

Camp Lejeune Revisited: Strategies for Implementing a Program of Benefits for Veterans' Dependents

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INTRODUCTION

The underlying mission of the Department of Veterans Affairs (VA) is to fulfill Lincoln's promise "to care for him [or her] who shall have borne the battle, and for his widow, and his orphan" ² In 1996, Congress expounded upon this mission by enacting new statutes and regulations allowing for the care of certain children of herbicide-exposed Vietnam veterans born with the birth defect spina bifida, possibly as the result of one or both parent's exposure to herbicides during active service in the Republic of Vietnam during the Vietnam era. ³ This group of special beneficiaries was subsequently expanded to include children of veterans who served in the Korean Demilitarized Zone (DMZ) ⁴ and children born with additional identified birth defects. ⁵ Currently, VA benefits available to these beneficiaries include health care, vocational rehabilitation, and monetary compensation. ⁶

Sixteen years ago, Senator Thomas A. Daschle of South Dakota made an impassioned argument for extending benefits

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² President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

³ Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, Pub. L. No. 104-204, § 421, 110 Stat. 2874, 2923 (1996).

⁴ Herbicide Exposure and Veterans with Covered Service in Korea, 76 Fed. Reg. 4245 (Jan. 25, 2011) (codified at 38 C.F.R. pts. 3, 17, & 21).

⁵ Monetary Allowances for Certain Children of Vietnam Veterans; Identification of Covered Birth Defects, 67 Fed. Reg. 49,585 (July 31, 2002) (codified at 38 C.F.R. pt. 3).

⁶ 38 U.S.C. §§ 1802-34 (2006); 38 C.F.R. §§ 3.814-15 (2011).

to the children of veterans because their disabilities were the unexpected and unintended consequence of war in the modern age.⁷ Similarly, Senator John D. Rockefeller IV, noted that

War is changing We are getting into the century of toxins, of chemicals. We do not have the big Russian bear anymore. We have the little horrendous dictators They build their little bombs, and their little bombs are not filled with explosives, they are filled with chemicals and toxins that will destroy peoples' nervous systems.⁸

He referred to this exposure to environmental hazards as the “toxic hazards of war.”⁹ While these hazards are egregious, the situation at Camp Lejeune highlights another alarming reality: the toxic hazards of peace.

Less than a decade after the end of the Vietnam War, contaminants were found in portions of the water supply at Marine Corps Base Camp Lejeune (Camp Lejeune) in North Carolina.¹⁰ Further investigation found that the contamination likely spanned the thirty-year period from the mid-1950s to the mid-1980s.¹¹ Ongoing scientific research has sought to determine the types and extent of maladies associated with this contamination.¹² Thus, the question for the legislative and legal communities is what should be done for the people affected by the contamination at Camp Lejeune once they have been identified.¹³

⁷ 142 CONG. REC. S9878-79 (daily ed. Sept. 5, 1996) (statement of Sen. Thomas A. Daschle).

⁸ *Id.* at S9885 (statement of Sen. John D. Rockefeller, IV).

⁹ *Id.*

¹⁰ Veterans Benefits Admin., Dep't of Veterans Affairs, Processing Disability Claims Based on Exposure to Contaminated Drinking Water at Camp Lejeune, Training Letter 11-03 (Revised) (Nov. 29, 2011) [hereinafter Training Letter 11-03].

¹¹ Veterans Benefits Admin., Dep't of Veterans Affairs, Environmental Hazards in Iraq, Afghanistan, and Other Military Installations, Training Letter 10-03 (Apr. 26, 2010) [hereinafter Training Letter 10-03].

¹² Training Letter 11-03, *supra* note 10, at 3.

¹³ See generally Allison Lin, *Warning: Don't Drink the Water: An Examination of*

Through Public Law 104-204 the federal government provides benefits to children of Vietnam veterans whose birth defects were the unexpected byproduct of their parents' service in Vietnam during the Vietnam era.¹⁴ It follows that VA should owe no less duty to the disabled children who suffer from disabilities associated with their parents' exposure to toxins during military service, regardless of the location of such service or whether that military service was during a period of war or a period of peace.

On August 6, 2012, President Barack Obama signed into law the "Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012" which sought to address this issue.¹⁵

In light of the new law, this Note will compare the benefits provided to children of veterans who were exposed to contaminated drinking water while stationed at Camp Lejeune between 1955 and 1985 [hereinafter children of Camp Lejeune] with those provided to the children of certain Vietnam and Korean War veterans exposed to Agent Orange and other herbicides [hereinafter children of herbicide-exposed veterans]. First, the authors will examine the current regulations concerning benefits for children of herbicide-exposed veterans and the events preceding the adoption of such benefits. Second, the authors will summarize the known history of water contamination at Camp Lejeune and the suspected health effects. Third, the authors will compare the circumstances surrounding claims for VA disability benefits by children of herbicide-exposed veterans with those

Appropriate Solutions for Veterans Exposed to Contaminated Water at Marine Corps Base Camp Lejeune, 4 VETERANS L. REV. 85 (2012) (discussing the need for regulations allowing for the presumptive grant of service connection for veterans exposed to contaminated water at Camp Lejeune from 1957 to 1987 by drawing an analogy to Vietnam War veterans exposed to Agent Orange, and analyzing the then-pending bills' proposed benefits for the non-veteran family members of veterans exposed to contaminated water while living at Camp Lejeune).

¹⁴ See generally Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, Pub. L. No. 104-204, 110 Stat. 2874 (1996).

¹⁵ Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 102.

surrounding the would-be claims of the children of Camp Lejeune. Finally, the authors will address the recently enacted law and evaluate the pros and cons of this law.

I. HERBICIDE-LINKED BIRTH DEFECTS AND VA BENEFITS

During the Vietnam War, the United States military used Agent Orange and other herbicides containing dioxin to defoliate the jungle terrain of Vietnam and other parts of Southwest Asia.¹⁶ Years later, an ongoing Air Force Health Study (also known as the “Ranch Hand Study”), an epidemiological study conducted by the U.S. Air Force beginning in 1979 and ending in 2006 that evaluated the frequency and nature of adverse health effects that might be related to exposure to Agent Orange and other military herbicides used during the Vietnam Conflict, released findings showing a possible link between dioxin exposure and certain health problems.¹⁷ Based on released findings from this study, Congress passed the Agent Orange Act of 1991, which eased the burden of proof for herbicide-exposed veterans seeking service connection by establishing a list of disabilities for which service connection would be presumed.¹⁸ This legislation also called for continuing research on the potential detrimental health effects of herbicide exposure.¹⁹ The list of disabilities subject to presumptive service connection for herbicide exposure continues to grow.²⁰

¹⁶ *Facts about Herbicides*, PUBLIC HEALTH.VA.GOV, <http://www.publichealth.va.gov/exposures/agentorange/basics.asp> (last updated Feb. 28, 2012).

¹⁷ See COMM. ON THE DISPOSITION OF THE AIR FORCE HEALTH STUDY, INST. OF MED. OF THE NAT’L ACAD., *DISPOSITION OF THE AIR FORCE HEALTH STUDY 2-5* (Nat’l Acad. Press 2006) (concluding that the medical records, data, and biological specimens collected in the study, which closed on September 30, 2006, were a trove of valuable research material).

¹⁸ Agent Orange Act of 1991, Pub. L. No. 102-04, § 2, 105 Stat. 11 (codified at 38 U.S.C. § 1116 (2006)).

¹⁹ *Id.* § 3.

²⁰ See, e.g., Diseases Associated with Exposure to Certain Herbicide Agents (Hairy Cell Leukemia and Other Chronic B-Cell Leukemias, Parkinson’s Disease and Ischemic Heart Disease), 75 Fed. Reg. 53,202 (Aug. 31, 2010) (codified at 38 C.F.R. pt. 3) (establishing presumptive service connection for hairy cell leukemia and other chronic b-cell leukemias, Parkinson’s disease, and ischemic heart disease).

In March 1996, researchers discovered a significantly higher number of cases of spina bifida among the children of herbicide-exposed veterans when compared to the general population.²¹ These findings led Congress to take the unprecedented step of expanding VA's authority to provide benefits to children of veterans based not on the veteran's disability, but solely on the child's disability.²² These benefits include providing healthcare, providing up to four years of vocational rehabilitation, and paying a monthly stipend based on the severity of the child's symptomatology.²³

Throughout the years, VA's authority over such dependents has expanded. As noted above, benefits are now provided to the children of veterans exposed to herbicides while serving in the Korean DMZ.²⁴ Additionally, medical research in 2000 found that the risk of having children with "moderate-to-severe" birth defects was significantly elevated among female Vietnam veterans.²⁵ As a result of these findings, VA began funding assistance programs for all birth defects without other known causes in the children of female

²¹ See COMM. TO REVIEW THE HEALTH EFFECTS IN VIETNAM VETERANS OF EXPOSURE TO HERBICIDES, INST. OF MED., *VETERANS AND AGENT ORANGE: UPDATE 1996 9-10* (Nat'l Acad. Press, 1996) (finding "limited/suggestive evidence for an association" between parental exposure to Agent Orange and spina bifida in children, but inadequate evidence of an association with additional birth defects).

²² 142 CONG. REC. S10019 (daily ed. Sept. 6, 1996) (statement of Sen. Jim Jeffords); 142 CONG. REC. S9878-79 (daily ed. Sept. 5, 1996) (statement of Sen. Thomas A. Daschle); Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, Pub. L. No. 104-204, § 421, 110 Stat. 2874, 2923 (1996); see also Monetary Allowance Under 38 U.S.C. § 1805 for a Child Suffering From Spina Bifida Who Is a Child of a Vietnam Veteran, 62 Fed. Reg. 51,274, 51,274 (Sept. 30, 1997) (establishing section 3.814, which allows VA to pay a monthly allowance to a child of a Vietnam veteran with spina bifida).

²³ 38 U.S.C. §§ 1813-15; Monetary Allowance Under 38 U.S.C. § 1805 for a Child Suffering From Spina Bifida Who Is a Child of a Vietnam Veteran, 62 Fed. Reg. at 51,275-77.

²⁴ Herbicide Exposure and Veterans with Covered Service in Korea, 76 Fed. Reg. 4245 (Jan. 25, 2011) (codified at 38 C.F.R. pts. 3, 17, & 21).

²⁵ Han K. Kang et al., *Pregnancy Outcomes Among U.S. Women Vietnam Veterans*, 38 AM. J. INDUS. MED. 447, 450 (2000).

veterans who served in Vietnam from February 28, 1961, to May 7, 1975, if the affected child was conceived after the Veteran first entered Vietnam.²⁶

Eligibility requirements differ for children with spina bifida and children with other birth defects.²⁷ The chief feature of the statutory presumption is that the covered condition is a birth defect,²⁸ not a disability that developed later in the child's life. Additionally, covered birth defects do not include conditions due to family disorders, birth-related injuries, or fetal or neonatal infirmities with well-established causes.²⁹ Moreover, effective October 10, 2008, Congress expanded the Spina Bifida Health Care Program to provide additional medical services and supplies to spina bifida beneficiaries so that such benefits were no longer limited to the spina bifida condition.³⁰ As a result of these changes, the Spina Bifida Health Care Program now covers comprehensive healthcare considered to be medically necessary and appropriate for the birth of children of Vietnam and certain Korean veterans who have been diagnosed with a form of spina bifida other than spina bifida occulta.³¹

Currently, VA health benefits for dependents are administered through VA's Civilian Health and Medical Program (CHAMPVA), the Spina Bifida Health Care Program, and the Children of Women Vietnam Veterans Health Care

²⁶ Monetary Allowances for Certain Children of Vietnam Veterans; Identification of Covered Birth Defects, 67 Fed. Reg. 49,585, 49,588 (July 31, 2002) (codified at 38 C.F.R. pt. 3).

²⁷ Compare 38 C.F.R. § 3.814(a) (2011) (providing benefits for children whose biological mother *or* father is or was a Vietnam veteran *or* had covered service in Korea) with *id.* § 3.815(a) (providing benefits only for children whose biological mother is or was a Vietnam veteran).

²⁸ 38 U.S.C. §§ 1802, 1812; 38 C.F.R. §§ 3.814-15(c)(3)(d).

²⁹ *Id.*

³⁰ Veterans' Mental Health and Other Care Improvements Act of 2008, Pub. L. No. 110-387, § 408, 122 Stat. 4110, 4130; see also DEP'T OF VETERANS AFFAIRS, HEALTH ADMIN. CTR., FACT SHEET 01-10, SPINA BIFIDA PAYMENT METHODOLOGY (June 2009) [hereinafter FACT SHEET 01-10].

³¹ Veteran's Mental Health and Other Care Improvements Act of 2008, Pub. L. No. 110-387 § 408, 122 Stat. at 4130; see also FACT SHEET 01-10, *supra* note 30.

Program (CWVV). CHAMPVA is VA's health benefit program for dependents of permanently and totally disabled veterans, and survivors of veterans who died from service-connected conditions or who, at the time of death, were rated permanently and totally disabled from a service-connected disability.³² The Spina Bifida Health Care Program covers biological children of veterans who served in Vietnam or in the DMZ between September 1, 1967, and August 31, 1971, who have been diagnosed with spina bifida (except spina bifida occulta).³³ Under the CWVV, VA reimburses the costs of treatment for certain birth defects that have been identified as resulting in permanent physical or mental disability of the biological child of a female veteran who served in Vietnam between February 28, 1961, and May 7, 1975.³⁴ Thus, while CHAMPVA provides benefits for dependents based on the disability of the Veteran, the Spina Bifida Health Care Program and CWVV provide benefits based on the disability of the dependent. As such, the latter two programs are more relevant to the current discussion.

Notably, both the Spina Bifida Health Care Program and CWVV are fee for service programs (indemnity plans) that provide reimbursement for the costs of medical services and supplies related to treatment for covered birth defects and associated conditions.³⁵ Additionally, the Spina Bifida Health Care Program pays 100 percent of the allowable charge without requiring beneficiaries to make co-payments or pay deductibles.³⁶

³² 38 U.S.C. § 1781; 38 C.F.R. §§ 17.270-74; *see also* DEP'T OF VETERANS AFFAIRS, HEALTH ADMIN. CTR., FACT SHEET 01-03, CHAMPVA ELIGIBILITY (July 2009) (listing who is eligible for CHAMPVA coverage).

³³ 38 U.S.C. § 1821(a)-(c); 38 C.F.R. § 3.814(c)(2); *see also* FACT SHEET 01-10, *supra* note 30.

³⁴ 38 U.S.C. §§ 1811-16; 38 C.F.R. § 3.815(a); *see also* DEP'T OF VETERANS AFFAIRS, HEALTH ADMIN. CTR., FACT SHEET 01-26, CWVV HEALTH CARE PROGRAM (July 2009); DEP'T OF VETERANS AFFAIRS, HEALTH ADMIN. CTR., FACT SHEET 01-27, CWVV PAYMENT METHODOLOGY (June 2009) [hereinafter FACT SHEET 01-27].

³⁵ FACT SHEET 01-10, *supra* note 30; FACT SHEET 01-27, *supra* note 34.

³⁶ FACT SHEET 01-10, *supra* note 30.

II. CAMP LEJEUNE

A. Water Contamination at Camp Lejeune

Camp Lejeune is an active military base located on 244 square miles of land in Onslow County, North Carolina, near the City of Jacksonville.³⁷ The base was commissioned in 1942 as a training area to prepare Marines for combat.³⁸ It is the largest East Coast base of the United States Marine Corps.³⁹

Camp Lejeune officials first realized that the drinking water supplied to some Camp Lejeune family homes may have contained volatile organic compounds (“VOCs”) during routine water sampling conducted in 1980.⁴⁰ Thereafter, in January 1982, the Navy Assessment and Control of Installation Pollutants (NACIP) program at Camp Lejeune began to identify potentially contaminated sites on the base.⁴¹ Further testing later that year and in 1983 identified two VOCs: (1) trichloroethylene (TCE), a metal degreaser used for industrial purposes on the base, and (2) perchloroethylene (PCE), a dry cleaning solvent, in two water systems serving two Camp Lejeune base housing areas—Hadnot Point and Tarawa Terrace.⁴²

By 1985, multiple contaminated wells were closed.⁴³ According to the National Research Council (NRC), functioning under the auspices of the National Academy of Sciences (NAS), there were multiple sources of potential pollutants.⁴⁴ Contamination

³⁷ S. REP. NO. 112-42, at 2 (2011).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* The sources of potential pollutants include an industrial area, a drum dump, a transformer storage lot, an industrial fly ash dump, an open storage pit, a former fire training area, a site of a former on-base dry cleaner, a liquids disposal area, a former burn dump, a fuel-tank sludge area, and the site of the original base dump. *Id.*

of the Tarawa Terrace water system is believed to be the result of the disposal practices of a nearby dry cleaner, which opened in 1954.⁴⁵ The estimated period of contaminated water exposure at Camp Lejeune is from 1957 to 1985, when the wells were shut down.⁴⁶ Based on information received from the Department of Defense, the Congressional Budget Office (CBO) estimates that 650,000 people were stationed at Camp Lejeune during the period of contamination.⁴⁷ Further, at a June 8, 2011 Senate hearing, Dr. Robert L. Jesse, a VA physician, testified that “one million people may have been exposed to hazardous chemicals in the Camp Lejeune well water.”⁴⁸

“According to the Marine Corps, nine of ten wells taken out of service have been permanently demolished,” meaning their piping was removed and holes were filled.⁴⁹ One well was returned to service in 1993 following multiple clean samples and is still in service today.⁵⁰ Currently, the Camp Lejeune drinking water is checked on a quarterly basis to ensure that there is no VOC contamination.⁵¹

In 1989, Camp Lejeune was added to the Superfund list of the nation’s highly contaminated hazardous waste sites.⁵² From 1991 to 1997, the U.S. Agency for Toxic Substances and Disease Registry (ATSDR) conducted a public health assessment (PHA)

⁴⁵ AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY DIV. OF HEALTH STUDIES, U.S. DEP’T OF HEALTH & HUMAN SERV., PROGRESS REPORT: SURVEY OF SPECIFIC CHILDHOOD CANCERS AND BIRTH DEFECTS AMONG CHILDREN WHOSE MOTHERS WERE PREGNANT WHILE LIVING AT U.S. MARINE CORPS BASE CAMP LEJEUNE, NORTH CAROLINA, 1968-1985 (2003) [hereinafter PROGRESS REPORT].

⁴⁶ S. REP. NO. 112-42, at 3, 8.

⁴⁷ CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, S. 277 CARING FOR CAMP LEJEUNE VETERANS ACT OF 2011, at 2; *see also* S. REP. NO. 112-42, at 8.

⁴⁸ *Legislation Pending Before the Veterans’ Affairs Comm.*, 112th Cong. (2011) (statement of Dr. Robert L. Jesse, Principal Deputy Under Sec’y for Health, Veterans Health Admin., Dep’t of Veterans Affairs); *see also* S. REP. NO. 112-42, at 5.

⁴⁹ S. REP. NO. 112-42, at 3-4.

⁵⁰ *Id.* at 4.

⁵¹ *Id.*

⁵² PROGRESS REPORT, *supra* note 45, at Introduction; *see also* S. REP. NO. 112-42, at 4 (noting that the Environmental Protection Agency placed Camp Lejeune on the National Priorities List in 1989).

at Camp Lejeune, as required by law due to the installation's listing on the National Priorities List.⁵³ In 1997, ATSDR issued a PHA, which concluded that exposure to VOCs in the drinking water occurred at Camp Lejeune and declared the past exposure a public health hazard.⁵⁴ "In 2009, ATSDR retracted that 1997 PHA after ATSDR acknowledged that it had not fully investigated the extent of benzene contamination on the base."⁵⁵

ATSDR continues to conduct studies and surveys investigating the contamination of the water system at Camp Lejeune and plans to issue a revised PHA once the studies are complete.⁵⁶ In July 2011, ATSDR began sending a health survey to 300,000 former residents of the base, military and civilian.⁵⁷ ATSDR anticipates release of this survey's findings in 2014.⁵⁸ Additionally, ATSDR is working on a mortality study of former base personnel,⁵⁹ as well as a scientific method called "water modeling," which will synthesize the data from multiple samples of water and other data in order to map out the most likely dispersion and concentration of the VOCs at various locations on the base.⁶⁰

⁵³ S. REP. NO. 112-42, at 4.

⁵⁴ See *January 1, 2011, Update to the 1997 Camp Lejeune Public Health Assessment*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, <http://www.atsdr.cdc.gov/hac/pha/pha.asp?docid=1082&pg=0> (last updated Sept. 10, 2010) [hereinafter *Update to PHA*].

⁵⁵ S. REP. NO. 112-42, at 5.

⁵⁶ See *Health Study Activities Frequently Asked Questions (FAQs)*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, http://www.atsdr.cdc.gov/sites/lejeune/qa_healthstudyactivities.html#2 (last updated Apr. 4, 2012) [hereinafter *Health FAQs*]; *Update to PHA*, *supra* note 54.

⁵⁷ S. REP. NO. 112-42, at 5.

⁵⁸ *Id.*; *ATSDR Health Survey of Marine Corps Personnel and Civilians*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, http://www.atsdr.cdc.gov/sites/lejeune/qa_healthstudyactivities.html#2 (last updated Feb. 17, 2012).

⁵⁹ *Health FAQs*, *supra* note 56.

⁶⁰ S. REP. NO. 112-42, at 5; see also *Water Modeling (FAQs)*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, http://www.atsdr.cdc.gov/sites/lejeune/faq_water.html (last updated Sept. 16, 2010) (stating that water modeling is a scientific method that will help identify where and when certain areas at Camp Lejeune received volatile organic compound ("VOC")-contaminated drinking water, and noting that the U.S. Agency for Toxic Substances and Disease Registry (ATSDR) will use the water modeling results to determine which people were exposed to contaminated drinking water); see, e.g., Robert E. Faye, ANALYSES AND HISTORICAL RECONSTRUCTION OF GROUNDWATER

B. Health Effects

The contaminated drinking water at Camp Lejeune has been anecdotally linked to a higher incidence of some cancers (e.g., esophageal, breast, and kidney cancer), birth defects, and other physical ailments.⁶¹ For example, Janey Ensminger, who was conceived, carried, and born at Camp Lejeune, died of acute lymphoblastic leukemia at the age of nine.⁶² Her father, Jerry Ensminger, a retired Marine Corps Master Sergeant and a member of ATSDR's Community Assistance Panel for Camp Lejeune studies, has lobbied exhaustively on behalf of those who were exposed to contaminated water at Camp Lejeune.⁶³ As a result, much of the proposed legislation on this subject, including the recently enacted law, bears Janey's name.⁶⁴ Significantly, however, studies continue to examine the scientific accuracy of such a correlation.

FLOW, CONTAMINANT FATE AND TRANSPORT, AND DISTRIBUTION OF DRINKING WATER WITHIN THE SERVICE AREAS OF THE HADNOT POINT AND HOLCOMB BOULEVARD WATER TREATMENT PLANTS AND VICINITIES, U.S. MARINE CORPS BASE CAMP LEJEUNE, NORTH CAROLINA, CHAPTER B: GEOHYDROLOGIC FRAMEWORK OF THE BREWSTER BOULEVARD AND CASTLE HAYNE AQUIFER SYSTEMS AND THE TARAWA TERRACE AQUIFER (Jan. 2012), *available at* http://www.atsdr.cdc.gov/sites/lejeune/docs/chapter_B_hadnotpoint.pdf (providing a report on the Aquifer Systems at Camp Lejeune, which will aid in the eventual historical reconstruction of groundwater flow, contaminant fate and transport, and distribution of drinking water within Camp Lejeune).

⁶¹ See, e.g., William R. Levesque, *Daughter's Death Drives Marine's Long Quest for Answers about Tainted Water*, TAMPA BAY TIMES, *available at* <http://www.tampabay.com/news/military/daughters-death-drives-marines-long-quest-for-answers-about-tainted-water/1144514> (last modified Jan. 10, 2011); see also Jerry Ensminger (Janey), SEMPER FI: ALWAYS FAITHFUL BLOG, <http://semperfialwaysfaithful.com/blog122-jerry-ensminger-janey> (last visited Oct. 4, 2012).

⁶² S. REP. NO. 112-42, at 5.

⁶³ See, e.g., *Legislation Pending Before the Veterans' Affairs Comm.*, 112th Cong. (2011) (statement of Jerry Ensminger) (advocating for Congress to closely examine the scope and severity of the water contamination at Camp Lejeune and consider the duty owed to veterans and their family members who were exposed to such contamination).

⁶⁴ See Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 101, 126 Stat. 1165, 1167 (bearing the name of Jerry Ensminger's daughter, Janey).

Generally, fetuses and very young children are the most vulnerable to chemical exposures.⁶⁵ In this regard, previous studies suggested that the chemicals discovered in the drinking water at Camp Lejeune might cause health effects including neural tube defects, cleft lip, and cleft palate, and two childhood cancers: leukemia and non-Hodgkin's lymphoma.⁶⁶ Currently, scientific research is underway to determine whether a link exists between exposure to Camp Lejeune drinking water and specific birth defects such as spina bifida, anencephaly, cleft lip, cleft palate, childhood leukemia, and childhood non-Hodgkin's lymphoma.⁶⁷ Notably:

In 1998, ATSDR completed a birth outcome study of women who conceived or gave birth to children while at Camp Lejeune and concluded that drinking water contaminated with VOCs may be associated with decreased average birth weight-for-gestational-age births in infants born to mothers over the age of 35 or in women who had a history of adverse pregnancy outcomes. As reported by ATSDR, health outcomes linked to exposure to PCE and TCE include eye defects, miscarriages, fetal death, leukemia, and many forms of cancer.⁶⁸

Additionally, a telephone survey conducted from September 1999 to January 2002 identified 103 parent-reported cases of birth defects, oral cleft defects, and cancers in children born to women between 1968 and 1985 who lived at Camp Lejeune for a period of time during their pregnancies.⁶⁹ Of the 103

⁶⁵ *Health FAQs*, *supra* note 56.

⁶⁶ *Id.*

⁶⁷ *See Study on Birth Defects and Childhood Cancers*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, <http://www.atsdr.cdc.gov/sites/lejeune/update.html> (last updated July 6, 2009).

⁶⁸ S. REP. NO. 112-42, at 4 (2011).

⁶⁹ *ATSDR Camp Lejeune Survey Executive Summary*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, http://www.atsdr.cdc.gov/sites/lejeune/survey_summary.html (last updated July 6, 2009).

cases reported, 53 children were confirmed to have the reported diseases, which included 15 cases of neural tube defects, 24 oral cleft defects, and 13 hematopoietic cancers.⁷⁰

Further, pursuant to the John Warner National Defense Authorization Act for Fiscal Year 2007, Congress mandated that the Secretary of the Navy enter into an agreement with the NAS to examine whether adverse health effects are associated with past contamination of the water supply at Camp Lejeune.⁷¹ Pursuant to this agreement, in June 2009, the NRC published its report, which listed possible health consequences of exposure to TCE and PCE in the contaminated water at Camp Lejeune during the period from 1957 to 1985.⁷² “All the health outcomes listed in its report were placed into one of two categories: limited/suggestive evidence of an association or inadequate/insufficient evidence to determine whether an association exists between exposure to TCE and PCE and adverse health outcomes.”⁷³ Fourteen of the 59 health outcomes reviewed by the NRC were placed in the limited/suggestive evidence of an association category, and 45 were placed in the inadequate/insufficient evidence category.⁷⁴ The limited/suggestive evidence category means that “there is some evidence that people who were exposed to TCE or PCE were more likely to have the disease or disorder but that the studies were either few in number or had limitations[;]” however, associations between exposure and these diseases or disorders could not be ruled out.⁷⁵ The inadequate/insufficient evidence category, where the remainder of the health outcomes reviewed were placed, means that “the studies were

⁷⁰ *Health FAQs*, *supra* note 56.

⁷¹ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 318, 120 Stat. 2083, 2143 (2006).

⁷² *See* COMM. ON CONTAMINATED DRINKING WATER AT CAMP LEJEUNE, BD. ON ENVTL. STUDIES & TOXICOLOGY, NAT’L RESEACH COUNCIL, CONTAMINATED DRINKING WATER AT CAMP LEJEUNE: ASSESSING POTENTIAL HEALTH EFFECTS 25 (Nat’l Acad. Press, 2009) [hereinafter *ASSESSING POTENTIAL HEALTH EFFECTS*].

⁷³ S. REP. NO. 112-42, at 4.

⁷⁴ *ASSESSING POTENTIAL HEALTH EFFECTS*, *supra* note 72, at 8; *see also* S. REP. NO. 112-42, at 5.

⁷⁵ *ASSESSING POTENTIAL HEALTH EFFECTS*, *supra* note 72, at 6; *see also* S. REP. NO. 112-42, at 4.

too few in number, limited in quality, inconsistent, or inclusive in results to make an informed assessment.”⁷⁶ According to the NRC, in many cases the study subjects were exposed to multiple chemicals, making it impossible to separate the effects of individual chemicals.⁷⁷ Despite this, it is informative to note that the the Environmental Protection Agency (EPA) has acknowledged that TCE is associated with several types of cancers in humans, especially cancers of the kidney, liver, cervix, and lymphatic system.⁷⁸

III. PUBLIC LAW 112-154: HONORING AMERICA’S VETERANS AND CARING FOR CAMP LEJEUNE FAMILIES ACT OF 2012

On August 6, 2012, President Barack Obama signed into law the “Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012.”⁷⁹ Upon signing the bill, President Obama stated that it “ends a decades-long struggle for those who serve[d] at Camp Lejeune.”⁸⁰

This Act provides hospital care and medical services for veterans who served on active duty in the Armed Forces at Camp Lejeune for 30 days or more between January 1, 1957, and December 31, 1987, and subsequently develop certain enumerated illnesses.⁸¹ These illnesses include esophageal

⁷⁶ ASSESSING POTENTIAL HEALTH EFFECTS, *supra* note 72, at 6-7; *see also* S. REP. NO. 112-42, at 4-5.

⁷⁷ *Id.*

⁷⁸ S. REP. NO. 112-42, at 5; *see also* *Trichloroethylene Hazard Summary*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/ttn/atw/hlthef/tri-ethy.html> (last updated Nov. 6, 2007).

⁷⁹ Matt Compton, *President Obama Signs the Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012*, THE WHITE HOUSE BLOG (Aug. 6, 2012, 5:36 PM), <http://www.whitehouse.gov/blog/2012/08/06/president-obama-signs-honoring-americas-veterans-and-caring-camp-lejeune-families-ac>.

⁸⁰ Press Release, Office of the Press Sec’y, The White House, Remarks by the President at Signing of the Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012 (Aug. 6, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/08/06/remarks-president-signing-honoring-americas-veterans-and-caring-camp-lej>.

⁸¹ *See* Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 102, 126 Stat. 1165, 1167-68.

cancer, lung cancer, breast cancer, bladder cancer, kidney cancer, leukemia, multiple myeloma, myelodysplastic syndromes, renal toxicity, hepatic stenosis, female infertility, miscarriage, scleroderma, neurobehavioral effects, and non-Hodgkin's lymphoma.⁸² Likewise, the Act provides for hospital care and medical services for the family members of veterans who resided in Camp Lejeune for 30 days or more during that time period, including those in utero of a mother residing at Camp Lejeune.⁸³ This coverage is to be provided by VA, as opposed to by the Department of Defense and its TRICARE program.⁸⁴ In this way, VA has been authorized to provide health-care benefits to the children of Camp Lejeune.⁸⁵

The scientific research regarding correlations between exposure and the subsequent development of certain illnesses is still ongoing. In the meantime, veterans who were stationed at Camp Lejeune can continue to apply for service connection on a direct basis for disabilities not contemplated by the newly established presumption.⁸⁶ In this regard, as of June 8, 2011, the Louisville, Kentucky, Regional Office (RO) (i.e., the RO at which all disability claims based on exposure to contaminated drinking water at Camp Lejeune have been consolidated)⁸⁷ had adjudicated 125 such claims, granting service connection in 22 percent of those cases.⁸⁸

⁸² *Id.*

⁸³ *Id.* This new law added section 1787 to Title 38, Chapter 17. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See* *Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994) (holding that the availability of presumptive service connection for a disability does not preclude a veteran from establishing service connection with proof of actual direct causation).

⁸⁷ VETERANS BENEFITS ADMIN., DEP'T OF VETERANS AFFAIRS, FAST LETTER 11-03, CONSOLIDATION AND PROCESSING OF DISABILITY CLAIMS BASED ON EXPOSURE TO CONTAMINATED DRINKING WATER AT CAMP LEJEUNE, NORTH CAROLINA (Jan. 11, 2011).

⁸⁸ S. REP. NO. 112-42, at 6.

Unfortunately, however, the regulations allowing for VA compensation benefits for children of veterans are narrowly drawn.⁸⁹ Even evidence of a causal link between a veteran-parent's exposure to contaminated drinking water and a child's disability would not warrant VA compensation benefits for that child unless legislative action is taken to authorize VA to do so.

CONCLUSION

While Public Law 104-204 opened the door for benefits provided to veterans' dependents based on their own disabilities, it did not provide a universal roadmap for these benefits. Although the research is still ongoing as to which disabilities can be linked to a parent's exposure to the contaminated water at Camp Lejeune, two types of disabilities have been identified as potentially linked: childhood cancers and birth defects.

The recently enacted legislation addresses the provision of health care benefits to the children of Camp Lejeune.⁹⁰ Those benefits are limited to patients with one of the fifteen listed disabilities: esophageal cancer, lung cancer, breast cancer, bladder cancer, kidney cancer, leukemia, multiple myeloma, myelodysplastic syndromes, renal toxicity, hepatic stenosis, female infertility, miscarriage, scleroderma, neurobehavioral effects, and non-Hodgkin's lymphoma.⁹¹ In this way, the new law addresses the needs of children of Camp Lejeune who have developed a listed childhood cancer, such as leukemia.⁹²

In addition to the provision of healthcare benefits, the children of herbicide-exposed veterans with spina bifida also receive vocational training and a monetary allowance.⁹³ While the

⁸⁹ See discussion *supra* Part I.

⁹⁰ Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 102, 126 Stat. 1165, 1167-68.

⁹¹ *Id.*

⁹² *Id.*

⁹³ 38 U.S.C. §§ 1813-15, 1821(a) (2006).

benefits available to the children of Camp Lejeune are currently limited to the provision of healthcare benefits, this distinction is justifiable based on the nature of the disabilities. Although the monetary allowance for an eligible child with spina bifida is not analogous to the schedule of rating disabilities, some notice should be taken of that schedule's repeated reversion to evaluation based on residual impairment if there is no local recurrence or metastasis after treatment.⁹⁴ This is significant because, ideally, the active malignancy could be overcome through treatment. Therefore, the disability, while serious, may not be permanent.⁹⁵ Thus, in providing benefits for children whose non-birth defect disabilities are found to be linked to a claimant's parent's exposure to the contaminated water at Camp Lejeune, the new law sufficiently extends much needed benefits to those who are suffering from the effects of the Camp Lejeune water contamination.⁹⁶ In this regard, it is a good first step towards providing for the children of Camp Lejeune.

Where the new law falls short is in its failure to address the types of birth defects thought to be linked to exposure to the chemicals in the contaminated drinking water at Camp Lejeune and the development of birth defects, including neural tube defects (such as spina bifida), cleft lip, and cleft palate.⁹⁷ Assuming the ongoing research confirms a link between a parent's exposure to the chemicals in the contaminated drinking water at Camp Lejeune and any of the birth defects listed in 38 C.F.R. § 3.815 a claimant with such a birth defect should also be entitled to a monthly

⁹⁴ See, e.g., 38 C.F.R. § 4.116, Diagnostic Code 7627 (2011) (providing the rating criteria for malignant neoplasms of gynecological system or breast); *id.* § 4.117, Diagnostic Code 7703 (providing the rating criteria for leukemia).

⁹⁵ See, e.g., *id.* § 4.116, Diagnostic Code 7627, Note (providing that when there has been no recurrence or metastasis, the disability should be rated on residuals only); *id.* § 4.117, Diagnostic Code 7703, Note.

⁹⁶ See Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 102, 126 Stat. 1165, 1167-68.

⁹⁷ Compare *id.* with ATSDR *Camp Lejeune Survey Executive Summary*, *supra* note 69 and accompanying text (noting a full study of birth defects, to include cleft lip and cleft palate, is ongoing).

monetary allowance and vocational rehabilitation on the same basis as the children of herbicide-exposed Vietnam veterans. The recently enacted law does not sufficiently address this issue.

In conclusion, while the new law provides healthcare benefits for dependents of those living at Camp Lejeune with certain disabilities, additional benefits would be necessary for claimants with any of the birth defects listed in 38 C.F.R. § 3.815 in order to align these benefits with those already available for children of herbicide-exposed veterans. The fact that the veteran-parents' exposure in Vietnam (and Korea) was abroad during a war whereas exposure to the Camp Lejeune water contamination occurred domestically both during a time of war and during peacetime does not alter the nature of the disabilities associated with exposure to toxins, and as such, should not impact the benefits provided by VA.