UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL JUSTICE HEALTH ALLIANCE FOR CHEMICAL POLICY REFORM and THE BREAST CANCER FUND,

Plaintiffs,

-against-

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Defendant.

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16-cv-9401 (PKC)

MEMORANDUM AND ORDER

CASTEL, U.S.D.J.

Plaintiffs filed this action under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA"), seeking declaratory relief directed to the United States Consumer Product Safety Commission ("CPSC"). This case involves the CPSC's rulemaking obligations related to phthalates, a chemical that softens plastics. Phthalates are sometimes used in children's toys and are believed to cause permanent harm to the male reproductive system.

In 2008, the President signed into law a statute that banned certain types of phthalates from use in children's toys and delegated authority to the CPSC to further regulate the use of phthalates in children's products. 15 U.S.C.A. § 2057c. It is undisputed that, pursuant to statute, the CPSC was required by law to issue a final rule no later than January 14, 2015, but has failed to do so.

The Complaint seeks a declaration requiring the CPSC to issue the final rule. This action is directed solely to the timely issuance of a final rule and not to the rule's contents.

On March 23, 2017, the parties submitted to the Court a proposed consent decree that would require the CPSC to vote on a final rule no later than October 18, 2017.

On April 6, 2017, the National Association of Manufacturers (the "NAM") filed a motion to intervene pursuant to Rule 24, Fed. R. Civ. P., and a motion to dismiss the Complaint for lack of subject matter jurisdiction. (Docket # 28.) The NAM's membership includes companies that manufacture and import phthalates. The NAM contends that plaintiffs have failed to show that they have suffered an injury as a result of a delay in the final rule because the challenged categories of phthalates are not currently used in children's products. Therefore, the NAM contends, plaintiffs do not have Article III standing. Of the three plaintiff organizations, only the Natural Resources Defense Council ("NRDC") has made submissions in opposition to the NAM's motion, including declarations of individual members who describe injuries suffered as a consequence of the CPSC's delay in issuing a final rule.

Federal courts have an independent obligation to examine their subject matter jurisdiction. See, e.g., Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 104 (2d Cir. 2014). This Court has reviewed the submissions made by the NAM, the NRDC and the CPSC related to plaintiffs' Article III standing. For reasons that will be explained, this Court comfortably concludes that the NRDC has made a showing that it has Article III standing. The additional two plaintiffs, Environmental Justice Health Alliance for Chemical Policy Reform and The Breast Cancer Fund, have made no showing in support of their standing, and their claims are therefore dismissed.

The Court has fully considered the NAM's submissions. Because the motion to intervene is directed only to the Court's subject matter jurisdiction, which the Court now

considers as a threshold matter, and because the NAM does not seek to intervene for additional purposes, the motion to intervene is denied.

OVERVIEW OF PLAINTIFFS' CLAIMS.

Phthalates are a category of chemical used to soften plastics, and have been used in children's toys. (Compl't ¶ 1.) According to plaintiffs, studies have shown that phthalates interfere with hormone development and can cause permanent harm to the human reproductive system. (Compl't ¶ 2.)

The Consumer Product Safety Improvement Act of 2008 ("CPSIA") permanently banned the sale of children's toys and childcare products that contain more than 0.1 percent of three phthalate categories known as DEHP, DBP and BBP. (Compl't ¶ 14.) The CPSIA states in part:

> Beginning on the date that is 180 days after August 14, 2008, it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children's toy or child care article that contains concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP).

15 U.S.C.A. § 2057c(a).

The statute also directed the CPSC to form a Chronic Hazard Advisory Panel ("CHAP") to study the effects of phthalates on children's health, and to recommend whether additional phthalates should be banned. Id. § 2057c(b)(2)(A). The statute directs that the CPSC "shall . . . promulgate a final rule" governing the use of phthalates in children's products within 180 days of receiving a final report from the CHAP. Id. § 2057c(b)(3).

The CHAP was formed in April 2010 and submitted a final report to the CPSC on July 18, 2014. (Compl't ¶¶ 20-21.) The CHAP recommended that additional categories of phthalates not specifically listed in the CPSIA be permanently banned from children's products

based on the harms that they present to male reproductive development. (Compl't ¶ 22.) On December 30, 2014, the CPSC published a proposed rule that would permanently ban five additional phthalates based on the CHAP report. (Compl't ¶ 23; 79 Fed. Reg. 78,324 (Dec. 30, 2014).) Those five phthalates are abbreviated as DINP, DPENP, DHEXP, DCHP and DIBP. (Id.)

Pursuant to 15 U.S.C. § 2057c(b)(3), the CPSC was required to publish a final rule regulating phthalates in children's products no later than 180 days after receiving the July 18, 2014 CHAP report, meaning that the final rule was due to be issued no later than January 14, 2015. (Compl't ¶ 24.) However, as of the time that the Complaint was filed on December 6, 2016, the CPSC still had not issued a final rule. (Compl't ¶ 25.)

The three plaintiffs are non-profit organizations that, among other things, advocate for issues related to public health and the environment. (Compl't ¶¶ 5-7.) They allege the following injury:

> Plaintiffs' membership includes individuals and families who are concerned about the health risks to their children from exposure to phthalates in toys and child care articles. The CPSC's failure to publish a final rule regulating phthalates in children's products creates a risk of harm to plaintiffs' members and their children. Plaintiffs' members have been and continue to be injured by the CPSC's unlawful delay in publishing the final phthalate regulation.

(Compl't ¶ 8.) They also allege that the CPSC's delay in issuing a final rule is causing "continued human exposure" to phthalates that would otherwise be banned if the proposed rule were finalized. (Compl't ¶ 26.)

On March 23, 2017, plaintiffs and the CPSC submitted a Proposed Consent Decree and a proposed Stipulation and Order. In the Proposed Consent Decree, "the CPSC acknowledges that the CPSC has not yet promulgated a Final Phthalates Rule . . . ." (Consent

Decree at 2.) It states that in order to satisfy 15 U.S.C. § 2057c(b)(3), the CPSC "shall vote on a Final Phthalates Rule by no later than October 18, 2017 . . . ." (Proposed Consent Decree ¶ 3.) It further provides that "[n]othing in Paragraph 3 shall limit or modify any discretion accorded the CPSC . . . as to the substance of the Final Phthalates Rule." (Consent Decree ¶ 4.)

Thus, the proposed Consent Decree is not directed to the contents of the CPSC's final rule, and only provides that it shall be issued by a date certain.

THE NRDC HAS MADE A SHOWING THAT IT HAS ARTICLE III STANDING.

A. Rule 12(b)(1) Standard and Article III Standing.

Rule 12(b)(1) provides that a complaint may be dismissed for lack of subject matter jurisdiction. The party invoking subject matter jurisdiction has the burden of establishing its standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). A Rule 12(b)(1) challenge may be either facial or factual. Carter v. HealthPort Techs., LLC, 822 F.3d 47, 56 (2d Cir. 2016). Where, as here, there is a fact-based challenge to standing, "the plaintiffs will need to come forward with evidence of their own to controvert that presented by the defendant . . . ." Id. at 57. "'[T]he court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits, and if necessary, hold an evidentiary hearing.'" Fountain v. Karim, 838 F.3d 129, 134 (2d Cir. 2016) (quoting Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000)).

"'[T]he irreducible constitutional minimum of standing' derives from Article III, Section 2 of the U.S. Constitution, which limits federal judicial power to 'cases' and 'controversies.'" NRDC v. U.S. Food & Drug Admin., 710 F.3d 71, 79 (2d Cir. 2013), as amended (Mar. 21, 2013) (quoting U.S. Const. art. III, § 2; Lujan, 504 U.S. at 560). "To establish that a case or controversy exists so as to confer standing under Article III, a plaintiff

must satisfy three elements: (a) the plaintiff must suffer an 'injury in fact,' (b) that injury must be 'fairly traceable' to the challenged action, and (c) the injury must be likely to be 'redressed by a favorable decision' of the federal court." NRDC, 710 F.3d at 79. "A membership organization like NRDC may assert the standing of its members if, among other requirements not at issue here, it establishes that at least one of its members has standing to sue individually." Id.

B. The NRDC Has Made a Showing of Injury in Fact.

"Injury in fact is 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" NRDC, 710 F.3d at 80 (quoting Lujan, 504 U.S. at 560). "To establish injury in fact based on exposure to a potentially harmful product, a plaintiff must show 'a credible threat of harm' due to that exposure." Id. at 81.

"[T]he relevant 'injury' for standing purposes may be exposure to a sufficiently serious risk of medical harm – not the anticipated medical harm itself." Baur v. Veneman, 352 F.3d 625, 641 (2d Cir. 2003). For instance, "where plaintiffs reside in close proximity to sources of air pollution, 'uncertainty' as to the health effects of such pollution constitutes cognizable injury-in-fact." Id. at 634. "'[T]he injury-in-fact analysis is highly case-specific, and the risk of harm necessary to support standing cannot be defined according to a universal standard.'" Id. at 637 (internal citation omitted). "[T]o support standing, the plaintiff's injury must be actual or imminent to ensure that the court avoids deciding a purely hypothetical case in which the projected harm may ultimately fail to occur." Id. at 632.

In Baur, plaintiff sought to require the Department of Agriculture to ban the human consumption of downed livestock based on the risks associated with Bovine Spongiform Encephalitis, commonly known as "mad cow disease." Id. at 627-28. Although the disease had

not been detected in the United States, the Second Circuit concluded that "an enhanced risk of disease transmission may qualify as injury-in-fact," and that the plaintiff had alleged a credible risk of personal harm based on potential future exposure to contaminated beef. Id. at 628, 636. Among other things, the Second Circuit relied on the existence of government studies that confirmed risks related to the disease, and plaintiff's allegation that his risk of harm arose from an established government policy – in that case, the decision to permit the human consumption of downed livestock. Id. at 637; see also id. at 637-38 ("Significantly, the USDA itself as well as other government agencies have recognized that downed cattle are especially susceptible to BSE infection.").

The NRDC has shown a risk of harm consistent with Baur's requirements. Here, Congress recognized the health risks associated with phthalates when it enacted the CSPIA. The CSPIA banned the sale and distribution in commerce of three specific types of phthalates (DEHP, DBP and BBP), and directed the formation of the CHAP and the promulgation of a final rule to prohibit the use of additional phthalates. 15 U.S.C. § 2057c(a), (b). In summarizing the CHAP's findings, the CPSC described "the cumulative risk of male developmental reproductive effects," including testicular dysgenesis syndrome, as well as neurobehavioral effects. 79 Fed. Reg. at 78,327.

The NAM argues that of the five categories of phthalates addressed by the CPSC's proposed rule, one has been subject to an interim ban since February 2009, three were found by the CHAP not to be currently used in children's products, and a fifth was found by the CHAP to be used only "in some toys" but not in "quantifiable exposures . . . ." (Docket # 29 at 14-19.) The NAM argues that because exposure to these five categories of phthalates is limited

to non-existent, plaintiffs cannot allege a "direct risk of harm which rises above mere conjecture." Baur, 352 F.3d at 636.

But the CPSC and the NRDC have come forward with evidence that at least three of the five phthalates potentially subject to the final rule are contained in children's products. A CPSC memorandum of October 27, 2014 summarizes the findings of a study done by the agency's Division of Chemistry. (Knicley Dec. Ex. A.) That study sampled 1,125 children's toys and child care articles, and found that 725 contained one of three types of phthalate: DEHP, DIBP or DINP. (Id. at 1-2.) Although DINP was subject to an interim statutory ban, it was nevertheless found in 93 samples, amounting to about 8 percent of the products. (Id. at 2.)

In addition, the CPSIA's interim ban on DINP only applies to toys and childcare items "that can be placed in a child's mouth." 15 U.S.C. § 2057c(b)(1). Thus, contrary to the NAM's contention, DINP has not been banned from the toy marketplace, but only as to a subset of products. See 79 Fed. Reg. at 78,335 ("The statute's interim prohibition on DINP applies only to children's toys that can be placed in a child's mouth, which is narrower in scope than the permanent prohibitions on DEHP, DBP, and BBP in all children's toys."). The CPSC's interim rule proposes to ban the use of DINP in all toys. Id. In its proposed rule, the CPSC concluded that permanently banning DINP from use in toys was "necessary to ensure a reasonable certainty of no harm to children with an adequate margin of safety." 79 Fed. Reg. at 78,335.

Another category of phthalates, DIBP, is not currently restricted. The CPSC's 2014 study found DIBP in 132 of the 1125 products tested. (Knicley Dec. Ex. A at 2.) The proposed rule states that a permanent ban on DIBP is needed "to protect the health of children because it would prevent current and future use of this antiandrogenic phthalate in toys and child care articles." 79 Fed. Reg. at 78,336.

The NRDC also notes that the text of the CSPIA directed the CHAP and the CPSC to take actions directed to the "cumulative effect of total exposure to phthalates, both from children's products and from other sources, such as personal care products." 15 U.S.C. § 2057c(b)(2)(B)(iv). The proposed rule discusses the cumulative effect of phthalate exposure, as opposed to exposure to one type of phthalate in isolation. See 79 Fed. Reg. at 78,327-28.

Even if the NRDC had not come forward with evidence about the continued use of phthalates, its failure to do so would not necessarily be a barrier to establishing injury in fact. As discussed, Baur concluded that a plaintiff's fear of exposure to Bovine Spongiform Encephalitis, as transmitted from fallen livestock, alleged a credible risk of personal harm, even though the disease had not been detected in the United States. See 352 F.3d at 636 ("there is no question that Baur alleges a discrete, individual risk of personal harm from exposure to contaminated beef . . . ."). The harm in Baur was based in significant part on agency findings of the risks associated with downed cattle. See id. at 637-40. Similarly, in this case, Congress and the CPSC have expressly determined that phthalates pose a risk to human health. Assuming that manufacturers have voluntarily elected not to use phthalates in children's products while the rulemaking process has been pending, that unilateral decision by manufacturers and importers is subject to change at any time. A consumer still has a credible risk of personal harm from potential exposure to phthalates, just as the plaintiff in Baur adequately alleged injury based on potential exposure to contaminated beef.

At the pleading stage, the NRDC has made a sufficient showing that its members have suffered injury in fact, based on a credible harm posed by actual exposure to phthalates. Its claims of the risks associated with phthalate exposure are consistent with Congress's passage of the CSPIA and the CPSC's proposed rule. The NRDC has adequately "show[n] 'a credible

threat of harm' due to that exposure." NRDC, 710 F.3d at 81. As to the specific phthalates that the NAM claims are not in use, the NRDC has come forward with evidence that they continue to be used in children's toys and childcare products. At the pleading stage, this is sufficient to show that the NRDC has suffered an injury in fact.

C. The NRDC Has Made a Showing that any Injury Is "Fairly Traceable" to the Rulemaking Delay.

In addition to showing injury in fact, the injury "must be 'fairly traceable' to the challenged action . . . ." NRDC, 710 F.3d at 79. This requires a plaintiff's injury to be fairly traceable to the defendant's challenged action, and not the result of "'the independent action of some third party not before the court.'" Carter, 822 F.3d at 55 (quoting Lujan, 504 U.S. at 560-61). This requirement "does not create an onerous standard." Id. Even if an agency's inaction is a small, "incremental" source of plaintiff's injury, it is "fairly traceable." See Massachusetts v. E.P.A., 549 U.S. 497, 524-25 (2007); see also NRDC, 710 F.3d at 85 (plaintiffs have shown causation when, "but for" an agency's "challenged inaction," a hazardous product would be removed from the market).

As discussed, Congress has delegated authority to the CPSC to promulgate a final rule addressing phthalate exposure. The NRDC has made a showing that the CPSC's delay in promulgating the rule has facilitated a continued exposure to phthalates. As the CPSC acknowledges (Docket # 45 at 18), the NRDC has made a showing that the CPSC's delay in issuing a final rule is contributing to its members' exposure to phthalates.

The NRDC has therefore satisfied the fairly traceable requirement.

D. The NRDC Has Made a Showing of Redressability.

The third requirement to confer Article III standing is that "the injury must be likely to be 'redressed by a favorable decision' of the federal court." NRDC, 710 F.3d at 79.

"Where, as here, a litigant complaining of procedural or substantive injury is not the regulated party, the litigant must demonstrate that favorable action by the agency is likely to result in favorable action by the regulated party in addition to demonstrating a link between the procedural or substantive injury to the litigant and the adverse agency action." Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221, 229 (2d Cir. 2012). A litigant challenging agency procedure may show redressability even if it "cannot establish with any certainty" that agency action will result in relief. Lujan, 504 U.S. at 572 n.7.

The NRDC seeks to compel the CPSC to issue a final rule concerning the use of phthalates in children's products. Its claims are directed to procedural rights and not to the ultimate substance of the final rule. However, to the extent that the NRDC's injuries implicate phthalate exposure, the fact that the proposed rule suggests a limitation on phthalate use supports a likelihood that the final rule could do the same. Even if the CPSC's final rule does otherwise, any uncertainty concerning permissible uses of phthalates would be redressed by the issuance of a final rule. Therefore, even though the NRDC cannot establish with certainty that the final rule will eliminate exposure to phthalates, pursuant to Babylon and Lujan, it has made a showing of redressability. See also Baur, 352 F.3d at 632 n.6 ("[I]t seems clear that if the alleged risk of disease transmission from downed livestock qualifies as a cognizable injury-in-fact then Baur's injury . . . could be redressed if the court granted Baur's request for equitable relief.").

E. The NRDC Has Established that Certain of Its Members Have Standing Individually.

The NRDC has submitted declarations from three of its members that describe the injuries that they have experienced because a final rule has not been issued. A membership organization must establish "that at least one of its members has standing to sue individually." NRDC, 710 F.3d at 79.

Janet Friesen states that she is a member of the NRDC, and has three children, ranging from two to eleven years in age. (Friesen Dec. ¶¶ 1-2.) She states that she buys toys for her children and plans to do so in the future. (Friesen Dec. ¶ 3.) She states that she is concerned about her children's exposure to phthalates, and that generally, product labels do not indicate whether toys contain phthalates. (Friesen Dec. ¶¶ 4-5.) She states that the issuance of a final rule would lessen her fears about the health risks that phthalates pose to her children. (Friesen Dec. ¶ 7.)

Elyssa Getreu states that she is a member of the NRDC, and has three children who range between five and eleven years in age. (Getreu Dec. ¶¶ 1-2.) She states that she has researched the role of chemicals in plastics, and is "very worried about endocrine disruptors including phthalates." (Getreu Dec. ¶ 4.) Getreu states that she is particularly worried about the role of phthalates in her children's toys. (Getreu Dec. ¶ 5.) She states that because plastics products do not label whether toys contain phthalates, she is unable to make purchasing decisions that limit phthalate exposure. (Getreu Dec. ¶ 6.) Getreu states that she "absolutely would feel safer" if the CPSC adopted its proposed rule. (Getreu Dec. ¶ 7.)

Audrey Sarn states that she is a member of the NRDC, and has five children ranging from three to eight years in age. (Sarn Dec. ¶¶ 1-2.) She states that she is "concerned" about her children's exposure to "really dangerous" phthalates, but that their exposure to phthalates is inevitable due to the widespread use of plastic products. (Sarn Dec. ¶¶ 4-5.) Sarn states that she has an older daughter with sensory deficits who medically requires oral soothing with products that contain plastic. (Sarn Dec. ¶¶ 6-7.) Sarn states that because product labels do not include information about phthalates, she is unable to eliminate or control her children's

exposure to them. (Sarn Dec. ¶ 10.) She states that the issuance of a final rule would make her "feel a lot better" about eliminating phthalate exposure. (Sarn Dec. ¶ 11.)

The Court concludes that the affidavits of these individual NRDC members make a showing that they have suffered an injury in fact that is fairly redressable to the rulemaking delay, which would possibly be redressed by a final rule from the CPSC.

F. The Additional Two Plaintiffs Have Made No Showing in Support of Their Standing.

Plaintiffs Environmental Justice Health Alliance for Chemical Policy Reform and The Breast Cancer Fund have not come forward with facts to support their claims of injury. As noted, when there is a fact-based challenge to standing, plaintiffs must "come forward with evidence of their own" in support of Article III standing. Carter, 822 F.3d at 56. For membership organizations, this includes a showing that at least one member has standing to sue individually. NRDC, 710 F.3d at 79.

While the NRDC has come forward with evidence of the injury that potential phthalate exposure causes to its members, the additional two plaintiff organizations have made no such showing. Absent such a showing, this Court cannot conclude that they have Article III standing. The claims of plaintiffs Environmental Justice Health Alliance for Chemical Policy Reform and The Breast Cancer Fund are therefore dismissed.

THE NAM'S MOTION TO INTERVENE.

The NAM moves to intervene pursuant to Rule 24 and, upon intervention, to dismiss the Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The NAM is an industrial trade association that represents industrial manufacturers, including companies that produce and import phthalates. (Palmieri Dec. ¶ 2.)

The NAM seeks to intervene solely for the purpose of challenging the plaintiffs' Article III standing. (See, e.g., Docket # 30 at 4 (asserting that NAM seeks "to intervene in order to dismiss the Complaint for lack of subject-matter jurisdiction because plaintiffs lack standing under Article III of the U.S. Constitution to compel any relief impacting the rulemaking . . . .").) The NAM asserts that this Court must consider its standing arguments as a threshold matter, regardless of whether it formally intervenes. See, e.g., Cronin v. Browder, 898 F. Supp. 1052, 1057 (S.D.N.Y. 1995) (Schwartz, J.). Plaintiffs' action is limited in scope to the enforcement of the CPSIA's statutory deadline and not the substance of any proposed or final rule.

In adjudicating the three plaintiffs' Article III standing, the Court has resolved the only issue that the NAM seeks to raise as an intervenor. Its motion to intervene is therefore rendered moot, and denied.

CONCLUSION.

For the reasons explained, Court concludes that it has subject matter jurisdiction over the NRDC's claims. The additional two plaintiffs, Environmental Justice Health Alliance for Chemical Policy Reform and The Breast Cancer Fund, have made no showing in support of their Article III standing and are therefore dismissed from this case.

The Court has considered the NAM's challenge to subject matter jurisdiction, and because the NAM's motion to intervene is limited to the jurisdictional challenge, its motion to intervene is denied. The Clerk is directed to terminate the NAM's motion. (Docket # 28.)

The proposed consent decree will issue.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
August 18, 2017