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' REPLY IN SUPPORT OF MOTION FOR A STAY PENDING PLAINTIFFS' APPEAL AND CROSS-APPEAL BY DEFENDANTS

INTRODUCTION

As the Government established in its Motion for a Stay Pending Appeal ("Motion"), maintenance of the *status quo* through the imposition of a modest stay pending the parties' appeals is warranted, and Plaintiffs' Opposition does not seriously argue to the contrary. A stay is particularly appropriate here because both parties have appealed aspects of the Court's final judgment and injunction; the Ninth Circuit has expedited briefing on the parties' cross-appeals (which will be completed by April 21, 2014); the Government's appeal raises serious and important issues about the scope of Section 706(1) of the Administrative Procedure Act ("APA") and the interpretation of Army Regulation 70-25; the Army will be irreparably harmed in terms of the substantial burden in both time and costs associated with compliance with an injunction that may be eliminated or modified after appeal; and plaintiffs will not face an undue hardship should the stay be issued. As discussed below, Plaintiffs' opposition fails to meaningfully or directly address these arguments, and a stay pending the parties' appeals is accordingly warranted.

ARGUMENT

I. THE NINTH CIRCUIT HAS ENDORSED ALTERNATIVE TESTS FOR EVALUATING STAYS OF INJUNCTIONS PENDING APPEAL.

As an initial matter, Plaintiffs argue that the Government fails to meet the standard for a stay. Dkt. 556 at 1-2. Plaintiffs are mistaken, and this Court has repeatedly recognized two alternative standards for evaluating stay motions. *See, e.g.*, *County of Sonoma v. Fed. Housing Fin. Agency*, No. C 10-3270 CW, 2011 WL 4536894, at *1 & n.1 (N.D. Cal. Sept. 30, 2011); *Adobe Sys. Inc. v. Hoops Enter. LLC*, No. C 10-2769 CW, 2012 WL 892162, at *1 & n.1 (N.D. Cal. Mar. 14, 2012).[1] While the circumstances here easily satisfy either formulation, the

[1] On one end of the spectrum, a party may obtain a stay of an injunction if he establishes that he "is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of relief, that the balance of equities tips in his favor, and that a stay is in the public interest." *County of Sonoma*, 2011 WL 4536894, at *1 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). On the other end of the spectrum is the "substantial questions" test, which requires one seeking a stay to demonstrate "serious questions going to the merits and a balance of hardships that tips sharply towards plaintiff . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011)).

Government's motion has focused primarily upon the "substantial questions" test – a test that Plaintiffs fail to legitimately dispute has been satisfied here.

II. A STAY IS WARRANTED GIVEN THE SERIOUS LEGAL QUESTIONS RAISED BY THE GOVERNMENT'S CROSS-APPEAL.

As explained in the Government's Motion, the cross-appeal raises a number of serious legal questions concerning whether the Court correctly applied Supreme Court and Ninth Circuit precedent concerning Section 706(1) of the APA in concluding that it provides a basis for judicial review and enforcement of the "duty to warn" that the Court held is contained in the 1988, 1989 and 1990 versions of Army Regulation 70-25.

Plaintiffs do not persuasively argue to the contrary. Rather, Plaintiffs first argue that the arguments raised in the Government's cross-appeal are not "substantial" because the Court previously considered and rejected them. Dkt. 556 at 4. But this is not the applicable standard, and, indeed, this Court has rejected the very argument Plaintiffs' advance. *See Big Lagoon Rancheria v. Cal.*, No. C 09-01471 CW, 2012 WL 298464, at *2 (N.D. Cal. Feb. 1, 2012). In *Big Lagoon*, this Court granted a state government's motion to stay based, in part, upon the conclusion that "the State has raised serious questions going to the merits of the case." *Id.* In so holding, it noted that while the state government's argument that the Court had misapplied Ninth Circuit precedent were arguments made, and rejected, on summary judgment and thus the government was not likely to succeed on the merits, the arguments "raised serious questions going to the merits of the case." *Id.* Indeed, as the Court previously has held, it "need not conclude that it is likely to be reversed on appeal in order to grant the stay." *CRS Recovery, Inc. v. Laxton*, No. C 06-7093 CW, 2008 WL 5170132, at *1 (N.D. Cal. Dec. 9, 2008).

Plaintiffs next contend that "there is no serious question that the Army is failing to take the action AR 70-25 requires it to take." Dkt. 556 at 4. But this argument is factually unfounded and not pertinent to the question before the Court of whether to stay its injunction. The record in this case indicates that the Government has provided notice letters to all test participants for whom it could find contact information (both before and after 2006), created a public website with pertinent studies regarding health effects about the testing program, and set up a 1-800

number to answer questions from individual test participants and to provide participants with their service member test files upon request. Dkt. 553 at 5. Indeed, to the extent Plaintiffs are contending that these efforts do not satisfy the Army's alleged obligations under AR 70-25, it simply highlights that they are impermissibly seeking to challenge "the sufficiency of an agency action dressed up as an agency's failure to act." *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). In any event, the issue now before the Court is whether an injunction requiring the Army to take further steps at this stage should be stayed pending the parties' appeals, and the requirements for such a stay are satisfied here.

III. THE BALANCE OF HARDSHIPS HEAVILY FAVORS THE GOVERNMENT.

The Government explained in its Motion that the balance of hardships strongly favors a stay pending appeal. Dkt. 553 at 6-8. As discussed in the Motion and in great detail in the Declaration of Dee Dodson Morris, Dkt. 553-2, in the absence of a stay, the Army will have to incur the substantial burden, time, and cost of compliance with the Court's injunction while an appeal that may obviate the need to do so is pending. *Id.* And these burdens and costs may be modified or eliminated altogether based upon how the Ninth Circuit resolves the appeal and cross-appeal.

Plaintiffs do not dispute any of the irreparable harms identified by Ms. Morris in her declaration. Rather, Plaintiffs contend that "typically, 'monetary harm does not constitute irreparable harm." Dkt. 556 at 2 (citing *S.F. Unified Sch. Dist. v. S.W.*, No. C-10-05211-DMR, 2011 WL 577413, at *2 (N.D. Cal. Feb. 9, 2011) (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851 (9th Cir. 2009), *vacated on other grounds, Douglas v. Indep. Living Ctr.*, 132 S. Ct. 1204 (2012)). This is both legally incorrect and beside the point. As the Ninth Circuit explained in *California Pharmacists*, monetary harm typically does not constitute irreparable harm "*because the injury can later be remedied by a damage award*." 563 F.3d at 852 (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("It is true that economic injury alone does not support a finding of irreparable harm, *because such injury can be remedied by a damage*

award.")) (emphasis in original).[2] But that circumstance is not present here – the Government cannot recover the cost of compliance with the Court's injunction through a damages remedy. Indeed, the Ninth Circuit in *California Pharmacists* held that the plaintiffs were irreparably harmed based solely upon a monetary injury because they could not obtain a damages remedy. *Id.* at 852. Plaintiffs do not dispute that compliance with the Court's injunction will require the Government to spend millions of dollars, and there is no dispute that the Government lacks the ability to later "remedy" that harm through a damages award or otherwise should the Ninth Circuit vacate or modify the injunction on appeal.

Moreover, the irreparable harm to the Government extends beyond the expenditure of money. As explained in the Government's Motion and the Morris Declaration, assuming the Government contracted with a private entity such as the Institute of Medicine (IOM) to conduct new studies, the Army would need to expend substantial time to evaluate the results of the IOM's findings and conduct any follow-on analysis as may be appropriate – and to do so on an ongoing basis indefinitely into the future. Morris Decl. at ¶ 13. In addition to identifying additional research concerning the test substances, the Army would also have to devote substantial resources "to compare the circumstances discussed in the literature to the specific circumstances of the thousands of test participants to determine, on an individualized basis, whether there is an increased risk of adverse health effects," a process that would be "extremely labor- and cost-intensive." *Id.* at ¶ 17. Furthermore, Plaintiffs do not dispute that "substantial efforts also would be necessary to effectively communicate the results of such additional scientific and medical literature searches should the results suggest that there is information that may affect the well-being of the test participants." *Id.* at ¶ 19. Nor do Plaintiffs dispute that, given that the risk communication review for the previous general notification efforts took approximately five

[2] *See also Sierra Club, Inc. v. Bostick*, No. 12-6201, 2013 WL 5539633, at *4 (10th Cir. Oct. 9, 2013) (rejecting argument "that injunctive relief cannot be denied based on a weighing of economic harm" and noting that "[t]he Supreme Court has recognized that financial harm can be weighed against environmental harm – and in certain instances outweigh it.") (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)).

months, "providing a number of different notices based upon possible different health risks associated with a wide variety of different substances would necessarily require substantially more time at additional cost and use of manpower." *Id.* at ¶ 21. The substantial time, manpower, and cost necessary to comply with the Court's injunction plainly constitutes a significant diversion of governmental resources that could not be undone should the Ninth Circuit vacate or modify the injunction on appeal.[3]

Furthermore, as the Government explained in its Motion, Plaintiffs will not be substantially prejudiced by a modest stay pending appeal. The Ninth Circuit has expedited the briefing on the parties' appeals, Plaintiffs have never sought emergency relief in this case, and each of the named plaintiffs, as well as many other class members, has already received his service member test file, which contains the information the Army has concerning an individual's participation in the test program. Dkt. 553 at 8. Indeed, Plaintiffs filed their lawsuit more than thirty years after the end of the test programs and twenty years after the promulgation of the versions of AR 70-25 upon which their APA claim is based.

Notably, Plaintiffs do not dispute any of these points. Dkt. 556 at 5-6. Instead, Plaintiffs contend that, as a result of the alleged "continuing failure to notify them of new information regarding the test program . . . test subjects are impeded in their ability to obtain meaningful medical care." *Id.* at 5 (citing Dkt. 490 at 5 n.4). Putting to one side the fact that Plaintiffs have not identified any information within the Government's possession that it has not made available to the class concerning information that the Government has concluded may affect their well-being, Plaintiffs have failed to identify a single class member who has actually been "impeded in their ability to obtain meaningful medical care" based upon the fact that the Army has

[3] Plaintiffs contend that "[i]t is well-established that 'irreparable injury is unlikely where the Court has merely ordered the defendants to comply with the law." Dkt. 556 at 3 (citing *Miller v. Carlson*, 768 F. Supp. 1341, 1343(N.D. Cal. 1991). But the injunction plainly does much more here; otherwise, it would be an impermissible order to "obey the law" that is too vague to satisfy the requirements of Fed. R. Civ. P. 65(d)(1)(C). Moreover, Plaintiffs' contention begs the central question presented in the Government's cross-appeal: whether AR 70-25 creates an ongoing legal obligation to warn class members that is enforceable under Section 706(1) of the APA. For the reasons discussed above, this question is undoubtedly "substantial."

affirmatively withheld information that it believes affects the test participant's well-being. Plaintiffs' generic and factually unsupported allegation of prejudice should be rejected.

Accordingly, the balance of hardships tips sharply in favor of granting a stay.

IV. THE PUBLIC INTEREST SUPPORTS A STAY.

As the Government explained in its Motion, a stay would promote the public interest in the efficient adjudication of disputes and the conservation of scarce resources. Dkt. 553 at 9. Indeed, Plaintiffs do not dispute that the Ninth Circuit's decision on Plaintiffs' appeal and the Government's cross-appeal may well result in the modification or vacatur of the Court's injunction. Nor do they dispute that the Army's compliance with the injunction would result in the devotion of substantial resources that may be unnecessary should the injunction be vacated or modified on appeal. Preservation of the *status quo* under these circumstances will thus serve to promote the public interest by preserving both the parties' and the Court's resources.

In their opposition, Plaintiffs contend that "ensuring that veterans receive timely notice about the health effects of testing performed on them" serves the public interest because "it may" have "urgent implications for an aging class." Dkt. 556 at 7. First, Plaintiffs' argument presumes that the Government is in possession of information concerning health effects that it believes may affect class members' well-being that the Government has not made available to the class. Yet there is no record evidence to support such an assertion. Second, given that the Ninth Circuit has expedited briefing in this case, which will be completed by April 21, 2014, the modest delay in staying the injunction is entirely consistent with the public interest.

V. THIS COURT HAS GRANTED ENLARGEMENTS OF DEADLINES TO PERMIT SEEKING A STAY IN THE COURT OF APPEALS.

As the Government explained in its motion, if the Court does not grant the Government's motion and stay the injunction pending the parties' appeals, the Court should extend the deadlines in the injunction by 60 days to maintain the *status quo* and allow the Government adequate time to seek a stay of the injunction in the court of appeals. This Court has granted similar requests. *See, e.g., Cnty. of Sonoma*, 2011 WL 4536894 at *2 (denying motion to stay, but granting

alternative request to stay case for ten days to allow for appeal to the Ninth Circuit and continuing the stay until the Ninth Circuit ruled upon the motion).

CONCLUSION

For the foregoing reasons, the Court should stay its judgment and injunction pending the parties' appeals. In the alternative, the Court should stay the injunction to allow the Government an adequate opportunity to seek emergency relief in the court of appeals.

Respectfully submitted,

January 31, 2014

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