

Impact of the Court decision in *Gray v. MacDonald* on the Blue Water Navy state of affairs

Procedural History. The United States Court of Veterans Appeals ruled on April 23, 2015, that the VA's exclusion of bays and harbors from their definition of inland waters was irrational. The time for appeal has expired and the *Gray* case is now law.

What the Court Did. The Court held that the VA failed to provide sufficient justification for excluding the bays and harbors of Vietnam, more specifically Da Nang Harbor, from their definition of inland waters. As the VA includes inland waters in their presumption of Agent Orange exposure, this ruling could expand the presumption to include all ships that entered Da Nang Harbor and possibly other bays and harbors. The Court stopped short of requiring such a result, however, and provided the VA with an opportunity to re-write their regulation. The Court also stopped short of adopting the definition contained in the 1958 Convention on the Territorial Seas and the Contiguous Zone that would have included most bays and harbors in the definition. The Court also specifically rejected a VA claim that the Institute of Medicine "confirmed" that there was no likelihood of exposure to herbicides in Da Nang harbor.

Impact of New VA Regulation. The impact of the new VA regulation could be dramatic. Should the VA adopt the 1958 Convention's definition of inland or internal waters, it will encompass virtually every bay and harbor in Vietnam. This would cover approximately 90% of the ships that deployed and should reduce the expected ten year \$1 billion cost of HR 969/S 681 to approximately \$100 million. Conversely, if the new regulation continues to exclude the bays and harbors, the cost will remain the same requiring a significant offset such as "round downs." Unfortunately, there is no deadline for the VA to issue the new regulation. Accordingly, Congress must consider the pending legislation without being able to apply any potential offset as a result of *Gray*. A Senate mark-up hearing on S 681 is scheduled for early October. This bill currently has 20 co-sponsors. The companion House bill, HR 969, has 264 co-sponsors.

Future Litigation Efforts. Obviously if the new VA regulation does not adequately address the needs of Navy veterans who entered the bays and harbors of Vietnam, it will be challenged. Military-Veterans Advocacy will file suit pursuant to 38 U.S.C. § 502 to seek judicial review. A pending action in the United States Court of Appeals for the District of Columbia will determine whether the District Court has jurisdiction to review VA procedural regulations excluding these veterans. Another case pending in the Court of Appeals for Veterans Claims will address the exclusion of Nha Trang Harbor from the presumption of exposure. This case is actually stronger than *Gray* since there is documented evidence of Agent Orange infiltration into that harbor.

Plans Moving Forward. Military-Veterans Advocacy Executive Director, Commander John B. Wells, USN (retired) met with VA Deputy Secretary Sloan Gibson on July 6, 2015 to discuss the Blue Water Navy issue. While the meeting was cordial, there have been no indications that the VA will abandon their current position and extend the presumption exposure to the ships operating in the bays and harbors or territorial seas of the Republic of Vietnam. One source, deemed reliable, indicates that the VA intends to continue to resist the expansion of the presumption. Military-Veterans Advocacy will continue to advocate for the expansion through litigation, legislation and education. We are not giving up!