UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

17-1821

ALFRED PROCOPIO, JR.,
Claimant-Appellant

v.

DAVID J. SHULKIN, MD,
Secretary of Veterans Affairs,
Respondent.-Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, 15-4082, JUDGE PIETSCH

ORIGINAL BRIEF OF APPELLANT ALFRED PROCOPIO

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CERTIFICATE OF INTEREST

NOW COMES BEFORE this Honorable Court, pursuant to Rule 47.6, attorney for appellant, Alfred Procopio and attorney John B. Wells Esquire, to file the required certificate of interest providing herein:

The represented party in this case is Alfred Procopio.

The real party in interest Alfred Procopio

Alfred Procopio, Jr. is a natural person.

The appellant will be represented by Military-Veterans Advocacy through attorney John B. Wells, Post Office Box 5235, Slidell, LA 70469.

/s/ John B. Wells
John B. Wells

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STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument may be of some assistance to the court in applying the unique veterans law as well as understanding the various hydrological studies, naval engineering procedures, surface ship operations and international/national lines of demarcation. Given the complexity of the record in this matter and its long history, oral argument might also assist the Court in ensuring that all facts in the record are properly vetted and considered.

TABLE OF AUTHORITIES

Cases:

Statement of Related Cases

Although not exactly on point, the following cases currently pending before this court have similar issues: *Gray v. David J. Shulkin, M.D. Secretary of Veterans Affairs*, docket number16-1783 and *Blue Water Navy Vietnam Veterans Association v. David M. Shulkin, M.D., Secretary of Veterans Affairs* docket number 16-1793.

Statement of Jurisdiction

Jurisdiction rested in the court below under 38 U.S.C. § 7252 granting them sole jurisdiction to review a decision of the Board of Veterans Appeals. This Court has jurisdiction over the matter pursuant to 38 U.S.C. § 7292(a) as a final decision from the United States Court of Appeals for Veterans Claims. A timely notice of appeal was filed from that court's decision, Judge Davis presiding, denying Appellant's appeal from the decision of the Board of Veterans Appeals.

Statement of Issues

I. The Federal Circuit Decision in *Haas v. Peake,* 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008) was wrongly decided and Should Be Overruled.

II. The Federal Circuit Decision in *Haas v. Peake,* 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008) is

Not Controlling.

III. The Court Below's Reliance upon 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)] in Reaching Their Decision Was Clear Error since That Notice Misstates the Facts of Naval Operations off of Vietnam and Has Been Repeatedly Debunked.

IV. The Court Failed to Properly Consider the Issue of Direct Exposure Based on the Presence of Agent Orange in the Waters, Including the Territorial Sea, Off the Mekong River, Through Which the Veteran's Ship Transited.

V. In Light of *Gray v. McDonald*, 27 Vet. App. 313 (2015), the Court's Interpretation That the Territorial Seas of the Republic of Vietnam Was Excluded from Regulatory Definition of Inland Waterways That Would Give Rise to Presumption That Navy Veteran Seeking Disability Benefits Was Exposed to Herbicide, Was Clearly Erroneous.

Statement of the Case

A. Statement of Facts.

The veteran served in the U.S. Navy from September 1963 to August 1967. Appx225. He was assigned to the U.S.S. *Intrepid*, (CV-11), an aircraft carrier, from November 1964 through July 1967. Appx41. In July 1966, the *Intrepid* was deployed off the coast of Vietnam. Appx49, Appx50-51, Appx52, within the

territorial seas of that nation.

In October 2006, Mr. Procopio sought entitlement to service connection for diabetes mellitus. In October 2007, Mr. Procopio sought entitlement to service connection for prostate cancer. Claims were denied and Mr. Procopio submitted his Notice of Disagreement (NOD). Appx224. This included a private treatment record which reflects that Mr. Procopio provided Dr. Grado with a "detailed description and discussion regarding his military history" and communicated that he was concerned with "his exposure as a 'blue water sailor' where they were in the runoff from Vietnam of these sprays and of Agent Orange." Appx220. Dr. Grado opined that Mr. Procopio should be considered full disability related due to his Agent Orange exposure," Appx223, and recorded that the "patient received not only direct exposure from planes on the flight deck but from the evaporators on board, which condensed the waters used for food, cleaning clothes and showering." Appx220.

The VA issued a Statement of the Case (SOC) in October 2009 continuing to deny service connection for prostate cancer and Diabetes Mellitus. Appx219. A Supplemental Statement of the Case (SSOC) was subsequently issued in December 2009, and another SSOC in January 2010. Appx195-198, Appx199-211, Appx212-218.

Mr. Procopio's claims were subsequently transferred to the Board and, in September 2010 the Board held a hearing. Appx185-194. During the hearing, he testified that he was exposed to "chemical exposure and herbicide exposure, due to . . . workings upon the flight deck, such as . . . when planes land and take off, there's fluid or chemicals that are on the deck that I worked in to replace landing lights . . . ." Appx189. He also argued that his treating physician, Dr. Grado, opined that he was exposed to Agent Orange "[e]ither through direct contact or through the distillation of the water aboard ship." Appx191.

In March 2011, the Board issued a decision denying service connection for prostate cancer and diabetes, both to include as secondary to herbicide exposure. Appx172-184. This decision was based on their interpretation that Mr. Procopio "did not serve or visit on-shore in Vietnam" and was "not exposed to herbicide while on active duty." Appx173. The Board also rejected Mr. Procopio's contention that he was exposed to herbicides through the drinking water onboard the U.S.S. *Intrepid*, and it also considered the Australian scientific article of record, but found that "this article is too general in nature to provide, alone, the necessary evidence to show that the Veteran was exposed to Agent Orange while onboard the USS INTREPID (sic)." Appx181.

Mr. Procopio appealed the Board's decision to the Court of Veterans Claims

and, in October 2012, the Court vacated and remanded the Board's decision. Appx157-170; *Procopio v. Shinseki*, 26 Vet.App. 76 (2012). A panel of the court below held that remand was warranted because Mr. Procopio was not provided with an adequate Board hearing. *Id.*

Mr. Procopio's case was remanded to the Board and, in November 2012, Mr. Procopio submitted a statement requesting "consideration [be] given to the fact that I was also exposed to aircraft that flew through the spray of Agent Orange while on their missions." Appx156.

In March 2013, the Board remanded Mr. Procopio's claims for further adjudication and development, to include additional VA notice. Appx150-155. Dr. Grado submitted a private treatment record in a June 2013. Appx146-149. Dr. Grado provided an impression of "Agent Orange exposure in Vietnam as blue water sailor off the coast of Vietnam" with "[s]ide effects related to Agent Orange, including erectile dysfunction, prostate cancer, coronary artery disease"; and "[t]ype 2 diabetes mellitus (also associated with Agent Orange)." Appx149.

The VA issued another Supplemental Statement of the Case and, in September 2013, Mr. Procopio submitted another statement arguing that he was exposed to Agent Orange when working on the flight deck of the U.S.S. *Intrepid*. Appx144.

Additional evidence was received, including the deck log book of the U.S.S. *Intrepid*, showing the ship's deployment off the coast of Vietnam commencing on July 1, 1966, at Yokosuka, Japan, and ending on July 31, 1966, at Dixie Station, in the South China Sea to include the territorial seas of the Republic of Vietnam. A hearing was held on November 13, 2014.

In July 2015, the Board issued the decision that is now on appeal. Appx19-40. The court below affirmed in a non-precedential decision. Appx4-17.

B. Judicial and Regulatory Review of the VA Blue Water Navy Policy.

Since 2002, the VA has refused to grant the presumption of exposure to "Blue Water Navy" veterans who served in bays, harbors and the territorial seas of the Republic of Vietnam.[1] This Court in a 2-1 decision in *Haas v. Peake*, 525F.3d 1168 (Fed. Cir. 2008) applied *Chevron*[2] deference to the VA's decision to deny the presumption of exposure to those who served within the Vietnam Service Medal area. On rehearing, the *Haas* Court noted that they did not apply the pro-

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[1] Previously the crews of ships operating within the Vietnam Service Medal demarcation area, approximately 100 nautical miles from shore, were granted the presumption of exposure. It was this line of demarcation that we upheld in *Haas v. Peake*, 525F.3d 1168 (Fed. Cir. 2008).

[2] Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

veteran canon of construction required by *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct.1197 (2011). *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir 2008).

In *Gray v. McDonald,* 27 Vet.App. 313 (2015), the Court of Appeals for Veterans Claims distinguished *Haas* by noting that the veteran served in Da Nang Harbor, while Commander Haas did not enter any harbor. The *Gray* court found that since the bays and harbors were outside the scope of *Haas*, they were free to review the VA policy. Noting that the rivers, which are awarded the presumption of exposure under the VA policy, discharge into the bays and harbors, the *Gray* court confirmed that river water would mix with the saltwater brought in via tidal surge from the South China Sea. As the rivers were heavily sprayed with Agent Orange their discharge "plume" would carry the herbicide/petroleum mix for some distance into the harbors, bays and the South China Sea. Thus the *Gray* court determined that the exclusion of Da Nang Harbor from the "inland waterways" category did not comply with the intent of the underlying statute and regulation. *Gray*, 27 Vet. App. at 324-26. The Veterans Court went on to explain that the intent of the statute and regulation was "providing compensation to veterans based on the likelihood of [their] exposure to herbicides." *Id.* at 322.

The VA explained that their decision to exclude bays and harbors was based

on "depth and ease of entry---and not on spraying." *Id.* at 324. This led the *Gray* court to properly hold that the VA policy was "irrational." *Id.* at 323-24 and "arbitrary and capricious because the decision was based on VA's flawed interpretation of [the regulation]." *Id.* at 326.

The *Gray* Court declined to rewrite the regulation but invited the 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 the probability of exposure.

Id. at 327. The Secretary did not appeal *Gray* and the decision became final.

Instead of complying with the mandate of the *Gray* court, the Secretary "doubled down" on his irrational policy. In a change to its M21-1 Manual, the VA continued to use depth and ease of entry as the criteria for inclusion in the definition of "inland waterways." The M21-1 Manual, of course, does not have the force of law. *Disabled American Veterans v. Secretary of Veterans Affairs*, No. 2016-1493, ___ F.3d ___, 2017 WL 2561922, at *3 (Fed. Cir. June 14, 2017).

This Court is currently considering two related matters brought under 38 U.S.C. § 502: *Gray v. David J. Shulkin, M.D. Secretary of Veterans Affairs*, docket number16-1783 and *Blue Water Navy Vietnam Veterans Association v. David M. Shulkin, M.D., Secretary of Veterans Affairs* docket number 16-1793. A consolidated oral argument was held on May 5, 2017.

B. 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 commissioned the University of Queensland's National Research Centre for Environmental Toxicology (NRCET) to determine why there was elevated cancer incidence in Navy veterans who did not touch shore. The Australian studies showed a 22-26% increase in cancer above the norm for Royal Australian Navy sailors who served offshore compared with only a 11-13% increase for Army soldiers who served onshore. Appx122.

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. Appx56-57. Their report, was titled the *Examination of The Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins And Polychlorinated Dibenzofurans Via Drinking Water*, (hereinafter NRCET study). Appx53-57, Appx58-65, Appx69-73, Appx76-78, Appx82-83. 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. *Id*. The shipboard distillers, that converted the salt

water into water for the boilers and potable water, co-distilled the dioxin and enhanced the effect of the Agent Orange. Appx53-57, Appx58-65, Appx69-73.

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. Appx54. Additionally, many ships disregarded this guidance and distilled to potable water close to land. *Id.*

Hydrological studies have shown that the river water containing dirt and debris contaminated with the dioxin would have discharged several hundred kilometers into the South China Sea. Appx107. A study in Nha Trang Harbor showed definite infiltration of the dioxin from the Kay River and from the coastal land areas caused by rainwater runoff. Appx111-118. A similar result was found in a study tracing the effects of Agent Orange dumped in the State of New Jersey. Appx110. The dioxin was found in seafood 150 miles from shore. *Id.* This is in consonance with other studies showing pathways of exposure to bays and harbors.

Hydration is important in the tropics and sailors would have ingested a large amount of water from the ship's tanks. Appx55. Additionally, it was used for showering, laundry, food preparation, dishwashing and cleaning. *Id.* Commencing

in late 2003 and accelerating in 2005 the Australians began granting benefits to those who served at sea in Vietnamese waters. Appx63, Apx78.

Until 2002, the American VA granted the presumption of exposure to the crews of those ships operating within the Vietnam Service Medal Area.[3] Appx81-82. In that year, the VA implemented a precedential General Counsel's opinion stating 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). (emphasis added).

VAOPGCREC 27-97. The General Counsel went on to say that ships serving offshore were not to be considered "service in the Republic of Vietnam" but did not specify the distance offshore or the territorial seas.

The Seventh Biennial Report of the Institute of Medicine's Agent Orange

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[3] In referring to the chart at Appx94, the bolder outermost line delineates the Vietnam Service Medal area while the inner line indicates the territorial seas. Vietnam claims a straight baseline method of determining their territorial seas and the innermost line is plotted 12 nautical miles seaward of that baseline.

Committee validated the NRCET study and recommended that Blue Water Navy personnel not be excluded from the presumption of exposure. Appx92, Appx93. A follow on study corroborated the findings of the NRCET study and found that there were plausible pathways of exposure for the Blue Water Navy via wind drift and the rivers and streams. IOM (Institute of Medicine) 2011. *Blue Water Navy Vietnam Veterans and Agent Orange Exposure.* Washington, DC: The National Academies Press at 131-133. *See, also,* Appx83. They also found that they could not state with certainty that the exposure for Blue Water Navy veterans was qualitatively different than their Brown Water or ground forces counterparts. *Id*. According, while the VA has irrationally failed to recognize the presumption of exposure, there is strong evidence of exposure.

Congress is considering the plight of the Blue Water Navy veterans. As of the date of this writing, HR 299, which would, extend the presumption of exposure to the ships in the bays, harbors and territorial seas has 285 co-sponsors. The companion Senate bill, S 422 has 42 co-sponsors. A Legislative hearing was held by the Senate in May of 2015 and reviewed again in October 2015. A legislative hearing was held in the House on April 5, 2017.

Summary of the Argument

The Secretary's obsession with excluding the 90,000 Blue Water Navy

veterans from their earned benefits has spanned two decades. It has forced a number of irrational actions on the part of the VA which has left veterans, the media, the citizenry and Members of Congress shaking their collective heads. The matter has gone past the point of reasonable people having an honest disagreement. In the current environment, the Secretary and his minions have chosen to ignore and forcibly suppress favorable scientific information while misrepresenting or ignoring favorable science. Although the Secretary will try to cherry-pick isolated phrases or sentences from scientific reports to support his position, the basis of his policy is "I am the Secretary and I can do what I want." This action has led to significant criticism of the VA in Congress and more recently in the Courts as his peremptory and autocratic regulations are adopted with no justification.

The issues are simple and clear cut. The Agent Orange dioxin was mixed with petroleum. Petroleum floats. There was rainwater runoff into the rivers and streams and the river banks themselves were sprayed. The rivers discharged through the bays, harbors and territorial seas of Vietnam. The contaminated fresh water mixed with the tidal surge. The currents and tides carried the contaminated water out for an unknown number of miles but definitely to the limit of the territorial seas. Some of the dioxin laced petroleum emulsified and fell to the

bottom of the harbors or the shallow seabed off the Vietnamese coast. Some continued out to sea. Maritime traffic and anchoring, as well as wind, currents and main battery gunfire disturbed the shallow harbor bottom and caused the emulsified Agent Orange attached to bottom sediment to rise. The dioxin then entered the evaporation distillation suction line where it was pumped into the flash chamber for distillation. This distillation process was used to convert sea water to reserve feed water for the boilers and potable water for the crew. This process did not remove the dioxin - it enriched it. All of the available evidence supports this scenario.

Additionally, the Secretary stands alone in claiming that the bays, harbors, and territorial seas are not part of the sovereign territory of the Republic of Vietnam. The Secretary ignores international law, domestic jurisprudence and the American recognition of Vietnamese sovereignty in two separate treaties.

The Secretary's refusal to consider substantial evidence, his inability to provide a reasoned explanation for his policy and the refusal to recognize domestic and international law is more than an abuse of discretion. It is an inflexible and arbitrary attitude which the *Gray* court properly found to be irrational. Although he continues to argue in a weak attempt to justify the unjustifiable, the key point in the saga is that the Secretary, for whatever reason,

does not like the Blue Water Navy community and is determined to deny them their earned benefits. This cannot be allowed to continue.

In light of the facts and the record in this case, this Court should find that *Haas* was wrongly decided or in the alternative, should be limited to its facts. The Court should further find that the Secretary exceeded his Constitutional and statutory authority in stripping earned benefits from these 90,000 veterans who placed their life on the line to go into harms way in support of national policy.

Standard of Review

The limited standard of review for decisions of the Court of Appeals for Veterans Claims is outlined in 38 U.S.C. § 7292 and provides in pertinent part:

> (a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision.

While not empowered to review factual determinations, this court has the authority to review decisions of the Court of Appeals for Veterans Claims and set aside any decision that this court finds to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or in

violation of a statutory right; or
(D) without observance of procedure required by law.

38 U.S.C. § 7292(d)(1).

In other words, legal determinations of the Veterans Court are reviewed without deference. *Prenzler v. Derwinski,* 928 F.2d 392, 393 (Fed.Cir.1991). See, also, *Bingham v. Nicholson* 421 F.3d 1346, 1348 (Fed. Cir. 2005). This Court cannot review purely factual determinations. *Mayfield v. Nicholson* 499 F.3d 1317, 1322 (Fed. Cir. 2007). However, factual matters can be considered in determining whether a decision is incorrect legally within the scope of 38 U.S.C. § 7292(d)(1). In the instant case, the court can review whether the reliance of the court below on *Haas* was misplaced and whether or not the actions of the court below are arbitrary and capricious. This includes a review to determine whether the court below in affirming the VA position is contrary to the Constitution and the law.

A reviewing court must evaluate the action to determine whether the agency action was based on the consideration of all relevant factors and whether there was a clear error of judgment. *Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). Additionally, there must an articulation of an explanation for its decision that rationally connects the facts and

the decision. *Id*. The standard to determine whether the actions are arbitrary and capricious, was announced in *Milena Ship Management Company v. R. Richard Newcomb*, 995 F.2d 620 (5th Cir. 1993). In *Milena Ship*, the Fifth Circuit held that the decision must be reviewed to determine whether the action of the decision maker was within its authority, adequately considered all the relevant factors, and provided a reasoned basis for its decision. *Id*. at 623.

An action also constitutes arbitrary and capricious conduct when it contravenes rules "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." *See Am. Farm Lines* v. *Black Ball Freight Serv.,* 397 U.S. 532, 538-39 (1970).

Any deference owed to agency decisions does not excuse the agency from considering all of the relevant evidence and proffering an explanation that establishes a "rational connection between the facts found and the choice made." *Bowen v. American Hosp. Ass'n,* 476 U.S. 610, 626 (1986); *see also*, *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360 (1989). A court "must consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*. "Substantial evidence has been defined innumerable times as more than a scintilla, but less than a preponderance." *Thomas v. Celebrezze,* 331 F.2d 541, 543 (4th Cir.1964). The

findings of the administrative agency should not be "mechanically accepted" and review does not require or contemplate the rubber stamping of the agency's decision. *Flack v. Cohen,* 413 F.2d 278, 279 (4th Cir. 1969). Substantial evidence constitutes such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971). While the reviewing court cannot substitute its judgment for the agency, if considerable countervailing evidence is manifestly ignored or disregarded in finding a matter clearly and convincingly proven, the decision must be vacated and remanded for further consideration where all the pertinent evidence is weighed. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012).

In deciding veterans' cases, this Court must 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 (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).

In determining the breadth of the deference granted to the agency, this Court should consider the fact that the Supreme Court has recently put the brakes on unfettered and excessive deference in *Christopher v. Smith Kline Beecham Corp.*, 132 S.Ct. 2156 (2012). Deference is not appropriate when:

> it appears that the interpretation is nothing more than a "convenient litigating position," or a " ' *post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack. (Citations omitted).

Christopher v. Smith Kline Beecham Corp. 132 S.Ct. at 2166 -2167 (2012)

Argument

I. The Federal Circuit Decision in *Haas v. Peake,* 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008) Was Wrongly Decided and Should Be Overruled.

Pursuant to Federal Circuit Rule 35(a)(1), a party may argue before a panel that a binding precedent should be overruled. Appellant submits that *Haas* was wrongly decided based on the facts known at the time. Additionally facts that have become known since the *Haas* decision call its underlying basis into question.

In *Haas*, this court in a 2-1 decision found that the Secretary could define the limits of the presumption in their interpretation of the Agent Orange Act of 1991. The *Haas* court found ambiguity in the original statute and applied the deference required by *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (a court will defer to an agency's regulatory interpretation of a statute if the statute is ambiguous or contains a gap that Congress has left for the agency to fill through regulation). Such deference applies, however, only when the interpretation is not arbitrary and capricious, or manifestly contrary to the intent of the statute. *Chevron*, 467 U.S. at 483. In other words, the interpretation must be reasonable. *Id*.

To a large extent the grounds for ascertaining reasonablity depends on the information in the record. The Secretary submitted a Federal Register finding *ex parte* and post oral argument in *Haas*. The decision was rendered prior to any supplemental briefing being afforded by the court. *See*, 73 Fed.Reg. 20,566, 20,568 (Apr. 16, 2008). The VA submission contained glaring errors and unsupported assertions which have since been widely debunked. R. 285-300. Rebuttals were not available to the *Haas* court although they are in the record of the instant case.

Since the decision in *Haas*, other studies and information have become

available that call into question the reasonableness of the VA's interpretation and the level of deference applied by *Haas*. This information is in the record.

The Federal Register notice called into question the applicability of a scientific study showing the shipboard distillation system enhanced the effect of the Agent Orange dioxin. Subsequent to the decision in *Haas* two separate committees of the Institute of Medicine (IOM) validated that study. *See*, IOM (Institute of Medicine). 2009. *Veterans and Agent Orange: Update 2008.* Washington, DC: The National Academies Press and IOM (Institute of Medicine). 2011. *Blue Water Navy Vietnam Veterans and Agent Orange Exposure.* Washington, DC: The National Academies Press. Additionally, the Update 2008 specifically stated that "based on 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." 2008 update at 656. Appx93. This recommendation was not available to *Haas*.

Other scientific evidence discovered subsequent to the *Haas* decision discussed hydrological evidence documentation detailing the infiltration of the Agent Orange dioxin into the bays, harbors and territorial seas. Notably, the IOM has also recognized 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." IOM (Institute of Medicine). 2012. *Veterans and Agent Orange: Update 2010.* Washington, DC: The National Academies Press at 62.

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). The *Haas* court merely questioned the applicability of the 1958 Convention's interpretation of the definition of territorial seas but did not rule it invalid. *Haas*, 544 F.3d 1306, 1309 (Fed. Cir. 2008). More importantly, the *Haas* court did not address Vietnam's own definition of their territorial seas. Nor did *Haas* discuss American recognition of Vietnamese sovereignty over the territorial seas that was recognized by the 1954 Geneva Accords and the 1973 Paris Peace Treaty. Finally, *Haas* itself recognized that their decision did not apply the pro-veteran canon of statutory construction. *Haas v. Peake*, 544 F.3d at 1309. This issue is addressed *infra*.

It is not the place of the VA to define the sovereign territory of a nation. A nation defines its own sovereignty and the United States at its discretion can recognize it or not. Without question, the United States recognized the Republic of Vietnam and its sovereignty. The issue here is the limits of the United States' recognition of the sovereignty of the Republic of Vietnam. An understanding of

the Vietnam territory only begins to reveal the unreasonable determination by the VA.

Since its founding, the Republic of Vietnam claimed sovereignty over territorial seas and the bays as well as other inland waters. Article 4 of the Agreement on the Cessation of Hostilities in Vietnam, (hereinafter 1954 Geneva Accords) issued July 20, 1954 provides:

> The provisional military demarcation line between the two final regrouping zones is extended into the territorial waters by a line perpendicular to the general line of the coast. All coastal islands north of this boundary shall be evacuated by the armed forces of the French union, and all islands south of it shall be evacuated by the forces of the People's Army of Viet-Nam.

Geneva Accords Article 4. https://www.mtholyoke.edu/acad/intrel/genevacc.htm (last visited June 6, 2014). Article 24 of the 1954 Geneva Accords Confirms the sovereignty of the territorial seas:

> The present Agreement shall apply to all the armed forces of either party. The armed forces of each party shall respect the demilitarized zone and the territory under the military control of the other party, and shall commit no act and undertake no operation against the other party and shall not engage in blockade of any kind in Viet-Nam. For the purposes of the present Article, the word "territory" includes territorial waters and air space.

Id. Accordingly, the founding document of the Republic of Vietnam recognizes its sovereignty over the territorial seas. Notably these documents were not provided to or cited to the *Haas* court.

The next question that must be answered is whether the United States recognized the territorial seas, Vietnamese sovereignty over those seas and the breadth of the territorial seas. Initially, as documented in the history of the Joint Chiefs of Staff, the United States recognized a three mile sovereign territorial seas:

> The Saigon government would announce that it had asked the United States for help in countering sea infiltration. It would further declare its territorial waters up to the three-mile limit a "Defensive Sea Area" in which it would, with US help, stop and search any vessel of any nation suspected of supporting the Viet Cong.

The Joint Chiefs of Staff and the War in Vietnam 1960-1968, Part II at page 256 http://www.dtic.mil/doctrine/doctrine/history/jcsvietnam_pt2.pdf. This information was not provided to the *Haas* court.

The Secretary of Defense, acting on behalf of the President, later expanded the United States recognition of the sovereign territorial seas to twelve miles.

> Whereas the earlier rules had established a three-mile limit for territorial waters, the Secretary changed this limit to 12 miles. He appreciated the Joint Chiefs' "concern over the apparent recognition of a twelve-mile territorial limit but, solely for the purpose of these rules," he believed it was "not desirable" to "bring these claims to issue with State now.

Id. at 358. The unilateral action of the Secretary of Defense recognized the 12 mile limit for the territorial seas of the Republic of Vietnam. This information was not provided to the *Haas* court.

The matter was formally ratified by the United States in the Agreement On Ending The War And Restoring Peace In Viet-Nam, executed and entered into force on January 27, 1973. http://www.upa.pdx.edu/IMS/currentprojects /TAHv3/Content/PDFs/Paris_Peace_Accord_1973.pdf (last visited June 6, 2014). Article 1 of that agreement provides that:

> The United States and all other countries respect the independence, sovereignty, unity, and territorial integrity of Viet-Nam as recognized by the 1954 Geneva Agreements on Viet-Nam.

Id. In other words, the United States formally recognized the sovereignty of the territorial seas of both the Republic of Vietnam and the Democratic Republic of Vietnam. This information was not presented to the *Haas* court.

The *Haas* Court danced around the question of whether or not the territorial seas 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)[4] (defining "service in the Republic of Vietnam" as "including service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the

[4] This provision, now designated 38 C.F.R.§ 3.309(e), authorizes benefits for Non Hodgkins Lymphoma, including Blue Water Navy veterans.

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).

Despite the Secretary's argument to the contrary, the Appellant has also highlighted errors in the *Haas* opinion. In a denial of a request for rehearing, the Federal Circuit in *Haas* argued that there 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 to 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."

This is effectively the same definition that should be applied to the sovereign territory of Vietnam.

The *Haas* court majority went 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 could not be said that the territorial seas were part of the RVN. *Haas* 544 F.3d at 1309-1310. This was clear error. 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. This is especially true n light of the American recognition of Vietnamese sovereignty over the territorial seas.

Additionally, the Supreme Court has adopted the definitions of the 1958 Treaty, incorporating it into domestic law. *United States. v. Alaska* 521 U.S. 1, 8 (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 *infra.*

Although the Secretary in his response to the petition for *en banc* review argues weakly that *Haas* does not conflict with *Alaska*, that is not the case. His argument is that because *Alaska* predates *Haas* that *Alaska* did not apply. That is incorrect. A long record of Supreme Court jurisprudence supports the fact that the 1958 Treaty should be the guideline for determining the territorial seas.

The Secretary then tries to apply a mistaken holding of *Gray*, *supra,* to support his case that the 1958 Treaty does not apply. In *Gray, supra.*, at 326, the Court noted that the 1958 Treaty was adopted for purposes of the Submerged Lands Act in *United States v. California,* 381 U.S. 139, 165 (1965) and *United States v. Louisiana*, 394 U.S. 11 (1968) but that the Court did not signal a general intent to adopt the definition for all determinations of inland waters. The boundaries of internal or inland waters, territorial seas and the contiguous zone usually only arise in the course of disputes over submerged lands. Since

sovereignty is conceded over inland waters and the territorial seas, the only question is where to draw the line. It obviously cannot be drawn on the water but only on the underlying submerged land.[5]

Notably *Haas* and its progeny stand alone in their finding that the 1958 Treaty should not be used to define sovereignty over the territorial seas.

The *Haas* analysis did not have the benefit of all of the scientific and legal information. Accordingly it was based on an incomplete picture. Looking at the totality of the evidence that is available today, *Haas* is clearly wrong and should be overruled.

II. The Federal Circuit Decision in *Haas v. Peake,* 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008) is Not Controlling.

A. *Haas* Must Be Limited to its Facts Because it Was Not Decided in Accordance with the Accepted Canons of Construction for Veteran's Cases Pursuant to *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct. 1197, 1206 (2011).

As discussed, *supra*., the VA's adjudicatory process was designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. National Assn. of Radiation Survivors*, 473 U.S. at 311. This was re-affirmed by a unanimous Supreme Court in *Henderson supra.,* 131 S.Ct. at

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[5] The Submerged Lands Act was passed by Congress to *inter alia*, define the boundaries of State sovereignty over submerged lands under navigable waters. 43 U.S.C. § 1301 *et. seq.*

1206. *See, also*, *Gambill, supra.*, 576 F.3d at 1317; *Hodge, supra.,* 155 F.3d at 1362.

The application of this pro-veteran canon sometimes runs aground in the shoal water of *Chevron* deference. In *Sears v. Principi*, 349 F.3d 1326 (Fed. Cir. 2003) this Court found that:

> Where, as here, a statute is ambiguous and the administering agency has issued a reasonable gap-filling or ambiguity-resolving regulation, we must uphold that regulation. No adjudicatory scheme can produce perfect results in every case, and the law does not require that, to be valid, an agency regulation do so. The applicable standard is merely reasonableness . . .

Id at 1332.

The question therefore becomes whether or not the Secretary's interpretation was reasonable and whether it "conflict[s] with the spirit of the veterans' benefits scheme in any substantial way." *Id*. at 1332. If this Court finds that the Secretary's interpretation is unreasonable or in conflict with the spirit of the veteran's benefits scheme it must discount *Chevron* and apply the pro-veteran's canon. The *Haas* court left this matter open when it specifically found that the Court did not apply the pro-veteran canon. *Haas*, 544 F.3d at 1308. Additionally, this Court must balance the specific in finding in *Gray,* that:

> Recognizing "[t]hat [a] generous degree of deference is due to an agency interpretation of its own regulations even when that

> interpretation is offered in the very litigation in which the argument in favor of deference is made," *Cathedral Candle Co.,* [*v. U. S. Intern Trade Com,* 400 F.3d 400 F.3d [1352] at 1364 [(Fed. Cir. 2005)] (citing *Auer,* 519 U.S. at 461–62, 117 S.Ct. 905), and in light of *Haas v. Peake,* the Court here considered the Agency's interpretation carefully. However, unlike in *Auer* and *Cathedral Candle Co.,* here VA's interpretation of its regulation is both inconsistent with the regulatory purpose and irrational; thus, the Court has "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Cathedral Candle Co.,* 400 F.3d at 1364 (quoting *Auer,* 519 U.S. at 462, 117 S.Ct. 905). Therefore, VA's interpretation is "unworthy of deference." *Auer,* 519 U.S. at 462, 117 S.Ct. 905.

Gray, 27 Vet. App. at 325.

In other words, the *Gray* Court correctly found that the Secretary's interpretation was unreasonable. This Court should agree.

The *Haas* Court specifically noted that they did not consider the long accepted canon of statutory interpretation holding that ambiguity in a veteran's benefits statute should be resolved in favor of the veteran. *Haas*, 544 F.3d 1308. Under the accepted "pro-claimant" provisions of *Brown v. Gardner,* 513 U.S. 115, 117-18 (1994) defense of an agency's interpretation must be balanced against the Congressional intent that any ambiguity be resolved in favor of the veterans.

Here the *Haas* court found ambiguity in the statutory phrase "served in the Republic of Vietnam" as applied to service in the waters adjoining the landmass of Vietnam. *Haas* 525 F.3d at 1184. In denying the Petition for Rehearing, the

Haas court found that the failure to apply the accepted statutory canons was waived because it was not raised in this Court. *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008). In the instant case, Plaintiffs have carefully protected that argument. Thus this case is distinguishable from *Haas*.

In their opposition to the petition for *en banc* hearing, the government argued that *Henderson* reaffirmed a standing canon. That is correct. The re-affirmance of the pro-veteran canon by the unanimous *Henderson* court, however, calls into question attempts to limit its application. This just makes sense as the canon would have little practical impact if it could be neutered by the *Chevron* doctrine. Notably in their opposition to the petition for *en banc* review, the Secretary cited to pre-*Henderson* case law with the exception of *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 809 F.3d 1359, 1363 (Fed. Cir. 2016). A fair reading of this decision confirms its non-applicability since the court did no even mention *Henderson.* It noted that pro-veteran canon did not apply in that case because the regulations were facially reasonable. That is not the case here where the Secretary defies the law of nature and national and intentional law in support of their denial of earned benefits to 90,000 sea service veterans.

Irrespective of whether there is ambiguity in the statute or the regulation, the application of the pro-veteran canons of construction require the most

favorable interpretation of the statutory phrase "served in the Republic of Vietnam" as applied to service in the waters adjoining the landmass of Vietnam. The Supreme Court has reaffirmed the applicability of this pro-veteran canon in *Henderson* and has never found that it does not apply in light of *Chevron*. This court is free to utilize this canon in its review of the Secretary's policy, and Appellant urges them to do so. Under that pro-veteran canon, *Haas* must be limited to its facts.

B The *Haas* Affirmance of the VA's Decision to Rescind the Previous Presumption Policy Based on the Issuance of the Vietnam Service Medal Should Not Apply to the Narrower Definition of the Territorial Seas.

As discussed *supra*., *Haas* did not rule out the use of the territorial seas as a demarcation line for purposes of the presumption of exposure. Instead it found the VA decision to not use the Vietnam Service Medal line as reasonable. This line, as reflected in the record at Appx94 extends out for approximately 100 nautical miles. More importantly, it includes a large area off North Vietnam where no spraying took place.

The elongated area addressed by *Haas* was arguably overbroad. In addition to the fact that ships operating off the northern port of Haiphong would have been covered, others who served in ships and aircraft out of the spray area would have

been included in the presumption. The *USS Tecumseh* (SSBN 628) crossed the Vietnam Service Medal area as part of the ballistic missile deterrent patrol. B-52 crews who took off from Guam, bombed Hanoi and returned to Guam would have been within the scope of the original presumption. Submarines landing SEALS in North Vietnam or monitoring Red Chinese electronic signals off Hainan Island could also have come within the presumption. Yet little or no evidence shows a likelihood of exposure.

The territorial seas are a different story. Dr. Robinson Hordoir, a French hydrologist who has conducted Vietnamese River studies. Appx95-101. He specifically found that ships operating in the territorial seas would have been sailing through river water which was permeated with Agent Orange dioxin particles. Appx96, Appx98. Notably the concentration would have been greater at the mouth of the Mekong River where the *Intrepid* entered the territorial seas. Appx96.

Dr. Hordoir's findings are consistent with the effect of dioxin infiltration into the Passaic River in New Jersey. Dioxin was found in the soil at a manufacturing site near the river. Dioxin was confirmed in the river, in New York bight, Newark Harbor and in seafood 150 nautical miles from shore. Appx110.

Obviously dioxin concentrations were higher closer to land. Evidence

confirmed toxic levels of the dioxin in Nha Trang Harbor two decades after the war. Appx111-118. Nha Trang Harbor is relatively open to the sea with a wide mouth. Appx112. Dispersion and dilution, if any would have taken place in that harbor. Yet dioxin still existed in the sediment at toxic levels.

Once the ship steamed through the floating dioxin, it would have been taken into the inlet system of the distillation plants. As found by the NRCET study, confirmed by the Institute of Medicine and eventually conceded by the VA,[6] the evaporation distillation process would have enriched the dioxin prior to it being discharged into the potable water tanks. Appx53-57, Appx58-65, Appx69-73, Appx76-78, Appx82-83.

An argument could be made that the Vietnam Service Medal demarcation line was too broad for purposes of the presumption. This argument, incorporated into the *Haas* holding, does not invalidate the use of the territorial seas as the demarcation line. In light of Dr. Hoirdoir's examination, using the territorial seas as the dividing line is reasonable scientifically as well as legally.

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[6] Mr. David R. McLenachen, Acting Deputy Under Secretary for Disability Assistance, Veterans Benefits Administration, U.S. Department of Veterans Affairs conceded at a Senate hearing that the evaporation distillation system would have enriched the Agent Orange dioxin if it was present. http://www.veterans.senate.gov/hearings/exposures09292015 at 1:33 to 1:34 (last visited October 18, 2015)

Accordingly, *Haas* should be limited to its facts.

III. The Court Below's Reliance upon 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)] in Reaching Their Decision Was Clear Error since That Notice Misstates the Facts of Naval Operations off of Vietnam and Has Been Repeatedly Debunked.

The Federal Register notice relied upon by the Board, the court below, and to at least some extent by the *Haas* court, has been a roundly debunked as a misrepresentation of facts punctuated with fatal leaps of logic that failed to connect facts to conclusions.

As an initial matter, the VA notice falsely claimed that the NRCET study "was not peer reviewed or published and, to our knowledge, has never been cited in any subsequent reputable study concerning herbicide exposure." Dr. Caroline Gaus, one of the authors of the NRCET study, in her response to the VA, noted that it was presented at an appropriate conference and published in peer reviewed periodical. Appx58.

Based on the acceptance of the report by the Australian VA, there was no need for further peer review. Nonetheless, the IOM reviewed and later replicated the Australian study and validated the results. Appx53-55, Appx93.

The VA then went on to cast a red herring by stating that "VA's scientific experts have noted many problems with this study that caution against placing

significant reliance on the study. In particular, the authors of the Australian study themselves noted that there was substantial uncertainty in their assumptions regarding the concentration of dioxin that may have been present in estuarine waters during the Vietnam War." Dr. Gaus responded as follows:

> The problem referred to in this comment is associated with estimating the exposure level of Vietnam Veterans, not with the study's primary finding that exposure to dioxins was likely if I) drinking water was sourced via distillation and ii) the source water was contaminated.

Appx58-59.

Given the enrichment factor found by NRCET and confirmed by the IOM, the exposure would have indeed been considerable. The culmination effect of the repeated inflow of the dioxin would have concentrated the contaminants in the piping, equipment and potable water tanks. Appx64. As discussed *supra*, all of the evidence supports the proposition that the dioxin was discharged into the harbors and the open sea.

The VA notice went on to question whether the ships of the Royal Australian Navy used the same systems as American built ships. Many Australian ships were American built, especially the gun ships of the *Charles F. Adams* class. Appx65. All used the same type of evaporation distillation system, Appx53-55, Appx65. The VA Notice seemed to imply that the ships did not distill their own

water and that sailors did not drink distilled water. That is preposterous. Appx64-65.

Despite the fact that there was voluminous evidence contesting this Federal Register notice, the Board and the court below gave it undue weight. Appx36.

The Board must assess and weigh the evidence. *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed.Cir.1997); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995). This is not just a right, it is a responsibility. The Board's assessment of the weight of the evidence must be plausible and understandable in order to facilitate judicial review. If on the other hand, when the supportive evidence leaves the reviewing court with a definite and firm conviction that a mistake has been committed." the action is clearly erroneous. *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948). If the Board fails to properly weigh the evidence, it is the duty of the court below to vacate the decision and remand with instructions. This they did not do.

Initially, the so called VA scientists and experts were never identified or made available for interview. The author of the VA note does not even use proper nautical terminology, which calls his or her expertise into question. Many of the conclusions are false (as with the peer review) or simply ludicrous (such as questioning whether or not the sailors, deployed for months on end, drank water). The failure to recognize basic facts such as the common use of the evaporation

distillation system and the fact that the Australian gun ships were designed and built in the United States further calls the credibility of the notice into question.

The preposterous conclusions of the VA Notice were then decimated by the evidence of one of the NRCET report's authors and two retired Navy Commanders experienced with shipboard water distillation and distribution systems. Appx53-73. No qualifications for the VA experts and scientists were presented to the Board. Presumably no pertinent qualifications exist.

The actions of the Board and the court below in weighing the actions of the Board were clearly erroneous. The Court should reverse and remand for further proceedings.

IV. The Court Failed to Properly Consider the Issue of Direct Exposure Based on the Presence of Agent Orange in the Waters, Including the Territorial Sea, Off the Mekong River, Through Which the Veteran's Ship Transited.

The court below curiously rejected the argument that Procopio was directly exposed to Agent Orange. This convoluted reasoning supported the Board's finding that there was not sufficient evidence. Specifically the court said:

> Court notes that the issue on appeal is whether the evidence of record shows that the appellant was directly exposed to Agent Orange, not whether certain reports scientifically prove that herbicides did or did not enter the coastal waters of Vietnam. The record shows that the Board considered entitlement to service connection on a direct basis but reasonably found that the appellant's statements regarding

> exposure to Agent Orange were "outweighed by the more probative evidence to the contrary--namely, the responses from [the National Public Records Center] and review of the deck logs of the U.S.S. *Intrepid* showing [the appellant had] no exposure to tactical herbicides, included Agent Orange.

Appx15.

The IOM 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." Appx92, Appx93. The Committee also noted that it was not unreasonable to presume that personnel on ships operating closest to shore were exposed to Agent Orange. Appx92. The crux of that finding is that the ship's deck logs did not show that the ship steamed through Agent Orange. Appx35. The court's agreement with this assertion is nothing short of mind boggling. There is no requirement to document an invisible molecule of dioxin in the ship's deck log. Even if it was part of a small oil slick, those type of anomalies are often encountered at sea and would never have been documented. Additionaly, no instruments existed on board the ship or attached to its hull that could have detected the dioxin.

The court has set the bar too high for any veteran to meet. This confirms the rejection of the pro-veteran canons of construction required by law. All of the scientific evidence shows that the discharge plume, containing the Agent Orange

mixed with petroleum, flowed through the territorial seas at its widest point. The *Intrepid* did enter the territorial seas off the Mekong Delta where Dr. Hoirdoir indicated the discharge plume was at its most pronounced. Even the VA conceded under question before the United States Senate that the evaporation distillation process would have enriched the dioxin. *See, supra.*, footnote 6.

It is well settled that when records are unavailable through no fault of the veteran, the BVA bears a heightened obligation to "explain its findings and conclusions and to consider carefully the benefit-of-the-doubt rule." *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991); *see also Moore v. Derwinski,* 1 Vet.App. 401, 405-06 (1991), *Godwin v. Derwinski*, 1 Vet.App. 419, 426 (1991). The Board failed on both counts and the court below failed to correct them.

Here the records the Board so wistfully required simply did not exist. No samples of the discharge plume were taken by the Navy and no tests were performed. There was no explanation by the Board why the strong circumstantial case of Agent Orange infiltration was not sufficient. The facts and evidence presented were not challenged. There was no effort to show the evidence or the methodology was faulty. It is uncontested that Agent Orange from the rivers was present in the South China Sea. In light of this, the court below should have vacated the Board decision and remanded the matter.

Nor did the Board apply the benefit of the doubt rule. Under this rule, when the Board has made its determinations as to credibility and probative value of all pertinent evidence of record and there is approximate balance of positive and negative evidence, veteran prevails. *Bucklinger v. Brown*, 5 Vet.App. 435 (Vet.App.1993).

The hard fact, which the Board and the court below failed to grasp, is that the Agent Orange, which was mixed with petroleum to improve its adherence to plant life, floated down the rivers and streams and out to sea. There was no magic invisible Agent Orange filter to prevent the dioxin from transiting to the open sea. Once there it would either emulsify and fall to the bottom or continue to drift seaward. This contaminated river water would have intersected the *Intrepid'*s track as it steamed into the territorial seas. Winds from Vietnam were offsetting and aviation capable ships such as the *Intrepid* turned in to the wind to launch aircraft. This would have taken them close to the intense river discharge off the Mekong.

The amount of river water present in the territorial seas would vary based on time of year, direction of the wind, water runoff, currents, tides and other factors. As Robinson Hoirdoir,[7] notes, the range would never be lower than 20%

[7] Dr. Hoirdoir's qualifications can be found at Appx99-101.

and could be as high as 51-72%. The depth of the barocline current containing the Mekong River water could be from 5-10 meters, which is well below the distillate plant's seawater intake. Appx97. Given the hydrological events associated with that river the Agent Orange would have been discharged as far as Dixie Station and beyond.

The actions of the court below are arbitrary and capricious in several ways. As a threshold matter, the fact that they ignored a ratified treaty, formal United States recognition of sovereignty and Supreme Court precedent constitutes arbitrary and capricious behavior. Obviously, Congress would want the VA and the courts to rely upon treaties signed by the President and ratified by Congress.

The failure of the VA and the court below to recognize the presence of the Agent Orange in the bays, harbors and territorial seas is simply absurd. They have chosen to ignore the Nha Trang study, Appx111-118, and other very persuasive evidence of contamination. The Secretary remains in rejection mode, failing to consider any evidence of contamination, no matter how strong. Unfortunately, the court below refused to overturn this injustice.

The actions of the court below certainly demonstrate a failure to consider an important part of the problem, runs counter to the evidence and is so implausible that it cannot be ascribed to agency expertise or a difference in view.

Additionally, the agency really has no expertise in this area. As discussed *supra*, individual decision makers had no naval, engineering or hydrology experience. The lack of experience is evident in the April 16, 2008 Federal Register notice, which took a nonsensical approach to the problem even to the point of referring to ships as "boats." Rather than discussing issues, VA officials were only prepared to deny and stonewall reasoned attempts to communicate with them.

The irrational action of the court below in ignoring accepted scientific principles of hydrology constitutes arbitrary and capricious behavior. Here the Secretary has ignored the hydrological effects as documented in the record. Finally they have chosen to ignore the report prepared by the State of New Jersey documenting the dioxin's presence in seafood 150 nautical miles off the east coast of the United States after an unauthorized dumping. Appx110.

Here the Secretary has viewed the issue with a jaundiced, anti-veteran eye. All evidence, no matter how strong has been rejected or mischaracterized. The 15 year saga to restore these benefits has been met with resistance and even contempt. Viewing the evidence delineated herein, even if the light most favorable to the Secretary shows that the veteran has established his direct exposure claim. The court below erred in not overturning the Secretary's position.

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

The Secretary has no evidence to support his position. All he has done is criticize evidence put forward by the veterans and ignore both direct and circumstantial evidence of Agent Orange infiltration into the harbors, bays and territorial seas. He has twisted or ignored the international and domestic law of the sea to deny benefits to this group of veterans. He has not proffered any evidence other than his own conjecture to support his position. His position is not pro-claimant. Instead it is distinctly anti-veteran.

The Board also rejected key medical evidence that supported the veteran's claim of direct exposure. Appx31-32. The diagnosis was consistent with Agent Orange exposure and the VA physician found that it was "at least as likely as not" that the diabetes and prostate (and now ischemic heart disease) was caused by the dioxin if the veteran was exposed to Agent Orange. No countervailing medical evidence was submitted by the Secretary.

The presence of Agent Orange in the harbors and bays and territorial seas of Vietnam does not in itself prove exposure. Established science, however, shows

how the crew of Australian and American ships were exposed. Faced with an increase in cancer incidence among Royal Australian Navy personnel significantly greater than among Army personnel who fought in-country, the Australian Department of Veterans Affairs sought the answer. The cancer incidence increase (22-26% above the norm for Navy compared with 11-13% for Army) is documented. Appx119-123.

As confirmed by the NRCET report, the co-distillation of the Agent Orange caused it to contaminate the distillers and the water supply. Hydration is important in the tropics and potable water tanks were replenished daily. Sailors would have ingested a significant amount of water from the ship's tanks. Additionally they would have showered in it and brushed their teeth with 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.

Here the Board and the court below did not address the direct exposure claim other than to say that the scientific treatises showing evidence of Agent Orange infiltration into the bays, harbors and territorial seas of the Republic of Vietnam as being too general. It is too much to expect for the ship to obtain samples as it transited these contaminated waters, especially when no one was

aware that the dioxin problem even existed.

Consequently the court erred in its analysis of the direct exposure claim and the decision should be reversed and remanded.

V. In Light of *Gray v. McDonald*, 27 Vet. App. 313 (2015), the Court's Interpretation That the Territorial Seas of the Republic of Vietnam Was Excluded from Regulatory Definition of Inland Waterways That Would Give Rise to Presumption That Navy Veteran Seeking Disability Benefits Was Exposed to Herbicide, Was Clearly Erroneous.

The Secretary claims that *Gray* is not relevant to the instant case. It is not controlling on this court and it is not relevant to discuss the territorial seas. It is relevant, however, to show that the potential for exposure goes beyond the line drawn by the Secretary. *Gray* does not set the outer line of demarcation, but confirms that the Secretary's line is flawed.

The *Gray v. McDonald* case has redefined the Blue Water Navy problem for the VA. The *Gray* court has found that the Secretary acted irrationally in excluding the bays and harbors from the presumption of exposure. The VA had historically argued that spraying took place only over land and not over the water areas. In doing so, they limited the presumption of exposure to those who set foot on the ground or entered the rivers.

Gray gives rise to the question of where the inland river ends. Certainly there is an area where the fresh water of the river mixes with the salt water of the

sea. While the salinity will increase as the river discharge plume goes farther and farther from land, the VA failed to ascertain the point where the river discharge ceases. That plume can be significant and actually can extend for miles.

As discussed *supra*., the Mekong River and other rivers in Vietnam discharge silt and dirt into the South China Sea. The river discharge, especially off the Mekong, extends for hundreds of kilometers. Appx95-107.

In *Gray*, the veterans court found the VA definition of inland waters irrational. *Gray*, 27 Vet.App. At 326. The *Gray* court went on to vacate the regulation and direct the Secretary to 'exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulation's emphasis on the probability of exposure." *Id* at 327. The Secretary defied this invitation and doubled down on his previous exclusions. Accordingly the rule today remains "boots on the ground" without any rational analysis of where the river discharge ends.

The definitions of arbitrary and capricious actions are discussed *supra*. Certainly the Secretary's action meets that standard. He failed to address an important aspect of the problem by refusing to explore the limits of the probability of exposure. He failed to consider evidence showing the discharge plume's encroachment into the South China Sea. He did not provide a proper explanation

of their reasoning, if such reasoning actually occurred. They certainly acted against the will of this Court and the desires of Congress. The court below's refusal to correct the irrational action of the Secretary rises to the level of arbitrary and capricious.

Inland, sometimes called internal waters are clearly defined by international law. Article 5 of the 1958 treaty defines these waters as: " 1.Waters on the landward side of the baseline of the territorial sea form part of the internal waters." The territorial seas of the Republic of Vietnam are shown by the dashed line on the map included in the record. Appx94. Waters inward of the territorial seas should be included in the inland waters definition.

Additionally, since the evidence shows that the Mekong River discharge plume extends for several hundred kilometers, the Court should require the inclusion of the territorial seas within the presumption of exposure.

As discussed *supra*., the Court is free to do this, even in light of *Haas*, by applying the pro-veteran canons of construction. This is consistent with the findings of the hydrologists in the treatises and Dr. Hordoir's expert opinion reflected at Appx95-101.

Consequently, the current regulation excluding those who served in the bays, harbors and territorial seas must be vacated and this case reversed for further

proceedings.

Conclusion

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

Respectfully Submitted:

Military-Veterans Advocacy

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Certificate of Service

The undersigned certifies that the within was served on counsel for the Secretary and the court via the CM/ECF filing system this 21st day of June, 2017.

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

CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,351 by computer word count, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a monospaced typeface using Wordperfect 8.0 with 14-point proportionally spaced face.

/s/ John B. Wells
John B. Wells

ADDENDUM

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4082

ALFRED PROCOPIO, JR., APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

PIETSCH, *Judge*: The appellant, Alfred Procopio, Jr., appeals through counsel a July 9, 2015, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for prostate cancer and diabetes mellitus, type II (DM).[1] Record (R.) at 2-23. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs and the appellant submitted a reply brief. The appellant has also filed a motion for oral argument, and the Secretary filed a response opposing the motion. Also pending is the appellant's motion for leave to file a reply to the Secretary's opposition; the appellant's response; and the Secretary's opposition to the later motions. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court affirm the Board's decision as to denial of service connection for prostate cancer and diabetes mellitus with edema.

[1]The Board also remanded the appellant's claim for service connection for coronary artery disease, to include as secondary to herbicides, because the regional office (RO) had not yet issued a Statement of the Case with respect to this claim. The Court does not have jurisdiction to address the remanded claim. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi,* 17 Vet.App. 475 (2004).

The Court concludes that, in this case, there is no reason that oral argument "will materially assist in the disposition of this appeal." *Janssen v. Principi*, 15 Vet.App. 379 (2002). The Court will therefore deny the appellant's motion for oral argument and deny the appellant's motion for leave to file a response to the Secretary's motion opposing oral argument.

I. FACTS

Mr. Procopio served on active duty in the U.S. Navy from September 1963 to August 1967, R. at 1688, including service aboard the U.S.S. *Intrepid*, an aircraft carrier, from November 1964 through July 1967, R. at 34. In July 1966, the *Intrepid* was deployed off the coast of Vietnam. R. at 226-39; *see* R. at 423-512 (deck log book reflecting the location of the U.S.S. *Intrepid* from July 1, 1966, to July 31, 1966), 1084 (reflecting Mr. Procopio's assertion that his ship was in the Gulf of Tonkin from May 1967 to July 1967), 1681 (reflecting Mr. Procopio's assertion that "we sailed into Vietnam on two occasions and spent time in the Gulf of Tonkin and on the Southern Coast of Vietnam"). Mr. Procopio's service treatment records do not reflect diagnoses or treatment of DM or a prostate condition during active military service. R. at 1512-1602.

In October 2006, Mr. Procopio sought entitlement to service connection for DM and noted that his disability began in January 2004. R. at 1680. On his application, he reported that he was in Vietnam from March 1966 to July 1967. R. at 1674, 1681. He explained that "the benefits I am seeking is service connection for type II diabetes with edema. While in the Navy, I served onboard the USS Intrepid. During my service, we sailed into Vietnam on two occasions and spent time in the Gulf of Tonkin and on the Southern Coast of Vietnam." R. at 1681. He further stated that "I believe this to be the cause of my type II diabetes with edema." *Id*. The RO deferred Mr. Procopio's claim in January 2007 and again in an April 2007 rating decision. R. at 1315, 1330.

In October 2007, Mr. Procopio sought entitlement to service connection for prostate cancer and argued that "I believe that this condition is also as a result of my exposure to Agent Orange while stationed aboard the U.S.S. *Intrepid*." R. at 1262. The RO received additional evidence and argument from Mr. Procopio in March 2009 in which he stated that "I believe that my exposure to Agent Orange was while serving onboard the aircraft carrier USS Intrepid from March to November 1966 and again from May 1967 to July 1967 in the Gulf of Tonkin." R. at 1084. He argued that

"[w]hile performing my duties onboard the ship, we quite frequently handled these chemicals and the aircraft and equipment that was used to spray these chemicals, as well as the water that was pulled from the Gulf and 'purified' through co-distillation for use as our drinking water." R. at 1084. He further argued that "[t]his water was runoff water from Vietnam and the probability that we were drinking dioxin[-]contaminated [water] is high." *Id.* Along with his argument, Mr. Procopio submitted a scientific study entitled "Co-Distillation of Agent Orange and Other Persistent Organic Pollutants in Evaporative Water Distillation." R. at 1086-93 (Australian scientific article).

In April 2009, the RO issued a rating decision, denying service connection for DM with edema and service connection for prostate cancer. R. at 1063. The RO reasoned that service connection was not warranted for these disabilities because the evidence of record did not show "a medical relationship between a current disability and a disease, event, or injury" during service and because the evidence of record did not reflect "on-ground Vietnam service" to warrant entitlement to service connection on a presumptive basis. R. at 1065.

In response, Mr. Procopio submitted his Notice of Disagreement (NOD) and a May 2009 private treatment record, written by Dr. Gordon L. Grado, MD, FACRO, FACR. R. at 1035-43. The private treatment record reflects that Mr. Procopio provided Dr. Grado with a "detailed description and discussion regarding his military history" and communicated that he was concerned with "his exposure as a 'blue water sailor' where they were in the runoff from Vietnam of these sprays and of Agent Orange." R. at 1035. Dr. Grado opined that Mr. Procopio "has multiple problems associated with Agent Orange exposure including prostate cancer, erectile dysfunction, and diabetes" and recorded that the "patient received not only direct exposure from planes on the flight deck but from the evaporators on board, which condensed the waters used for food, cleaning clothes, and showering." *Id.*

The RO issued a Statement of the Case (SOC) in October 2009 continuing to deny service connection for prostate cancer and DM. R. at 981. The RO concluded that "there is simply no record of your purported exposure to herbicides in service" and that "there is neither a direct nor a presumptive basis for the grant of service connection for prostate cancer and diabetes mellitus type 2." R. at 1000. Mr. Procopio thereafter perfected his appeal to the Board and argued that "it remains my contention that my exposure to dioxin/agent orange occurred while onboard ship handling the

drums that carried these chemicals, as well as maintaining the aircraft that were responsible for flying over Vietnam and spraying these chemicals." R. at 969. A Supplemental SOC (SSOC) was subsequently issued in December 2009, and, after additional VA treatment records were obtained, the RO issued another SSOC in January 2010. R. at 929-32, 933-45, 958-64.

Mr. Procopio's claims were subsequently transferred to the Board and, in September 2010, he presented for a Board hearing. R. at 898-907. During the hearing, he testified that he was exposed to "chemical exposure and herbicide exposure, due to . . . workings upon the flight deck, such as . . . when planes land and take off, there's fluid or chemicals that are on the deck that I worked in to replace landing lights . . . ." R. at 902. He also argued that his treating physician, Dr. Grado, opined that he was exposed to Agent Orange "[e]ither through direct contact or through the distillation of the water aboard ship." R. at 904.

Subsequently, Mr. Procopio submitted additional medical evidence in support of his claim, including an October 2010 letter from private physician Dr. Grado opining that "[i]f Mr. Procopio was exposed to Agent Orange or Agent Orange was used in the regions where he was off shore, then his claim would be 'as likely as not' related to Agent Orange." *Id.*

In March 2011, the Board issued a decision denying service connection for prostate cancer and diabetes, both to include as secondary to herbicide exposure. R. at 866-78. The Board found that Mr. Procopio "did not serve or visit on-shore in Vietnam" and was "not exposed to herbicide while on active duty." R. at 867. Additionally, the Board considered Mr. Procopio's contention that he was exposed to herbicides through the drinking water onboard the U.S.S. *Intrepid*, and it also considered the Australian scientific article of record, but found that "this article is too general in nature to provide, alone, the necessary evidence to show that the Veteran was exposed to Agent Orange while onboard the USS INTREPID." R. at 875.

Mr. Procopio appealed the Board's decision to this Court and, in October 2012, the Court vacated and remanded the Board's decision. R. at 788-802; *Procopio v. Shinseki*, 26 Vet.App. 76 (2012). A panel of this Court held that remand was warranted because Mr. Procopio was not provided with an adequate Board hearing. *Id.* at 81-83.

Thereafter, Mr. Procopio's case was returned to the Board and, in November 2012, Mr. Procopio submitted a statement requesting "consideration [be] given to the fact that I was also

exposed to aircraft that flew through the spray of Agent Orange while on their missions." R. at 777. In March 2013, the Board remanded Mr. Procopio's claims for further adjudication and development, to include additional VA notice. R. at 760-65.

Thereafter, VA received a June 2013 private treatment record, written by Dr. Grado, in conjunction with Mr. Procopio's claim for service connection for coronary artery disease. R. at 708-11. Dr. Grado provided an impression of "Agent Orange exposure in Vietnam as blue water sailor off the coast of Vietnam"; with "[s]ide effects related to Agent Orange, including erectile dysfunction, prostate cancer, coronary artery disease"; and "[t]ype 2 diabetes mellitus (also associated with Agent Orange)." R. at 711.

Also in June 2013, the RO issued another SSOC and, in September 2013, Mr. Procopio submitted another statement arguing that he was exposed to Agent Orange when working on the flight deck of the U.S.S. *Intrepid*. R. at 623. This case was returned to the Board and, in November 2013, the Board, again, remanded Mr. Procopio's claims because he "was not scheduled for a videoconference hearing before a Veterans Law Judge." R. at 620.

After his case was again returned to the RO, additional evidence was received, including the deck log book of the U.S.S. *Intrepid*, showing the ship's deployment off the coast of Vietnam commencing on July 1, 1966, at Yokosuka, Japan, and ending on July 31, 1966, at Dixie Station, South China Sea. R. at 423-512. In November 2013, Mr. Procopio's counsel submitted additional evidence and argument in support of Mr. Procopio's claims, including, inter alia, a "Memorandum in Support of Veteran Procopio's Claim"; a pleading from a separate case filed in the United States District Court for the District of Columbia, captioned as *Blue Water Navy Vietnam Veterans Association, Inc., et al. v. Eric Shinseki, Secretary of Veterans Affairs*; multiple declarations; a "Comment by John B. Wells"; and treatises. R. at 187-410.

Thereafter, Mr. Procopio presented for a Board hearing. R. at 168-86. His counsel argued that "the river banks were sprayed [and] [t]hat was mixed with petroleum. The petroleum would then float down into the South China Sea." R. at 176. He also argued that the "evidence will support . . . that ships that were constantly anchoring within the South China Sea, within the territorial seas, would churn up the bottom. Now, coming from Louisiana, we know that Agent Orange floats, but

it also falls to the bottom and emulsifies. Constant anchoring would turn that, would churn up the bottom." R. at 176-77.

In July 2015, the Board issued the decision that is now on appeal. R. at 2-23. The Board denied service connection for prostate cancer and DM with edema, both to include as due to exposure to herbicides. The Board found that "[t]he competent and credible evidence of record is against a finding that the Veteran was present on the landmass or the inland waters of Vietnam during service and, therefore, he is not presumed to have been exposed to herbicides, including Agent Orange." R. at 4. The Board also found that "[t]he competent and credible evidence of record is against finding that the Veteran was directly exposed to herbicides during service." *Id.*

II. ANALYSIS

A. Presumptive Service Connection

Under 38 U.S.C. § 1116(a) a veteran who "served in the Republic of Vietnam" between January 6, 1962, and May 7, 1975, is presumed service connected for certain conditions likely caused by exposure to Agent Orange, including DM and prostate cancer, even if the veteran cannot prove actual exposure to a qualifying herbicide. 38 U.S.C. § 1116(a); 38 C.F.R. § 3.309(e) (2016). "'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." 38 C.F.R. § 3.307(a)(6)(iii) (2016). In *Haas v. Peake*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) adopted VA's interpretation of the statutory phrase "served in the Republic of Vietnam" to mean that, for a veteran to be entitled to the presumption, he or she must have been present at some point on the landmass or inland waters of Vietnam. 525 F.3d 1168, 1182-83 (Fed. Cir. 2008).

For veterans who served in the U.S. Navy during the Vietnam era, VA distinguishes between the "brown water" Navy, which consisted of usually smaller vessels that "operated on the muddy, brown-colored inland waterways of Vietnam," and the "blue water" Navy, which consisted of larger "gun line ships and aircraft carriers . . . operat[ing] on the blue-colored waters of the open ocean." VA Training Letter 10-06, at 4 (Sept. 9, 2010). VA has defined inland waterways to include "rivers, estuaries, canals, and delta areas 'inside the country.'" *Gray v. McDonald*, 27 Vet.App. 313, 321

(2015) (quoting VA Training Letter 10-06). VA also extends the presumption of herbicide exposure to veterans who served on ships where deck logs reference "anchoring [in] or entering the 'mouth' of" the Cua Viet River, Saigon River, Mekong River Delta, Ganh Rai Bay, and the Rung Sat Special Zone. *Id.* However, VA does not include in the definition of inland waterways "open deep-water coastal ports and harbors where there is no evidence of herbicide use." *Id.* at 321-22.

In *Gray*, the veteran served aboard a ship whose logs reflected that it anchored in Da Nang Harbor on numerous occasions in 1972. *Id.* at 316. The Board, relying on VA policy, concluded that Mr. Gray's presence in Da Nang Harbor did not entitle him to the presumption of herbicide exposure. *Id.* at 317. On appeal, this Court held that, although the Federal Circuit in *Haas* upheld VA's distinction between blue open water and the brown inland waterways, VA's exclusion of Da Nang Harbor from the definition of inland waterways was not entitled to deference, was inconsistent with the regulation, and was arbitrary and irrational. *Id.* at 319, 326. Accordingly, the Court vacated the Board decision as arbitrary and capricious and remanded 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 [§ 3 .307(a)(6)(iii)'s] emphasis on the probability of exposure." *Id.* at 326-27.

The appellant asserts that VA's exclusion of the territorial seas of the Republic of Vietnam from the regulatory definition of "inland waterway" was arbitrary and capricious in light of the Court's decision in *Gray*. Appellant's (App.) Brief (Br.) at 27-30. However, the Board considered the Court's recent holding in *Gray*, but correctly found that it was not applicable to the appellant's case because "the record reflects . . . the [appellant's] presence aboard ship in the Gulf of Tonkin and South China Sea, with some activity in the territorial waters of South Vietnam," and because the appellant "has not specifically alleged that his ship anchored in a deep water harbor such as Cam Ranh Bay," Da Nang Harbor, Quy Nhon Bay, Ganh Rai Bay, or any other bay or harbor in Vietnam. R. at 14; *see* R. at 423-512, 1084; *Gray*, 27 Vet.App. at 319, 326. Further, the appellant does not assert that his ship anchored or entered the mouth of one of the enumerated rivers that VA considers, in VA Training Letter 10-06, to constitute "inland waterways." *See Gray,* 27 Vet.App. at 326.

Therefore, because the appellant has not provided the Court with any evidence of record demonstrating that his ship anchored in a deep water harbor, as was the case in *Gray*, the holding

in *Gray* does not help the appellant and his argument must fail. *See Gray*, 27 Vet.App. at 320 n. 6 (noting that the holding of *Haas* applies where a veteran "never entered a harbor or port" and "served exclusively on the open ocean"); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (holding that the appellant bears the "burden of demonstrating error in the Board's decision"), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

The appellant also argues that the Federal Circuit's decision in *Haas* must be limited to its facts and should not be applied to his claims "because it was not decided in accordance with the accepted canons of construction for [v]eteran's cases." App. Br. at 8. However, the Court agrees with the Secretary's assessment and conclusions regarding the applicability of *Haas* to the appellant's claims:

> Essentially, [the] appellant is requesting this Court to review and reverse a decision by the superior tribunal. Yet, such an argument is inappropriate and legally erroneous. Indeed, the Federal Circuit's decision in *Haas* is binding precedent on this Court, and this Court does not have the statutory authority to review decisions of a higher court and provide the relief that [the] [a]ppellant seeks in this case. *See Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) (holding that such binding precedent on this Court includes "a decision of the United States Court of Appeals for the Federal Circuit (which may review some of this Court's decisions)"; *see also* 38 U.S.C. § 7292.

Secretary's (Sec'y) Br. at 19. Accordingly, the appellant's argument that the controlling precedent found in *Haas* should not be applied to his claims must fail.

B. Direct Service Connection

A veteran who does not meet the criteria governing herbicide exposure and service connection on presumptive bases may nevertheless establish entitlement to benefits on a direct basis. *Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994) (noting that a veteran may also obtain disability compensation based on in-service herbicide exposure by demonstrating "direct actual causation"); *Romanowsky v. Shinseki*, 26 Vet.App. 289, 293 (2013) (listing in-service incurrence or aggravation of a disease or injury as an element of a direct service-connection claim); 38 C.F.R. § 3.303(d) (2016) ("The presumptive provisions of the statute and [VA] regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid.").

A finding of service connection, or no service connection, is a finding of fact reviewed under the "clearly erroneous" standard in 38 U.S.C. § 7261(a)(4). *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *See id.*

The appellant argues that, in finding that he was not exposed to herbicides during service, the Board clearly erred by relying on VA's conclusion in a 2008 Federal Register notice that "we do not intend to revise our long-held interpretation of 'service in Vietnam'" based on the agency's review of an Australian scientific study similar to the Australian study of record in the current appeal. R. at 19 (Board quoting 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)); *see* App. Br. at 13-16. He asserts that, in the Federal Register notice, VA "misstates the facts of naval operations off of Vietnam and has been repeatedly debunked"; that it contains false conclusions and is contrary to the Australian scientific study of record; and that the "so called VA scientists and experts were never identified or made available for interview." App. Br. at 13-16. He assert that "despite the fact that there was voluminous evidence contesting this Federal Register notice, the Board gave it undue weight." *Id*. at 15.

However, the Court disagrees and concludes that the appellant's argument must fail for several reasons. First, the Board explained that it "has considered the Australian study [of record], as well as the detailed arguments, testimony, and articles submitted by the [appellant]," but permissibly and reasonably found "this article and the submissions made by the [appellant] . . . too general in nature to provide, alone, the necessary evidence to show that the [v]eteran was exposed to Agent Orange while onboard the U.S.S. *Intrepid*." R. at 18 (citing *Sacks v. West*, 11 Vet.App. 314, 316-17 (1998). The Board explained that "the articles do not show to any degree of specificity that the [v]eteran was exposed to Agent Orange while drinking water [on] the *Intrepid*, or that he was otherwise shown to have been exposed to herbicides during service." R. at 20.

Second, the Court notes that the Board's reference to the Federal Register notice was in the context of its discussion of the applicability of the holding in *Haas* to the appellant's claims. The Board explained that "the arguments provided by the [appellant] regarding '[b]lue [w]ater' veterans was considered, but the law as to '[b]lue [w]ater' veterans is clear as delineated by the Federal Circuit in Haas." R. at 19. The Board further made clear that when the Federal Circuit in *Haas* considered the "blue water" veteran question, the Federal Circuit explained that "VA scientists and experts have noted many problems with the study that caution against reliance on the study to change our long-held position regarding veterans who served off shore." *Id*. Although the appellant disputes these findings of VA regarding the Australian study and argues that they are scientifically incorrect, the issue in this case is whether the appellant has provided evidence to prove that he was directly exposed to Agent Orange, not whether the Federal Circuit in *Haas* correctly decided that "blue water" veterans were excluded from eligibility for presumptive service connection. Again, the Court notes that *Haas* is a precedential decision that is binding upon this Court, and, therefore, the appellant's argument regarding the Federal Register notice fails to allege an error, prejudicial or otherwise, that the Board committed.

The appellant next asserts that the Board failed to adequately consider the issue of direct service connection due to his exposure to Agent Orange "in the waters, including the territorial sea, off the Mekong River, through which the veteran's ship transited." App. Br. at 16. The appellant's argument is based upon the scientific theory that Agent Orange washed into the Mekong River where it combined with petroleum and other sediment and flowed out into the South China Sea, forming discharge plumes, and that this sea water was distilled on board ship and used for, inter alia, potable water. App. Br. at 17-19. He avers that the Secretary's failure to recognize the presence of Agent Orange in the harbors off the coast of Vietnam, including the harbor in which the appellant's ship transited, was arbitrary and capricious because two reports by the National Academy of Sciences, Institute of Medicine (IOM), Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, show that "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." App. Br. at 19; *see* R. at 337-40 (excerpt of IOM report entitled *Veterans and Agent Orange: Update 2008*); R. at 415-16 (excerpt of IOM report entitled *Veterans and Agent Orange: Update 2010*).

However, again, the Court notes that the issue on appeal is whether the evidence of record shows that the appellant was directly exposed to Agent Orange, not whether certain reports scientifically prove that herbicides did or did not enter the coastal waters of Vietnam. The record shows that the Board considered entitlement to service connection on a direct basis but reasonably found that the appellant's statements regarding exposure to Agent Orange were "outweighed by the more probative evidence to the contrary--namely, the responses from [the National Public Records Center] and review of the deck logs of the U.S.S. *Intrepid* showing [the appellant had] no exposure to tactical herbicides, included Agent Orange." R. at 17-18; *see Washington v. Nicholson*, 19 Vet.App. 362, 366-67 (2005) (holding that "credibility determinations must be supported by adequate reasons or bases"); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that it is the Board's responsibility to determine the credibility and probative value of evidence).

Finally, in his brief, the appellant acknowledged that actual evidence of his exposure to herbicides while aboard the *U.S.S. Intrepid* does not exist, but argued that the circumstantial evidence he presented should be satisfactory to establish service connection. *See* App. Br. at 26-27. Unfortunately, because presumptive service connection is not available, actual evidence of exposure to herbicides is needed to substantiate his claims. *See Combee*, 24 F.3d at 1043-44; *Wallin v. West*, 11 Vet.App. 509, 514 (1998) (holding that medical treatise, textbook, or article evidence must "discuss[]generic relationships with a degree of certainty" so that there is plausible causality based on the facts of a specific case); *see also Haas*, 525 F.3d at 1193-94 (noting that judgments regarding similar circumstantial evidence of blue water veterans' exposure to herbicides "are properly left to Congress and [] VA in the first instance; this court is not the proper forum for an initial analysis of such evidence and its implications for [] VA's policies."). The Court therefore agrees with the Secretary's conclusion that the appellant "fails to support his scientific theory with any empirical evidence of record . . . reflecting that the U.S.S. *Intrepid* actually entered into a discharge plume that contained Agent Orange . . . [or] that such Agent Orange . . . was pulled into the ship[']s distillation system and converted into, *inter alia*, potable water." Sec. Br. at 25 (citing *Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169).

In sum, because the Board reasonably found that the appellant was not directly exposed to Agent Orange and reasonably found that his DM and prostate cancer were not otherwise linked to

his active military service, the Board had plausible bases for its determinations in this case. *See Gilbert v. Derwinski,* 1 Vet.App. 49, 52-53 (1990) (in determining whether a finding is clearly erroneous, "this Court is not permitted to substitute its judgment for that of the [Board] on issues of material fact; if there is a 'plausible' basis in the record for the factual determinations of the [Board] . . . we cannot overturn them").

III. CONCLUSION

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, the appellant's opposed motion for oral argument and opposed motion for leave to file a response to the Secretary's motion opposing oral argument are DENIED. The Board's July 9, 2015, decision as to denial of service connection for prostate cancer and diabetes mellitus with edema is AFFIRMED.

DATED: November 18, 2016

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VA General Counsel (027)

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 15-4082

ALFRED PROCOPIO, JR., APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

Under Rule 36, judgment is entered and effective this date.

Dated: December 12, 2016

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Abie M. Ngala
Deputy Clerk

Copies to:

John B. Wells, Esq.

VA General Counsel (027)