STATEMENT OF

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VETERANS' AFFAIRS

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MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the National Veterans Legal Services Program (NVLSP) on VA's efforts in addressing the claims required to be adjudicated under the order of the U.S. District Court of the Northern District of California in *Nehmer v. U.S. Department of Veterans Affairs,* as well as our assessment of VA's transformation efforts aimed at improving the timeliness and accuracy of claims decisions.

Secretary Shinseki's Appropriate Decision in 2010 Under the Agent Orange Act of 1991

As background, *Nehmer v. U.S. Department of Veterans Affairs* is a class action lawsuit that was initiated by NVLSP's attorneys in 1986 on behalf of Vietnam veterans and their survivors. The lawsuit challenged a VA regulation, former 38 C.F.R. 3.311a, that provided that chloracne, a skin condition, is the only disease that has a positive association with exposure to Agent Orange or the other herbicides containing dioxin that was used by the United States in Vietnam. In 1989, the district court invalidated this regulation and voided all VA decisions denying benefit claims under the regulation. The VA decided to comply, rather than appeal this decision.

In 1991, NVLSP's attorneys negotiated a favorable consent decree with the VA in *Nehmer.* The *Nehmer* consent decree requires VA, whenever it recognizes in the future that the scientific evidence shows that a positive relationship exists between Agent Orange exposure and a new disease, to (a) identify all claims based on the newly recognized disease

that were previously denied and then (b) pay disability and death benefits to these claimants, retroactive to the initial date of claim. Between 1991 and 2009, VA has recognized that scientific studies show that there is a positive association between Agent Orange exposure and diabetes, and more than a dozen different types of cancer.

In assessing VA's transformation efforts in improving claims processing under the tenure of Secretary Shinseki, it is important to understand that the requirement in the *Nehmer* consent decree to redecide past claims denials is only triggered if and when the VA Secretary decides that the scientific evidence now shows that a positive relationship exists between Agent Orange exposure and a disease whose positive relationship with Agent Orange had not been previously recognized by VA.

So it was in 2010, when Secretary Shinseki was simultaneously faced with (a) a growing backlog of VA claims, due in part to the increasing number of claims being filed by veterans returning from Iraq and Afghanistan, and (b) the conclusion of the National Academy of Sciences (NAS) in its latest report under the Agent Orange Act of 1991 to place three new diseases – ischemic heart disease, Parkinson's disease, and chronic B-cell leukemia – in the same category of association with Agent Orange exposure as all of the diseases that prior VA Secretaries had concluded should be accorded presumptive service connected status due to their association with Agent Orange.

Secretary Shinseki knew that if he agreed as a result of the latest NAS report to add these three new diseases to the list of diseases already accorded presumptive service connected status due to Agent Orange exposure, VA adjudicators would be required by the *Nehmer* consent decree to redecide more than 150,000 past claims for these three diseases – at the exact same time that these same adjudicators were faced with the growing backlog of other claims. He could have avoided the need to redecide these 150,000 past claims by simply refusing to add the three diseases as related to Agent Orange exposure. But in a courageous decision that gave appropriate recognition to both the scientific evidence and the service and needs of hundreds of thousands of disabled Vietnam veterans who risked harm to themselves in serving their country in Vietnam, Secretary Shinseki agreed on August 31, 2010 to add these three diseases as presumptively service connected due to Agent Orange exposure.

VA's Efforts in Addressing *Nehmer* Claims

In the years prior to the administration of Secretary Shinseki, VA's efforts to implement the *Nehmer* consent decree were shoddy. On several occasions, NVLSP's attorneys had to file a motion to enforce the consent decree due to VA failure to comply with the terms of the consent decree. On each of these occasions, the U.S. District Court or the U.S. Court of Appeals for the Ninth Circuit ruled against the VA. VA's performance was so bad that the U.S. District Court had to issue an order requiring VA to show cause why it should not be held in contempt.

Things changed under Secretary Shinseki. The Secretary ensured that the 150,000 past claims for ischemic heart disease, Parkinson's disease, and chronic B-cell leukemia were decided speedily and accurately. He accomplished this result through two key management decisions. First, he wisely assigned decision-making on these 150,000 past claims to a large group of VA adjudicators whose primary task was devoted to these claims. Second, he assembled a competent management team to train these adjudicators thoroughly through use of a more than 130-page training guide and a training video.

The end result was speedy and quality decision-making. On October 30, 2010, two months after Secretary Shinseki's issued the VA rule adding the three diseases as Agent Orange-related, VA began to issue decisions on these past claims. The VA adjudicated over 146,000 of these claims by August 1, 2012.

Not all of these adjudications were correct. As class counsel, NVLSP has a team of attorneys and paralegals devoted to ensuring that VA meets its obligations under the *Nehmer* consent decree. VA provides NVLSP with a copy of all of its decisions under the *Nehmer* consent decree. NVLSP's attorneys work with the Vietnam veterans and survivors on these cases to ensure that the VA assigns them the correct effective date for their award of benefits for these three diseases and pays them the proper amount of retroactive compensation. NVLSP and VA have developed an effective system for quickly rectifying mistakes in decision-making, and thus far nearly 1,000 mistakes have been corrected. But the mistakes have been relatively rare, and a far cry from the low quality of decision-making that occurred during prior administrations.

NVLSP has also identified a group of more than 60,000 past claimants whom VA did not previously identify as needing review under the *Nehmer* consent decree. But to VA's credit, it has agreed that these cases need to be reviewed, and the parties are currently working together to ensure that they are reviewed in a timely fashion.

While VA has been subject to much criticism over the past few years about the timeliness and accuracy of its decision-making in general, the bottom line is that on *Nehmer* claims, VA deserves a great deal of credit.

VA's Other Transformation Efforts for Improving Timeliness and Accuracy

NVLSP has three observations about other VA's transformation efforts aimed at improving the timeliness and accuracy of claims decisions. First, we commend VA management's development of the new Fully Developed Claim (FDC) process. While it needs to be clarified and modified for it to produce significant improvement in timeliness and accuracy, it is a welcome innovation.

In its present formulation, it is not applicable to many claims because VA prohibits use of FDC process if the claimant has any other claims pending that are not subject to the FDC process. This is unwise. For example, claimants and their representatives are being deterred from using the FDC process because it requires that they withhold the filing of other claims – and risk loss of months of benefits – simply to obtain a quick decision on one claim filed under the FDC process.

Second, there has long been an unfortunate obsession by both VA and Congress with one statistic: how long it takes VA to decide an initial claim for benefits, regardless of the quality of the decision on that claim. When VA reports to Congress that the average time it takes to decide an initial claim is now down to 164 (or whatever number of) days, it is not representing to Congress that this is the number of days it takes on average to decide an initial claim **correctly**. Rather, VA is merely reporting the average time it takes to reach a correct or incorrect decision. The long-standing obsession with this skewed statistic has long produced a significant deleterious effect: VA regional office adjudicators prematurely decide claims – without taking the time to obtain and assemble the evidence necessary to properly decide a claim – in an effort to ensure that the average time for deciding an initial claim that is reported to VA managers and Congress is a low number of days. This obsession is counter-productive because it produces unjust premature denials, which, in turn, result either in the veteran giving up on a potentially valid claim or in appeals filed by veterans which create the existing backlog of claims.

Finally, on cases in which an appeal is filed, there is another longstanding adjudicatory phenomenon which both frustrates the interests of justice and adds to the backlog. NVLSP and others have long observed that after a veteran files an appeal (i.e., a notice of disagreement) with an initial decision, there is an unfortunate tendency of many VA adjudicators to overdevelop the claim. That is, there is a tendency by many VA regional office and Board of Veterans' Appeals adjudicators to delay a decision on a claim where the evidence in the current record supports a grant of the claim, in order to obtain additional evidence – typically in the form of another VA medical examination – in the apparent hope that evidence will be developed to support a denial of the claim. This longstanding phenomenon certainly works to protect the public fisc. But it is contrary to the pro-claimant process embodied in statutes and regulations and is a major contributor to the large VA backlog of claims.

I would be pleased to answer any questions that Members of the Committee may have.