UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FRAN ANSLEY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 3:13-cv-000190
	)	Judge Collier
STEVEN V. ERHART, Manager of the Nuclear Production Office, et al.,	)	
	)	
Defendants.	)	

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

The United States of America makes this special appearance on behalf of federal employees Steven C. Erhart, Larry Kelly, Neile L. Miller, and Steven Chu, all of whom are named as defendants in their official capacities ("Federal Defendants"), by and through William C. Killian, United States Attorney for the Eastern District of Tennessee, and without waiving any defenses, responds in opposition to Plaintiffs' Motion for Temporary Restraining Order (Doc. 2).

PROCEDURAL POSTURE

Plaintiffs, who claim standing as citizens who have exercised First Amendment rights at the United States Department of Energy, National Nuclear Security Administration, Y-12 National Security Complex, filed suit on April 3, 2013, claiming that their First Amendment rights are being violated by the erection of a "barricade/fence around a piece of property adjacent to the Y-12 facility." Compl. ¶ 10. Plaintiffs contemporaneously filed a Motion for Temporary Restraining Order and a brief in support (Docs Nos. 2, 3). The Motion seeks the following: "a mandatory Temporary Restraining Order directing the Defendants to remove the temporary barrier/fence which has been placed along the edge of Scarboro Road at the Y-12 facility prior to April 6, 2013." Mot. (Doc. No. 2), p. 2.

The Federal Defendants now respond in opposition to the relief sought in the Motion.[1]

BACKGROUND ON THE Y-12 NATIONAL SECURITY COMPLEX

The National Nuclear Security Administration (NNSA) was established by Congress in 2000, pursuant to the NNSA Act (50 U.S.C. §§ 2401 *et seq.*), as a separately organized agency within the United States Department of Energy (DOE). The head of NNSA is the Administrator for Nuclear Security, and that role is currently filled in an acting capacity by Neile L. Miller. The NNSA Act provides that the Administrator has authority over, and is responsible for, all programs and activities of the NNSA, with the exception of functions of the Deputy Administrator for Naval Reactors. NNSA employees are responsible to and subject only to the authority, direction, and control of the Secretary of Energy, the Deputy Secretary of Energy, and the Administrator. Only the authority of the Administrator is delegable. 50 U.S.C. § 2410. NNSA is responsible for maintaining the safety, effectiveness, and security of the United States nuclear weapons stockpile to meet national security requirements, and for nuclear nonproliferation activities. In fulfilling this responsibility, NNSA manages nuclear weapons and related programs and facilities, including the Y-12 National Security Complex (Y-12), located in Oak Ridge, Tennessee.

The original purpose of Y-12 was to make enough highly enriched uranium for the atomic bomb known as "Little Boy," which was ultimately detonated and resulted in the surrender of the Empire of Japan and the end of World War II. Since that time, Y-12's

[1] The Federal Defendants are responding only to the sole request of the Motion that the Court order removal of the fence. Plaintiffs' complaint and brief raise ambiguous claims about the "New Hope Center" accommodation, but the Motion does not seek any relief regarding the New Hope Center.

missions have changed, and today, Y-12 provides critical elements of NNSA's missions that ensure the safety, effectiveness, and performance of the U.S. nuclear weapons deterrent.

Currently, Y-12 is the primary NNSA site for enriched uranium processing and storage and is one of the primary manufacturing facilities for maintaining the U.S. nuclear weapons stockpile. Y-12 is unique in that it is the only source of secondaries, cases, and other nuclear weapons components within the NNSA nuclear security enterprise. Y-12 also dismantles nuclear weapons components, safely and securely stores and manages special nuclear material, supplies special nuclear material for use in naval and research reactors, and supports NNSA nuclear nonproliferation programs.

NNSA relies upon management and operating (M&O) contractors to manage day-to-day site operations and to adhere to DOE and NNSA policies when operating the laboratories, production plants, and other facilities within the complex. Since 2000, Babcock & Wilcox Technical Services Y-12, LLC (B&W Y-12) has been the M&O Contractor at Y-12. Charles G. Spencer, one of the named defendants in the Complaint, is the President and General Manager of B&W Y-12.

The NNSA Production Office is responsible for, among other things, contract management and oversight of Y-12. Steven Erhart is the Manager of the NNSA Production Office that replaced two separate federal site offices at Pantex and Y-12 in 2012.[2]

[2] It should be noted that Larry Kelly, Manager of the DOE Integrated Service Center Oak Ridge Office (ISC-OR), was also named in the Complaint. The ISC-OR is responsible for, among other things, providing a variety of services to Oak Ridge-area DOE Site Offices, and these site offices are responsible for and oversee two major programs in Oak Ridge – the Oak Ridge National Laboratory (ORNL) Site Office, which oversees ORNL, and the Environmental Management Site Office, which oversees environmental cleanup at several DOE sites, most notably the East Tennessee Technology Park. While Mr. Kelly heads the service-driven ISC-OR, the ISC-OR does not service Y-12 or any NNSA component, and he has no responsibility for plant operations

The security boundary of Y-12 is designated pursuant to Section 229 of the Atomic Energy Act of 1954 (AEA), as amended, and as implemented by 10 C.F.R. Part 860. Section 229 of the AEA prohibits the unauthorized entry into or upon any facility under DOE's jurisdiction, administration, and custody. 10 C.F.R. Part 860 sets forth the requirements for enforcement of this prohibition. First, there must be a publication in the Federal Register of the notice designating the facility, installation, or real property as essentially an "off-limits" facility. 10 C.F.R. § 860.7. Second, notices stating the pertinent prohibitions and penalties of Part 860 must be "conspicuously posted at all entrances of each designated facility, installation or parcel of real property and at such intervals along the perimeter as will provide reasonable assurance of notice to persons about to enter." 10 C.F.R. § 860.6.

The current Y-12 229 boundary is designated in a Federal Register notice dated November 9, 2004. 69 Fed. Reg. 64,920 (Nov. 9, 2004). The newly installed fence at issue in this litigation is within the boundary as described in the Federal Register notice, and the fence contains signs which meet the posting requirements set forth in 10 C.F.R. Part 860. Accordingly, persons who trespass on DOE/NNSA property are subject to criminal and civil prosecution for violations of the requirements contained in 10 C.F.R. Part 860.

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or authority at Y-12. Further, there is no reporting relationship between Mr. Erhart and Mr. Kelly, so it is unclear as to why he was named a defendant in the Complaint.

ARGUMENT

PLAINTIFFS' MOTION MUST BE DENIED BECAUSE PLAINTIFFS CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Rule 65 Standard

Federal Rule of Civil Procedure 65 authorizes the Court to issue a temporary restraining order (TRO), without notice to an adverse party, or a preliminary injunction, with notice. Although Plaintiffs have sought only a TRO, because the Federal Defendants have received notice, the Motion will be treated as also seeking a preliminary injunction. The same general analytical framework applies to both TROs and preliminary injunctions. *Moulds v. Bank of New York Mellon*, No. 1:11-CV-200, 2011 WL 4344439, at *2 & n.3 (E.D. Tenn. Sept. 14, 2011) (Collier, C.J.).

In *Moulds*, this Court succinctly explained a plaintiff's burden under Rule 65:

> A preliminary injunction is an extraordinary remedy designed to preserve the relative positions of the parties until a trial on the merits can be held. *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 445 (6th Cir. 2009). Pursuant to Fed. R. Civ. P. 65, in order to grant a preliminary injunction, a district court must consider: "(1) whether the plaintiff[s] [have] established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff[s]; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief." *See Babler v. Futhey*, 618 F.3d 514, 519-20 (6th Cir. 2010) (quoting *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007)). Generally, "these factors are not prerequisites that must be met, but are inter-related considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

Id. at *5 (alterations in original).

Here, as a matter of law, Plaintiffs are not entitled to an order requiring the Federal Defendants to remove the fence because the government simply has closed an area that was

previously a designated public forum[3] and the government has a right to close a designated public forum "whenever it wants." *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004).

B. Plaintiffs cannot show any likelihood of success on the merits.

Plaintiffs argue that the raising of a barrier by the government is an improper restriction under First Amendment jurisprudence. Pls.' Mem. of Law (Doc. No. 3) at 8-13. Plaintiffs' own argument reveals the folly of their position: "**As long as a designated public forum remains open**, it is bound by the same standards as are applied to a traditional public forum." *Id.* at 7 (emphasis added). Simply, the previously designated public forum at the Y-12 facility no longer remains open.

The Supreme Court has designated three types of fora that are subject to First Amendment analysis: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). As explained by the *Cornelius* Court,

> Traditional public fora are those places which "by long tradition or by government fiat have been devoted to assembly and debate." Public streets and parks fall into this category. In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.

Id. (citations omitted).

Critically, the Supreme Court has noted, "Of course, the government 'is not required to indefinitely retain the open character of the facility." *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). Indeed, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *U.S.*

[3] For purposes of this response only, the Federal Defendants concede that the space at issue was previously a designated public forum.

Postal Serv. v. Council of Greenburgh Civil Ass'ns, 453 U.S. 114, 129 (1981); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) ("It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State."). The Court has also noted that the government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Council of Greenburgh*, 453 U.S. at 129-30 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

The circuit courts of appeal have consistently acknowledged that the government, having designated a forum as a public forum subject to the First Amendment rules that are applied to traditional public fora, may close the designated public forum as it sees fit. The Ninth Circuit held moot a challenge to an ordinance that had been amended to preclude all private parties from using a previously designated public forum, stating the defendant "has now closed the designated public forum in which appellants sought to exercise their rights." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1031-32 (9th Cir. 2006). The Ninth Circuit had previously expressly acknowledged the same principle, stating, "The government may limit the forum to certain groups or subjects – although it may not discriminate on the basis of viewpoint – **and may close the forum whenever it wants**." *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004) (emphasis added) (citing *Perry*, 460 U.S. at 46); *see also Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004) ("The government is free to change the nature of any nontraditional forum as it wishes." (citing *Cornelius*, 473 U.S. at 802)); *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004) ("Furthermore, the government may decide to close a designated public forum." (citing *Perry*, 460 U.S. at 46)); *United States v.*

Bjerke, 796 F.2d 643, 647 (3d Cir. 1986) (noting that "officials may choose to close such a designated public forum at any time" (citing *Perry*, 460 U.S. at 46)).

The Fourth Circuit Court of Appeals, in a challenge by an advertising publisher to a military base commander's decision to prohibit door-to-door distribution of circulars in residential areas of the base, determined that even if the court were to decide that the housing areas had been designated public fora, the commander "'[wa]s not required to indefinitely retain the open character of the facilt[ies].'" *Shopco Distribution Co. v. Commanding General of Marine Corps Base, Camp Lejeune, N.C.*, 885 F.2d 167, 173 (4th Cir. 1989) (first alteration added) (quoting *Perry*, 460 U.S. at 46). The court found that the commanding officer had "clearly demonstrate[d] his intent to make base housing areas generally off limits to door-to-door delivery."

Similarly, the government here has determined to close the previously designated public forum space to the public. Such closure returns the space at issue to a nonpublic forum. Restrictions on the use of "a nonpublic forum need only be reasonable and view-point neutral." *Make the Road by Walking*, 378 F.3d at 143. Plaintiffs have not (and cannot) argue that the fencing of the nonpublic forum at the security-sensitive Y-12 facility is unreasonable or other than content-neutral. The fence at issue here simply precludes unauthorized public access to a facility that continues to play a pivotal role in maintaining the U.S. nuclear weapons stockpile. The enforcement of that preclusion is wholly neutral (both as to individual and as to group) and, therefore, non-discriminatory. Further, "when a regulation plainly prohibits all [access to] a nonpublic forum and has no discriminatory effect, the government's particular motivation in enacting the regulation is immaterial." *Sons of Confederate Veterans v. City of Lexington*, No. 7:12cv00013, 2012 WL 2191688 (W.D. Va. June 14, 2012) (citing *Hill v. Colorado*, 530 U.S.

703, 724 (2000) ("[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support."); *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1290 (7th Cir. 1996) ("[W]e hold that the motive of a government body is irrelevant when it enacts a content-neutral rule that regulates speech in a nonpublic forum . . . .")).

Finally, the Sixth Circuit has also agreed with the other circuits. In *Satawa v. Macomb County Road Commission*, 689 F.3d 506, 517 (6th Cir. 2012), the court noted that when the government makes a facility a designated public forum, "it need not indefinitely retain the open character of the facility." Further, the court acknowledged that "if a piece of government property 'is not by tradition or designation a forum for public communication . . . the [government] may reserve the forum for its intended purpose.' In such a nonpublic forum, 'it is . . . **black-letter law** that . . . [the government] can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum.'" *Id.* at 518 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007)).

Under these circumstances, Plaintiffs' request for the "extraordinary remedy" of a TRO must be denied because they cannot show a likelihood of success on the merits. Indeed, to the contrary, the government has shown a substantial likelihood of success on the merits in this case.

Even had Plaintiffs made a more substantial showing on the merits, the balance of the equities clearly favors the Federal Defendants.[4] Plaintiffs cannot show irreparable harm because they have been offered an alternative location to exercise their rights (which they have

[4] To the extent that the Court decides to reach the remaining three factors for issuance of a preliminary injunction, the Federal Defendants would ask to present evidence and argument at a hearing.

used in the past), but they have chosen not to accept the government's offer. Moreover, any action diminishing security at the Y-12 site has potential consequences for national security and, thus, would cause substantial harm to others and would also be harmful to the public interest.

CONCLUSION

Because Plaintiffs cannot show a likelihood of success on the merits of their First Amendment claim, the Court should deny the Motion for Temporary Restraining Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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