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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY *et al.*,

Defendants.

Case No. CV 09-0037-CW

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: March 14, 2013
Time: 2:00 p.m.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT on March 14, 2013, at 2:00 p.m., or as soon thereafter as counsel may be heard, before the Honorable Claudia Wilken in the United States District Court for the Northern District of California, located at 1301 Clay Street, Courtroom 2, 4th Floor, Oakland, California 94612, Plaintiffs, both on their own behalf and on behalf of the Certified Class (collectively, "Plaintiffs"), will, and hereby do, move the Court for partial summary judgment, pursuant to Federal Rule of Civil Procedure 56, that Defendants Department of Defense and Department of the Army have discrete legal obligations under the Administrative Procedure Act to provide Notice (*see* footnote 1, below) and medical care to test subjects.

This Motion for Partial Summary Judgment is based on this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the accompanying Declaration of Ben Patterson, attached exhibits filed herewith, all other pleadings and matters of record, and such further oral and documentary evidence as may be presented at or before the hearing on this motion.

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I. INTRODUCTION

The question for the Court framed on this motion is whether the government owes certain duties to veterans who were subjects of dangerous military experiments while in service. Because the answer—that it clearly does owe them those duties—arises from a plain reading of Defendants' own regulations and directives, about which there is no genuine factual dispute, the matter is appropriate for summary judgment.

Plaintiffs include a class of military test subjects who participated in secret government-conducted testing of hundreds of chemical and biological substances for use as possible weapons, including nerve agents sarin and VX, mustard gas, LSD, and tularemia. Among other claims for relief, Plaintiffs seek a declaration, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, that Defendants Department of Defense ("DOD") and Department of the Army ("Army") (collectively for purposes of this motion, "Defendants") have a duty to provide test subjects with Notice[1] and with medical care for any conditions associated with their participation in the testing programs, and an order requiring Defendants to fulfill those duties. Defendants' own regulations and directives expressly mandate that they provide this relief to test subjects. Yet, for decades, they have failed to do so.

Plaintiffs seek partial summary judgment on the limited issue of whether the DOD and Army have discrete legal obligations to provide Notice and medical care to test subjects.[2] Defendants' own regulations and directives, many of which the Court has already analyzed, spell out those duties. For example, test subjects "will be told as much of the nature, duration, and purpose of the experiment, the method and means by which it is to be conducted, and the

[1] As used in this motion, "Notice" means notice to each test subject regarding the substances and doses to which he or she was exposed, the route of exposure (e.g., inhalation, injection, dermal, etc.), and the known or potential health effects associated with those exposures or with participation in the tests, with a continuing duty to provide updated information as it is acquired. (*See* Sept. 30, 2012 Order Granting in Part, and Denying in Part, Plaintiffs' Motion for Class Certification ("Class Cert. Order") (Docket No. 485) at 21.)

[2] Plaintiffs are not moving against any other Defendants, including the Department of Veterans Affairs ("DVA") or Central Intelligence Agency ("CIA").

inconveniences and hazards to be expected, as will not invalidate the results," and "will be fully informed of the effects upon [their] health or person which may possibly come from [their] participation in the experiment." Army Regulation 70-25 ("AR 70-25") ¶ 4(a)(1) (1962) (Declaration of Ben Patterson in Support of Plaintiffs' Motion for Partial Summary Judgment ("Patterson Decl."), Ex. 1.) As the Court has held, "[t]he Wilson Directive and versions of AR 70-25 *mandate* that Defendants provide information to the test participants regarding the possible effects upon their own health or person." (Class Cert. Order at 47 (emphasis added).) And "[t]he duty to warn exists even after the individual volunteer has completed his or her participation in research." AR 70-25 § 3-2(h) (1990) (Patterson Decl., Ex. 2). The regulations also require that "medical treatment and hospitalization will be provided for all casualties." AR 70-25 ¶ 5(c) (1962). The Court noted with approval Plaintiffs' contention that Defendants' "regulations create prospective obligations to provide for future testing-related medical needs for all test volunteers, and an ongoing duty to warn." (*See* Class Cert. Order at 39-40.)

The existence of Defendants' duty is a key threshold issue for Plaintiffs' APA claims,[3] resolution of which will help streamline the case for trial. Plaintiffs do not seek summary judgment on the separate and independent issue of whether Defendants have failed to fulfill—unlawfully withheld or unreasonably delayed performance of—their duties. Based on Defendants' clearly documented legal duties, Plaintiffs respectfully ask the Court to find that Defendants are obligated as a matter of law under the APA: (1) to inform test subjects of their exposures, test agents used, doses, and possible health effects from participation, and to provide updated notice as more information about exposures and medical effects is learned or acquired; and (2) to provide medical care to test subjects for all casualties of the experiments.

[3] Defendants have previously framed the issue of their legal duty in the same terms as those employed on this motion: "Similar to Plaintiffs' notice claim, Plaintiffs' health care claim will require consideration of two threshold questions: *(1) whether either DoD or the Army has a duty to provide health care to test participants*, and (2) whether DoD or the Army has failed to fulfill that duty." (Defendants' Opposition to Motion for Class Certification (Apr. 2, 2012) (Docket No. 393) at 32 (emphasis added).)

II. BACKGROUND

During Defendants' testing programs, which ran from 1922 to at least 1975, tens of thousands of service members participated in chemical and biological weapon agent tests. (*See* Class Cert. Order at 2-3; Defendants' Answer to Fourth Amended Complaint (Nov. 16, 2012) (Docket No. 489) ¶ 5; *Chemical Warfare Agent Experiments Among U.S. Service Members* (Patterson Decl., Ex. 3). These test subjects were exposed to a wide variety of toxic agents, including VX, scopolamine, 2-PAM, CX, CS, BZ, mustard gas, and substances identified by code names, such as CAR 302688, EA 3580, and EA 1476. (Defendants' Answer ¶ 5.)

A. Defendants' Own Regulations and Directives Set Forth Their Legal Obligations

Since 1953, Defendants' own directives have explicitly required them to provide Notice and medical care to all test subjects. In February 1953, the DOD issued a directive purporting to bring the government into compliance with the 1947 Nuremberg Code on medical research (the "Wilson Directive"). (Patterson Decl., Ex. 4 at C-001-02.) The Wilson Directive required that test subjects be informed of "all inconveniences and hazards reasonably to be expected; and the effects upon [their] health or person which may possibly come from [their] participation in the experiment." (*Id.* at C-002.) Later in 1953, the Department of the Army Office of the Chief of Staff issued Memorandum CS: 385, "Use of Volunteers in Research," which promised "[m]edical treatment and hospitalization *will be provided* for all casualties of the experimentation as required." ("CS: 385" (Patterson Decl., Ex. 5) at VVA 024544 (emphasis added) (also requiring that each test subject be informed of the "nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon [the test subject's] health or person which may possibly come from his participation in the experiment").)

In March 1962, the Army codified these principles in AR 70-25, which concerned the "Use of Volunteers as Subjects of Research." AR 70-25 set forth certain "basic principles" that "*must be observed* to satisfy moral, ethical, and legal concepts," including that each volunteer "will be fully informed of the effects upon his health or person which may possibly come from

his participation in the experiment." AR 70-25 ¶ 4 (1962) (emphasis added). The regulation further "[r]equired [that] medical treatment and hospitalization *will be provided* for all casualties." *Id.* ¶ 5(c) (emphasis added).

In response to Congressional hearings between 1975 and 1977, the Army issued a series of memoranda further elaborating on its obligations to test subjects. On August 8, 1979, Army General Counsel Jill Wine-Volner advised top Army officials regarding "Notification of Participants in Drug or Chemical/Biological Agent Research." (Patterson Decl., Ex. 6.) Acknowledging the Army's underlying legal obligation to test subjects, Wine-Volner urged quick implementation of a notification program, stating that its "legal necessity . . . is not open to dispute." (*Id.* at VET123-004994.) A September 24, 1979 Memorandum further advised the Director of the Army Staff that "[i]f there is reason to believe that any participants in such research programs face the risk of continuing injury, those participants should be notified of their participation and the information known today concerning the substance they received." (J. Wine-Volner Memorandum, "Notification of Participants in Drug or Chemical/Biological Agent Research" (Patterson Decl., Ex. 7) at VET017-000279.) An October 25, 1979 Army Chief of Staff Memorandum further states that "[p]articipants in those projects who are considered by medical authority to be subject to the possible risk of a continuing injury are to be notified." (J. McGiffert Memorandum, "Notification of Participants in Drug or Chemical/Biological Agent Research" (Patterson Decl., Ex. 8) at VET030-022687.) On November 2, 1979, the Army informed Congress of this notification plan and the Surgeon General's plan to ask the National Academy of Sciences to study the effects of the testing compounds. (Army Memorandum, "Notification of Participants in Drug or Chemical/Biological Agent Research" (Patterson Decl., Ex. 9) at VET030-022693.)

A revised version of AR 70-25 was promulgated in 1990, formally acknowledging the ongoing nature of the "duty to warn." It requires Defendants to "provide [research volunteers] with any newly acquired information that may affect their well-being when that information becomes available. The duty to warn exists even after the individual volunteer has completed his or her participation in research." AR 70-25 § 3-2(h) (1990). The regulation also requires that a

"volunteer data base" be maintained to "ensure that the command can exercise its 'duty to warn.'" (*Id.* at Appx. H-1.)

In 1991, the DOD issued regulations adopting the so-called "Common Rule," which codified the basic principles of the Wilson Directive. *See* 32 C.F.R. pt. 219. In 1993, Deputy Secretary of Defense William Perry issued a Memorandum (the "Perry Memo") that required the military branches, among other things, to identify the names of test participants, the locations of tests, the military units stationed at research sites, and the dates when human subjects were used. (Patterson Decl., Ex. 10.) Finally, in 2002, Congress passed Section 709 of the National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 709(c), 116 Stat. 2586 (2002) ("Bob Stump Act"), which "established a requirement to identify potentially exposed Service members and civilians during chemical and biological warfare tests conducted outside Project 112 from 1942 to present." ("Implementation Plan for U.S. Chemical and Biological (CB) Tests Repository Program" (Patterson Decl., Ex. 11) at DVA002 004549.)[4]

B. The Court's Prior Rulings Concerning Defendants' Regulations and Directives Support This Motion

This Court has previously analyzed the regulations and directives defining Defendants' duties to test subjects. That analysis is directly applicable to this motion and supports Plaintiffs' request for judgment as a matter of law on the issue of duty.

In its January 19, 2010 Order Denying Defendants' Motion to Dismiss in Part, the Court found that AR 70-25 (1962) supports "a claim under [APA] section 702 for which the Court could compel discrete agency action." ("Jan. 19, 2010 Order" (Docket No. 59) at 15 ("The 1962

[4] Plaintiffs will prove at trial that Defendants, in violation of their legal duties, failed to provide Notice and medical care to test subjects. As a result, test subjects are impeded in their ability to obtain both health care from DVA or private providers, and disability compensation to which they are entitled. Defendant DVA admits that without information about exposures, dosages, and health effects, test subjects (and their survivors) are at a significant disadvantage in seeking to prove DVA service-connected death and disability compensation ("SCDDC") claims. (Excerpts from the Jan. 20, 2012 Deposition of Mark Brown (Patterson Decl., Ex. 12) at 39:2–41:6; *see also* Compensation and Pension Service Meeting Minutes of Nov. 29, 2004 (Patterson Decl., Ex. 13) at DVA003 006437 (listing data that DVA "absolutely required" from DOD to adjudicate claims, including the test substance, "test dose," and "details of any exposure injuries").)

version of AR 70-25 *mandated* the disclosure of information so that volunteers could make informed decisions.") (emphasis added).) The Court further found that AR 70-25 "suggests that Defendants had a non-discretionary duty to warn" the volunteers about the "nature of the experiments." (*Id.* at 16.)

In its Class Certification Order of September 30, 2012, the Court held that "[t]he Wilson Directive and versions of AR 70-25 *mandate* that Defendants provide information to the test participants regarding the possible effects upon their own health or person." (Class Cert. Order at 47 (emphasis added).) The Court further explained that the 1990 version of AR 70-25 "also required the Army to create and maintain a 'volunteer database' so that it would be able 'to readily answer questions concerning an individual's participation in research' and 'to ensure that the command can exercise its duty to warn.'" (*Id.* at 5 (quoting AR 70-25 (1990) at 3, 13-14) (internal quotation marks omitted).)

The Court has rejected Defendants' argument that their legal duty to provide medical care to test subjects ended with the testing itself. According to the Court, Defendants conceded "that AR 70-25 (1962) accords a right to medical care, but contend[ed] that such care was 'an additional safeguard' available to address a medical need during an experiment rather than care over the course of a test participant's lifetime." (Jan. 19, 2010 Order at 17.) Noting that "[t]he language of the regulation does not require this conclusion," the Court recognized that Defendants' duty to provide medical care is ongoing: "The safeguards were put in place to protect a volunteer's health. The fact that symptoms appear after the experiment ends does not obviate the need to provide care." (*Id.*)

In its recent Class Certification Order, moreover, the Court explained that "Plaintiffs' contention is that the regulations create prospective obligations to provide for future testing-related medical needs for all test volunteers, and an ongoing duty to warn." (Class Cert. Order at 39.) The Court concluded that "[t]here is nothing in any version of the regulations or other documents that limits these forward-looking provisions to those people who became test volunteers after the regulation was created":

> In the 1990 version of AR 70-25, the definition for human subject or experimental subject included, with limited exceptions, "a living individual about whom an investigator conducting research obtains data through interaction with the individual, including both physical procedures and manipulations of the subject or the subject's environment." Herb Decl., Ex. 13, 16. The definition does not exclude individuals who were subjected to testing prior to the date of the regulations. Further, by its terms, the section in the 1990 regulation regarding the duty to warn contemplates an ongoing duty to volunteers who have already completed their participation in research.

(*Id.* at 39-40.)

III. LEGAL STANDARD

"Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law." (Jan. 19, 2010 Order at 17-18 (citing Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987)).)[5] Where a regulation's language has a plain meaning, courts address the meaning of the regulation as a matter of law. *See, e.g., Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir. 2002) (granting summary judgment to plaintiffs based on plain language of regulation); *Exportal Ltda. v. United States*, 902 F.2d 45, 50-51 (D.C. Cir. 1990) (granting plaintiff's petition for review of Secretary of Agriculture's decision because the plain meaning of Department's regulations was "dispositive").

Section 706(1) of the APA directs that "[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 62 (2004) (citing 5 U.S.C. § 706(1)). A "'claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.'" (Jan. 19, 2010 Order at 14 (quoting *Sea Hawk Seafoods, Inc. v. Locke*, 568 F.3d 757, 766 (9th Cir. 2009) (quoting *SUWA*, 542 U.S. at 64)) (emphasis omitted).)

[5] Federal Rule of Civil Procedure 56 states that a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

IV. ARGUMENT

A. Defendants Have a Duty To Provide Notice to All Test Subjects

1. Defendants' Duty To Provide Notice Is Clearly Set Forth in Their Own Regulations and Directives

Defendants' own regulations and directives impose on them a legal duty to provide Notice to each test subject. The Court's analysis of that duty "begin[s] with the language of the regulation." *See, e.g., Wards Cove Packing Corp.*, 307 F.3d at 1219 (finding entitlement for plaintiffs based on plain language of regulation). The 1962 version of AR 70-25, "which incorporates language from the Wilson Directive, states that a participant 'will be told as much of the nature, duration, and purpose of the experiment, the method and means by which it is to be conducted, and the inconveniences and hazards to be expected, as will not invalidate the results' and 'will be fully informed of the effects upon [the test subject's] health or person which may possibly come from his participation in the experiment.'" (Jan. 19, 2010 Order at 14-15 (quoting AR 70-25 ¶ 4(a)(1) (1962)).)

Even before AR 70-25, the DOD's February 1953 Wilson Directive required that test subjects be informed of "all inconveniences and hazards reasonably to be expected; and the effects upon [their] health or person which may possibly come from [their] participation in the experiment." (Wilson Directive (Patterson Decl., Ex. 4) at C-002.) The Army Chief of Staff's 1953 Memorandum CS: 385, "Use of Volunteers in Research," reiterated this legal requirement. *See* CS: 385 at VVA 024538. This duty to notify was codified in AR 70-25, which sets forth certain "basic principles" that "must be observed to satisfy moral, ethical, and legal concepts." AR 70-25 ¶ 4 (1962). The Court has noted that "[t]he various regulations and documents" contain provisions that are "identical or similar" to each other. (Class Cert. Order at 39.)

The duty flowing from AR 70-25, reflected in its plain meaning, requires Defendants to provide individualized Notice of the "nature" and "methods and means" of the testing (e.g., exposure, substance tested, route of exposure, and dose), "the inconveniences and hazards," and "the effects upon [the test subject's] health or person which may possibly come from his participation in the experiment" (e.g., potential health effects, including updated information as it

is acquired). AR 70-25 ¶ 4(a)(1) (1962). Indeed, the Court previously found that AR 70-25 (1962) supports "a claim under [APA] section 702 for which the Court could compel discrete agency action." (Jan. 19, 2010 Order at 15 ("The 1962 version of AR 70-25 *mandated* the disclosure of information so that volunteers could make informed decisions.") (emphasis added).)

The ongoing nature of this duty to provide Notice was reaffirmed in the 1990 iteration of AR 70-25, which "by its terms . . . contemplates an ongoing duty to volunteers who have already completed their participation in research" (Class Cert. Order at 40):

> *Duty to warn*. Commanders have an obligation to ensure that research volunteers are adequately informed concerning the risks involved with their participation in research, and to provide them with *any newly acquired information* that may affect their well-being when that information becomes available. The duty to warn exists *even after* the individual volunteer has completed his or her participation in research.

AR 70-25 § 3-2(h) (1990) (emphasis added). Defendants' legal duty to provide Notice extends to *all* test subjects—regardless of whether testing took place before or after the promulgation of regulations mandating Notice. AR 70-25 provides that this duty continues "even after the individual volunteer has completed his or her participation in research," and requires Defendants to "establish a system which will permit the identification of volunteers *who have participated* in research" that Defendants conducted or sponsored. *Id.* (emphasis added). As the Court previously ruled, "[t]here is nothing in any version of the regulations or other documents that limits these forward-looking provisions to those people who became test volunteers after the regulation was created." (Class Cert. Order at 39-40.)

2. The Volunteer Database Required by AR 70-25 (1990) Further Underscores Defendants' Duty to Provide Notice

AR 70-25 (1990) also obligates Defendants to create a global Volunteer Database. That database has two purposes: to "readily answer questions concerning an individual's participation in research conducted or sponsored by the command," and "to ensure that the command can exercise its 'duty to warn.'" AR 70-25 Appx. H-1 (1990). Along with personal information that must be contained in the database (e.g., "name, social security number"), other representative elements may include: "Report[s] generated by the results of the test or protocol," the laboratory

or facility that conducted the test, the test period, the "Name of the material used (both active and inert material)," and a "Description of untoward reactions experienced by the volunteer." *Id.* at Appx. H-2.

If Defendants had no legal duty to provide Notice to test subjects, then the Volunteer Database would be unnecessary and, indeed, inexplicable. Thus, the further requirement that Defendants create such a volunteer database affirms their duty to provide Notice, as required on the face of the regulation, including individual notice of participation, substance, and health effects. *See Wards Cove Packing Corp.*, 307 F.3d at 1219 (employing one subsection of a regulation to elucidate the plain meaning of another subsection).

The database requirement also shows the ongoing nature of Defendants' duty to provide Notice: it applies prospectively, regardless of the date of the test subjects' participation. The regulation states that a "method should be established, which is consistent with the *potential for long-term risks* of the test or protocol," to update "perishable" volunteer contact information (e.g., "local address and telephone number"). AR 70-25 Appx. H-3 (1990) (emphasis added). If Defendants' duty to provide Notice to test subjects were not ongoing, this provision of the regulation—requiring that contact information be updated as it changes over time—would be superfluous. And "it is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" *Khatib v. County of Orange*, 639 F.3d 898, 904 (9th Cir. 2011) (quoting *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)).

3. Defendants Are Legally Required To Provide Notice

AR 70-25 obligates Defendants to provide Notice to test subjects. Under the APA, the agency action at issue must be "'demanded by law (which includes, of course, agency regulations that have the force of law).'" (May 31, 2011 Order Granting in Part and Denying in Part Defendants' Motion to Dismiss ("May 31, 2011 Order") (Docket No. 233) at 7 (quoting *SUWA*, 542 U.S. at 65).)[6]

[6] Even a less formal agency "plan" "itself creates a commitment binding on the agency" if there is a "clear indication of binding commitment in the terms of the plan." *See SUWA*, 542 U.S.

(Footnote continues on next page.)

The duty to provide Notice arises from an Army regulation, which has "the force of law." (Jan. 19, 2010 Order at 15; May 31, 2011 Order at 9 (citing *Nat'l Med. Enters. v. Bowen*, 851 F.2d 291, 293 (9th Cir. 1988); *Kern Copters, Inc. v. Allied Helicopter Svc., Inc.*, 277 F.2d 308, 310 (9th Cir. 1960)).) Summary judgment is appropriate where the military fails to follow duties prescribed by its own regulations. *See, e.g.*, *Dilley v. Alexander*, 603 F.2d 914, 925 (D.C. Cir. 1979) (entering judgment against Army for not following its own regulation governing promotion selection procedures); *Berge v. United States*, No. 10-0373 RBW, 2012 WL 3039736, at *18, *34-35 (D.D.C. July 26, 2012) (granting summary judgment against DOD for failure to follow own regulations in adjudicating TRICARE eligibility); *Golding v. United States*, 48 Fed. Cl. 697, 740 (Fed. Cl. 2001) (granting summary judgment against Navy for "failure to comply with its own directive").

As the Court has previously found, AR 70-25 "suggests that Defendants had a non-discretionary duty to warn" the volunteers about the "nature of the experiments." (*See* Jan. 19, 2010 Order at 16.) Indeed, AR 70-25 states that test subjects "*will* be told . . . the nature, duration, and purpose of the experiment, the method and means by which it is to be conducted, and the inconveniences and hazards to be expected . . ." and "*will* be fully informed of the effects upon [their] health or person which may possibly come . . ." (1962), and that "Commanders *have an obligation to ensure* that research volunteers are adequately informed . . ." (1990). AR 70-25 ¶ 4(a)(1) (1962) & AR 70-25 § 3-2(h) (1990) (emphasis added).

This language imposes a mandatory legal obligation to provide Notice. Indeed, the Court has previously held that "[t]he Wilson Directive and versions of AR 70-25 *mandate* that Defendants provide information to the test participants regarding the possible effects upon their own health or person." (Class Cert. Order at 47 (emphasis added).) Numerous courts have similarly looked to the plain meaning of statutes and regulations to determine whether

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(Footnote continued from previous page.)

at 69, 71; *see also Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1260 (E.D. Cal. 2006).

government agencies are legally required to act as a matter of law. *See, e.g., Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1091 (N.D. Cal. 2008) (granting summary judgment for plaintiffs, finding that because the National Historic Preservation Act "states that a federal agency *'shall'* take into account" potential adverse effects, the DOD's obligation is "discrete agency action that is non-discretionary and specific"); *cf. Sea Hawk Seafoods*, 568 F.3d at 767 (finding no legally required action because "the word 'may' implies discretion" over whether to act).

Furthermore, the agency action required by Defendants' regulations and directives is "discrete" as *SUWA* defines that term. 542 U.S. at 61-64. *SUWA* held that a "failure to act" is "properly understood as a failure . . . to take one of the agency actions (including their equivalents) earlier defined in § 551(13)." *Id.* at 62-63. This Court has already found that AR 70-25 (1962) supports "a claim under [APA] section 702 for which the Court could compel *discrete* agency action." (Jan. 19, 2010 Order at 15 (emphasis added).) Indeed, AR 70-25 prescribes specific actions Defendants must perform for a defined group: test subjects "*will be told* . . . the nature, duration, and purpose of the experiment, the method and means by which it is to be conducted, and the inconveniences and hazards to be expected . . ." and "*will be fully informed* of the effects upon [their] health or person which may possibly come . . . ." AR 70-25 ¶ 4(a)(1) (1962) (emphasis added).

Accordingly, because there is no genuine issue of material fact concerning the legal question of duty and Defendants have a discrete legal duty to provide Notice as a matter of law, summary judgment should be granted.

B. Defendants Are Legally Required To Provide Medical Care to Test Subjects

Pursuant to their own regulations and directives, Defendants have a legal duty to provide medical care for all casualties arising from the testing. After the DOD issued the Wilson Directive, the Department of the Army issued Memorandum CS: 385, stating that "[m]edical treatment and hospitalization will be provided for all casualties of the experimentation as required." CS: 385 at VVA 024544.

AR 70-25 (1962) codifies this duty to provide medical care. It requires that "medical treatment and hospitalization *will be provided* for all casualties." AR 70-25 ¶ 5(c) (1962)

(emphasis added). The 1990 version of AR 70-25 similarly states that "[v]olunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research." AR 70-25 § 3-1(k) (1990). This duty to provide medical care is linked to Defendants' ongoing duty to warn, addressed above. The regulation requires that "[t]he Surgeon General (TSG) will . . . [d]irect medical followup, when appropriate, on research subjects to ensure that any *long-range problems* are detected and treated." *Id.* § 2-5(j) (emphasis added).

The Court has previously recognized the ongoing nature of Defendants' duty under AR 70-25 to provide medical care. Rejecting Defendants' contention that the medical care required by AR 70-25 was "'an additional safeguard' available to address a medical need during an experiment," the Court found that "[t]he language of the regulation does not require this conclusion. . . The safeguards were put in place to protect a volunteer's health. The fact that symptoms appear after the experiment ends does not obviate the need to provide care." (Jan. 19, 2010 Order at 17.) Furthermore, the Court has noted that "nothing in any version of the regulations or other documents . . . limits these forward-looking provisions to those people who became test volunteers after the regulation was created." (Class Cert. Order at 39-40.)

Defendants' legal obligation to act is contained in an Army regulation, which has "the force of law." (Jan. 19, 2010 Order at 15 (internal citation omitted).) By its plain meaning, the regulation requires Defendants to provide medical care. The regulation explicitly states that "medical treatment and hospitalization *will be provided* . . . ." AR 70-25 ¶ 5(c) (1962) (emphasis added). The use of the word "will" here imposes a mandatory obligation, in contrast to words like "may." *See, e.g., Okinawa Dugong*, 543 F. Supp. 2d at 1091 (because the National Historic Preservation Act "states that a federal agency *'shall'* take into account" potential adverse effects, the DOD's obligation is "discrete agency action that is non-discretionary and specific"). The Court should apply that ordinary meaning to find that the regulation legally requires Defendants to provide medical care. *See, e.g., Khatib*, 639 F.3d at 903 (looking to "ordinary meaning" to define a term that the statute did not define (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

The agency action required by AR 70-25 to provide medical care is also discrete. Plaintiffs ask the Court to compel discrete action that is specifically prescribed by AR 70-25 and must be taken for a specific set of people: "medical treatment and hospitalization will be provided for all casualties." AR 70-25 ¶ 5(c) (1962).

Because Defendants' regulations and directives create a legal duty to provide medical care for all casualties of the testing, regardless of when they participated in testing, the Court should find that Defendants have a discrete legal obligation to provide them such medical care for health problems arising from the testing, and should grant Plaintiffs summary judgment.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to grant their motion for partial summary judgment, and hold that Defendants DOD and the Army have discrete legal duties to provide Notice and medical care to test subjects, pursuant to Defendants' regulations and directives.

Dated: December 4, 2012

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: March 14, 2013
Time: 2:00 p.m.
Courtroom: 2, 4th Floor
Judge: Hon. Claudia Wilken

Complaint filed January 7, 2009

Plaintiffs, both on their own behalf and on behalf of the Certified Class (collectively, "Plaintiffs"), moved for partial summary judgment, pursuant to Federal Rule of Civil Procedure 56, regarding the legal duty aspect of Plaintiffs' Administrative Procedure Act ("APA") claims seeking equitable relief related to Notice and medical care.

This matter came before this Court for hearing on March 14, 2013, with all parties appearing through counsel. Having considered all the papers filed by the parties in connection with Plaintiffs' Motion for Partial Summary Judgment, the parties' arguments at the hearing on this matter, the documents previously on file, and other matters of which the Court may properly take judicial notice, the Court hereby **GRANTS** Plaintiffs' Motion for Partial Summary Judgment, having found there is no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law that:

- Under their own regulations and directives, Defendants Department of Defense ("DOD") and Department of the Army ("Army") (collectively, "Defendants") owe discrete legal duties to each test subject for purposes of providing relief pursuant to the APA, 5 U.S.C. § 706(1):
    - Defendants are legally required to provide Notice to each test subject regarding (1) the substances to which he or she was exposed, (2) the doses to which he or she was exposed, (3) the route of exposure (e.g., inhalation, injection, dermal, etc.), and (4) the effects upon their health or person which may possibly come from their participation in the experiment, with a continuing duty to provide updated information as it is acquired;
    - Defendants are legally required to provide medical care to each test subject for any and all health problems arising from his or her exposure during and/or participation in the testing programs.

IT IS SO ORDERED.

Dated: _____

_____
The Honorable Claudia Wilken
Chief District Judge, United States District Court
for the Northern District of California