UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 15-2124 PA (AJWx)	Date	May 8, 2015
Title	America Unites for Kids, et al. v. Sandra Lyon, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Stephen Montes Kerr	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a Motion for Preliminary Injunction filed by plaintiffs America Unites for Kids and Public Employees for Environmental Responsibility (collectively "Plaintiffs") (Docket No. 13). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for May 4, 2015, is vacated, and the matter taken off calendar.

I. Factual and Procedural Background

Plaintiffs filed their Complaint on March 23, 2015, and then filed the operative First Amended Complaint ("FAC") as a matter of right on April 1, 2015. Plaintiffs served Defendants with the FAC and the Motion for Preliminary Injunction on April 2, 2015. Plaintiffs' FAC alleges a claim against defendants Sandra Lyon, Jan Maez, Laurie Lieberman, Jose Escarce, Craig Foster, Maria Leon-Vazquez, Richard Tahvildaran-Jesswein, Oscar de la Torre, and Ralph Mechur (collectively "Defendants") pursuant to the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2695d. Defendants are administrators and members of the Board of Education of the Santa Monica-Malibu Unified School District (the "District").

According to the FAC, testing in 2009 and 2010 revealed elevated levels of polychlorinated biphenyls ("PCBs") in air and soil samples at Malibu Middle and High School ("MHS") and Juan Cabrillo Elementary School ("JCES"). Additional testing undertaken since then has revealed that caulk and other building materials used at MHS and JCES contain levels of PCBs in excess of standards adopted by the Environmental Protection Agency ("EPA"). The FAC alleges that although the District has, in consultation with the EPA, agreed to remove the PCB-containing materials from certain areas within the schools, Defendants have refused or been slow to test additional areas within MHS and JCES that are also likely to contain building materials with levels of PCBs in excess of those allowed by the EPA.

In their Motion for Preliminary Injunction, Plaintiffs seek an order requiring Defendants to immediately stop using classrooms 3, 7, 401, 505, 704 (interior), and 704 (exterior) at MHS and classrooms 18, 19, 22, and 23 at JCES. Plaintiffs also seek an order requiring Defendants to remove and dispose of all caulk, and remediate any other materials contaminated with PCBs in those rooms by July

31, 2015. Plaintiffs' Motion for Preliminary Injunction relies on testing that Plaintiffs already completed at those locations and subsequent testing undertaken by the District that apparently confirms the presence of building materials containing PCBs in excess of the levels allowed by the EPA in each of those locations.

The District has committed to EPA that it will remove caulk from four other locations at MHS no later than June 30, 2015. On March 20, 2015, three days prior to Plaintiffs' filing of this action, the District committed to EPA that it would remediate the areas that are the subject of this Motion within one year. Indeed, according to the Supplemental Declaration of Douglas Daugherty, who is a Managing Principal with Environ, the environmental firm retained by the District to conduct as-needed environmental services at the District's schools and coordinate the District's response to the presence of PCBs at MHS and JCES, the "District plans to remediate as many of these locations as possible over the summer 2015 school break." (Supp. Daugherty Decl. 3:26-27.) According to the District, if it cannot accomplish that remediation by March 2016, it will submit to EPA a request for an extension.

II. **Legal Standard**

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." Id. The Ninth Circuit employs a "sliding scale" approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale," a preliminary injunction may issue "when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as long as the other two Winter factors have also been met. Id. (internal citations omitted). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

The injunction Plaintiffs seek goes far beyond preserving the status quo and would require Defendants to immediately take action to remove building materials from the locations at which testing has identified materials containing PCBs in excess of the limits allowed by EPA. Mandatory injunctions such as this are particularly disfavored. See Stanley v. University of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) ("A prohibitory injunction preserves the status quo. A mandatory injunction 'goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored.' When a mandatory preliminary injunction is requested, the district court should deny such relief 'unless the facts and law clearly favor the moving party.'") (citations omitted) (quoting Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979)); Martin v. International Olympic Comm., 740 F.2d 670, 675 (9th Cir. 1984) ("In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing

a preliminary injunction."); Anderson, 612 F.2d at 1115 ("'[M]andatory injunctions, however, are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'") (quoting Clune v. Publishers' Assn., 214 F. Supp. 520 (S.D.N.Y. 1963)).

III. Analysis

A. Success on the Merits

Pursuant to the TSCA, beginning in 1978, "no person may . . . use any polychlorinated biphenyl in any manner other than in a totally enclosed manner." 15 U.S.C. § 2605(e)(2)(A). The TSCA also authorizes the EPA Administrator to promulgate rules authorizing the use of PCBs "other than in a totally enclosed manner . . . if the Administrator finds that such . . . use . . . will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(2)(B). The EPA has concluded that items "with PCB at concentrations of 50 ppm or greater present an unreasonable risk of injury to health within the United States." 40 C.F.R. § 761.20. As a result, "[n]o persons may use any PCB, or any PCB item regardless of concentration, in any manner other than in a totally enclosed manner . . . ." 40 C.F.R. § 761.20(a).

Defendants do not dispute that caulk containing PCBs is not use of PCBs in "a totally enclosed manner." Moreover, Defendants appear to acknowledge that the TSCA requires the removal of PCB-containing building materials when testing indicates that those materials contain PCBs in excess of 50 ppm. Specifically, Defendants have committed to removing the PCB-containing caulk in the specific locations identified in their testing because that caulk contains concentrations of PCBs in excess of 50 ppm. Defendants appear to acknowledge that the TSCA requires them to remove caulk that they identify that contains concentrations of PCBs in excess of 50 ppm.

Throughout their Opposition, Defendants contend that EPA has authorized the District to allow PCB-containing materials to remain at the school so long as air and surface wipe testing does not reveal heightened levels of PCBs. See Opposition 5:11-13 ("EPA found unequivocally, as required by TSCA, that PCB materials remaining in place at the Malibu Campus do not pose an unreasonable risk of injury, either to human health or to the environment."); id. at 8:5-10 ("EPA has stated in no uncertain terms that '[a]n approval under TSCA regulations in 40 C.F.R. 761.61(c) requires EPA to make a finding that PCB remediation wastes remaining in place at the two schools will not pose an unreasonable risk of injury to health or the environment. EPA is hereby making a finding that the District meets this TSCA standard for Malibu High School and Juan Cabrillo Elementary School.'"); id. at 11:9-13 ("EPA, the lead agency with authority to require remediation of PCBs under TSCA, has already approved a remediation plan for the Malibu Campus that not only addresses identified PCB contamination but provides for mandatory best management practices that will eliminate the potential for future TSCA violations.").

At least on this record, the obvious problem with these statements is that the District appears to have conflated the identified caulk containing PCBs with concentrations in excess of 50 ppm that must

be removed with "remediation wastes" that are the subject of EPA's regulations for management in place. The EPA has neither approved nor disapproved the District's plans to remove the PCB-containing caulk. According to the October 31, 2014 letter from EPA to defendant Sandra Lyon, caulk removal "as proposed by the District, is not required to be part of the enclosed approval. EPA's enclosed approval addresses the PCBs remaining in the substrate (known as PCB remediation waste) after the PCB-containing caulk is removed at both schools." (Decl. of Doug Daugherty filed April 2, 2015 ("Original Daugherty Decl."), Ex. C.) Defendant's citations to EPA's approvals, which were issued pursuant to 40 C.F.R. § 761.61, deal with "remediation waste," not the caulk itself.

Whether intentionally misleading or merely unintentionally confusing, by conflating the PCB-containing caulk with the "remediation waste," Defendants have overstated the degree to which the relief Plaintiffs seek conflicts with EPA's expertise and considered judgment. As a result, the Court is not convinced that Plaintiffs are unlikely to prevail because, as Defendants argue, the EPA has primary jurisdiction over this dispute to which the Court should defer. Although, in August 2014, EPA informed the District that it "does not recommend additional testing of caulk unless dust or air samples persistently fail to meet EPA's health-based guidelines," (Original Daugherty Decl., Ex. F), nothing in the record to date suggests that an order requiring the removal of PCB-containing caulk would be contrary to or interfere with the EPA's expertise. See N.Y. Cmtys' for Change v. N.Y. City Dept. of Educ., No. 11CV3494 (SJ)(CLP), 2013 WL 1232244, at *6 (E.D.N.Y. Mar. 26, 2013).

Nor is the Court persuaded by Defendants' contention that Plaintiffs' 60 Day Notice of Intent to File Suit was not sufficiently specific to comply with the requirements of 40 C.F.R. § 702.61. Although Plaintiffs' Notice of Intent to File Suit identifies the rooms at the campus in which testing has shown caulk containing concentrations of PCBs in excess of 50 ppm, and information concerning suspicions that caulk installed in other locations at MHS and JCES built at the same time prior to 1980, and presumably using the same types of materials that testing has shown contain concentrations of PCBs in excess of 50 ppm, Defendants nevertheless assert that the Notice of Intent to File Suit must identify the precise location on each window where the caulk contains PCBs in excess of 50 ppm. Nothing in the TSCA's statutory or regulatory language requires that level of specificity. Cf. Ctr. for Biological Diversity v. Marina Point Dev. Co., 566 F.3d 794, 800-01 (9th Cir. 2008) (construing the Clean Water Act's similar notice provision and noting that the Ninth Circuit has "sometimes been slightly forgiving to plaintiffs in this area, but even at our most lenient we have never abandoned the requirement that there be a true notice that tells a target precisely what it allegedly did wrong, and when. The target is not required to play a guessing game in that respect."). Here, Defendants have been provided notice that caulk used on the windows of buildings at MHS and JCES constructed prior to 1980 may contain PCBs in concentrations that exceed the levels allowed by EPA. Whatever deficiencies may exist in Plaintiffs' Notice, those deficiencies are unlikely to jeopardize the likelihood that Plaintiffs will ultimately prevail.

The Court therefore concludes that Plaintiffs have established that they are likely to prevail on their claims that Defendants must remove the PCB-containing caulk at the locations identified in this Motion. At a minimum, Plaintiffs have raised serious questions going to the merits.

B. **Irreparable Harm**

Plaintiffs assert that they will suffer irreparable harm if the Court does not grant their requested injunctive relief because each day the students and teachers at the school are exposed to PCB-containing caulk increases the risks that they will suffer the serious health consequences associated with exposure to PCBs. According to the EPA, however, "research studies show that primary health concerns from PCBs in building materials derive from inhalation of contaminated air; and secondarily from contact with PCBs in dust and subsequent incidental ingestion." (Original Daugherty Decl., Ex. C.). After reviewing results from air and surface wipe sampling performed at the schools, EPA has determined that "the sampling data from the two schools demonstrate that these PCB exposure pathways are currently being addressed by the District's [Best Management Practices ("BMPs")] in a manner that protects public health." (Id.) The EPA therefore concluded that "the District's undertaking of the BMPs, as verified by pre- and post-BMP sampling data, demonstrates that the TSCA standard for no unreasonable risk is currently being met at MHS and JCES." (Id.)

Particularly in light of the fact that Plaintiffs seek a mandatory injunction rather than a prohibitory injunction, the Court does not believe that the speculative risk identified by Plaintiffs justifies granting the preliminary injunctive relief they seek. Specifically, there remains little more than a month remaining in the current school year, the District has already committed to completing as much of the remediation work that is the subject of this Motion during the summer break as possible, and EPA does not object to the District's plans to remove PCB-containing caulk within one year of its identification. The Court therefore concludes that Plaintiffs have not established that they will suffer irreparable harm in the absence of the preliminary injunction they seek.

C. **Balance of Hardships**

The balance of hardships, which in this instance involves weighing the minimal harm from exposure to PCBs in an environment where the District has management practices requiring frequent thorough cleanings and air and surface wipe sampling tests reveal low levels of PCBs in the air and dust against the disarray that would be caused by quickly closing areas of the campuses while school is still in session and requiring complicated remediation efforts on short notice, does not support issuance of preliminary injunctive relief. Indeed, the Court notes that even if Plaintiffs were to ultimately prevail at trial, the Court would provide Defendants with a reasonable amount of time within which to complete any required remediation. Given the apparent complexity of any such remediation, along with the need for adequate planning and time to consult with EPA, that deadline would likely exceed the three months Plaintiffs have proposed.

D. **Public Interest**

While the public certainly has a strong interest in providing safe school environments, there is also a strong public interest in avoiding the confusion and difficulties that would be caused by closing areas of MHS and JCES on shortened notice in the midst of the school year. The public also has a

strong interest in having remediation work performed in a well-planned, careful, and cost-effective manner. The mandatory injunction Plaintiffs seek would have the Court interfere in a complex construction and environmental remediation process with very limited information concerning the associated costs and challenges. The public's interest in an orderly clean-up weighs against the granting of a mandatory preliminary injunction.

The Court additionally notes that it is concerned that the public interest is not served by the combative manner in which the parties have litigated the matter to date. So far, in the six weeks this action has been pending, the parties have filed an ex parte application and two motions. In their arguments, the parties have taken aggressive positions that are not necessarily supported by the facts and law. As an example, the primary relief Plaintiffs' sought to compel in bringing this Motion is relief that Defendants had already voluntarily promised to undertake. It would be extremely unfortunate if resources that should be expended by the District to further its educational mission and provide a safe learning environment are instead diverted to fight an unnecessary legal battle in an overly litigious manner.

Conclusion

For all of the foregoing reasons, the Court concludes that Plaintiffs are not entitled to the preliminary injunction they seek. Although Plaintiffs have established a likelihood of success and raised serious questions concerning the merits, they have not established irreparable harm. The balance of hardships and public interest also do not tip in favor of awarding a mandatory preliminary injunction that would disrupt the school year and require the District to begin a potentially complex remediation plan without adequate planning. The Court therefore denies Plaintiffs' Motion for Preliminary Injunction.

IT IS SO ORDERED.