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16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 OAKLAND DIVISION

20 VIETNAM VETERANS OF AMERICA, et al.,
 21 Plaintiffs,
 22 v.
 23 CENTRAL INTELLIGENCE AGENCY, et al.,
 24 Defendants.

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

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

Complaint filed January 7, 2009

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

3 DISCUSSION

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

20 The proposed injunction thus goes well beyond the narrow relief Plaintiffs can obtain
21 under section 706(1) and, indeed, highlights why, as discussed below, the "duty to warn"
22 language in the 1988, 1989 and 1990 versions of AR 70-25 is not properly the subject of a section
23 706(1) claim in the first instance. As the Court correctly noted in its summary judgment decision,
24 "[a] claim under § 706(1) can be maintained 'only where there has been a genuine failure to act.'
25 *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). The Ninth
26 Circuit 'has refused to allow plaintiffs to evade the finality requirement with complaints about the
27 sufficiency of an agency action 'dressed up as an agency's failure to act.'"
28 *Id.* (quoting *Nevada v.*

1 *Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991)).” Dkt. 541-1 at 42. The Court thus rejected
2 Plaintiffs’ claim “to the extent that Plaintiffs seek to require the DOD and Army to provide notice
3 to each class member which discloses on an individual basis the substances to which he or she
4 was exposed, the doses to which he or she was exposed, the route of exposure and the known
5 effects of the testing,” because such a claim “is not brought properly under § 706(1).” Dkt 541-
6 1 at 43. The proposed injunction, which seeks to require the Court (and Plaintiffs) to oversee the
7 Army’s implementation of an ongoing “duty to warn,” is thus impermissible given the narrow
8 APA claim brought by Plaintiffs in this case.

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

1 The undisputed facts highlight this point. For example, although the Court concluded in
2 its order that “Defendants have not provided evidence that they have sent any updated
3 information to test subjects since the DVA sent the notice letters,” dkt. 541-1 at 43, this
4 conclusion is at odds with the undisputed facts concerning the government’s on-going outreach
5 efforts. It is undisputed that DoD has established and continues to operate a public website for
6 veterans which contains, among other things, long-term studies concerning the test program and
7 identifies a 1-800 number allowing veterans to obtain their service member test files containing
8 the information that DoD has concerning the relevant tests. *See* Dkt. 495 at 9 n.11 & 10. More
9 than 100 veterans have sought their test files from DoD within the past five years. *Id.* at 9 n.11.¹
10 More fundamentally, Plaintiffs have failed to establish that there is in fact any “Newly Acquired
11 Information” in the possession of the Army since 2006 that the Army has unreasonably delayed in
12 providing to class members. Accordingly, there is no factual predicate for concluding that the
13 Army has unreasonable delayed in complying with a discrete legal obligation under the APA.
14 Thus, in concluding that Plaintiffs have established an APA violation and entering the proposed
15 injunction, the Court is implicitly assessing the adequacy of those ongoing outreach efforts — an
16 assessment that the Court itself recognized was improper. *See* 541-1 at 42-43.

17 Furthermore, the inherently discretionary duty to warn contained in the 1988, 1989, and
18 1990 versions of AR 70-25 counsel against the imposition of a prospective injunction under
19 Federal Rule of Civil Procedure 65(d). That rule requires that “[e]very order granting an
20 injunction” must “state its terms specifically,” and “describe in reasonable detail — and not by
21 reference to the complaint or other document — the act or acts restrained or required.” As the
22 Supreme Court has explained,

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25 ¹ Furthermore, it is undisputed that since the initial June 2006 letters to veterans sent by the
26 Department of Veterans Affairs (“VA”), VA has sent letters on additional occasions. Dkt. 495 at
27 8-9. Not only has VA sent a notice letter to every test participant in the databases maintained by
28 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.*

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

7 *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (footnotes and citations omitted); *Atiyeh v. Capps*,
8 449 U.S. 1312, 1317 (1981); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1048 (9th
9 Cir. 2013); *Union Pacific R.R. Co. v. Mower*, 219 F.3d 1069, 1077 (9th Cir. 2000).

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

27 In addition, determining what constitutes "Newly Acquired Information," and when the
28 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

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

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

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

26 **CONCLUSION**

27 For the foregoing reasons, the Court should not enter the proposed injunction.
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October 21, 2013

Respectfully submitted,

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