



## Military-Veterans Advocacy, Inc.

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Admitted to practice:  
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June 29, 2013

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

Re: Blue Water Navy

Dear Mr. Secretary:

On April 30, 20-13, I wrote you demanding, on behalf of my organization and the Blue Water Navy Vietnam Veterans Association (BWNVVA) that you restore the presumption of exposure to those members of the armed forces who served in the territorial seas and the bays and harbors of the Republic of Vietnam. On June 20, 2013, your Chief of Staff responded and indicated that the Department was treating my demand as a request for rulemaking. Nowhere in my original correspondence did I request rulemaking and I will reiterate herein that I am not requesting rulemaking.

The demand discusses both the M21-1R Manual, an interpretive regulation and the General Counsel Opinion that gave rise to the manual interpretation. VA Op. Gen. Counsel Prec. 27-97 (1997). As noted in *Haas v. Peake*, 525 F.3d 1168, 48 A.L.R. Fed. 2d 787 (Fed.Cir. 2008) and *Paralyzed Veterans of America v. Secretary of Veterans Affairs*, 308 F.3d 1262 (Fed. Cir. 2002), the Department does not have to resort to rulemaking under 5 U.S.C. § 553 to reconsider these policies. Accordingly, I am giving you another opportunity to meet the demand, prior to litigation, in light of your misunderstanding.

I also note that your discussion of the law of the seas and the United States treaty obligations in light of *Haas v. Peake*, 544 F.3d 1306, 1309-1310 (Fed.Cir. 2008) was based on *dicta* and not the holding of the court.

You also cherry-picked from the Institute of Medicine 2011 report ignoring the fact that the IOM report noted that there was no more or less evidence to support the blue water personnel than there was to support the in-country or brown water personnel. Your statement that the Australian cancer incident reports showing increased cancer among Navy personnel did not take into consideration smoking or carcinogens was disingenuous. As you well know most soldiers smoked and cigarettes could be found in their rations. The other carcinogens were also present in the land based forces as well. The paucity of other information is because the Department did

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not do their job and undertake correct studies to identify problems that would affect the health of veterans. I understand that the Department refused to institute a blood test that would have detected Agent Orange in the individual veteran until long after the half-life deterioration of the dioxin fell below the detection threshold.

The failure of the Department to conduct proper studies is also reflected in the IOM's conclusion that forty years later there was no evidence of Agent Orange infiltration into the South China Sea. They also found that there is no evidence of Agent Orange presence ashore. Both conclusions were erroneous. The United States is today funding Agent Orange cleanup in Da Nang. Additionally, you failed to acknowledge the presence of Agent Orange located in Nha Trang Harbor. *Pavlov, et, al, Present-Day State of Coral Reefs of Nha Trang Bay (Southern Vietnam) and Possible Reasons for the Disturbance of Habitats of Scleractinian Corals, RUSSIAN JOURNAL OF MARINE BIOLOGY, Vol. 30, No. 1 (2004)*. I do invite you to do proper studies of the harbor and the territorial seas to the 30 fathom curve. You may have to take core samples down to 40 feet but the Agent Orange will be there. I am confident that Vietnam would be willing to grant the diplomatic clearance.

Nor have you addressed the hydrological effects raised in my letter. That represents a failure to address an important issue, which is *per se* an arbitrary and capricious action.

In January of 2012, your former Chief of Staff, John Gingrich, sat across the table from me in his office and agreed with me that denying benefits to those who entered bays such as Da Nang Harbor made no sense. He looked at the picture of Da Nang Harbor and could provide no good reason why the presumption was not granted for such a harbor. In fact he thought that the bays and harbors were covered and I had to refer him to your own M21-1R Manual. Given the fact that Agent Orange has been found in Nha Trang Harbor, which to my knowledge is the only such study undertaken, I cannot understand how you continue to deny benefits for those who served in ships that entered the bays and harbors of Vietnam as defined in Article 7(2) of the 1958 Convention on the Territorial Seas and Contiguous Zones. While granting the presumption of exposure for those areas would not be adequate relief, it would be a step in the right direction. The failure to expand the presumption to the bays and harbors is more than arbitrary and capricious - it is simply irrational.

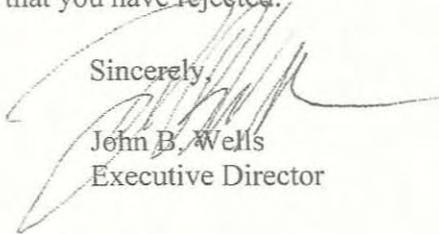
In light of your real or feigned mistaken assumption that my demand that you rescind a General Counsel's Opinion and an interpretive regulation was a request for rulemaking, I will take no further action until August 1, 2013, to allow you to reconsider your position in light of this clarification letter. If I have not received a favorable response by that date, I will take appropriate action in a court of competent jurisdiction.

Too many sailors have died because of this irrational position. The original General Counsel's opinion was not based on the law and your continued exclusion policy is without merit. Substantial evidence does not support your position, despite your attempt to take portions of the 2011 IOM report out of context. Trying to convert *dicta* in *Haas* to the holding of the

court merely underscores the weakness of your position. Trying to "bootstrap" a 5 U.S.C. § 502 issue when none exists is more than disingenuous - it is borderline unethical. I urge you to abandon this position and rescind the M21-1R Manual's prohibition on granting the presumption to those who serve in the bays and harbors of Vietnam and the territorial seas. I also urge you to consign the VA Op. Gen. Counsel Prec. 27-97 (1997) to history.

Pursuant to 5 U.S.C. § 555(e), if you refuse to accede to this demand, provide a brief statement of reasons for each point delineated herein that you have rejected.

Sincerely,



John B. Wells  
Executive Director