

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

BLUE WATER NAVY VIETNAM VETERANS
ASSOCIATION, INC., et. al.

Plaintiffs,

v.

ERIC SHINSEKI, in his official capacity as
SECRETARY OF VETERANS AFFAIRS,

Defendants.

Case No. 1:13cv1187-EGS

**PLAINTIFF'S SEPARATE
STATEMENT OF UNDISPUTED
FACTS**

NOW INTO COURT, through undersigned counsel, comes Plaintiffs BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, INC. ("BWNVVA"), and MILITARY-VETERANS ADVOCACY, INC. ("MVA"), and hereby submits their Separate Statement of Undisputed Facts.

1. In the 1960's and early 1970's, the United States sprayed millions of gallons of a chemical laced with 2, 3, 7, 8-Tetrachlorodibenzodioxin (TCDD) and nicknamed Agent Orange over the Republic of Vietnam (RVN). This program, code named Operation Ranch Hand, was designed to defoliate jungle areas around North Vietnamese infiltration points and United States bases. Exhibit 1, Exhibit 4, Complaint ¶ 7.
2. Riverbanks in the RVN were sprayed continuously with Agent Orange. This

- resulted in direct contamination of the rivers. Exhibit 1, Complaint ¶ 8.
3. Agent Orange was sprayed across Da Nang Harbor by planes who flew over the water during landing and take off, leaving residue on the ships in the harbor, including USS Sanctuary (AH-17) from at least April 10, 1967 to June 24, 1967. Exhibit 4-5.
 4. Da Nang Harbor was one of two primary points of activity for the Ranch Hand Herbicide Spray Project. As such, the environment of Da Nang and the Harbor itself were contaminated with Agent Orange and its by-product dioxin (TCDD). Exhibit 4.
 5. The Agent Orange that was sprayed over South Vietnam was mixed with petroleum. Exhibit 1, Complaint ¶ 8.
 6. The Agent Orange/petroleum mixture washed into the rivers and streams and discharged into the South China Sea. Exhibit 1, Exhibit C to Exhibit 7, Complaint ¶ 8.
 7. Dirt and silt that washed into the Mekong River eventually floated out to the South China Sea. Within two weeks, the freshwater of the Mekong River, along with the dirt, silt and Agent Orange dioxin, traveled several hundred kilometers out to sea. Exhibit 1, Exhibit F to Exhibit 7, Complaint ¶9.
 8. The Agent Orange/petroleum mixture would emulsify and fall to the seabed of the South China Sea. Exhibit 1, Complaint ¶10.
 9. During the Vietnam War, the anchoring evolution of ships would disturb the shallow seabed of the South China Sea, churning up the bottom. Weighing

- anchor would pull up a small portion of the seabed. Exhibit 1. Complaint ¶11.
10. The ship's anchor would cause silt and dioxin to rise from the seabed to the surface. In order to set the anchor, the ship reverse, creating cavitation from the propellers, forcing additional silt and dioxin to rise. In order to hold the anchor in place, several fathoms of chain would be dropped on top of the anchor, which further shifted the sea bottom. Exhibit 1, Complaint ¶ 11.
 11. Military ships moving along the coast, especially within the ten fathom curve at high speeds, impacted the sea bottom. This caused Agent Orange to constantly rise to the surface of the South China Sea. Exhibit 1 Complaint ¶11.
 12. The cavitation of the propellers at the angle at which the warships dipped by the stern triggered the rise of silt and dioxin to the surface. Exhibit 1, Complaint ¶ 11.
 13. In a Russian study conducted in the 1990's, evidence of Agent Orange impingement was found in the seabed and coral of Nha Trang Harbor. Exhibit 1, Exhibit H to Exhibit 7, Complaint ¶ 12.
 14. By 1967, studies initiated by the United States government proved that Agent Orange caused cancer and birth defects. Despite this finding, the aerial defoliation continued without pause. Exhibit 1, Complaint ¶13.
 15. Since 1967, there have been estimates of 400,000 deaths and 500,000 birth defects among the Vietnamese population, confirmed by the Vietnamese government. Similar incidence of cancer development and birth defects have been documented in members of the United States and Allied Armed forces who served in and near

Vietnam. Exhibit 1, Complaint ¶13.

16. In 1991, Congress passed and President George H.W. Bush signed, the Agent Orange Act of 1991, Pub.L. 102-4, Feb. 6 1991, 105 Stat. 11 (codified at 38 U.S.C. § 3316). This law required the Department of Veterans Affairs to award benefits to a veteran manifesting a specified disease who, “during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975.” Exhibit 1, Complaint ¶14.
17. Specified diseases included Non-Hodgkin’s lymphoma soft-tissue sarcoma other than osteosarcoma, chondrosarcoma, Kaposi’s sarcoma, or mesothelioma, chloracne or another acneform disease consistent with chloracne, Hodgkin’s disease, porphyria cutanea tarda, respiratory cancers (cancer of the lung, bronchus, larynx, or trachea), multiple myeloma, diabetes mellitus (Type 2) and other diseases designated by the Secretary. Exhibit 1, Complaint ¶15.
18. The Agent Orange Act of 1991 required the Secretary to take into account reports received by the Secretary from the National Academy of Sciences and all other sound medical and scientific information and analyses available. The Secretary is further required to consider whether the results are statistically significant, are capable of replication, and withstand peer review. Exhibit 1, Complaint ¶16.
19. The Department of Veterans Affairs (VA) drafted regulations to implement the Agent Orange Act of 1991 and defined “service in the Republic of Vietnam” as “service in the waters offshore and service in other locations if the service

involved duty or visitation in the Republic of Vietnam.” 38 C.F.R. § 3.307(a)(6)(iii) (1994). Exhibit 1, Complaint ¶19.

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

(iii) A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. The last date on which such a veteran shall be presumed to have been exposed to an herbicide agent shall be the last date on which he or she served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. “Service in the Republic of Vietnam” includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

Exhibit 1, Complaint ¶20.

21. In 1997, the VA General Counsel issued a precedential opinion excluding service members who served offshore but not within the land borders of Vietnam. The opinion construed the phrase “service in the Republic of Vietnam” as defined in 38 U.S.C. § 101(29)(A) and 38 C.F.R. § 3.307(a)(6)(iii) to require “that an individual actually have been present within the boundaries of the Republic to be considered to have served there,” and that for purposes of both the Agent Orange regulation and section 101(29)(A), service “in the Republic of Vietnam” does not include service on ships that traversed the waters offshore of Vietnam absent the service member’s presence at some point on the landmass of Vietnam.” VA Op. Gen. Counsel Prec. 27-97 (1997). Exhibit 1, Complaint ¶21.

22. The General Counsel Opinion was not a substantive change, but an interpretation of the existing statute and regulation. Exhibit 3, Complaint ¶23.
23. The General Counsel Opinion was incorporated into a 2002 change to the Department's Adjudication Procedures Manual known as the M21-1 Manual (now M21-1MR Manual). Exhibit 1, Complaint ¶24.
24. The M21-1 Manual previously allowed the presumption of exposure to be extended to all veterans who had received the Vietnam service medal, in the absence of "contradictory evidence." Exhibit 1, Complaint ¶25.
25. Beginning in 2002, the VA stopped granting the presumption of exposure to those who served in the waters offshore Vietnam. Exhibit 1, Complaint ¶26.
26. In April of 2008, the Department of Veterans Affairs revised the M21-1 Manual which continued the prohibition against allowing the presumption of exposure to those who served offshore. Exhibit 1, Complaint ¶29.
27. The rulemaking provisions of 5 U.S.C. § 553 were not used in making this revision. Exhibit 1, Complaint ¶30, 31.
28. In June 2008, BWNVVA officials traveled to San Antonio, Texas to present to the Institute of Medicine's (IOM) Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides (Seventh Biennial Update). Exhibit 1, Complaint ¶33.
29. In July 2009, the IOM Seventh Biennial Committee produced their report, which included the blue water navy issues. The IOM report accepted the proposition that veterans who served on ships off the coast of the RVN were exposed to Agent

Orange and recommended that they be given the presumption of exposure. The committee stated: “Given the available evidence, the committee recommends that members of the Blue Water Navy should not be excluded from the set of Vietnam-era veterans with presumed herbicide exposure.” Exhibit 1, 6, Complaint ¶34.

30. The Secretary did not accept the recommendations concerning the Blue Water Navy veterans. Exhibit 1, Complaint ¶35.

31. On May 3, 2010, BWNVVA officials testified before the Institute of Medicine’s Board on the Health of Special Populations in relation to the project “Blue Water Navy Vietnam Veterans and Agent Orange Exposure.” The Committee reported out on May 20, 2011 (IOM II) with the following major conclusions:

- A. There was a plausible pathway for some amount of Agent Orange to have reached the South China Sea through drainage from the rivers and streams of South Vietnam as well as wind drift.
- B. The distillation plants aboard ships at the time which converted salt water to potable water did not remove the Agent Orange dioxin in the distillation process and enriched it by a factor of ten. ?
- C. Based on the lack of firm scientific data and the four decade passage of time, they could not specifically state that Agent Orange was present in the South China sea in the 1960's and 1970's.

- D. There was no more or less evidence to support its presence off the coast than there was to support its presence on land or in the internal waterways.
- E. The decision to extend the presumption of exposure “given the lack of measurements taken during the war and the almost 40 years since the war, this will never be a matter of science but instead a matter of policy.”

Exhibit 1, Complaint ¶38.

- 32. On December 16, 2011, the Secretary authorized a change to the M21-1MR

Manual which is currently in effect and now reads as follows:

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

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

Notes Service aboard a ship that anchored in an open deep-water harbor, such as Da Nang, Vung Tau, or Cam Ranh Bay, along the RVN coast does not constitute inland waterway service or qualify as docking to the shore and is not sufficient to establish presumptive exposure to herbicides, unless the Veteran served as a coxswain aboard ship and reports going ashore during anchorage.

Exhibit 1, Complaint ¶40.

33. As with other changes to the M-21-1R manual, this revision was not a substantive change, but an interpretation of the existing statute and regulation. *Haas v. Peake*, 525 F.3d 1168, 1195 (Fed.Cir. 2008). Exhibit 1, Complaint ¶41.
34. In January of 2012, BWNVVA officials briefed VA Chief of Staff, John Gingrich, ordered an inquiry into the reason for the original General Counsel's opinion regarding the presumption of exposure in 2012, yet the VA has not cooperated with BWNVVA in ascertaining whether or not the current policy should be modified or rescinded. Exhibit 1, Complaint ¶42-44.
35. On December 26, 2012, without notice to BWNVVA, the Department of Veterans Affairs published Federal Register Notice 77 Fed. Reg. 76170 (December 26, 2012). The Notice omitted findings favorable to the Blue Water Navy Veterans. The Notice read "After careful review of the ION report, 'Blue Water Navy Vietnam Veterans and Agent Orange Exposure,' the Secretary has determined that the evidence available at this time does not support establishing a presumption of exposure to herbicides for Blue Water Navy Vietnam Veterans. There was no opportunity for comment on the Notice. Exhibit 1, Complaint ¶45-46.
36. On April 30, 2012, plaintiffs served a demand on the Secretary demanding that he modify his interpretive regulations to grant the presumption of exposure to ships that operated in the harbors, inland waters and the territorial sea of Vietnam. Exhibit 1, Complaint ¶50.

37. On June 20, the Secretary, through his Chief of Staff, denied the demand and indicated that the Department considered the demand for correction of the interpretive regulation as a request for rulemaking. Exhibit 2, Complaint ¶51.
38. On June 29, 2013, plaintiffs informed the Secretary that the April 30 demand was not a request for rulemaking, but a demand that he rescind his incorrect interpretive regulations. The Secretary was given until August 1, 2013 to respond. Exhibit 3, Complaint ¶52.
39. On February 6, 2013, Congressman Chris Gibson of New York introduced HR 543, which would extend the presumption of exposure to the Territorial Seas of the Republic of Vietnam. Exhibit A to Exhibit 7 Complaint ¶48.
40. In 2002, the University of Queensland Australia's National Research Centre for Environmental Toxicology (NRCET) published the result of a study of the cause of elevated cancer incidence in Australian Navy Veterans. This study was commissioned by the Australian department of Veterans Affairs because of statistics showing a higher cancer incidence among Royal Australian Navy personnel than those who fought in-country. Exhibit 1, Exhibits I and J to Exhibit 7, Complaint ¶s 54-58, 80-81.
41. 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. The study also noted that distilling plants aboard the ships, co-distilled the dioxin, enhancing the effect of Agent Orange. The Royal Australian Navy served beside the United States conducting gunfire support ashore, search and

interdiction missions and resupply missions. Exhibit 1, Exhibit J to Exhibit 7, Complaint ¶¶59-60.

42. Agent Orange tainted feed water contaminated the interior of the boilers including the steam drum, water drum, headers and the inside of boiler tubes. Crew members were exposed to the interior of the boilers every 1800 hours of operation while conducting a cleaning process. The process involved a mechanical washing of the inside of the boiler tubes followed by hand maintenance to remove any dissolved oxygen blisters that could weaken the tubes or the interior of the drums and headers. Exhibit 1, Complaint ¶¶s 66-68.
43. The NRCET Report confirmed that the co-distillation of the Agent Orange caused it to contaminate the distillers and the water supply, both feed water and potable water. Exhibit 1.
44. Distillation equipment used by Australian ships were identical to the equipment on American Ships. The system showed in the American Navy's Principles of Naval Engineering is the same system studied by the Australians. The study revealed that the distillation process actually enriched the Agent Orange, co-distilled it and contaminated both the distillation and potable water system. Exhibit 7, Complaint ¶¶s 60-63
45. In 2008, IOM I conducted an exhaustive review including an independent review by Dr. Steve Hawthorne, who is the Senior Research Manager of the Energy and Environmental Research Center (EERC), University of North

Dakota. IOM I validated the NRCET report noting that it was properly based on Henry's Law of thermodynamics. Exhibit 1, Complaint ¶s 84-85.

46. In its 2011 report, IOM II replicated every step of the NRCET study and confirmed the results. The only criticism was that NRCET may have underestimated the enrichment factor of the Agent Orange during the co-distillation process. Exhibit 1, Complaint ¶85.
47. Vietnam claims a 12 mile territorial sea using the straight baseline method. Exhibit 1, Exhibit B to Exhibit 7 Complaint ¶88.
48. Pursuant to Article 6 of the 1958 Convention on the Territorial Seas and the Contiguous Zone, the territorial seas of the RVN begin at the baseline and extend twelve nautical miles to seaward. Pursuant to Article 5 of the 1958 Convention, the waters landward of the baseline are considered internal or inland waters. Exhibit 1, Exhibit B to Exhibit 7, Complaint ¶90.
49. Article 5, Section 1 of the 1958 Convention defines inland waters as follows:

Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

Exhibit 1, Exhibit B to Exhibit 7, Complaint ¶s 91-93.
50. Article 7(2) of the 1958 Convention sets forth the following geographic criteria for deciding whether a body of water qualifies as a bay:

For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

- Exhibit 1, Complaint ¶94.
51. Da Nang Harbor, Nha Trang Harbor and Cam Ranh Bay are bays within the scope of Article 7(2) of the 1958 Convention. Exhibit 1, Complaint ¶95.
 52. All bays within the scope of Article 7(2) of the 1958 Convention are inland or internal waters. Exhibit 1, Complaint ¶96.
 53. The RVN had sovereignty over the territorial seas and the bays as well as other internal or inland waters. Exhibit 1, Complaint ¶97.
 54. Settled principles of hydrology show that the Agent Orange dioxin was present in the territorial seas during Naval operations in support of the Vietnam War. Exhibit 1, Exhibits C, D, E, F, G and H to Exhibit 7, Complaint ¶s 99-101, 113.
 55. No scientific studies refute the principle that the Agent Orange was present in the bays of the RVN and the South China Sea during Naval operations in support of the Vietnam War. Exhibit 1, Complaint ¶114.
 56. The distillation of Agent Orange contaminated water resulted in crew exposure via potable water and boiler feed water. Exhibit 1, Exhibit 7, Exhibit J to Exhibit 7, Complaint ¶115.
 57. Under the 1958 Convention and controlling Supreme Court precedent, the territorial seas and internal or inland waters are part of the sovereign territory of a nation including the RVN. Exhibit 1.
 58. By Presidential Proclamation No. 5928 issued on Dec. 27, 1988 and published in the Federal Register at 54 F.R. 777, the United States recognized

sovereignty over territorial seas, defined as 12 nautical miles from the baseline as determined by international law. Exhibit 1.

59. To the extent that the 1958 Convention was not self-executing, Presidential proclamation 5928 implemented the Convention. Exhibit 1.
60. Under the 1958 Convention and controlling Supreme Court precedent, Da Nang Harbor, Nha Trang Harbor and Cam Ranh Bay are bays. Exhibit 1.
61. Da Nang Harbor, Nha Trang Harbor and Cam Ranh Bay are bays within the sovereign territory of the RVN to the same extent as is the land mass and are located within the geographical boundaries of the RVN. Exhibit 1.
62. A study known as the Da Nang Harbor Report regarding the presence and effects of Agent Orange in the harbor of Da Nang reported that Agent Orange did not deteriorate in sunlight and there is no known dilution level at which it is safe to ingest dioxin (Maximum Contaminant Level (MCL)). Exhibit 4.
63. Conclusions from the Da Nang Harbor Report have been validated and are in accord with recent United States involvement in extensive and costly remediation of the exact land-based locations discussed in the Da Nang Harbor Report. Exhibit 4.
64. A drainage ditch that ran from the area of an Airbase tarmac where the Agent Orange herbicide was stored and mixed down to the Harbor has been located. Documentation shows that the purpose of the drainage ditch was to move the rinse-down contamination away from the Ranch Hand area of operation. The

liquid run-off was engineered to flow directly into Da Nang Harbor. Exhibits 4, and 5.

65. The Da Nang Harbor Report concluded that the evidence overwhelmingly shows that Agent Orange infiltrated into Da Nang Harbor and crews aboard ships entering the harbor were exposed to the dioxin by contamination of the ship's distillation plant as well as inhalation of volatized dioxin. Exhibit 4.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the within was served on opposing counsel by the Court's EC/CMF system this 3rd day of December 2013.

//s// John B. Wells
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