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Admitted to practice:
Louisiana
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April 26, 2019

Hon. Mark Takano
Chairman, House Veterans Affairs Committee
420 Cannon House Office Bldg.
Washington, DC 20515

Re: HR 299/Blue Water Navy Vietnam Veterans Act of 2019

Dear Mr. Chairman:

I write on behalf of Military-Veterans Advocacy and Blue Water Navy Vietnam Veterans Association and its National Commander Mike Yates. It is with great regret that I notify you that both organizations are withdrawing our support for this bill.

As you know, Military-Veterans Advocacy successfully brought the case of *Procopio v. Wilkie* in the Court of Appeals for the Federal Circuit. The court found that the phrase "served in the Republic of Vietnam" included the territorial sea and specifically referenced international law in their finding. As we have often discussed, both the 1958 Convention on the Territorial Sea and the Contiguous Zone and the United Nations Convention on the Law of the Sea allows a coastal state to use the straight baseline method. Vietnam has done so.

The court went on to note that the term "waters offshore" is demonstrative and that it extends past the territorial sea. The current HR 299 language uses geographic points to define "waters offshore" that are the same points that mark the territorial sea claimed by Vietnam and incorporated by the *Procopio* court.

Frankly we do not think the geographic points are necessary in light of *Procopio*. As written and proposed the bill will restrict the scope of *Procopio*. We cannot support such a limitation. This language will prevent tens of thousands of sailors, primarily aircraft carrier sailors, from claiming benefits for Agent Orange exposure. Hydrological studies have shown that the dioxin traveled 150 nautical miles or more from the mainland. Those ships who operated just outside of the territorial sea were exposed to the dioxin. They should be compensated for their disabilities.

On a number of accessions we have met with your staff to discuss our objections to the current language and to various proposed revisions. The current discussion draft does not adequately incorporate our concerns. I note that in the latest discussion draft they have dropped the term "waters" from the original language so that it reads "offshore." We do not feel that this corrects the problem. If anything, the introduction of a third point of demarcation will cause more ambiguity requiring courts to move to *Chevron* step two in any analysis. Given that courts

Hon. Mark Takano
Chairman, House Veterans Affairs Committee
April 25, 2019

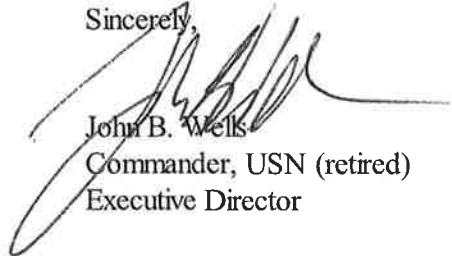
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must give great deference to agency decisions at step two, we believe sailors operating just outside the territorial sea would be excluded from benefits.

Our withdrawal of support should not be construed as an abandonment of Blue Water Navy veterans. The opposite is true. We believe that the current and proposed language will lead to an unnecessary narrowing of the presumption of exposure recognized by the courts. I assure you that it gives me no pleasure to withdraw support for this bill. I've walked the halls of Congress for most of a decade trying to get benefits for these sailors. When Congress failed us we turned to the courts and won. I implore you to refrain from marginalizing that victory with the limiting language of the present bill and the proposed Amendment.

Accordingly we ask you to adopt the less restrictive language of Senate bill S 1195, which modifies the Agent Orange Act by inserting the words "including the territorial seas of such Republic pursuant to the maximum extent authorized by international law)" after "served in the Republic of Vietnam." This language comports with *Procopio* and will allow us maximum flexibility in pursuit of our litigation strategy.

Sincerely,

A handwritten signature in black ink, appearing to read "John B. Wells", is written over the typed name and title.

John B. Wells
Commander, USN (retired)
Executive Director