

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :  
 :  
v. : Civil No. WMN-08-717  
 :  
POTOMAC NAVIGATION, INC. :

MEMORANDUM

Before the Court is Defendant's Motion to Dismiss. Paper No. 6. The motion is fully briefed and ripe for decision. Also pending is Plaintiff's motion for a preliminary injunction. Paper No. 2. Upon review of the pleadings and the applicable case law, the Court determines that no hearing is necessary and that the motion to dismiss will be denied and the motion for preliminary injunction will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action is brought by the United States of America on behalf of the Administrator of the United States Environmental Protection Agency (EPA) pursuant to section 17 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2616. This action relates to the M/V Sanctuary, a decommissioned United States Navy hospital ship. The Sanctuary has been berthed in the Port of Baltimore for approximately 18 years and, for much of that time, was owned by Project Life, Inc., a non-profit organization. After Project Life defaulted on the payment of various dockage fees and other obligations, the Maryland Port Administration filed suit in this Court against Project Life and against the

Sanctuary, in rem. Civil Action No. WMN-07-602. As a result of that suit, this Court ordered that the Sanctuary be sold at public auction.

Defendant Potomac Navigation, Inc. (Potomac) purchased the Sanctuary. Potomac maintains that it purchased the vessel with the intention of towing it to Piraeus, Greece, where it would be modified to serve as a hotel platform or a storage facility.<sup>1</sup> As Potomac made arrangements for the towing, EPA requested permission to inspect the vessel for the presence of PCBs.<sup>2</sup> Potomac refused that request and moved in Civil Action No. 07-602 for a judgment declaring that EPA had no authority to inspect the vessel and enjoining EPA from seeking a warrant for that inspection. The United States, on behalf of EPA, opposed that motion and itself moved for a temporary restraining order and preliminary injunction to prevent Potomac from exporting the Sanctuary before EPA had the opportunity to inspect for PCBs. This Court granted the government's motion.

The EPA obtained a warrant to search the vessel and the subsequent inspection revealed numerous items on board that contained PCBs in concentrations greater than 50 parts per million (ppm), the regulatory limit under TSCA. Those items

---

<sup>1</sup> While the EPA has expressed concern that Potomac's true intention for the Sanctuary is to tow it to Turkey where it would be dismantled for scrap, the current Complaint is, for the most part, premised on the alleged modification of the Sanctuary.

<sup>2</sup> PCBs, or Polychlorinated biphenyls, are hazardous substances regulated under TSCA.

include paint on various parts of the vessel, gaskets in the ventilation systems, and the electrical cables. The original injunction preventing the export of the Sanctuary was then extended with the consent of the parties in order to give EPA time to discern if it would file a new civil enforcement action against Potomac. That civil action was filed on March 19, 2008.

The instant complaint contains four counts. In Count I, EPA alleges that towing the vessel to Greece for modification would violate TSCA's prohibitions of the "distribution in commerce" of PCBs. See 15 U.S.C. § 2605(e)(2)(A) and 40 C.F.R. § 761.20(c). In Count II, EPA asserts that going forward with the intended modifications of the vessel in Greece would necessarily involve the "exporting for disposal" of PCBs in violation of 15 U.S.C. § 2614(1) and 40 C.F.R. § 761.97. Count III essentially presents an alternative claim to Count II. EPA alleges that, should Potomac proceed with the declared use of the Sanctuary without first removing or "disposing" of the PCBs, this would constitute an unlawful "use" of PCBs in violation of 15 U.S.C. § 2605(e)(2)(A) and 40 C.F.R. § 761.20(a).

The final count relates to a particular piece of electrical equipment located on the deck of the Sanctuary. This piece of equipment, a rectifier, is labeled to indicate that it contains 1,800 pounds of Askarel, a liquid coolant that was commonly used in electrical equipment which contains 60% to 70% PCBs. According to the complaint, the metal exterior of the rectifier has corroded and there is residue at its base giving the

appearance that there has been a leak from a valve on the rectifier. EPA contends in this count that Potomac is required to dispose of the rectifier in accordance with the requirements of 40 C.F.R. § 761.60.

As relief, EPA seeks in its Complaint a permanent injunction enjoining Potomac from "distributing in commerce," "exporting," or "using" the Sanctuary and all PCBs and PCB containing items on the Sanctuary at concentrations greater than 50 ppm except as authorized under TSCA. EPA also seeks an order requiring Potomac to properly dispose of the rectifier and to clean up any PCBs that may have leaked from it in accordance with the requirements of TSCA. Finally, EPA would have Potomac ordered to develop a PCB disposal plan for the Sanctuary, subject to the approval of EPA, and asks that this Court retain jurisdiction over the case to assure that Potomac abides by that disposal plan. With the Complaint, EPA has also filed a motion for a preliminary injunction to preserve the status quo until such time as the merits of its causes of action and request for relief can be finally resolved. Paper No. 2.

Potomac has moved to dismiss the Complaint, in its entirety, arguing that its intended use of the Sanctuary does not fit within the TSCA's use of the terms "distribute in commerce," "export" or "use." Potomac also contends that under 40 C.F.R. § 761.99(a), Potomac's proposed towing of the vessel to Greece is exempted from TSCA, or at least from TSCA's regulations related to exportation, because Potomac avers that the Sanctuary and any

PCBs removed from the Sanctuary will be returned to the United States after the completion of the modification.

In addition to arguing that the Complaint should be dismissed for failure to state a claim, Potomac argues it should be dismissed for failure to join necessary parties. Potomac asserts that, because the Maryland Port Authority (MPA) is suffering financial and other harms due to the continued presence of the Sanctuary at one of its piers, it is a necessary party to this action. Because two government entities, the United States Navy and the Maritime Administration were once owners of the vessel but failed to remediate the PCB contamination, Potomac also argues that they too are necessary parties. In the alternative, Potomac argues that, if not dismissed, this action should at least be consolidated with Civil Action No. 07-602 so that MPA can assert its interests regarding the disposition of the Sanctuary.

## **II. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

### **A. Legal Standard**

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead plausible, not merely conceivable, facts in support of its claim. See Bell Atlantic Corp. v. Twombly, --- U.S. ----, ----, 127 S.Ct. 1955, 1974 (2007). Moreover, the "plaintiff's obligation to provide the 'grounds' of his 'entitl[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 1964-65. The court must,

of course, "accept the factual allegations of the complaint as true and must view the complaint in the light most favorable to the plaintiff." GE Inv. Private Placement Partners II v. Parker, 247 F.3d 543, 548 (4<sup>th</sup> Cir. 2001).

B. Count I - "Distribution in Commerce" of PCBs

Section 2605(e)(2)(A) of Title 15 of the United States Code provides that "no person may . . . distribute in commerce . . . any polychlorinated biphenyl in any manner other than in a totally enclosed manner."<sup>3</sup> Under TSCA,

The terms "distribute in commerce" and "distribution in commerce" when used to describe an action taken with respect to a chemical substance or mixture or article containing a substance or mixture mean to sell, or the sale of, the substance, mixture, or article in commerce; to introduce or deliver for introduction into commerce, or the introduction or delivery for introduction into commerce of, the substance, mixture, or article; or to hold, or the holding of, the substance, mixture, or article after its introduction into commerce.

15 U.S.C. § 2602(4). The term "commerce" is defined very broadly to include "trade, traffic, transportation, or other commerce (A) between a place in a State and any place outside of such State, or (B) which affects trade, traffic, transportation, or commerce described in clause (A)." 15 U.S.C. § 2602(3).

The Complaint alleges that there are numerous articles on

---

<sup>3</sup> "Totally enclosed manner" means any manner that will ensure no exposure of human beings or the environment to any concentration of PCBs. 40 C.F.R. § 761.3. Defendant does not dispute that the PCBs on the Sanctuary are not present in a totally enclosed manner under the facts as alleged.

the Sanctuary that contain PCBs in concentrations greater than the regulated amount. Thus, the Sanctuary is itself an article that contains PCBs. The Complaint also alleges that Potomac intends to transport the Sanctuary from Maryland to a place outside of Maryland (Greece) where it will be modified into either a hotel platform or a storage facility. The modification of a vessel from a deadship to a hotel platform or storage facility would undoubtable have some effect on commerce. The Court concludes that under the broad language of TSCA, this intended transportation of the Sanctuary could constitute a distribution in commerce.

C. Count 2 - "Exporting for Disposal" of PCBs

Under 40 C.F.R. § 761.97, no person may export for disposal PCBs or PCB Items at concentrations of 50 ppm or greater without an exemption. "Disposal" is defined to include: "actions relating to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items." 40 C.F.R. § 761.3. The EPA alleges that the anticipated modifications in Greece would necessarily involve the disposal of PCBs, rendering the towing of the Sanctuary to Greece an "export for disposal." The Complaint notes that Potomac has not applied for an exemption. EPA also opines that, should Potomac demolish or scrap the Sanctuary in Greece or some other overseas location, then all of the PCBs on board will have been exported for disposal in violation of 40 C.F.R. § 761.97.

Potomac does not appear to challenge that the alleged

intended modification of the vessel would involve the "disposal" of PCBs, nor could it as it has asserted all along that a part of the modification process in Greece would be the remediation of PCBs. See Mot. at 11. Potomac argues, however, that because "there is no reason to think (and EPA does not allege) that the PCBs will be disposed of in any way other than in compliance with U.S. law and regulation . . . the requested relief should be denied." Id. To bolster its assertion that the disposal will be properly conducted, Potomac adds that it has retained environmental consultants in Greece experienced in remediating PCBs in compliance with U.S. laws. Whether the PCBs will be properly disposed of in Greece is not relevant, however, to the issue at hand. TSCA prohibits any exportation for disposal without first obtaining an exemption from the EPA, regardless of whether there is a promise that the intended disposal will be in compliance with U.S. environmental laws and regulations.

Potomac also argues that towing the ship to Greece cannot be equated with exporting the vessel because there can be no "export" absent the sale of the vessel to some foreigner. Potomac avers that ownership of the vessel will remain in Potomac at all times. Id. at 5. Potomac has also represented that it is its intent to return the vessel to the United States after the modifications are complete. Potomac analogizes this temporary relocation of the Sanctuary to Greece with the "thousands of ships sail[ing] all over the world every day between ports of different foreign countries without being 'exported' (or

'imported') every time they depart or arrive." Id. Potomac then posits that a definition of export that encompasses vessels arriving in foreign ports is "ridiculous and inconsistent with international law." Id.

"Export" is not defined in TSCA nor in the regulations implementing TSCA. Albeit in a different context, the Fourth Circuit has discussed at length the meaning of "export" and "exportation."

"Exportation" has been defined as "the act of exporting; the sending of commodities out of a country, typically in trade," The Random House Dictionary of the English Language 682 (2d ed.1987), "the act of sending or carrying goods and merchandise from one country to another," Black's Law Dictionary 579 (6th ed.1990), and "a severance of goods from [the] mass of things belonging to [the] United States with [the] intention of uniting them to [the] mass of things belonging to some foreign country," id. The verb "export" itself means "to ship (commodities) to other countries or places for sale, exchange, etc.," Random House at 682, "to carry or send abroad," Black's at 579, and "to send, take, or carry an article of trade or commerce out of the country," id. These definitions vary in specificity, but all make clear that exportation involves the transit of goods from one country to another for the purpose of trade.

Common-law usage confirms this ordinary definition. Nearly a century ago the Supreme Court declared that "the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country." Swan & Finch Co. v. United States, 190 U.S. 143, 145, 23 S.Ct. 702, 47 L.Ed. 984 (1903). More specifically, the meaning "of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting

them to the mass of things belonging to some foreign country or other." Id. (internal quotation marks omitted). . . .

Throughout this history "exportation" has consistently meant the shipment of goods to a foreign country with the intent to join those goods with the commerce of that country. "The intent characterizes the act, and determines its legal complexion." Flagler v. Kidd, 78 F.341, 344 (2<sup>nd</sup> Cir. 1897).

United States v. Ehsan, 163 F.3d 855, 858 (4<sup>th</sup> Cir. 1998).

Under this understanding of the term "export," it is not clear whether towing the Sanctuary to Greece for modification would be an export. Potomac is certainly sending goods (the Sanctuary and the items on the Sanctuary) to another country. Although Potomac has claimed that the Sanctuary and all the PCBs and PCB Items will be returned to the United States for proper disposal with the Sanctuary,<sup>4</sup> that claim is not part of the Complaint and the Court need not consider it on a motion to dismiss. Drawing all inferences from the Complaint in EPA's favor, as the Court must do on a motion to dismiss, the Court finds that it is plausible that at least some of those goods will become part of the commerce of Greece. It would also appear likely that, while the ship is being modified, it will be a part of the commerce of Greece. If the ship is demolished or scraped, as the Complaint suggests it might be, all of the Sanctuary would

---

<sup>4</sup> Potomac also seems somewhat equivocal on this claim. See Mot. at 11 ("Potomac has already submitted evidence that it will be engaged in remediation of the PCBs with the intent of disposing the PCBs in the United States (or abroad if a permit is sought and obtained.)")(emphasis added).

have been "united with the mass of things" belonging to another country. At this stage in the litigation, the Court finds that the proposed course of action could involve the export of PCBs or PCB Items for disposal.<sup>5</sup>

Potomac also argues that, even if the Sanctuary's towing was otherwise considered an exportation, the activity in which it intends to engage is not violative of 40 C.F.R. § 761.97 because that activity falls under an exception to the regulation regarding exports, 40 C.F.R. § 761.99. Under that provision,

the following transboundary shipments are not considered exports or imports:

(a) PCB waste generated in the United States, transported outside the Customs Territory of the United States (including any residuals resulting from cleanup of spills of such wastes in transit) through another country or its territorial waters, or through international waters, and returned to the United States for disposal.

Because Potomac claims that, under its plan, the PCB wastes on board the Sanctuary will be returned to the United States for disposal, it asserts that Section 761.99 is applicable and its proposed action should not be deemed an "export."

Potomac's reliance on § 761.99 is misplaced. First, as noted above, Potomac's claims concerning the eventual return of

---

<sup>5</sup> In reaching this conclusion, the Court observes that the Sanctuary's voyage to Greece is not analogous, as Potomac attempts to argue, to oceangoing vessels calling at foreign ports. The Sanctuary has not moved on its own for more than 18 years. It would be towed and taken to Greece, would remain in Greece for a significant period of time, and would leave the port in a condition differing from that in which it arrived.

the PCB waste to the United States is not a part of the Complaint and the factual basis for such a claim would need to be established on a motion for summary judgment, not on a motion to dismiss. Also as noted above, Potomac is somewhat equivocal as to the ultimate disposition of the waste.

Even were the Court able to consider Potomac's representations regarding the eventual return of these PCB wastes to the United States, its proposed towing of the Sanctuary to another country and eventual return of the vessel to the United States is not the type of activity encompassed in this exception. As the history of the making of this rule discloses, the purpose of this exception was simply to allow for brief transit shipments of PCB wastes that initiate and end in the United States, but pass through another country in route, to not be treated as an imports or exports of PCB wastes. In the original notice of proposed rulemaking, the EPA gave the following explanation and example:

The proposal would clarify that PCB waste generated in the United States may be transported through a foreign country and returned to the United States for disposal. For example, PCB waste generated in Michigan could be transported across Canada for disposal in New York. Any residual PCB waste resulting from the cleanup of spills that might occur in transit could also be brought into the United States for disposal. Otherwise, it would be impractical and inefficient to transport PCBs generated in certain parts of the United States to nearby United States disposal facilities. This provision is included [] as a clarification. For purposes of this regulation, EPA considers such shipments to be transit

shipments, not exports or imports.

59 Fed. Reg. 62788, 62817-62818 (1994). With the issuance of the final rule, the EPA gave a similar example of an excepted transboundary shipment: "PCBs (including residues from spill clean-up in transit) are transported from the United States through another country and back to the United States (e.g., from Alaska through Canada to the continental United States)." 63 Fed. Reg. 35384, 35421 (1998). The shipment of PCB wastes to another country where they will be processed for some promised return to the United States at some unspecified time in the future is far different than the type of transboundary shipment anticipated by this rule.<sup>6</sup>

#### D. Count III - "Use" of PCBs

EPA asserts in Count III that, should Potomac in the course of modifying the Sanctuary to serve as a hotel platform or storage unit not fully remove the PCBs and PCB Items currently

---

<sup>6</sup> In its Reply memorandum, Potomac makes much of the fact that in the original notice of proposed rulemaking, the EPA indicates its awareness that ships are "'sometimes exported for salvage of the considerable amount of metal they contain'" and that PCBs are often present in the integral components of the ships. Reply at 6 (quoting 59 Fed. Reg. 62817). The paragraph discussing this shipbreaking activity, Potomac notes, is immediately followed by a paragraph discussing the proposed rule that became § 761.99. Id. The significance that Potomac would derive from the proximity of these paragraphs is unclear. While the EPA indicated that it was proposing a categorical exception for certain transboundary shipment under § 761.99, it gave no indication that the exportation of PCB-laden ships for salvage would fall under that categorical exception. In fact, the EPA stated clearly that it was proposing that this type of export would be allowed only on a "case-by-case" basis. 59 Fed. Reg. 62817.

onboard, it then would be in violation of TSCA's prohibition of the "use" of PCBs. See 15 U.S.C. § 2605(e)(2)(A) ("no person may . . . use any polychlorinated biphenyl in any manner other than in a totally enclosed manner"). Potomac's only response as to this count is that, "[s]ince the PCBs will be remediated, there will be no illegal use of the vessel which must be enjoined." Mot. at 11. While that may or may not be true, it certainly is not established at this point in the litigation.

E. Count IV - Remediation of Rectifier

As noted above, the Complaint states that there is a rectifier on the deck of the Sanctuary whose label indicates that it contains 1,800 pounds of Askarel, the generic name for a coolant commonly used in electrical equipment which contains 60% to 70% PCBs. The Complaint also states that the metal exterior of the rectifier is in a "highly corroded condition" and residue at the base of the rectifier indicates that there has already been some leakage. EPA alleges that, given the condition of the rectifier, it will continue to corrode if left on the deck of the Sanctuary and will eventually leak a substantial quantity of fluid likely to contain high concentrations of PCBs, which will then flow off of the deck and into whatever body of water in which the Sanctuary is floating.

Section 761.50(a)(4) of Title 40 of the Code of Federal Regulations provides that "[s]pills and other uncontrolled discharges of PCBs at concentrations of  $\geq 50$  ppm constitute the disposal of PCBs." Section 761.60 of that title sets forth the

method in which PCBs and articles containing PCBs must be disposed. EPA seeks an order requiring that Potomac dispose of the rectifier in accordance with those requirements.

Potomac's only response as to this count is to note EPA's inability to determine if the residue from the rectifier or the rectifier itself contains regulated quantities of PCBs. The Complaint states that, while the qualitative analysis of the residue revealed that it contained PCBs, EPA was unable to determine the PCB concentration. EPA elected not to open the rectifier to obtain a sample of the fluid out of concern that, due to the rectifier's highly corroded condition, any valve that was opened might fail or malfunction, causing an extensive leak or spill.

At the pleading stage, EPA need only present a plausible claim that the rectifier contains regulated concentrations of PCB. The allegation that the rectifier is labeled as containing Askarel exceeds that burden.

### **III. MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTY**

#### **A. Legal Standard**

Rule 12(b)(7) of the Federal Rules of Civil Procedure allows a court to dismiss an action for failure to join a party in accordance with Rule 19. Rule 19 requires that a party subject to service of process be joined if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action

in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. P. 19(a). "The inquiry contemplated by Rule 19(a) is a practical one, and is addressed to the sound discretion of the court." Heinrich v. Goodyear Tire & Rubber Co., 532 F. Supp. 1348, 1359 (D. Md. 1982) (citing Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 1108 (4<sup>th</sup> Cir. 1980)).

The Court does not find that dismissal for failure to join a necessary party is warranted here. Regarding MPA, Potomac has pointed to no interests of MPA's that would need to be litigated with the TSCA claims at issue here. EPA has no apparent claim against MPA and MPA has no claim against EPA. Potomac has not identified any claim it might have against MPA and any claim MPA might have against Potomac would be independent of the TSCA claims that EPA asserts against Potomac.<sup>7</sup> Nor is there any reason to consolidate this action with Civil Action No. 07-602. While the two actions are factual related, the legal issues involved are completely different.

Regarding the need to join the United States Navy or the

---

<sup>7</sup> If the MPA has some claim against Potomac related to the berthing of the Sanctuary, the MPA could move to intervene in this action and the Court would consider in response to that motion whether those claims should be heard along with those of the EPA.

United States Maritime Administration (MarAd), the government is correct that the United States executive is already a party to this action. If Potomac believes that it may have some cause of action against either agency based upon its detrimental reliance on some conduct or representations of those agencies, it can take appropriate action.

**IV. MOTION FOR PRELIMINARY INJUNCTION**

Aside from moving to dismiss the Complaint in its entirety, Potomac has not responded to the motion for preliminary injunction. The issues raised in the motion for a preliminary injunction are largely identical to those considered by this Court in issuing the temporary restraining order and the preliminary injunction in Civil Action No. 07-602. The only fact that has changed is that there is now definitive evidence that there are PCBs on the Sanctuary where in Civil Action No. 07-602, the presence of PCBs was only suspected. Therefore, for the reasons given in issuing the previous preliminary injunction, the Court will grant the instant motion in order to continue to maintain the status quo.

**V. CONCLUSION**

For the reasons stated, Defendant Potomac's motion to dismiss will be denied. The United States' motion for preliminary injunction will be granted. A separate order will issue.

\_\_\_\_\_  
/s/

William M. Nickerson  
Senior United States District Judge

Dated: July 3, 2008