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Admitted to practice:
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July 8, 2019

Hon. Robert L. Wilkie
Secretary of Veterans Affairs
810 Vermont Ave., NW
Washington, DC 20420

Re: Stay Under the Blue Water Navy Vietnam Veterans Act Pub. L. 116-23

Dear Mr. Secretary:

I am writing in response to your July 1, 2019 stay of claims for benefits under the Blue Water Navy Vietnam Veterans Act Pub. L. 116-23. Military-Veterans Advocacy urges you to rescind or clarify your July 1, 2019 memo imposing a stay on Blue Water Navy claims.

As a threshold matter, we do not believe any stay is currently ripe. The Act, by its language, is not effective until January 1, 2020. *See*, Pub. L. 116-23 § 2(g). Nothing in the stay authorization § 3(c)(3) allows for a premature stay. I understand the wording of § (c)(3)(B) refers to the legislation's enactment, however our position is that even this subsection does not take effect until January 1, 2020. Arguably there may be some ambiguity in this language, however application of the accepted canons of construction resolves the question in favor of veterans. *See, Kisor v. Wilkie*, ___ S. Ct. ____, No. 18-15, 2019 WL 2605554 (U.S. June 26, 2019).

The stay also seems to encompass claims filed under the provisions of *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019). This contrasts with representations made to the Supreme Court by the Solicitor General in their June 4, 2019 Motion to Dismiss filed in the case of *Gray v. Wilkie*, 17-1679. In that pleading the Solicitor General declared: "the Department of Veterans Affairs (VA) will follow *Procopio*'s interpretation of the [Agent Orange] Act going forward." Without clarification, we are concerned that the Board and the Veterans Benefits Administration will interpret the stay to include claims authorized by *Procopio*. This applies not only to Mr. Procopio but other similarly situated veterans. Since Pub. L. 116-23, by its terms, addresses only claims submitted under 38 U.S.C. § 1116A, not § 1116, our position is that *Procopio* claims are not within the scope of your stay. This needs to be clarified.

As you know, *Procopio* addresses claims of veterans brought under 38 U.S.C. § 1116 and pertains only to claims of veterans who served in the territorial sea. Pub. L. 116-23 did not repeal § 1116. Instead it added a new provision that addressed claims of veterans who served "offshore." Congress could have used the term "territorial sea" in their legislation or could have repealed § 1116. They chose not to do so. Therefore, we believe that the stay provisions of the legislation, even if ripe, are not applicable to claims brought under § 1116 that are based on service in the territorial sea.

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While we understand the need to devise an implementation strategy, I remind you of the recommended priorities we discussed at our meeting last April. Ships in harbors are identifiable in the deck log heading. Destroyers, Destroyer Escorts and Light Cruisers conducting gunfire support ashore had to be within 12 nautical miles of shore to provide effective fire. Although our position is that the territorial sea extends further, there is no question that these veterans are covered under *Procopio*. We contend that those veterans cannot legally be included in your stay. Quickly granting benefits to the veterans who operated within the harbors and 12 nautical miles from shore allows a more orderly implementation after January 1.

This is not to say that we are abandoning our position that the territorial sea extends 12 nautical miles from the baseline. The opposite is true. International law allows a nation to use the direct baseline method to define their territorial sea and Vietnam has chosen that option. *Procopio* has opened a pathway for coverage of veterans who served beyond the territorial sea into the waters offshore. We reserve all rights to pursue that position at the appropriate time.

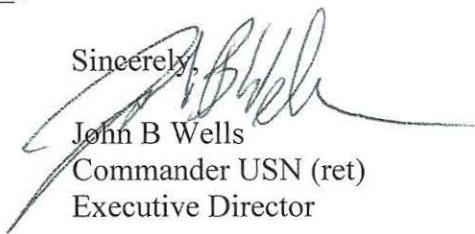
We also have two rulemaking requests pending on this issue. The first, dated October 2, 2016, covered rulemaking for Da Nang and Nha Trang Harbor. The second request, dated December 3, 2018, covers additional areas. Both are in consonance with the *Procopio* decision.

As I have previously stated, Military-Veterans Advocacy wishes to work with you and not against you. Still, our major concern is ensuring that these veterans receive their compensation and medical care without further delay. We have provided you with an implementation plan that will resolve this matter with minimum disruption within the VBA. We continue to offer our assistance to smooth the implementation of the *Procopio* mandate.

I am sure that you understand, time is of the essence in this matter. Blue Water Navy Veterans are dying every day. We therefore ask that you rescind your stay or clarify that it does not apply to claims submitted by veterans within Vietnam's territorial sea. Your response within fourteen days of this letter may preclude litigation of this matter.

These veterans have waited long enough!

Sincerely,



John B Wells
Commander USN (ret)
Executive Director

cc: Colonel Rob Maness, Incoming Executive Director
Mr. Mike Yates, Commander, Blue Water Navy Vietnam Veterans Association