STUART F. DELERY
Assistant Attorney General
KATHLEEN HARTNETT
Deputy Assistant Attorney General
MELINDA L. HAAG
United States Attorney
ANTHONY J. COPPOLINO
Deputy Branch Director
JOSHUA E. GARDNER
Assistant Director
District of Columbia Bar No. 478049
BRIGHAM JOHN BOWEN
District of Columbia Bar No. 981555
KIMBERLY L. HERB
Illinois Bar No. 6296725
LILY SARA FAREL
North Carolina Bar No. 35273
RYAN B. PARKER
Utah Bar No. 11742
Trial Attorneys
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8202
E-mail: joshua.e.gardner@usdoj.gov

Attorneys for DEFENDANTS

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 (EDL)

DEFENDANTS' RESPONSE TO THE COURT'S PROPOSED INJUNCTION AND JUDGMENT

Complaint filed January 7, 2009

Pursuant to the Court's October 11, 2013 Order, dkt no. 541, Defendants hereby respond to the Court's proposed injunction and final judgment.

DISCUSSION

As discussed below, Defendants submit that the Court's proposed injunction is inappropriate for several reasons. The Court found the existence of a "duty to warn" arising from Army regulations. However, as the Court recognized, the fulfillment of that duty is subject to Army discretion, and Plaintiffs cannot challenge the sufficiency of actions taken in fulfillment of such a duty under the guise of APA § 706(1). Dkt. 541-1 at 43. Notwithstanding this recognition, the proposed injunction impermissibly provides Plaintiffs' counsel and the Court with oversight over how the Army must fulfill that duty and raises the attendant possibility of contempt through continuing court oversight for the failure to do so. This is inappropriate under the narrow scope of review permitted by section 706(1) of the APA. As the Supreme Court has explained, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004). Yet the proposed injunction provides Court review and oversight precisely to "specify" how the Army must carry out a "duty to warn" under AR 70-25. *See* Dkt. 541-3, Proposed Injunction ¶ 4(a)-(e) (providing Court oversight over the sources of information the Army should examine and how it should plan to transmit "Newly Acquired Information" to affected servicemembers).

The proposed injunction thus goes well beyond the narrow relief Plaintiffs can obtain under section 706(1) and, indeed, highlights why, as discussed below, the "duty to warn" language in the 1988, 1989 and 1990 versions of AR 70-25 is not properly the subject of a section 706(1) claim in the first instance. As the Court correctly noted in its summary judgment decision, "[a] claim under § 706(1) can be maintained 'only where there has been a genuine failure to act.' *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). The Ninth Circuit 'has refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Id*. (quoting *Nevada v.*

Watkins, 939 F.2d 710, 714 n.11 (9th Cir. 1991))." Dkt. 541-1 at 42. The Court thus rejected Plaintiffs' claim "to the extent that Plaintiffs seek to require the DOD and Army to provide notice to each class member which discloses on an individual basis the substances to which he or she was exposed, the doses to which he or she was exposed, the route of exposure and the known effects of the testing," because such a claim "is not brought properly under § 706(1)." Dkt 541-1at 43. The proposed injunction, which seeks to require the Court (and Plaintiffs) to oversee the Army's implementation of an ongoing "duty to warn," is thus impermissible given the narrow APA claim brought by Plaintiffs in this case.

A prospective injunction — and the associated risk of contempt for failure to follow such an injunction in the future — is made all the more problematic given the inherently discretionary nature of the "duty to warn" found by the Court in its Order. While the Court found the *existence* of such a duty, the Court did not —and through issuance of an injunction cannot —dictate the Army's *exercise* of that duty. In its Order, the Court granted summary judgment to the Plaintiffs only "to the extent that Plaintiffs seek to require the Army to warn class members of any information acquired after the last notice was provided, and in the future, that *may* affect their well-being, *when that information has become available.*" Dkt. 541-1 at 70 (emphasis added). The duty to warn is only triggered if, in the exercise of the agency's scientific judgment, it determines that the newly acquired information *may* affect the well-being of test participants. Because the "duty to warn" contained in AR 70-25 is necessarily predicated on a scientific and discretionary judgment by the Army, the actual exercise of that duty may form neither the basis for a section 706(1) claim nor the basis for a prospective injunction. *See In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987) (recognizing the highly discretionary nature of a "duty to warn" of newly discovery information concerning health effects in the context of an FTCA claim). AR 70-25 vests substantial discretion in Army officials to determine when and under what circumstances the duty to warn is triggered; accordingly, and under well-settled law concerning the scope of relief available pursuant to § 706(1), injunctive relief is inappropriate.

The undisputed facts highlight this point. For example, although the Court concluded in its order that "Defendants have not provided evidence that they have sent any updated information to test subjects since the DVA sent the notice letters," dkt. 541-1 at 43, this conclusion is at odds with the undisputed facts concerning the government's on-going outreach efforts. It is undisputed that DoD has established and continues to operate a public website for veterans which contains, among other things, long-term studies concerning the test program and identifies a 1-800 number allowing veterans to obtain their service member test files containing the information that DoD has concerning the relevant tests. *See* Dkt. 495 at 9 n.11 & 10. More than 100 veterans have sought their test files from DoD within the past five years. *Id.* at 9 n.11.[1] More fundamentally, Plaintiffs have failed to establish that there is in fact any "Newly Acquired Information" in the possession of the Army since 2006 that the Army has unreasonably delayed in providing to class members. Accordingly, there is no factual predicate for concluding that the Army has unreasonable delayed in complying with a discrete legal obligation under the APA. Thus, in concluding that Plaintiffs have established an APA violation and entering the proposed injunction, the Court is implicitly assessing the adequacy of those ongoing outreach efforts — an assessment that the Court itself recognized was improper. *See* 541-1 at 42-43.

Furthermore, the inherently discretionary duty to warn contained in the 1988, 1989, and 1990 versions of AR 70-25 counsel against the imposition of a prospective injunction under Federal Rule of Civil Procedure 65(d). That rule requires that "[e]very order granting an injunction" must "state its terms specifically," and "describe in reasonable detail — and not by reference to the complaint or other document — the act or acts restrained or required." As the Supreme Court has explained,

[1] Furthermore, it is undisputed that since the initial June 2006 letters to veterans sent by the Department of Veterans Affairs ("VA"), VA has sent letters on additional occasions. Dkt. 495 at 8-9. Not only has VA sent a notice letter to every test participant in the databases maintained by the Department of Defense for whom VA can find identifying information, *id.* at 9-10, but nearly half of the approximately 3,300 total notice letters that have been circulated were sent after June 2006. *Id.*

> the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.

Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (footnotes and citations omitted); *Atiyeh v. Capps*, 449 U.S. 1312, 1317 (1981); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1048 (9th Cir. 2013); *Union Pacific R.R. Co. v. Mower*, 219 F.3d 1069, 1077 (9th Cir. 2000).

Questions concerning how, when, and in what manner the duty to warn should be exercised under AR 70-25 demonstrate that an injunction to follow the regulation would lack the requisite specificity to comply with Rule 65. For example, the question of what level of scientific evidence is required to trigger the duty to warn in a particular case, let alone what form the notice must take, must be left to agency discretion and cannot be enjoined on a class-wide basis under Section 706(1). Likewise, whether the government must actively seek out studies or scientific research concerning the various test substances, and from what sources they must search, should be left to the Army. Similar questions reinforce this point: whether, in exercising the duty to warn, the Army must search through foreign medical journals; whether the Army must search for and notify test participants of journals that consider the health effects on non-humans, such as mice; whether the Army must search the world's literature on a daily basis; whether the Army must conduct annual studies; whether the Army's notification obligation could be satisfied by posting the studies or information on DoD or Army websites; whether, if an injunction were entered, the Army would be at risk of contempt if it was unable to find the current address for a particular test participant if it believed that he was at risk for a certain medical condition. As in *Atmospheric Testing*, all of these questions highlight the inherently discretionary nature of a duty to warn and why prospective injunctive relief would be inappropriate under the circumstances.

In addition, determining what constitutes "Newly Acquired Information," and when the acquisition of such information triggers a "duty to warn"(through notices or otherwise), will inappropriately embroil the Court in endless follow-on litigation over whether particular information is sufficiently reliable or medically important enough to justify not only the

significant burdens of locating particular test subjects and providing new "warnings," but also whether this burden outweighs the considerable danger of unduly alarming former service members about insignificant risks based upon potentially unreliable information or reports. This reinforces the fact that these scientific determinations must be left to the discretion of the military, and any injunction would improperly appoint the Court as the arbiter of future disputes between Plaintiffs and the government in areas far beyond the Court's competence.

In any event, if the Court decides to issue the proposed injunction over the Army's objections, several modifications should be made. First, the deadlines identified in paragraph 4 of the proposed injunction should be modified to provide sufficient time for the Army to comply with the proposed injunction's requirements. For example, the thirty day deadline contained in paragraph 4 for providing the Court with a report describing the efforts the Army has undertaken to locate "Newly Acquired Information;" confirming whether "Newly Acquired Information" has been found and describing generally its nature; explaining the plan the Army has developed for transmitting "Newly Acquired Information" to the class members; and outlining the plan it has developed for periodically collecting and transmitting "Newly Acquired Information" that becomes available after the entry date of the injunction and providing any necessary update reports to the Court regarding future efforts should be enlarged to 90 days to ensure that the Army can reasonably comply with these aspects of the proposed injunction. Similarly, the 90 day deadline contained in paragraph 4(d) for the transmittal of "Newly Acquired Information" should be enlarged to 120 days to allow the Army reasonable time to comply with this aspect of the proposed injunction.

Second, for the reasons discussed above, because of the discretionary nature of the "duty to warn" and the limited scope of review and relief under Section 706(1) of the APA, the Court should not retain continuing jurisdiction "to enforce the terms of this Injunction and Order," as such enforcement would necessarily involve oversight into the adequacy of the Army's efforts.

CONCLUSION

For the foregoing reasons, the Court should not enter the proposed injunction.

Respectfully submitted,

October 21, 2013

STUART F. DELERY
Assistant Attorney General

KATHLEEN HARTNETT
Deputy Assistant Attorney General

MELINDA L. HAAG
United States Attorney

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ Joshua E. Gardner
JOSHUA E. GARDNER
Assistant Director
BRIGHAM JOHN BOWEN
KIMBERLY L. HERB
LILY SARA FAREL
RYAN B. PARKER
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-7583
Facsimile: (202) 616-8202

E-mail: Joshua.E.Gardner@usdoj.gov