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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 VIETNAM VETERANS OF AMERICA, et
9 al.,

10 Plaintiffs,

11 v.

12 CENTRAL INTELLIGENCE AGENCY, et
13 al.,

14 Defendants.

No. CV 09-0037-CW

ORDER DENYING
DEFENDANTS' MOTION
TO STAY
(Docket No. 553)

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Defendants United States Department of Defense and its Secretary Charles T. Hagel and the United States Department of the Army and its Secretary John M. McHugh have filed a motion to stay this Court's judgment and injunction pending the resolution of Defendants' cross-appeal.¹ Plaintiffs Vietnam Veterans of America; Swords to Plowshares: Veterans Rights Organization; Bruce Price; Franklin D. Rochelle; Larry Meirow; Eric P. Muth; David C. Dufrane; Tim Michael Josephs; William Blazinski and Kathryn McMillan-Forrest oppose the motion. Having considered the parties' papers and the entire record in this case, the Court DENIES the motion.

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¹ Defendants imply that the outcome of Plaintiffs' appeal could affect their need to comply with the injunction. Plaintiffs' appeal is quite separate. Only if Defendants' cross-appeal is granted would their compliance be unnecessary.

1 BACKGROUND

2 On November 19, 2013, this Court entered an order granting in
3 part and denying in part Plaintiffs' motion for summary judgment
4 and granting in part and denying in part Defendants' cross-motion
5 for summary judgment. Docket No. 544. Specifically, the Court
6 granted Plaintiffs' motion for summary judgment on their APA
7 notice claim "to the extent that Plaintiffs seek to require the
8 Army to warn class members of any information acquired after the
9 last notice was provided, and in the future, that may affect their
10 well-being, when that information becomes available." Docket. No.
11 544 at 71. The Court also entered an injunction regarding such
12 "Newly Acquired Information." Docket No. 545. The injunction
13 required Defendant Department of the Army to file, within ninety
14 days of the date of entry, a report describing its efforts to
15 locate Newly Acquired Information, describing any information
16 located, outlining its plan for disseminating, within 120 days of
17 the date of entry, that information to the class members entitled
18 to notification, and outlining the plans and policies developed
19 for periodically collecting and transmitting Newly Acquired
20 Information that becomes available in the future. Based on the
21 November 19, 2013 entry date, Defendant's report is due on
22 February 17, 2014.

23 On November 26, 2013, Plaintiffs filed a notice of appeal
24 and, on January 21, 2014, Defendants filed a notice of cross-
25 appeal. On January 22, 2013 Defendants filed the instant motion
26 to stay. The Ninth Circuit has granted Plaintiffs' motion for
27 expedited briefing and the cross-appeals will be fully briefed by
28 April 21, 2014.

1 LEGAL STANDARD

2 "A stay is not a matter of right, even if irreparable injury
3 might otherwise result." Nken v. Holder, 129 S. Ct. 1749, 1760
4 (2009) (citation and internal quotation marks omitted). Instead,
5 it is "an exercise of judicial discretion," and "the propriety of
6 its issue is dependent upon the circumstances of the particular
7 case." Id. (citation and internal quotation and alteration marks
8 omitted). The party seeking a stay bears the burden of justifying
9 the exercise of that discretion. Id.

10 The standard for determining whether to grant a stay pending
11 appeal is similar to the standard for issuing a preliminary
12 injunction. Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663
13 (9th Cir. 1988). A party seeking a stay must establish that he is
14 likely to succeed on the merits, that he is likely to suffer
15 irreparable harm in the absence of relief, that the balance of
16 equities tips in his favor, and that a stay is in the public
17 interest. Nken, 129 S. Ct. at 1761 (noting overlap with Winter v.
18 Natural Resources Defense Council, 555 U.S. 7 (2008)). The first
19 two factors of this standard "are the most critical." Id. Once
20 these factors are satisfied, courts then assess "the harm to the
21 opposing party" and weigh the public interest. Id. at 1762.

22 An alternative to this standard is the "substantial
23 questions" test. Under this test, "serious questions going to the
24 merits and a balance of hardships that tips sharply towards the
25 plaintiff" can support the issuance of a stay, "so long as the
26 plaintiff also shows that there is a likelihood of irreparable
27 injury and that the injunction is in the public interest." See
28 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135

1 (9th Cir. 2011) (holding that the substantial questions test, for
2 purposes of a motion for preliminary injunction, survives Winter,
3 555 U.S. at 7).

4 DISCUSSION

5 Defendants contend that they are entitled to a stay under the
6 substantial question test based on questions regarding "whether
7 Section 706(1) of the APA provides a basis for judicial review and
8 enforcement of the 'duty to warn' that the Court held is contained
9 in the 1988, 1989 and 1990 versions of Army Regulation 70-25."

10 Motion to Stay at 3. Even assuming that substantial questions
11 exist, Defendants have failed to establish a likelihood of
12 irreparable injury if the stay is denied or that the stay is in
13 the public interest. Defendants assert that the time and cost of
14 complying with the injunction are substantial. Defendants submit
15 the declaration of Dee Morris, the Chief of Staff for the Joint
16 Requirements Office for Chemical, Biological, Radiological and
17 Nuclear Defense. Morris declares that "even a minimum level of
18 compliance with the Court's injunction will impose substantial
19 monetary and manpower burdens on the Army." Morris Dec. ¶ 5.

20 Defendants provide two "informal" estimates for the cost of
21 compliance. If they contract with the Institute of Medicine to
22 conduct literature searches with respect to the relevant test
23 substances and compare those searches to previously conducted
24 reviews to determine whether there have been any material
25 developments, Defendants assert that the cost over five years will
26 be approximately \$8.8 million. Morris Dec. ¶ 12. Defendants
27 provide another option of having the government "conduct
28 scientific and medical literature searches pertaining to the

1 hundreds of substances at issue.” Morris Dec. ¶ 15. Morris
2 declares that this option presents unspecified “substantial
3 burdens and costs to the government.” Id. According to
4 Defendants, the “costs associated with reviewing and evaluating
5 the medical and scientific literature associated with just the
6 approximately twelve biological substances and vaccines used
7 during the test program” is \$860,000. Morris Dec. ¶ 15. Morris
8 further declares that these costs “would be substantially greater
9 if these literature reviews included all of the hundreds of test
10 substances used during the test programs, and had to be
11 continuously updated, as may be required by the Court’s
12 injunction.” Morris Dec. ¶ 18. The Court notes that the quoted
13 costs are for continuing and complete compliance. For example,
14 the \$8.8 million estimate to contract with the Institute of
15 Medicine is the amount expected to be spent over five years. As
16 Defendants themselves point out, the Ninth Circuit has agreed to
17 decide the parties’ cross-appeals on an expedited basis. If,
18 within the next few months, Defendants win their appeal, they will
19 be able to stop their efforts to comply with the injunction and
20 they will not have incurred all of the costs quoted.

21 While Defendants provide these “informal estimates”
22 indicating that compliance with the injunction may be expensive,
23 Defendants present no evidence that incurring such costs will
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1 cause irreparable harm.² In fact, the only harm identified by
2 Morris is the risk of "unnecessarily alarming past test
3 participants with additional notifications of minimal value to
4 them." Morris Dec. ¶ 5. Such speculative harm to the individuals
5 seeking the injunction is not sufficient to warrant a stay. See
6 County of Sonoma v. Federal Housing Finance Agency, 2011 U.S.
7 Dist. LEXIS 112945, *5 (N.D. Cal.) (finding no irreparable harm or
8 burden where the defendants claimed that a preliminary injunction
9 would impose a burden on its "limited financial and personnel
10 resources" but failed to "identify any agency activity that
11 will be undermined through the diversion of funds or staff
12 time.").

13 Moreover, an analysis of the balance of hardships tips in
14 Plaintiffs' favor. On the one hand, there are the expenses that
15 will be incurred by Defendants and, on the other, there is the
16 very real possibility that the aging and adversely affected test
17 subjects will not learn about health effects that could be
18 mitigated if known. Any expense incurred by Defendants doing
19 research and providing information to adversely affected test
20 subjects, even if Defendants should not have been required to
21 incur those expenses, would not be wasted. However, lost time for
22 the adversely affected test subjects could lead to irreversible
23 health consequences.

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25 ² Defendants state, "The Army's efforts to meet its other
26 obligations will be irreparably harmed by having to divert
27 resources to complying with an injunction that could ultimately be
28 changed by the ongoing litigation." Motion to Stay at 8.
However, Defendants do not support this contention with any
evidence.

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CONCLUSION

Accordingly, the Court DENIES Defendants' motion for a stay pending appeal. The Court also denies Defendants' request for an extension of the deadlines in the injunction. Defendants shall do their best to plan and begin compliance with the injunction and provide a report of their efforts and their plans to the Court by February 17, 2014.

IT IS SO ORDERED.

Dated: 2/5/2014


CLAUDIA WILKEN
United States District Judge