

1 CHAD A. READLER
 Acting Assistant Attorney General
 2 BRIAN STRETCH
 United States Attorney
 3 ANTHONY J. COPPOLINO
 Deputy Branch Director
 4 NICHOLAS P. CARTIER
 California Bar No. 235858
 5 Trial Counsel
 Civil Division, Federal Programs Branch
 6 U.S. Department of Justice
 20 Massachusetts Ave., NW
 7 Washington, D.C. 20530
 Telephone: (202) 616-8351
 8 Facsimile: (202) 616-8470
 E-mail: Nicholas.cartier@usdoj.gov
 9

10 Attorneys for Defendants

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 OAKLAND DIVISION

14 VIETNAM VETERANS OF AMERICA, et al.,

15 Plaintiffs,

16 v.

17 CENTRAL INTELLIGENCE AGENCY, et al.,

18 Defendants.
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

Case No. CV 09-0037-CW (EDL)

**DEPARTMENT OF THE ARMY
STATUS REPORT PURSUANT TO
THE COURT'S APRIL 4, 2017
INJUNCTION**

1 Pursuant to paragraph 4.a of the Court’s April 4, 2017 injunction, Dkt. 597, the
2 Department of the Army provides the following status report:

3 **BACKGROUND**

4 On April 19, 2017, the Court entered an Amended Judgment in this case. Dkt. 598. The
5 Court entered judgment for Plaintiffs on “their claim, pursuant to the APA, that Defendant
6 Department of the Army has an ongoing duty to provide medical care for diseases or conditions
7 proximately caused by their participation as research subjects in the Army’s chemical or
8 biological substance testing programs (Medical Care Claim).” *Id.* at ¶ 2. The Court’s judgment
9 indicated that the basis for the imposition of the duty was Army Regulation 70-25. *Id.*
10 Previously, on April 4, 2017, the Court entered an injunction over the objection of the
11 Defendants. *See* Dkt. 597. The Court’s injunction requires the Army to provide a report
12 “describing its implementation of policies and procedures to facilitate its compliance with [the
13 Court’s] Injunction.” Dkt. 597 at ¶ 4.a. The Army describes its efforts to comply with the
14 Court’s injunction in the following section of this report.

15 **DISCUSSION**

16 **I. THE ARMY’S EFFORTS TO PROVIDE NOTICE TO CLASS MEMBERS OF
17 POTENTIAL AVAILABILITY OF ARMY-PROVIDED MEDICAL CARE.**

18 **A. Individual Notifications**

19 In preparing to provide individual notifications to “those class members for whom the
20 Army has contact information,” Dkt. 597 at ¶ 3.a., the U.S. Army Medical Command
21 (MEDCOM) Medical Assistance Group (MMAG), is searching the existing U.S. Department of
22 Defense (DoD) and Veterans Affairs (VA) Chemical Biological Warfare Exposure System
23 (CBWES) database and identifying former test participants for whom the Army has contact
24 information (name and address or phone number). MEDCOM is currently exercising due
25
26
27
28

1 diligence to ensure the former test participants are still living and updating the database with
2 valid addresses that will be used to create and prepare mailings.

3 In addition to locating relevant contact information, MEDCOM is drafting the
4 notification letter that will be sent to former testing participants. The notification letter will
5 include instructions on how to apply for medical care at a Military Treatment Facility (“MTF”)
6 to treat any injury or disease that was a proximate result of the applicant’s participation in the
7 Army’s chemical or biological substance testing programs (hereafter, testing-related medical
8 care). The notification letter will list the required documentation (as set forth in the Court’s
9 April 4, 2017 injunction) that must be included for an application to be complete.
10

11 The letter will also contain information about potential eligibility for VA-provided
12 medical care and the process for applying for such care; information on how the class member, if
13 he cannot afford an examination, can obtain a no-cost diagnostic examination for any injury or
14 disease believed to be a proximate result of the applicant’s participation in the Army’s chemical
15 or biological substance testing programs at the nearest DoD MTF or VA facility; and information
16 on how to obtain the class member’s military personnel and medical records, as well as records
17 of participation in relevant research programs.
18

19 The notification letters will be merged with the relevant contact information to prepare
20 the official mailings. In order to measure the number of actual notifications received, all
21 notifications will be assigned a unique tracking number and will be sent to recipients by certified
22 mail, return receipt requested. The Army anticipates that it will be prepared to mail the first
23 round of notifications on October 1, 2017; should the Army be unable to meet this timeframe, it
24 will notify the court.
25
26
27
28

B. Public Notification

1
2 In order to “provide notice via public media and outreach to the VA and to veterans’
3 service organizations,” Dkt. 597 at ¶ 3.a., MEDCOM Public Affairs Office (PAO) will draft
4 news releases and other notification materials for a strategic communications plan. Once these
5 items are approved, the Army will launch an information campaign, as well as use a publicly
6 accessible website to post public notifications, in addition to existing social media accounts.
7 Additionally, the Army will contact the VA and Veterans Service Organizations (VSOs) to
8 provide information that those organizations can publicize to their members. The Army
9 anticipates that it will be prepared to launch the first round of wide-spread public notification on
10 October 1, 2017; should the Army be unable to meet this timeframe, it will notify the court.
11

**II. THE ARMY’S EFFORTS TO ESTABLISH THE CHEMICAL-BIOLOGICAL
MEDICAL CARE INFORMATION HOTLINE.**

12
13
14
15 In order to prepare to “use a previously established DoD toll-free number for veterans
16 who believe they may qualify for research related medical care to obtain additional information
17 about potential eligibility for medical care and the process of applying for such care,” Dkt. 597 at
18 ¶ 3.b., MEDCOM will prepare information to provide call-responders on potential areas of
19 inquiry and answers to frequently asked questions. This information will also include all
20 relevant contact information so call-responders can provider callers with points of contact,
21 including where to obtain research participation records, how to apply to the Army Board for
22 Correction of Military Records, how to obtain VA records and a service connection decision, and
23 information regarding enrollment in the VA’s comprehensive healthcare system.
24

25
26 In order to “assist veterans in determining whether they participated in the relevant
27 research programs,” Dkt. 597 at ¶ 3.b., MEDCOM will establish access to the chem-bio database
28 for all call-responders and train call-responders to search the database for proof of participation,

1 as well as to safeguard Privacy Act protected data. For callers whose participation is confirmed,
2 responders will provide information regarding proof of participation, relevant points of contacts,
3 locations of all DoD MTFs and VA medical facilities, and how to apply for testing-related
4 medical care at a MTF and VA-provided medical care. Call-responders will also have this
5 information available to provide over the phone should a caller not have access to the Internet.
6
7 The Army anticipates having the hotline fully functional for chem-bio testing related calls by
8 October 1, 2017; should the Army be unable to meet this timeframe, it will notify the court.

9 **III. THE ARMY'S EFFORTS TO ASSIST CLASS MEMBERS WITH DIAGNOSTIC**
10 **MEDICAL EXAMINATIONS**

11 In order to prepare to arrange for no-cost medical examinations for class members who
12 are "unable to pay for a medical examination for purposes of obtaining a diagnosis to support an
13 application," Dkt 597 at ¶ 3.c., MEDCOM is considering the best procedure to refer class
14 members to MTFs for examinations. Additionally, the Army will work with the VA to establish
15 procedures for referring class members to VA facilities for such examinations. The Army
16 anticipates having these procedures in place for examination at DoD MTFs by the time the first
17 notification is sent, namely, by October 1, 2017.
18

19 **IV. THE ARMY'S EFFORTS TO ESTABLISH A BENEFITS APPLICATION PANEL**
20 **TO REVIEW COMPLETE APPLICATIONS.**

21 The Army plans to establish two Benefits Application Panels (BAP) – one to review
22 chemical exposure cases and one to review biological exposure cases. *See* Dkt. 597 ¶ 3.d.
23 MEDCOM will establish a process for the BAPs to review and issue decisions on completed
24 applications for testing-related medical care, as well as the process to notify applicants of BAP
25 decisions, including a procedure to notify the MEDCOM Staff Judge Advocate if the BAP will
26
27
28

1 be unable to issue a decision in a case within the 120-day timeline outlined in the Court's
2 injunction. Dkt 597 at ¶ 3.d.

3 Upon approval of an application, the procedures established in 32 C.F.R. 108, DoDI
4 6025.23 and SEC Army Memo, Dated 24 Oct 2016, *Delegation of Authority-Secretarial*
5 *Designee Program*, will be used to recommend the Secretary of the Army or appropriate
6 designee to grant SECDES status.

7
8 The class member will be notified in writing of the decision of the Secretary or his
9 designee and the basis for the decision. Dkt 597 at ¶ 3.f. In addition, pursuant to ¶ 3.f., those
10 approved will receive notification of the qualifying condition for which medical care will be
11 provided and the location of the nearest DoD MTF capable of treating the qualifying condition.
12 The notification letter will be presented to the DoD MTF as authorization for medical care for
13 the qualifying condition. The Army is currently working on a policy to ensure access to military
14 installations in order to acquire such care.

15
16 Plaintiffs' counsel will receive notice of all denied applications for medical care via
17 electronic mail. These notices will not include any protected medical or personal information.

18
19 The Army is currently establishing a procedure for receiving applications and reviewing
20 them to ensure all documents and information required under ¶ 3.c is provided; coordinating with
21 other agencies to get any other available information related to individual applicants which can
22 be made part of the class member's application, and preparing complete applications for review
23 and decision by the BAP.

24
25 The Army intends to have these procedures in place by December 30, 2017; should the
26 Army be unable to meet this timeframe, it will notify the court.

1 **V. THE ARMY'S EFFORTS TO PROVIDE MEDICAL CARE TO ELIGIBLE**
2 **CLASS MEMBERS**

3 In order to ensure seamless integration of services for the provision of testing-related
4 medical care under the Court's injunction, the Army is drafting new policy guidance for MTFs.
5 This policy will include a process to notify individual MTFs, via the Regional Health Command,
6 of a class member's approval for medical care for a specified qualifying condition, including any
7 special provision and exclusions of medical care, to ensure no gap in care following approval.
8 Additionally, the Army is reviewing each MTF's capabilities and capacity to better assist
9 approved class members with locating the nearest MTF to treat their condition. Finally, the
10 Army will coordinate with the VA to establish procedures to assist approved class members in
11 requesting health care from the VA, when necessary, and identifying appropriate service
12 providers and available payment-assistance programs when authorized treatment is not available
13 from the DoD or the VA. Dkt 597 at ¶ 3.f.

14
15
16 The Army anticipates these policies will be completed within 120 days following the first
17 notifications to class members, namely, by January 28, 2018.

18
19
20 Dated: July 3, 2017

Respectfully submitted,

21 CHAD A. READLER
22 Acting Assistant Attorney General
23 BRIAN STRETCH
24 United States Attorney
25 ANTHONY J. COPPOLINO
26 Deputy Director, Federal Programs Branch

27 /s/ Nicholas P. Cartier
28 NICHOLAS P. CARTIER
California Bar No. 235858
Trial Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Ave., NW
Washington, D.C. 20530

Telephone: (202) 616-8351
Facsimile: (202) 616-8470
E-mail: Nicholas.cartier@usdoj.gov

Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attestation Pursuant to Civil Local Rule 5-1

I, Nicholas Cartier, am the ECF User whose ID and password are being used to file this document.

Date: July 3, 2017

/s/ Nicholas P. Cartier
Nicholas P. Cartier

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28