
**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

ALLIANCE OF NURSES FOR HEALTHY
ENVIRONMENTS; CAPE FEAR RIVER WATCH;
NATURAL RESOURCES DEFENSE COUNCIL,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

SAFER CHEMICALS HEALTHY FAMILIES;
ALASKA COMMUNITY ACTION ON TOXICS;
ENVIRONMENTAL HEALTH STRATEGY CENTER;
ENVIRONMENTAL WORKING GROUP; LEARNING
DISABILITIES ASSOCIATION OF AMERICA;
SIERRA CLUB; UNION OF CONCERNED
SCIENTISTS; UNITED STEEL, PAPER AND
FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-
CIO/CLC; WE ACT FOR ENVIRONMENTAL
JUSTICE; ASBESTOS DISEASE AWARENESS
ORGANIZATION; VERMONT PUBLIC INTEREST
RESEARCH GROUP,
Movants.

17-1926

ENVIRONMENTAL DEFENSE FUND,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY;
SCOTT PRUITT, Administrator, U.S. Environmental
Protection Agency,
Respondents.

17-2464

PETITIONERS' JOINT MOTION TO TRANSFER

INTRODUCTION

Pursuant to 28 U.S.C. § 2112(a)(5) and the Court's inherent authority to manage its docket, Petitioners¹ respectfully request that this Court transfer these consolidated petitions for review to the U.S. Court of Appeals for the Ninth Circuit.² The petitions for review pending before this Court challenge a rule issued by the U.S. Environmental Protection Agency (EPA) establishing procedures by which the Agency will evaluate the risks of chemicals under the Toxic Substances Control Act (TSCA). Another set of petitions for review filed by Petitioners and challenging a closely related EPA rule implementing TSCA is pending before the Ninth Circuit.

All parties agree that the challenges to the two related TSCA rules should be heard by a single Court of Appeals. To facilitate coordinated review of both rules,

¹ The petitioners before this Court include Alliance of Nurses for Healthy Environments; Cape Fear River Watch; Natural Resources Defense Council; and Environmental Defense Fund. Movants include Safer Chemicals Healthy Families; Alaska Community Action on Toxics; Environmental Health Strategy Center; Environmental Working Group; Learning Disabilities Association of America; Sierra Club; Union of Concerned Scientists; United Steelworkers; WE ACT for Environmental Justice; Asbestos Disease Awareness Organization; and Vermont Public Interest Research Group. Movants' challenge to the same rule at issue in the consolidated petitions before this Court is pending in the U.S. Court of Appeals for the Ninth Circuit. The petitioners before this Court and Movants are referred to in this motion collectively as Petitioners.

² Pursuant to Local Rule 27(a), Petitioners' counsel informed counsel for Respondents U.S. Environmental Protection Agency and Administrator Scott Pruitt that they intended to file this motion. Respondents oppose the motion.

all Petitioners request that this Court transfer the petitions pending in this Court to the Ninth Circuit. This result would serve the interest of justice and the convenience of the parties.

BACKGROUND

I. EPA issued two related rules under the Toxic Substances Control Act establishing procedures for the Agency's review of chemical risks

In June 2016, Congress amended TSCA to require EPA to evaluate a minimum number of chemicals to determine whether they pose “unreasonable risk[s]” to health or the environment. 15 U.S.C. § 2605(b)(2), (b)(4); *see* Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448, 462–63 (2016). Congress required EPA to issue two rules to implement the amendments to the law by June 22, 2017: one rule establishing the process by which EPA will prioritize chemicals for comprehensive risk evaluation by designating them as either high or low priority (the Prioritization Rule), 15 U.S.C. § 2605(b)(1)(A); and another rule to establish a process for evaluating the health and environmental risks of the prioritized chemicals (the Risk Evaluation Rule), *id.* § 2605(b)(4)(B).

On July 20, 2017, EPA published both rules in the Federal Register. Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act, 82 Fed. Reg. 33,753 (July 20, 2017); Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, 82

Fed. Reg. 33,726 (July 20, 2017). The two rules are closely related, and several of their key provisions concern interpretations of the same statutory terms and requirements. *See, e.g.*, 82 Fed. Reg. at 33,755 (cross-reference in Prioritization Rule to Risk Evaluation Rule’s discussion of the term “conditions of use”). Together, these rules establish the process by which EPA will determine which chemicals in commerce should undergo comprehensive risk evaluation, and whether these “prioritized” chemicals pose an unreasonable risk to health or the environment. These risk evaluations will in turn dictate the Agency’s obligations under TSCA to issue protective measures to reduce those risks. *See* 15 U.S.C. § 2605(a) (requiring EPA, if it finds that a chemical presents an “unreasonable risk” to health or the environment, to take actions “necessary so that the chemical . . . no longer presents such risk”).

II. Three sets of petitioners filed challenges to both the Risk Evaluation and Prioritization Rules

Pursuant to 15 U.S.C. § 2618(a), three sets of petitioners filed petitions for review in three different Courts of Appeals challenging both rules. On August 10, 2017, the following eleven groups (collectively, the Safer Chemicals Petitioners) filed petitions for review of the Prioritization and Risk Evaluation Rules in the Ninth Circuit: Safer Chemicals Healthy Families; Alaska Community Action on Toxics; Environmental Health Strategy Center; Environmental Working Group; Learning Disabilities Association of America; Sierra Club; Union of Concerned

Scientists; United Steelworkers; WE ACT for Environmental Justice; Asbestos Disease Awareness Organization; and Vermont Public Interest Research Group. Pet. for Review, *Safer Chems. Healthy Families v. EPA*, No. 17-72259 (9th Cir.), Dkt. 1-5 (Risk Evaluation Rule challenge); Pet. for Review, *Safer Chems. Healthy Families v. EPA*, No. 17-72260 (9th Cir.), Dkt. 1-5 (Prioritization Rule challenge).

On August 11, 2017, Alliance of Nurses for Healthy Environments, Cape Fear River Watch, and Natural Resources Defense Council (collectively, the Alliance of Nurses Petitioners) filed petitions for review of both rules in this Court. Pet. for Review, *All. of Nurses for Healthy Env'ts v. EPA*, No. 17-1926 (4th Cir.), Dkt. 3-1 (Risk Evaluation Rule challenge); Pet. for Review, *All. of Nurses for Healthy Env'ts v. EPA*, No. 17-1927 (4th Cir.), Dkt. 3-1 (Prioritization Rule challenge).

The same day, Environmental Defense Fund (EDF) filed petitions for review of the Prioritization Rule and the Risk Evaluation Rule in the U.S. Court of Appeals for the Second Circuit. *See* Pet. for Review, *EDF v. EPA*, No. 17-2464 (2d Cir.), Dkt. 1-2 (Risk Evaluation Rule challenge); Pet. for Review, *EDF v. EPA*, No. 17-2403 (2d Cir.), Dkt. 6-2 (Prioritization Rule challenge).

III. Orders of the Judicial Panel on Multidistrict Litigation

As required by 28 U.S.C. § 2112(a), on August 31, 2017, EPA notified the U.S. Judicial Panel on Multidistrict Litigation (JPML) that three petitions for

review of the Prioritization Rule and three petitions for review of the Risk Evaluation Rule had been filed in more than one federal appellate court. *See* Notice of Multicircuit Pets., No. 17-1927 (4th Cir.), Dkt. 15-2; Notice of Multicircuit Pets., No. 17-1926 (4th Cir.), Dkt. 16-2. The notices state that EPA “believes it would be in the interest of justice and judicial efficiency for challenges to both rules to be litigated in the same court.” *Id.*

On September 1, the JPML ordered the petitions challenging the Prioritization Rule to be consolidated in the Ninth Circuit, *see* Consol. Order, No. 17-1926 (4th Cir.), Dkt. 17, and the petitions challenging the Risk Evaluation Rule to be consolidated in the Fourth Circuit, *see* Consol. Order, No. 17-1926 (4th Cir.), Dkt. 18. Pursuant to the JPML’s consolidation order for the Prioritization Rule petitions (Multicircuit Petition (MCP) Docket No. 148), this Court and the Second Circuit transferred their Prioritization Rule cases to the Ninth Circuit.³ Order, No. 17-1927 (4th Cir.), Dkt. 18; Notice of Appeal Transfer, No. 17-2403 (2d Cir.), Dkt. 32-2. Accordingly, all three Prioritization Rule cases are either before, or have been transferred to, the Ninth Circuit.

³ While the Ninth Circuit has docketed EDF’s Prioritization Rule case, *see EDF v. EPA*, No. 17-72501 (9th Cir.), it has not consolidated that case with the Safer Chemicals Petitioners’ Prioritization Rule case, *see Safer Chems. Healthy Families v. EPA*, No. 17-72259 (9th Cir.). The Alliance of Nurses Petitioners’ Prioritization Rule case, although transferred to the Ninth Circuit by this Court, has not yet been docketed by the Ninth Circuit.

Pursuant to the JPML's consolidation order for the Risk Evaluation Rule petitions (MCP Docket No. 149), the Second Circuit transferred EDF's petition challenging the Risk Evaluation Rule to this Court. *See* Notice of Appeal Transfer, No. 17-2464 (2d Cir.), Dkt. 32-1. This Court then consolidated EDF's petition with the Alliance of Nurses Petitioners' Risk Evaluation Rule petition. Order, No. 17-1926 (4th Cir.), Dkt. 21. As of the time of this filing, however, the Ninth Circuit has not yet transferred its Risk Evaluation Rule case to this Court. Accordingly, two of the Risk Evaluation Rule cases are consolidated before this Court and one remains in the Ninth Circuit. Because the Safer Chemicals Petitioners anticipate that the Ninth Circuit may transfer their Risk Evaluation Rule case to this Court (pursuant to the JPML order) before this Motion is decided, they join the other Petitioners in seeking transfer of their Risk Evaluation Rule petition and the other petitions challenging that rule back to the Ninth Circuit.

EPA and its Administrator, Scott Pruitt (together, EPA), Respondents in both the Prioritization Rule cases and the Risk Evaluation Rule cases, support review of both rules in a single circuit, but favor review in this Court. On September 14, EPA moved to transfer the Prioritization Rule cases pending in the Ninth Circuit to this Court and hold the cases in abeyance while the transfer motion is pending. *See* Mot. to Transfer & Hold Cases in Abeyance, No. 17-72260 (9th Cir.), Dkt. 15-1. All of the Petitioners also support review in a single circuit,

but conclude that the interest of justice would be best served by review in the Ninth Circuit.

LEGAL STANDARD

Under 28 U.S.C. § 2112(a)(5), this Court has discretion to transfer the consolidated petitions challenging the Risk Evaluation Rule to “any other court of appeals” “[f]or the convenience of the parties in the interest of justice.” As a general rule, “plaintiff[s]’ choice of forum should rarely be disturbed” unless the balance of relevant factors “is strongly in favor of the defendant.” *Collins v. Straight, Inc.*, 748 F.2d 916, 921 (4th Cir. 1984) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)) (discussing transfers under 28 U.S.C. § 1404(a)). The interest of justice “favors retention of jurisdiction in the forum chosen by an aggrieved party,” especially when “Congress has given him a choice.” *Newsweek, Inc. v. U.S. Postal Serv.*, 652 F.2d 239, 243 (2d Cir. 1981). When weighing the interest of justice, courts also consider fairness, judicial economy, and the avoidance of inconsistent judgments. *See Samsung Elecs. Co. v. Rambus, Inc.*, 386 F. Supp. 2d 708, 721 (E.D. Va. 2005) (discussing district court transfers).

ARGUMENT

I. Transfer is warranted to facilitate coordinated review of both the Risk Evaluation and Prioritization Rules in a single Court of Appeals

EPA and Petitioners agree that it would serve the interest of justice for a single circuit to hear the challenges to both the Risk Evaluation and Prioritization

Rules. *See* Pet. for Review 2, No. 17-1926 (4th Cir.), Dkt. 3-1 (stating that consolidation of challenges to both rules will “promote judicial economy”); Not. to JPML of Multicircuit Pets. for Review 4, No. 17-1926 (4th Cir.), Dkt. 15-2. The Risk Evaluation and Prioritization Rules govern interrelated aspects of EPA’s processes under TSCA for selecting chemicals for risk evaluation and for completing risk evaluations. *See* 15 U.S.C. § 2605(b). The petitions for review challenging both rules involve identical parties, and their resolution will involve judicial interpretation of some of the same terms in TSCA. *See* Pet. for Review 2, No. 17-1926 (4th Cir.), Dkt. 3-1 (noting that the legal issues in the challenges to both rules “substantially overlap”). Review in a single court would thus avoid inconsistent outcomes and conserve judicial resources. *Cf. Va. Elec. & Power Co. v. U.S. EPA*, 655 F.2d 534, 536–37 (4th Cir. 1981) (granting transfer to enable consolidated review of “manifestly interrelated” rules to promote “judicial economy”). Indeed, this Court recognized the appropriateness of coordinated review here when it consolidated the Alliance of Nurses Petitioners’ two petitions before the JPML issued the order requiring transfer of the Prioritization Rule petition to the Ninth Circuit. Order, No. 17-1926 (4th Cir.), Dkt. 6.⁴

⁴ The Court subsequently deconsolidated the two *Alliance of Nurses* cases to effectuate the JPML order. Order, No. 17-1926 (4th Cir.), Dkt. 19.

II. That the majority of Petitioners chose the Ninth Circuit as their venue weighs significantly in favor of transfer

This Court should afford the choice of the majority of Petitioners to file their petitions for review in the Ninth Circuit “substantial weight” in determining whether transfer is appropriate. *See Trs. of Plumbers & Pipefitters Nat’l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015) (quoting *Bd. of Trs. v. Sullivant Ave. Props., LLC*, 508 F. Supp. 2d 473, 477 (E.D. Va. 2007)). The interest of justice generally “favors retention of jurisdiction in the forum chosen by an aggrieved party.” *Newsweek*, 652 F.2d at 243. This is especially so here, because Congress gave petitioners seeking judicial review under TSCA a choice of venue. 15 U.S.C. § 2618(a)(1)(A); *see Newsweek*, 652 F.2d at 243. Eleven Petitioners joining the Safer Chemicals petitions for review chose the Ninth Circuit to hear their challenges, far more than the three Petitioners that chose the Fourth Circuit. The interest of justice and convenience to the parties favor transfer to the preferred venue of the majority of Petitioners. *Accord Collins*, 748 F.2d at 921.

III. Tie-breaking factors weigh in favor of transfer to the Ninth Circuit

If this Court determines that the balance of the interest of justice and convenience to the parties does not resolve the question of the most appropriate venue, tie-breaking factors weigh in favor of transfer. First, as a general rule, to the extent that the “inconvenience of the alternative venues is comparable” or there is otherwise no basis to choose between venues, “the tie is awarded to the plaintiff.”

See In re Nat'l Presto Indus., Inc., 347 F.3d 662, 665 (7th Cir. 2003) (discussing venue transfers between district courts). Here, the choice of all Petitioners is now the Ninth Circuit.

Second, if the Court concludes that no other factor is dispositive, it may apply the first-to-file rule, which gives preference to the circuit where petitions are first filed, as a useful and objective approach to selecting the most appropriate venue. *See, e.g., Va. Elec. & Power Co. v. U.S. EPA*, 610 F.2d 187, 188 (4th Cir. 1979) (explaining first-to-file rule under prior version of section 2112(a)); *see also J.P. Stevens & Co. v. NLRB*, 592 F.2d 1237, 1239 (4th Cir. 1979) (“The consensus among those courts that have considered the question . . . is that the court of first filing should determine the validity of the petition filed in that court.”).

To be sure, Congress moved away from the first-to-file rule when it amended 28 U.S.C. § 2112(a) to require the JPML to randomly select a circuit from among those in which a petition was filed within ten days of the challenged rule’s promulgation. Nonetheless, the current version of section 2112 preserves the first-to-file rule to resolve situations not explicitly resolved by the ten-day window: “In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency . . . shall file the record in the court in which proceedings with respect to the order were first instituted.” 28 U.S.C. § 2112(a)(1). While this provision does not directly govern under these

circumstances (involving two sets of petitions challenging two different, but closely related rules), it indicates that Congress continues to view the first-to-file rule as a reasonable basis for choosing a forum when no other factor is controlling.

Applying this principle here favors transfer: The Safer Chemicals Petitioners filed their petitions challenging the Risk Evaluation and Prioritization Rules in the Ninth Circuit on August 10, whereas the Second Circuit and Fourth Circuit petitions were filed on August 11. This approach provides a useful, objective basis for selecting one court over the other.

CONCLUSION

For the foregoing reasons, this Court should transfer the consolidated petitions challenging the Risk Evaluation Rule to the Ninth Circuit.

Dated: September 18, 2017

Respectfully submitted,

/s/ Nancy S. Marks

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1926 **Caption:** All. of Nurses for Healthy Env'ts v. EPA

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(s) /s/ Nancy S. Marks

Party Name Pet'rs All. of Nurses for Healthy Env'ts et al.

Dated: 9/18/2017

CERTIFICATE OF SERVICE

I certify that on September 18, 2017, the foregoing document was served on all parties' counsel of record through the CM/ECF system.

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