ASSOCIATION, INC., 6454 South Datura Street,)
Littleton, CO 80120; MILITARY-VETERANS)
ADVOCACY, INC., 769 Robert Blvd., Suite 201D)
Slidell, Louisiana, 70458)
Plaintiffs,)

Case No: _____

v.)

ERIC SHINSEKI, in his official capacity as)
SECRETARY OF VETERANS AFFAIRS, 810)
Vermont Ave., Washington DC 20420)
Defendants.)

COMPLAINT

Blue Water Navy Vietnam Veterans Association, Inc. and Military-Veterans Advocacy, Inc. file the following Complaint and in support of avers as follows:

PARTIES

1.

Blue Water Navy Vietnam Veterans Association, Inc., hereinafter (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 is dedicated, *inter alia*, 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 those denied benefits despite their exposure to Agent Orange and the survivors of those who were denied benefits and later died from complication of Agent Orange.

2.

Military-Veterans Advocacy, Inc., (hereinafter MVA) is a non-profit corporation organized under the laws of Louisiana who has applied for tax exempt status under § 501c(3) of the Internal Revenue Code. The mission of MVA is to provide legal services, education and defense to members of the armed forces, counseling, education and assistance to veterans in obtaining veterans benefits and advocating for legislation on the federal, state and local level to benefit veterans. The organization also defends religious rights of members of the armed forces.

3.

Eric Shinseki is a natural person who is the Secretary of Veterans Affairs, a cabinet level position of the Executive Branch of the government of the United States of America.

JURISDICTION AND VENUE

4.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1331 as a federal question, the Administrative Procedures Act, 5 U.S.C. § 702, the Mandamus Act, 28 U.S.C. §1361 and the Declaratory Judgment Act, 28 U.S.C. § 2201. This action is also brought pursuant to Rule 65, Federal Rules of Civil Procedure.

5.

This action cannot be brought in the United States Court of Federal Appeals for the Federal Circuit because it does not deal with rulemaking or a request for rulemaking, but with an interpretive regulation (M21-1R) and a precedential General Counsel Opinion (VA Op. Gen. Counsel Prec. 27-97 (1997) (hereinafter 1997 General Counsel Opinion). U.S.C. § 502.

6.

Venue is proper pursuant to 28 U.S.C. § 1391(e).

HISTORICAL BACKGROUND

7.

In the 1960's and the first part of the 1970's the United States sprayed millions of gallons of a chemical laced with 2,3,7,8-Tetrachlorodibenzodioxin (TCDD) and nicknamed Agent Orange over the Republic of Vietnam (RVN). This program, code named Operation Ranch Hand, was designed to defoliate jungle areas around North Vietnamese infiltration points and United States bases.

8.

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.

9.

The largest river in the RVN was the Mekong River that discharged into the South China Sea. The dirt and silt that washed into the river eventually floats out to the South China Sea as part of a discharge "plume."

10.

Within two weeks, the fresh water of the Mekong, along with the dirt and silt and Agent Orange dioxin, traveled several hundred kilometers out to sea.

11.

Eventually, the Agent Orange/petroleum mixture would emulsify and fall to the seabed.

During the Vietnam War, the coastline, especially in the harbors and within the thirty fathom curve¹ 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.

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. 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).

13.

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. Since 1967 there have been estimates of 400,000 deaths and 500,000 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.

14.

¹ A fathom is six feet.

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(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.”

15.

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.

16.

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.

17.

The Institute of Medicine (IOM) is a non-profit organization which is chartered by the National Academy of Sciences.

18.

The responsibility to prepare a biennial report concerning the health effects of herbicide

exposure in Vietnam veterans was delegated to the IOM by Congress in the 1991 Act.

19.

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).

20.

There has been no substantive change to the 1994 version of the Code of Federal Regulations. The current version of 38 C.F.R. § 3.307(a)(6)(iii) reads as follows:

(iii) 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.

21.

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 “service 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 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).

22.

This opinion was authored by Mary Lou Keener. She later became the wife of Hershel Gober who served as Acting Secretary of the Department of Veterans Affairs from 2000-2001. Preliminary steps to implement the opinion took place during the last days of Gober’s tenure.

23.

The General Counsel Opinion was not a substantive change but an interpretation of the existing statute and regulation.

24.

The General Counsel Opinion was incorporated into a 2002 change to the Department’s Adjudication Procedures Manual known as the M21-1 Manual (now M21-1MR Manual).

25.

Previously, 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.”

26.

Starting in 2002, the VA stopped granting the presumption of exposure to those who served in the waters offshore Vietnam.

27.

On August 16, 2006, the Court of Appeals for Veterans Claims ruled that military personnel 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).

28.

The change to the M-21-1 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).

29.

In April of 2008, the Department of Veterans Affairs revised the M 21-1 Manual which continued the prohibition against allowing the presumption of exposure to those who served offshore.

30.

The rulemaking provisions of 5 U.S.C. § 553 were not used in making this revision.

31.

This revision to the M-21-1 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).

32.

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).

33.

In June of 2008, BWNVVA officials 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

34.

In July of 2009, the IOM Seventh Biennial Committee produced their report which included the blue water navy issues. The IOM report accepted the proposition that veterans who served on ships off the coast OF THE rvn were exposed and recommended that they be given the presumption of exposure. The 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.”

http://www.nap.edu/openbook.php?record_id=12662&page=R1. at 656. (IOM I)

35.

The Secretary did not accept the recommendations concerning the Blue Water Navy veterans.

36.

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.”

37.

The Committee reported out on May 20, 2011. (IOM II).

38.

The Committee reported the following major conclusions:

- a. 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.
- b. 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.

- c. 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 197-0's.
- d. 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.
- e. The decision to extend the presumption of exposure "given the lack 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."

39.

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.

40.

On December 16, 2011, the Secretary authorized a change to the M21-1MR Manual which is currently in effect and now reads as follows:

When a Veteran claims exposure to herbicides during service aboard a Navy or Coast Guard ship that operated on the offshore waters of the RVN, establish exposure on a presumptive basis if:

1. evidence shows the ship
 - docked on the shores or piers of the RVN
 - operated temporarily on the RVN inland waterways, or
 - operated on close coastal waters for extended periods, with evidence that
 - crew members went ashore, or
 - smaller vessels from the ship went ashore regularly with supplies or personnel
2. evidence places the Veteran onboard the ship at the time the ship docked to the shore or pier or operated in inland waterways or on close coastal waters for extended periods, and
3. the Veteran has stated that he/she went ashore when the ship docked or operated on close coastal waters for extended periods, if the evidence shows the ship docked to the shore or pier or that crew members were sent ashore when the ship operated on close coastal waters.

Notes

Service aboard a ship that *anchored* in an open deep-water harbor, such as Da Nang, Vung Tau, or Cam Ranh Bay, along the RVN 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.

41.

As with other changes to the M-21-1R manual, this revision 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).

42.

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.

43.

Initially, Gingrich thought that the harbors including Da Nang Harbor, were included in the presumption of exposure.

44.

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.

45.

No such co-operation ever occurred.

46.

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.”

47.

There was no opportunity for comment on the notice.

48.

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. The bill currently has 126 co-sponsors and is pending before the Subcommittee on Disability Assistance and Memorial Affairs.

49.

The Congressional Budget Office, in a preliminary estimate has projected a ten year cost for this bill at \$2.74 billion.

50.

On April 30, 2013, plaintiffs served a demand on the Secretary demanding that he modify his interpretive regulations to grant the presumption of exposure to ships that operated in the harbors, inland waters and the territorial seas of Vietnam.

51.

On June 20, the Secretary, through his Chief of Staff, denied the demand and indicated that the Department considered the demand for correction of the interpretive regulations as a request

for rule making.

52.

On June 29, 2013, plaintiff informed the Secretary that the April 30, demand was not a request for rulemaking but a demand that he rescind his incorrect interpretive regulations. The Secretary was given until August 1, 2013 to respond.

53.

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

THE AUSTRALIAN FACTOR

54.

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.

55.

Horsley shared the curious results of Australian VA studies which demonstrated a significant increase in Agent Orange related cancer incidence for sailors serving offshore compared with those who served ashore.

56.

Unlike the United States, the Australian Veterans Administration tracks the health of every single veteran.

57.

The Australian Department of Veterans Affairs commissioned NRCET to determine the cause of the elevated cancer incidence in Navy veterans.

58.

In 2002, as the American Department of Veterans Affairs (VA) was beginning to deny the presumption of exposure to the United States veterans who served offshore, NRCET published the result of their study, 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).

59.

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.

60.

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.

61.

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.

62.

The Royal Australian Navy served beside the United States conducting gunfire support ashore, search and interdiction missions and resupply missions.

63.

The same shipboard distillation process was used to distill potable water and water for the boilers known as “feed water.” The system was exactly the same for both feed and potable water until the water reached the distribution manifold.

64.

Navy directives discouraged the distillation of potable water in harbors and near the mouths of river, however this was a guideline that could be ignored as circumstances dictated.

65.

There were no restrictions on the distillation of feed water for the boilers.

66.

Irrespective of whether the distillation process was making feed water or potable water, the Agent range tainted water contaminated the suction piping, the distillers themselves and the discharge piping to the distribution manifold.

67.

Agent Orange tainted feed water contaminated the interior of the boilers including the steam drum, water drum, headers and the inside of boiler tubes.

68.

Crewmembers were exposed to the interior of the boilers every 1800 hours of operation while conducting a cleaning process known as “watersides.” This involved a mechanical washing of the inside of the boiler tubes followed by hand maintenance to remove any dissolved oxygen blisters that could waken the tubes or the interior of the drums and headers.

69.

Crew members were exposed to Agent Orange tainted feed water when taking samples

from the individual feed water tanks, soundings of the individual feed water tanks and water samples from the deaerating feed tank.

70.

Crew members were exposed to Agent Orange tainted feed water through high pressure and low pressure drains from various steam equipment used for main propulsion and auxiliary uses.

71.

Crew members were exposed to Agent Orange tainted feed water through maintenance and repair of condensate and feed piping, the Main and Auxiliary Condensers, the Air Ejector and various main propulsion and auxiliary pumps and piping.

72.

All crew members were exposed to Agent Orange through the tainted potable water used for drinking, food preparation, showering, dish washing and clothes washing.

73.

IOM II found that the guidelines on distilling potable water near the mouth of rivers were widely ignored.

74.

Hydration is important in the tropics and potable water tanks were replenished daily.

75.

The hydrological “plume” traveled for hundreds of kilometers, reaching ships that were well beyond the territorial seas of the RVN.

76.

As confirmed by the NRCET report, the co-distillation of the Agent Orange caused it to

contaminate the distillers and the water supply, both feed water and potable water.

77.

Commencing in late 2003 and accelerating by 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.

78.

Australia defines 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 the United States Code of Federal Regulations, covering various cancers.

79.

For several years, Australian Navy veterans have been receiving benefits denied to their American counterparts.

80.

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).

81.

The study 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.

82.

The American VA criticized the NRCET study claiming that it was not peer reviewed and that its conclusions should be discounted. 73 Fed.Reg 20363 (April 15, 2008).

83.

Subsequent to oral argument, The VA submitted this article to the Court of Appeals for the Federal Circuit in the *Haas* case. Before it could be rebutted, the *Haas* decision was issued, criticizing the NRCET report based on the VA Submission. *Haas v. Peake*, 525 F.3d at 1194.

84.

Several months later, IOM I conducted an exhaustive review including an independent review by Dr. Steve Hawthorne who is the Senior Research Manager of the Energy & Environmental Research Center (EERC), University of North Dakota. IOM I validated the NRCET report noting that it was properly based on Henry's Law of thermodynamics.

85.

In its 2011 report, IOM II replicated every step of the NRCET study and confirmed their results. Their only criticism is that NRCET may have underestimated the enrichment factor of the Agent Orange during the co-distillation process.

APPLICATION OF THE LAW OF THE SEA

86.

The applicability of the law of the sea to American law is found in the 1958 Convention on the Territorial Seas and the Contiguous Zone, (15 U.S.T. 1607, T.I.A.S. No. 5639) (hereinafter 1958 Convention).

87.

The 1958 Convention was approved by the Senate May 26, 1960, 106 Cong.Rec. 11196, and was signed by the President March 24, 1961, 44 State Dept.Bull. 609.

88.

Vietnam claims a 12 mile territorial sea using the straight baseline method. United States Department of State *Bureau of Intelligence and Research, Limits in the Seas No. 99 Straight Baselines: Vietnam*, (1983).

89.

Pursuant to Article 4 of the 1958 Convention, the straight baseline is authorized in locations where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. These baselines must be drawn to conform with the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

90.

Pursuant to Article 6 of the 1958 Convention, the territorial seas of the RVN begin at the baseline and extend twelve nautical miles to seaward.

91.

Pursuant to Article 5 of the 1958 Convention, the waters landward of the baseline are

considered internal or inland waters.

92.

The Supreme Court of the United States adopted the 1958 Convention's definition of internal waters to define the term "inland waters." *United States v. State of California*, 381 U.S. 139, 161-68 (1965).

93.

Article 5, Section 1, of the 1958 Convention defined inland 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.

94.

Article 7(2) of the 1958 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.

95.

At a minimum, Da Nang Harbor, Nha Trang Harbor and Cam Ranh Bay are bays within the scope of Article 7(2) of the 1958 Convention.

96.

All bays within the scope of Article 7(2) of the 1958 Convention are inland or internal waters.

97.

The RVN had sovereignty over the territorial seas and the bays as well as other internal or inland waters.

**THE SECRETARY'S REFUSAL TO RECOGNIZE THE PRESENCE OF
AGENT ORANGE IN BAYS OF THE RVN AND THE SOUTH CHINA SEA
AND THE EXPOSURE OF AGENT ORANGE IS IRRATIONAL**

98.

The petroleum/dioxin mixture, sprayed on the riverbanks or otherwise entering the rivers and streams of the RVN floated for a period of time.

99.

The dioxin, along with dirt, debris and silt discharged into the South China sea.

100.

Positive proof of Agent Orange impingement into Nha Trang Harbor has been established.

101.

The Mekong River discharge plume will travel several hundred kilometers in a two week period.

102.

The majority of the territorial seas are within the 30 fathom curve which is the maximum anchorage capability of most United States Navy warships.

103.

To provide gunfire support of troops ashore, ships would try to get as close to possible, often in harbors or within the ten fathom curve.

104.

During the relevant time period, gunfire solutions were computed using analog rather than digital computers.

105.

Anchoring resulted in a more stable fire control solution because ship's course and speed did not have to be factored into the equation.

106.

The ship's anchor would disturb the shallow sea bottom causing silt and dioxin to rise to the surface.

107.

In order to set the anchor, the ship would be reversed, causing cavitation from the propellers which also disturbs the shallow sea bottom causing silt and dioxin to rise to the surface.

108.

In order to hold the anchor in place, several fathoms of chain would be dropped on top of the anchor which would also disturb the shallow sea bottom causing silt and dioxin to rise to the surface.

109.

When weighting the anchor, the chain would be hauled in and the anchor housed which would also disturb the shallow sea bottom causing silt and dioxin to rise to the surface.

110.

Australian and American ships responded to interdiction missions and calls for fire at high speeds, often approaching thirty knots.

111.

At high speeds in shallow water, ships exceeding the speed-length ratio cause a lower pressure called “squat” which causes sleek warships to dip by the stern.

112.

The cavitation of the propellers at the angle accentuated by the “squat” impinge directly on the shallow sea bottom causing silt and dioxin to rise to the surface.

113.

Settled principles of hydrology show that the Agent Orange dioxin was present in the territorial seas during Naval operations in support of the Vietnam War.

114.

No scientific studies refute the principle that the Agent Orange was present in the bays of the RVN and the South China Sea during Naval operations in support of the Vietnam War.

115.

The distillation of Agent Orange contaminated water resulted in crew exposure via potable water and boiler feed water.

116.

The Department’s position that there is no evidence to support the presence of Agent Orange or the exposure of shipboard personnel to Agent Orange is simply irrational.

**THE SECRETARY’S REFUSAL TO RECOGNIZE THE PRESENCE OF
AGENT ORANGE IN BAYS OF THE RVN AND THE SOUTH CHINA SEA
AND THE EXPOSURE OF THOSE VETERANS SERVING ABOARD WARSHIPS IN
THOSE LOCATIONS TO AGENT ORANGE IS ARBITRARY AND CAPRICIOUS.**

117.

The actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's Opinion and the corresponding changes to the M21-1 Manual and its revisions lacked a reasoned analysis describing its prior policies and an indication that the prior policies and standards are being deliberately changed, not casually ignored," as required by *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.1970).

118.

The actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's Opinion and the corresponding changes to the M-21-1 Manual and its revisions did not consider all relevant factors including but not limited to the 1958 Treaty, the hydrological effects and the findings of the Australian studies.

119.

The actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's Opinion and the corresponding changes to the M21-1 Manual and its revisions constituted a clear error of judgment in that it ignored controlling treaty obligation and precedents of the Supreme Court of the United States as well as clearly established hydrological and thermodynamic effects.

120.

The Secretary in implementing and to persist in the continued application of the 1997 General Counsel's Opinion and the corresponding changes to the M21-1 Manual and its revisions failed to articulate an explanation for its decision that rationally connects the facts and the decision.

121.

The actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's opinion and the corresponding changes to the M21-1 manual and its revisions were arbitrary and capricious.

**THE SECRETARY'S REFUSAL TO RECOGNIZE THE PRESENCE OF
AGENT ORANGE IN BAYS OF THE RVN AND THE SOUTH CHINA SEA
AND THE EXPOSURE OF THOSE VETERANS SERVING ABOARD WARSHIPS IN
THOSE LOCATIONS TO AGENT ORANGE IS UNSUPPORTED BY
SUBSTANTIAL EVIDENCE.**

122.

The actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's opinion and the corresponding changes to the M21-1 manual and its revisions failed to consider all relevant evidence and did not proffer an explanation that establishes a rational connection between the facts found and the choice made considering all of the relevant evidence including controlling precedent, the Treaty obligations of the United States, the hydrological effects and the Australian studies.

123.

The actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's opinion and the corresponding changes to the M21-1 manual and its revisions failed to establish a "rational connection between the facts found and the choice made

124.

The actions of the Secretary in implementing and to persist in the continued application of the 1997 General Counsel's opinion and the corresponding changes to the M21-1 manual and

its revisions was not based on a consideration of the relevant factors including controlling precedent, the Treaty obligations of the United States, the hydrological effects and the Australian studies.

125.

A reasonable mind, considering all of the relevant evidence and factors including controlling precedent, the Treaty obligations of the United States, the hydrological effects and the Australian studies could not support the Secretary's conclusions in adopting and to persist in the continued application of the 1997 General Counsel's opinion and the corresponding changes to the M21-1 manual and its revisions.

126.

The evidence used by the Secretary to support the implementation and to persist in the continued application of 1997 General Counsel's opinion and the corresponding changes to the M21-1 manual and its revisions is inherently because the Secretary has proffered only selective portions of reports taken out of context, especially IOM II while ignoring the overall findings of the report as well as the findings of IOM I.

127.

The Secretary's decision to support the implementation and to persist in the continued application of the 1997 General Counsel's opinion and the corresponding changes to the M21-1 manual and its revisions is not supported by substantial evidence and the countervailing evidence supports an opposite conclusion.

**THE SECRETARY'S REFUSAL TO RECOGNIZE THE PRESENCE OF
AGENT ORANGE IN BAYS OF THE RVN AND THE SOUTH CHINA SEA**

**AND THE EXPOSURE OF THOSE VETERANS SERVING ABOARD WARSHIPS IN
THOSE LOCATIONS TO AGENT ORANGE IS CONTRARY TO LAW AND TO
CONTROLLING JURISPRUDENTIAL PRECEDENT.**

128.

Pursuant to Article VI clause 2 of the Constitution of the United States, treaties are part of the supreme law of the land.

129.

The 1958 Convention is self-executing because no legislation was necessary to authorize executive action pursuant to its provisions. *Cook v. United States* 288 U.S. 102, 119, 53 S.Ct. 305, 311 (1933).

130.

The Supreme Court of the United States has used the 1958 Conventions; definition of internal waters to apply to inland waters. *United States v. State of California*, 381 U.S. 139 (1965).

131.

Under the 1958 Convention and controlling Supreme Court precedent, waters landward of the baseline were inland or internal waters.

132.

Under the 1958 Convention and controlling Supreme Court precedent the territorial seas and internal or inland waters is part of the sovereign territory of a nation including the RVN.

133.

By Presidential Proclamation No. 5928 issued on Dec. 27, 1988, and published in the Federal Register at 54 F.R. 777, the United States recognized sovereignty over territorial seas,

defined as 12 nautical miles from the baseline as determined by international law.

134.

To the extent that the 1958 Convention was not self-executing, Presidential proclamation 5928 implemented the Convention.

135.

Under the 1958 Convention and controlling Supreme Court precedent Da Nang Harbor, Nha Trang Harbor and Cam Ranh Bay are bays.

136.

These bays are within the sovereign territory of the RVN. To the same extent as is the land mass and are located within the geographical boundaries of the RVN.

137.

By not considering shipboard service in the bays, internal or inland waters or the territorial seas as active military, naval, or air service in the Republic of Vietnam, the Secretary is in violation of international and domestic law.

RELIEF

138.

All administrative remedies have been exhausted in plaintiffs attempt to rescind the 1997 General Counsel's opinion and the M21-1MR manual.

139.

There is no other adequate relief available to plaintiffs.

140.

There is no adequate remedy at law.

141.

A preliminary and permanent injunction is required to prevent the Secretary from committing irreparable harm by continuing to deny service connection, compensation and medical care to plaintiff's membership.

142.

Injunctive relief is available pursuant to 5 U.S.C. § 706.

143.

A writ of mandamus is available pursuant to 5 U.S.C. § 706 and 28 U.C. § 1361.

144.

A declaratory judgment that the actions of the Secretary are irrational, arbitrary and capricious, unsupported by substantial evidence and contrary to law and regulation is available to plaintiffs pursuant to 28 U.S.C. § 2201.

145.

Appropriate relief is available to plaintiff's pursuant to 28 U.S.C. § 2202.

NEHMER FACTOR

146.

The Northern District of California in *Nehmer v. U.S. Veterans' Admin.*, 712 F.Supp. 1404, 1423 (N.D.Cal.1989), found that the VA "imposed an impermissibly demanding test for granting service connection for various diseases *and* refused to give veterans the benefit of the doubt in meeting that demanding standard."

147.

This class action suit resulted in the general vacation of VA denials in Agent Orange cases.

148.

A consent decree entered into by the VA in this litigation required the readjudication and payment of benefits to previously denied claims upon the change in the law governing service connection. *Nehmer v. U.S. Veterans Admin.* 32 F.Supp.2d 1175, 1177 (N.D.Cal. 1999).

149.

A failure to pay retroactive benefits based on a change of the is a violation of the consent decree. *Nehmer v. Veterans' Admin. of Government of U.S.*, 284 F.3d 1158, 1161 -1162 (9th Cir. 2002).

150.

The *Nehmer*, regulation, in 38 C.F.R. § 3.816, requires the Department of Veterans Affairs to readjudicate the claims of all veterans who have previously been denied benefits under the 1997 General Counsel's opinion and its implementation via the interpretive regulation M21-1MR Manual but who will be eligible for benefits because of the court's decision in his case.

WHEREFORE, Plaintiff prays that:

1. The court issue a preliminary and permanent injunction preventing the Secretary from denying the presumption of Agent Orange exposure to those who served aboard ship in the territorial seas of the RVN;
2. In the alternative, that the court issue a preliminary and permanent injunction

preventing the Secretary from denying the presumption of Agent Orange exposure to those who served aboard ship in the bays of the RVN, to include but not limited to Da Nang Harbor, Nha Trang Harbor and Cam Ranh Bay;

3. The court issue a writ of mandamus directing the Secretary to rescind the 1997 General Counsel's Opinion and to modify his M21-1MR Manual to grant the presumption of Agent Orange exposure to those who served aboard ship in the territorial seas of the RVN;

4. In the alternative, that the court issue a writ of mandamus directing the Secretary to rescind the 1997 General Counsel's Opinion and to modify his M21-1MR Manual to grant the presumption of Agent Orange exposure to those who served aboard ship in the bays of the RVN, to include but not limited to Da Nang Harbor, Nha Trang Harbor and Cam Ranh Bay;

5. The court order a writ of mandamus ordering the Department of Veterans Affairs to readjudicate the claims of all veterans affected by this decision.

6. Issue a declaratory judgment stating that the actions of the Secretary are irrational, arbitrary and capricious, unsupported by substantial evidence and contrary to law and regulation;

7. The court waive bond or in the alternative set a zero bond for this action;

8. The court award all costs of this action to the plaintiffs;

9. The court award attorneys fees in this action to the plaintiff pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d);

10. Such other relief as the court deems available and proper pursuant to 28 U.S.C. § 2202.

Respectfully Submitted,
//s// John B. Wells
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Please Serve:

Service will be made pursuant to Rule 4i