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**STATEMENT OF  
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BEFORE THE  
COMMITTEE ON VETERANS' AFFAIRS  
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS  
UNITED STATES HOUSE OF REPRESENTATIVES  
MAY 1, 2019**

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to testify at this legislative hearing of the Subcommittee on Disability Assistance and Memorial Affairs. As you know, DAV is a non-profit veterans service organization comprised of over one million wartime service-disabled veterans that is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity. DAV is pleased to offer our views on the bills under consideration by the Subcommittee.

**Amendment in the Nature of a Substitute to H.R. 299, the Blue Water Navy Vietnam Veterans Act of 2019**

DAV strongly supports the Amendment in the Nature of a Substitute to H.R. 299, the Blue Water Navy Vietnam Veterans Act of 2019, which will correct the injustice done to Blue Water Navy Vietnam veterans. As you know, during the 115th Congress, H.R. 299, similar Blue Water Navy legislation, passed the House of Representatives with a vote of 382 to 0; however, the bill was not successful in the Senate.

We are pleased that Chairman Takano and Ranking Member Roe have collaborated to bring H.R. 299 back before the Committee. While the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Procopio v. Wilkie*, overruled VA's previous misinterpretations and determined that service in the Republic of Vietnam includes the territorial waters within 12 nautical miles of the baseline, H.R. 299 will codify and protect that decision to ensure those men and women exposed to the toxic herbicides will be eligible for the benefits earned by their service.

**Section 2. Clarification of Presumptions of Exposure for Veterans Who served in Vicinity of Republic of Vietnam.**

Congress passed the Agent Orange Act of 1991 to provide benefits and establish presumptive diseases for veterans exposed to Agent Orange. When VA implemented the Agent Orange Act, it determined that veterans who received the Vietnam Service

Medal, to include those who served in the waters offshore, were exposed to Agent Orange. In 1993, a VA General Counsel opinion held that veterans with service in the waters offshore were exposed to Agent Orange.

The Veterans Benefits Improvements Act of 1996 extended the official wartime period for service in Vietnam. Subsequently, a VA General Counsel opinion in 1997 misinterpreted that statute and determined only veterans who physically served in Vietnam would be granted a concession of exposure to Agent Orange. In 2002, the VA updated its manual reiterating that exposure to Agent Orange was conceded only to those physically in Vietnam. The decision to exclude Blue Water Navy veterans from the concession of exposure to Agent Orange was not based on medical or scientific evidence, law, or actual Congressional intent; it was based on a misinterpretation.

In 2006, the Court of Appeals for Veterans Claims held that VA's interpretation was incorrect; however, VA subsequently appealed that decision to the Federal Circuit. In 2008 the Federal Circuit upheld VA's decision to exclude Blue Water Navy Vietnam Veterans.

As noted previously, during the 115th Congress, H.R. 299, Blue Water Navy legislation, passed the House of Representatives with a vote of 382 to 0 in June 2018. Senate leadership tried to pass the bill by unanimous consent, but due to the objections of two Senators, the bill failed as the 115th Congress closed in December 2018.

On January 29, 2019, in *Procopio v. Wilkie*, the Federal Circuit overruled VA's previous misinterpretations and held that it was Congress' intent to include the territorial seas as serving in Vietnam. The Court defined the territorial seas as 12 nautical miles from the baseline (the mean low-water mark).

The VA had until April 29, 2019, to appeal the decision to the U.S. Supreme Court. Although Secretary Wilkie, at the Senate hearing on March 26, 2019, indicated that the VA would not recommend appealing the *Procopio* decision, recently the Supreme Court granted the Department of Justice a 30-day extension to potentially file an appeal of the *Procopio* decision.

H.R. 299 and its proposed amendment would codify *Procopio*'s holdings that service in the Republic of Vietnam includes the territorial waters within 12 nautical miles from the baseline. The legislation would use the same grid coordinates in the legislation approved by the House last year which would extend beyond 12 nautical miles in some locations, particularly the southern portion of Vietnam. We strongly support Section 2, in alignment with DAV Resolution No. 033, which advocates that service in the Republic of Vietnam includes service in the territorial waters offshore.

VA will need to issue guidance to process and interpret *Procopio v. Wilkie* either via regulation or by their manual. Since that guidance could be contrary to the intent of the Federal Circuit decision, we believe it necessary to pass H.R. 299 to protect and

codify the decision and to ensure its correct interpretation and application for all affected veterans.

### **Section 3. Presumption of Herbicide Exposure for Certain Veterans Who Served in Korea.**

In accordance with DAV Resolution No. 090, we also support Section 3 that will recognize September 1, 1967 as the earliest date for exposure to herbicides on the Korean DMZ. This change will provide veterans greater equity with respect to the dates of herbicide exposure and the presumptive diseases associated therein.

In 2003, P.L. 108-183 established statute, title 38, United States Code, §1821, that provides spina bifida as a presumptive disease for children of veterans exposed to Agent Orange in or near the DMZ. It defines those veterans as those who served in the active military, on or near the DMZ, as determined by the Secretary in consultation with the Secretary of Defense, during the period beginning on September 1, 1967, and ending on August 31, 1971.

Currently, there are no statutes to concede Agent Orange exposure for veterans who served on or near the Korean DMZ. However, there are regulations as published in 38 C.F.R. § 3.307(a)(6)(iv), which note, if a veteran served on or near the Korean DMZ between April 1, 1968 and August 31, 1971, exposure is conceded and thus the veteran can establish service connection for the established presumptive diseases.

The U.S. Military Advisory Group's Vegetation Control Plan (CY-68) reveals that Agent Orange was used in 1967 and 1968 in trial application in U.S. Army 2nd Infantry Division and Republic of Korea Army 21st Infantry Division regions. Based on the U.S. Military Advisory Group's Vegetation Control Plan, the Republic of Korea recognizes 1967 as the earliest date of exposure to Agent Orange on the DMZ for their veterans.

In July 2016, the South Korean Daejeon District Court determined that this includes the 3rd Infantry Division GOP region in 1967 with evidence in the form of a Class 3 confidential military document reporting "suspected application" of Agent Orange.

As noted, children of veterans with spina bifida are eligible for benefits based on the veteran's exposure as early as September 1, 1967, however, the VA only recognizes April 1, 1968, for a veteran's exposure to establish their own presumptive service connection. Section 3 will align these two issues with respect to herbicide exposure and the presumptive diseases associated therein.

#### **Section 4. Benefits for Children of Certain Thailand Service Veterans Born with Spina Bifida.**

DAV supports Section 4 as it will provide benefits for those children of veterans exposed to herbicides while serving in Thailand during the Vietnam Era, which is in agreement with DAV Resolution No. 090.

It is proper to note that current statutes do not recognize veterans who served in Thailand during the Vietnam Era as exposed to herbicides. VA's manual (M21-1) does recognize herbicide exposure for specific military occupational specialties on the perimeter of eight Thai Royal Air Force Bases. VA's manual requires Air Force veterans to have service on the perimeters of the air bases; Army veterans to have provided perimeter security on air bases and to have been a member of the military police who served on the perimeter of small Army bases. However this creates additional burden of proof and development upon the VA and veterans.

There is currently legislation pending in the Committee, H.R. 2201, which would automatically concede Agent Orange exposure for all veterans who served at military installations in Thailand during the Vietnam Era, regardless of the base, duty on the perimeter or military occupational specialty. We ask the Subcommittee to consider addressing H.R. 2201 in the near future and eliminate any inequity created.

#### **Section 5. Updated Report on Certain Gulf War Illness Study.**

DAV supports Section 5 as it agrees with DAV Resolution No. 069, which urges continued collaboration on research and studies on the health outcomes of the men and women exposed to toxins in the course of their active military service.

#### **Section 6. Loans Guaranteed under Home Loan Programs of Department of Veterans affairs.**

DAV does not have a resolution specific to Section 6 to provide home loan guaranties for jumbo loans and takes no position on this section of the proposed amendment. However, we would note that this section includes the continuation of VA's policy of waiving home loan guaranty fees on service-connected veterans, which DAV adamantly supports.

#### **H.R. 1126, the Honoring Veterans' Families Act**

H.R. 1126, the Honoring Veterans Families Act, would allow the Department of Veterans Affairs to make an inscription on a veteran's grave regarding their spouse or dependent child if that veteran is buried in a non-VA cemetery. It would also allow the VA to replace a veteran's grave marker to add such an inscription if the veteran predeceased their spouse or dependent child and already has a marker. Current law does not provide for any inscription honoring spouses or dependents.

DAV does not have a resolution that pertains to this issue but we would not oppose its passage.

### **H.R. 1199**

This bill would require the Secretary of Veterans Affairs to examine and report on all websites (including attached files and web-based applications) of VA to determine whether such websites are accessible to individuals with disabilities in accordance with section 508 of the Rehabilitation Act of 1973.

H.R. 1199 would help to ensure that all VA websites and associated files are accessible by all veterans, especially those with disabilities and impairments as noted in section 508. DAV does not have a resolution on this issue; however, we would not oppose the enactment of this bill.

### **H.R. 1200**

This bill, if enacted, would authorize a cost-of-living adjustment (COLA) for veterans in receipt of compensation and pension, and for survivors of veterans who died from service-incurred disabilities and are in receipt of Dependency and Indemnity Compensation (DIC). It would provide a COLA increase by the same percentage as Social Security and would effective December 1, 2019.

Receipt of annual COLA increments aids injured and ill veterans, their families, and their survivors to help maintain the value of their VA benefits against inflation. Without COLAs, these individuals, who sacrificed their own health and their family life for the good of our nation, may not be able to maintain a quality of life in their elder years. DAV strongly supports H.R. 1200 as it is in alignment with DAV Resolution No. 031.

We further note that the Administration's proposed budget for FY 2020 is seeking to round-down COLA computations, for five years from 2020 to 2024. The cumulative effect of this proposal levies a tax on disabled veterans and their survivors, costing them money each year.

DAV is pleased to note that H.R. 1200 does not include any language about rounding-down the proposed COLA increase. Millions of veterans and their survivors rely on their compensation for essential purchases such as food, transportation, rent, and utilities. Any COLA round-down will negatively impact the quality of life for our nation's disabled veterans and their families.

### **H.R. 1628**

H.R. 1628 will require the Secretary to enter into an agreement with the National Academy of Sciences, Engineering, and Medicine to conduct a study on the level of radiation experienced by those members of the DOD who participated in the Enewetak

Atoll Cleanup in contrast to the report from the National Defense Threat Reduction Agency.

The United States conducted 43 nuclear tests on Enewetak Atoll from 1948 to 1958. The tests ranged in yield from a few kilotons to megatons. Prior to the start of testing, the Enewetak people were relocated to Ujelang Atoll, about 124 miles southwest of Enewetak. The tests were conducted primarily on the northern islands to minimize contamination of the base camp islands located in the atoll's southeast. The tests resulted in small, but observable, residual radiation environments, primarily on the northern islands of the atoll.

Radioactive contamination from nuclear detonations remained after testing ended. During the early 1970s, residents of the atoll, who had been relocated prior to the start of testing, expressed interest in returning to their homeland as they were promised. During the 1971 review required by the agreement between the United States and the Trust Territory of the Pacific Islands, it was determined that Enewetak Atoll was no longer needed for nuclear testing.

In March 1977, the United States began decontamination of Enewetak and built a concrete dome to deposit radioactive soil and debris. Approximately 6,000 military service members of the United States Department of Defense (DOD) participated in the cleanup project. The DOD established a Joint Task Group within the Defense Nuclear Agency to conduct the cleanup, as authorized by Congress in Public Law 95-134, in an operation named the Enewetak Atoll Cleanup Project (ECUP). The decontamination efforts concluded in May 1980.

In April 2018, the Defense Threat Reduction Agency released its report "Radiation Dose Assessment for Military Personnel of the Enewetak Atoll Cleanup Project." The report concluded that the highest of the estimated upper-bound total effective radiation doses for any of the included sample assessments is 0.21 rem. This dose is similar to the average effective dose of 0.31 rem to the U.S. population from ubiquitous background radiation.

We have concerns over the accuracy of the report. For example, the report acknowledges that high heat and humidity conditions at Enewetak damaged 90 to 100 percent of the film badges during the initial months of the clean-up. Typically, this damage was such that, if the wearers had received low doses, they would have been obscured by damage, which compromised the film badge image used to quantify exposure.

There is also evidence of two technicians who were given permission to bivouac on a controlled island overnight. Their film badges recorded doses of 0.400 rem and 0.430 rem. These doses were about two orders of magnitude greater than expected based on average exposure rates on that island. An investigation was conducted to assess the validity of the film badge doses based on worker activities and known radiation exposure rates on the island. Although there appeared to be no known

circumstances that could account for the recorded doses, it was possible to inadvertently expose the film badges if they were not stored in a low background area when not in use.

In addition, film badge and dosimeters were placed on a pile of steel debris. The film badges and dosimeters exposed for 14 hours placed on the debris pile known to contain the activation product Co-60 reported 0.413 and 0.466 rem and 0.519 and 0.465 rem, respectively. Reasonable agreement was observed between the technicians' film badge readings and those that resulted from the placement of the film badges and TLDs on the debris pile. The investigation concluded that it was likely that the technicians were not exposed to the radiation doses measured by their film badges.

In accord with DAV Resolution No. 090, we fully support this bill. In reference to the noted discrepancies, we agree that it is necessary to reconcile the Defense Threat Reduction Agency's report.

### **H.R. 1826**

This bill would amend 38 U.S.C. § 1562 by increasing the Medal of Honor Special Pension from \$1000.00 a month to \$1,329.58 a month. It would further amend the statute to direct the Secretary to pay the monthly special pension to the surviving spouse of a person who was awarded a Medal of Honor.

At this time, DAV does not have a resolution on this issue; however, we would not oppose the enactment of H.R. 1826.

### **Draft Bill to permit the Secretary of Veterans Affairs to establish a grant program to conduct cemetery research and produce educational materials for the Veterans Legacy Program.**

This legislation would permit the Secretary to establish a grant program with institutions of higher learning to conduct cemetery research and produce educational materials for the Veterans Legacy Program (VLP). The VLP is NCA's educational outreach initiative whose mission is to memorialize our nation's veterans through sharing their stories. The NCA partners with universities, schools, teachers, professors, and students of all levels to research veterans interred in NCA cemeteries and how they contributed to their country and their communities.

Currently, the NCA sponsors research for the VLP through federal contract, which is slightly different than a grant. The government uses grants and cooperative agreements as a means of assisting researchers in developing research for the public good, whereas it uses contracts as a means of procuring a service for the benefit of the government. Grants are much more flexible than contracts. Typically in federal contracts, changes cannot be made to the scope of work or budget, whereas in grants these changes can usually be made with the university's approval. Failure to deliver under a federal contract can have potential legal or financial consequences to all parties

at the University, whereas in the case of a grant typically a final report explaining the outcome is sufficient.

While DAV does not have a resolution specific to this program, we support the intent of the program to remember those who have served and sacrificed and are laid to rest in our National Cemeteries.