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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through **XAVIER BECERRA, ATTORNEY GENERAL,** Plaintiff, **v.** **UNITED STATES BUREAU OF LAND MANAGEMENT; JOSEPH BALASH,** Assistant Secretary for Land and Minerals Management, United States Department of the Interior; and **RYAN ZINKE,** Secretary of the Interior, Defendants.	Case No. 4:18-cv-00521-HSG Related to: Case No. 4:18-cv-00524-HSG **STATEMENT OF RECENT DECISIONS** Date: June 28, 2018 Time: 2:00 pm Courtroom: 2, 4th Floor Judge: Hon. Haywood S. Gilliam, Jr.

Pursuant to Civil Local Rule 7-3(d)(2), Plaintiff State of California, by and through Xavier Becerra, Attorney General ("California"), hereby submits this statement of recent decisions to notify the Court of two relevant judicial opinions published after the filing of California's opposition to Defendants' and Proposed-Intervenors' motions to transfer this action to the District of Wyoming (Dkt. Nos. 35, 37). Exhibit A is a copy of an opinion and order from the Southern District of New York in *State of New York v. Pruitt*, Case No. 1:18-cv-01030-JPO (S.D.N.Y. May 29, 2018). Exhibit B is a copy of an order from the District of South Carolina in *South Carolina*

Coastal Conservation League v. Pruitt, Case No. 2:18-cv-00330-DCN (D.S.C. May 11, 2018).

Dated: June 19, 2018

Respectfully Submitted,

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Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, -v- E. SCOTT PRUITT, et al., Defendants.	18-CV-1030 (JPO)
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., Plaintiffs, -v- ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	18-CV-1048 (JPO) OPINION AND ORDER

J. PAUL OETKEN, District Judge:

These two cases concern the definition of five words in the Clean Water Act: "waters of the United States." Specifically, they concern actions of federal agencies in implementing a definition of that phrase. The previous administration promulgated a broad definition of the phrase. The current administration promulgated a rule delaying the effective date of that broad definition. Plaintiffs in these cases seek to invalidate the latter rule. Before addressing the merits, however, Defendants request that these cases be transferred to the Southern District of Texas. For the reasons that follow, the motions to transfer are denied.

I. Background

This case involves two similar lawsuits. The first is brought by a group of states and the District of Columbia (collectively, "the States"), with New York serving as the lead plaintiff. The second is brought by the Natural Resources Defense Council and the National Wildlife

Federation. Because the two cases are mostly identical, the Court treats them as one except where otherwise noted. "Plaintiffs" refers to the plaintiffs in both cases. "Defendants" refers to the defendants in both cases, including the industry groups that have intervened as defendants.

The Clean Water Act regulates discharge into "navigable waters." The statute defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). The definition of this latter phrase—or "WOTUS"—is the subject of these cases.

In the 1980s, the Environmental Protection Agency and the U.S. Army Corps of Engineers ("the Agencies") promulgated rules defining "waters of the United States." *See, e.g.*, Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,216-17 (Nov. 13, 1986). That definition remained essentially unchanged until 2015, when the Agencies jointly promulgated a rule broadening the definition. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

The new definition was immediately challenged in the federal courts. In 2015, a federal court in the District of North Dakota issued an injunction prohibiting implementation of the 2015 definition. *See North Dakota v. E.P.A.*, 127 F. Supp. 3d 1047 (D.N.D. 2015). That injunction applied to thirteen states. Later, the Sixth Circuit issued a nationwide stay of the 2015 definition. *See In re Clean Water Rule*, 803 F.3d 804, 809 (6th Cir. 2015).

Earlier this year, however, the Supreme Court held that the Sixth Circuit lacked jurisdiction over the case. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). The Court held that the challenge to the 2015 rule should have been brought in the district court rather than the court of appeals. On remand, the Sixth Circuit vacated the nationwide stay and dismissed the case. *In re U.S. Dep't of Def.*, 713 F. App'x 489, 490–91 (6th Cir. 2018). This

seemingly paved the way for implementation of the 2015 definition everywhere except for the thirteen states subject to the North Dakota injunction.

Soon after the Supreme Court ruling, however, the Agencies jointly promulgated a rule delaying implementation of the 2015 definition by two years—until February 6, 2020. *See* Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200-01 (Feb. 6. 2018). The stated purpose of this delaying rule—which the parties refer to as the "Suspension Rule" or "Applicability Rule"—was to "provid[e] continuity and regulatory certainty . . . while the agencies continue to consider possible revisions to the 2015 rule." *Id.* The Plaintiffs in these cases challenge the legality of the Suspension Rule—the rule delaying implementation of the 2015 definition.

The last piece of the puzzle is the parallel litigation in the U.S. District Court for the Southern District of Texas. That suit began in 2015, seeking to invalidate the 2015 definition. *See Am. Farm Bureau Fed'n v. E.P.A.*, No. 15 Civ. 165 (S.D. Tex.); *Texas v. E.P.A.*, No. 15 Civ. 162 (S.D. Tex.). The Texas case had been stayed pending the outcome of the Sixth Circuit case, but it was revived after the Sixth Circuit case was dismissed. The plaintiffs in Texas are now moving for a nationwide injunction against the 2015 definition. That motion has been fully briefed but is yet to be decided.

To recap, here is the status quo: The 2015 definition of WOTUS has never been implemented and remains enjoined in thirteen states. The Sixth Circuit's nationwide stay has been dissolved. The plaintiffs in Texas seek a nationwide injunction against the 2015 definition. The Suspension Rule is also in effect, meaning that the 2015 definition would not be in effect at least until 2020 even if there were no injunction against it. The 1980s definition still reigns.

II. Legal Standard

The relevant statute is 28 U.S.C. § 1404(a). It provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The Second Circuit has explained that "[d]istrict courts have broad discretion in making determinations of convenience under Section 1404(a) and notions of convenience and fairness are considered on a case-by-case basis." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 106 (2d Cir. 2006).

There are two steps to this analysis. First, the Court asks whether this action could have been brought in the proposed transferee district. Second, the Court asks whether the convenience of the parties and the interests of justice weigh in favor of transfer. The burden is on the party seeking transfer to make a "strong case for transfer." *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 114 (2d Cir. 2010) (quoting *Filmline (Cross-Country) Prods., Inc. v. United Artists Corp.*, 865 F.2d 513, 521 (2d Cir. 1989)).

III. Discussion

There are four motions to transfer: In each of the two cases, the federal government and the industry groups seek transfer to the Southern District of Texas. The Plaintiffs contest both prongs of the § 1404(a) analysis. Each prong is discussed in turn.

A. Could These Cases Have Been Brought in the Southern District of Texas?

The first question is whether these suits could have been brought in the proposed transferee district. A court may transfer venue "to any other district or division where [the case] might have been brought." 28 U.S.C. § 1404(a). Thus, the question is whether venue would have been proper in the Southern District of Texas.

The relevant venue provision is 28 U.S.C. § 1391(e), which covers suits against officers or agencies of the federal government. It provides that venue is proper in any district in which:

> (A) a defendant in the action resides,
>
> (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
>
> (C) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e)(1). Defendants argue that venue would have been proper in the Southern District of Texas under either (A) or (B). Each of their arguments is addressed in turn.

1. Do Defendants "Reside" in Texas?

Defendants do not "reside" in Texas for the purposes of the venue statute. For venue purposes, a federal agency resides where it is headquartered—usually Washington, D.C. It is not enough that an agency has offices in Texas. *See Reuben H. Donnelley Corp. v. F.T.C.*, 580 F.2d 264, 267 (7th Cir. 1978) ("There is nothing inequitable in limiting the residence of a federal agency to the District of Columbia. That has been the settled law for decades."); *Jenkins v. West*, No. 95-0789, 1995 WL 704018, at *4 (D.D.C. Oct. 23, 1995) (holding that proper venue for suit against the Secretary of the Army is in Virginia, where the Pentagon is located). Nor do Defendants argue that the agency heads in these cases perform a significant amount of their official duties in Texas. *See Bartman v. Cheney*, 827 F. Supp. 1, 2 (D.D.C. 1993) (noting that venue may be appropriate where "an officer or agency head performs a 'significant amount' of his or her official duties") (quoting *Doe v. Casey*, 601 F. Supp. 581, 584 (D.D.C. 1985)).

Accordingly, 28 U.S.C. § 1391(e)(1)(A) provides no basis for bringing suit in Texas.

2. Did a Substantial Part of the Events Occur in Texas?

The events leading to these suits did not occur in Texas. Defendants argue that the Texas litigation gave rise to this suit because the Suspension Rule was motivated in part by the legal

challenges to the 2015 definition of WOTUS. But the mere fact that event A motivated a defendant to take action B does not mean that A gives rise to a lawsuit over the legality of B. And even if it did, the Texas litigation would still not constitute "a substantial part" of the events giving rise to the claim in this suit. *See Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005) ("[W]e caution district courts to take seriously the adjective 'substantial.'").

Accordingly, 28 U.S.C. § 1391(e)(1)(B) provides no basis for bringing suit in Texas.

3. Could These Cases Have Been Brought as Crossclaims?

Defendants' strongest argument is that these suits could have been asserted as crossclaims in the Texas case. (Because the Texas case began during the previous administration, the environmental-group Plaintiffs here are nominally on the same side of the "*v.*" as the federal government in the Texas case.)

Some courts have held that the ability to assert a counterclaim or crossclaim may satisfy the "might have been brought" requirement of the venue-transfer statute. *See A. J. Indus., Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 503 F.2d 384, 387 (9th Cir. 1974) (counterclaims); *Our Children's Earth Found. v. E.P.A.*, No. C 08-01461, 2008 WL 3181583, at *7 (N.D. Cal. Aug. 4, 2008) (crossclaims). But only two of the plaintiffs here—the two environmental groups—are parties in the Texas litigation. The State plaintiffs did not intervene in the Texas case and are not parties in that case. Their claims, therefore, could not have been brought in Texas. It would be a stretch to say that a plaintiff's case "might have been brought" in another district merely because the plaintiff *could have* intervened in some case and *could have* asserted a crossclaim. *Cf. Our Children's Earth Found.*, 2008 WL 3181583, at *7 ("[T]he instant case could have been filed as a crossclaim in lawsuits commenced in [another district] . . . *in which [the plaintiff] intervened.*") (emphasis added).

In sum, the case brought by the environmental groups might have been brought in Texas, but the case brought by the States could not.

B. Do the Convenience of the Parties and the Interests of Justice Weigh in Favor of Transfer?

Given that one of the two cases—the one brought by the environmental groups—satisfies the first requirement, the Court moves on to the second transfer requirement: the convenience of the parties and the interests of justice.

Answering this question involves a non-exhaustive list of factors:

> (1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, [and] (7) the relative means of the parties.

D.H. Blair & Co., 462 F.3d at 106–07 (alteration in original) (quoting *Albert Fadem Tr. v. Duke Energy Corp.*, 214 F. Supp. 2d 341, 343 (S.D.N.Y. 2002)) (internal quotation marks omitted).

Not all of the factors are relevant here. This is a law-heavy administrative-record case, meaning there will be little discovery or depositions, if any. As the parties recognize, the key factors here are (1) judicial efficiency, (2) the interest in avoiding inconsistent results, (3) the convenience of the parties, and (4) the plaintiffs' choice of forum.

1. Judicial Efficiency

The first argument for transfer is based on efficiency. Defendants argue that the Texas court is already familiar with the WOTUS litigation and is currently considering whether to enjoin the 2015 definition. Transfer to Texas, Defendants argue, will allow that court to decide both the validity of the 2015 rule and the validity of the Suspension Rule.

This argument weighs in favor of transfer, but only slightly. Transfer would lead to efficiency in the same way that it is efficient to centralize all litigation of a given subject matter

in a single forum. But the Court assigns this factor only slight weight because, at their core, the two suits are about different legal questions: The Texas litigation concerns the validity of the 2015 definition; this litigation concerns the validity of the Suspension Rule. One could find that the former is valid but the latter is not, and vice versa. The arguments for and against the legality of the Suspension Rule may be largely independent of the arguments regarding the merits of the 2015 definition.

Moreover, the efficiency gains of transfer are offset by the loss of inter-court dialogue that would result from having one court, and one circuit, decide a matter of national importance. It is a bedrock principle of our federal court system that the adjudication of novel and difficult issues of law is best served by letting questions percolate among the lower federal courts, even at the cost of short-term disuniformity.[1] That is not to say that centralization of certain cases is never beneficial. The desire for uniformity is why, for example, Congress vested exclusive nationwide patent jurisdiction in the Federal Circuit. Congress even vested exclusive jurisdiction in the D.C. Circuit for many challenges to administrative rules, so that "a federal agency regulating on a national scale need tailor its action to only one body of precedent, rather than to a patchwork of potentially conflicting cases in multiple circuits." Eric M. Fraser et al., *The*

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[1] This systemic preference was recognized over a century ago by the Supreme Court in *Mast, Foos & Co. v. Stover Manufacturing Co.*, which held that one circuit is not bound by a decision of another. 177 U.S. 485 (1900). The Court recognized the "substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question." *Id.* at 488. But the Court still rejected inter-circuit *stare decisis*, reasoning that otherwise "the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle." *Id.*; *see also* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 737 (1989) ("[D]octrinal and experiential dialogue on the part of the circuits aids the Supreme Court in deciding cases on the merits. Doctrinal dialogue isolates the issues on which the courts of appeals are divided and presents the competing positions on those issues, probably stated in their most compelling terms.").

Jurisdiction of the D.C. Circuit, 23 Cornell J.L. & Pub. Pol'y 131, 145 (2013); *see also* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. Rev. 67, 84 (1990) ("Where the desire for uniformity is especially strong, federal jurisdiction may be made exclusive."). But we should not automatically assume that it is better for a nationwide issue to be decided by a single court. Indeed, the Supreme Court acknowledged that "immediate court-of-appeals review facilitates quick and orderly resolution of disputes about the WOTUS Rule," *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. at 633, but still held that the Sixth Circuit lacked jurisdiction because Congress could have—and, for other environmental provisions, has—vested exclusive jurisdiction in a single court. Congress has not done so for this provision, so these cases should be treated like any other administrative law case.

Finally, it is worth noting that even if these cases were transferred, there would still be parallel litigation elsewhere, because a federal district court in South Carolina denied transfer to Texas of an identical case. *See S.C. Coastal Conservation League v. Pruitt*, No. 18 Civ. 330, 2018 WL 2184395 (D.S.C. May 11, 2018). This further undercuts any efficiency gains.

2. Risk of Inconsistent Results

The second argument for transfer is that it would minimize the risk of inconsistent results. Defendants argue that if these cases are not transferred, it is possible that the two courts would reach divergent conclusions or, in the worst-case scenario, issue conflicting injunctions.

This factor, too, weighs in favor of transfer, but again only slightly. Conflicting court decisions are a serious concern, but that risk is minimal here, for three reasons. First, the question before the Texas court—whether the 2015 rule is lawful—is different from the question before this Court, which is whether the Suspension Rule is lawful. As discussed above, one could conclude that the former is valid but the latter is not, and vice versa. Put another way, each of the two cases presents a separate hurdle for the proponents of the 2015 rule: in order for the

2015 rule to go into effect, it must withstand the challenges to its validity *and* overcome the Suspension Rule. The Texas court will deal with the former question; this Court will deal with the latter.

Second, we should not assume that either the Texas court or this Court will issue a nationwide injunction in the event that either invalidates a government action. Nationwide injunctions against federal agencies are relatively new and legally untested. It is possible that either or both of the courts dealing with the WOTUS rule will issue a geographically limited remedy rather than a nationwide one. That is what the North Dakota court did in enjoining the 2015 rule in the thirteen plaintiff-states only.[2] Some courts have expressed doubt about the desirability of the nationwide injunction, in large part because it encourages forum-shopping, raises the risk of conflicting injunctions, and stifles inter-circuit dialogue.[3] Some academic commentators, too, have cautioned against the nationwide injunction, arguing that injunctions either should be limited to the plaintiffs or should not extend beyond the circuit of the enjoining

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[2] In an unpublished order, the North Dakota court explained its rationale for limiting the remedy to the plaintiff states: "On the one hand, there is a desirability for uniformity regarding a national rule with national application. On the other hand, there is the idea of respecting the decisions of other courts and other sovereign states." *North Dakota v. E.P.A.*, No. 15 Civ. 59, slip op. at 4 (D.N.D. Sept. 4, 2015), ECF. No. 79.

[3] *See, e.g.*, *City of Chicago v. Sessions*, 888 F.3d 272, 288 (7th Cir. 2018) (affirming a nationwide injunction but noting the "hazards" that it poses, including "stym[ying] the development of the legal issues through the court system as a whole" and "the potential for forum shopping by plaintiffs"); *Aziz v. Trump*, 234 F. Supp. 3d 724, 738 (E.D. Va. 2017) (limiting injunction to residents of Virginia in order to "avoid encroaching on the ability of other circuits to consider the questions raised") (quoting *Va. Soc'y for Human Life v. Fed. Election Comm'n*, 263 F.3d 379, 393 (2001)) (internal quotation marks omitted).

court.[4] And while the Supreme Court has yet to weigh in on the legitimacy of the nationwide injunction, it may do so this term.[5]

Finally, from a practical perspective, odds are that the Texas court will reach a decision on the merits before this Court does. The Texas court has a fully briefed motion for a preliminary injunction before it. No such motion has been filed in these cases. If the Texas court invalidates the 2015 definition, this Court will adjudicate these cases so as to avoid conflicting rulings. Indeed, if the 2015 rule is enjoined nationwide, this Court might decide to stay these cases just as the Texas court stayed its case during the pendency of the Sixth Circuit stay.

3. Convenience of the Parties

The next factor—convenience of the parties—weighs against transfer in the case brought by the States, but less so in the case brought by the environmental organizations. New York is the lead plaintiff in the suit brought by the States, and, unsurprisingly, it is far more convenient for New York to litigate in New York. And though it might be more convenient for the federal government to litigate both issues in Texas, the civil division of the U.S. Attorney's Office in the

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[4] *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 469 (2017) (proposing a rule that "[a] federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be [but the] injunction should not constrain the defendant's conduct vis-à-vis nonparties"); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. Rev. 1068, 1100 (2017) (proposing a rule that "[i]njunctions against the federal government should not extend beyond the circuit where the enjoining court sits"). Others, however, have highlighted the merits of nationwide injunctions. *See, e.g.*, Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. (forthcoming 2018).

[5] The Supreme Court granted certiorari on the question "[w]hether the global injunction is impermissibly overbroad." Petition for Writ of Certiorari at I, *Trump v. Hawaii*, No. 17-965 (U.S. Jan. 5, 2018), 2018 WL 333818 at *I, *petition granted*, 138 S. Ct. 923 (2018).

Southern District of New York is perfectly capable of defending the federal government's position.

Defendants argue that the States already participate in the Texas case, pointing to an amicus brief they filed in the Texas case. But filing an amicus brief is different than litigating an entire case. Defendants' argument is stronger when it comes to the environmental organizations, since they have intervened in the Texas case and are already litigating in that forum. Accordingly, this factor points strongly against transfer in the case brought by the States, but less so for the case brought by the environmental groups.

4. Plaintiff's Choice of Forum

The final pertinent factor—the plaintiff's choice of forum—also weighs against transfer. "[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum . . . ." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). This is especially so when the plaintiff has chosen its home forum. *Id.*

New York is the lead plaintiff in the lawsuit brought by the States, and its choice of forum deserves substantial weight.[6] There is no indication of blatant forum-shopping, which otherwise would have supported transfer. *See Freeman v. Hoffmann-La Roche Inc.*, 2007 WL 895282, at *3 (S.D.N.Y. Mar. 21, 2007). Here, too, the environmental groups' arguments are

[6] It is impossible to fully analyze this element without acknowledging the *realpolitik* at play. The fact is that lawsuits challenging federal government policies are sometimes strategically filed in specific districts and circuits. *See* Bray, *Multiple Chancellors*, *supra* note 4, at 460; Berger, *Nationwide Injunctions*, *supra* note 4, at 1091–93. Rightly or wrongly, plaintiffs may think that certain districts or circuits are more likely than others to be receptive to certain arguments. One might think that this is an unfortunate feature of our judicial system, but that does not mean that a plaintiff's strategic choice should be disregarded, especially when the plaintiff sues in its home forum.

weaker, since it does not appear from the briefing that New York is their natural home forum. Nevertheless, their choice of forum also deserves weight.[7]

C. Balancing the Factors

In sum, two factors (efficiency and risk of inconsistent decisions) weigh slightly in favor of transfer, while two factors (convenience and choice of forum) weigh more heavily against transfer. As to the State Plaintiffs, Defendants have satisfied neither of the two § 1404(a) requirements because (1) they could not have sued in Texas, and (2) the convenience and choice-of-forum interests are particularly strong. It is a closer call when it comes to the environmental-group Plaintiffs because (1) they could have sued in Texas via crossclaims, and (2) their convenience and choice-of-forum interests are weaker. Nevertheless, it would make no sense to transfer one case but not the other. All that would accomplish is to duplicate the litigation, expend double the judicial resources, and increase the risk of inconsistent decisions. Accordingly, transfer is not appropriate for either case.

[7] Defendants argue that Plaintiffs have taken opposite positions in the Texas litigation and in these cases, and Defendants protest that Plaintiffs cannot have it both ways. In opposition to the motion for preliminary injunction in Texas, the States and environmental groups took the position that the 2015 definition poses no risk of imminent harm because it has been suspended by the Suspension Rule. Defendants argue that Plaintiffs' claim in Texas is at odds with their position here that the Suspension Rule is invalid. But there is nothing inconsistent between those two arguments: One can maintain that the Suspension Rule is legally invalid but nevertheless say that as long as the Suspension Rule is in effect, it mitigates any harm from the 2015 definition. (Of course, that argument carries the implicit concession that if the Suspension Rule is found invalid, the 2015 definition *would* harm the industry groups. But that is an issue relevant only to the Texas case.)

IV. Conclusion

For the foregoing reasons, the motions to transfer are DENIED.

The Clerk of Court is directed to close the motions at Docket Numbers 24 and 31 in Case No. 18 Civ. 1030, and Docket Numbers 22 and 27 in Case No. 18 Civ. 1048.

SO ORDERED.

Dated: May 29, 2018
New York, New York

J. PAUL OETKEN
United States District Judge

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, CHARLESTON WATERKEEPER, AMERICAN RIVERS, CHATTAHOOCHEE RIVERKEEPER, CLEAN WATER ACTION, DEFENDERS OF WILDLIFE, FRIENDS OF THE RAPPAHANNOCK, NORTH CAROLINA COASTAL FEDERATION, and NORTH CAROLINA WILDLIFE FEDERATION Plaintiffs, v. E. SCOTT PRUITT, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; R.D. JAMES, as Assistant Secretary of the Army for Civil Works; and UNITED STATES ARMY CORPS OF ENGINEERS Defendants.	No. 2-18-cv-330-DCN **ORDER**

This matter is before the court on defendants Scott Pruitt ("Pruitt"), the United States Environmental Protection Agency ("the EPA"), Ryan Fisher ("Fisher"), and the United States Army Corps of Engineers' ("the Army Corps, collectively "the government") motion to transfer case to the Southern District of Texas, ECF No. 13, and proposed intervenor-defendants American Farm Bureau Federation, American Forest & Paper Association, American Petroleum Institute, American Road and Transportation Builders Association, Leading Builders of America, Matagorda Farm Bureau, National Alliance of Forest Owners, National Association of Home Builders, National Association

of Manufacturers, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, National Stone, Sand and Gravel Association, Public Lands Council, Texas Farm Bureau, and U.S. Poultry & Egg Association's (collectively, "the business groups") motion to intervene, ECF No. 16. For the reasons set forth below, the court denies the motion to transfer and grants the motion to intervene.

I. BACKGROUND

This case arises out of the promulgation of a rule ("the Suspension Rule") that suspends the 2015 Clean Water Rule ("the WOTUS rule") for two years. The Clean Water Act ("the Act") prohibits discharge of pollutants from a point source into "navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12). The Act defines "navigable waters" as "waters of the United States, including the territorial seas" but does not define what constitute "waters of the United States." In 1980, the Environmental Protection Agency ("the EPA") and in 1982 the Army Corps of Engineers ("the Army Corps") issued a regulation that defined the term "waters of the United States," (hereinafter, "the 1980s regulation"). Under the 1980s regulation, the term "waters of the United States" included interstate waters including interstate wetlands, other waters such as "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds," and wetlands adjacent to these waters. The 1980s regulation specifically excluded "waters that are themselves wetlands" as a "waters of the United States."

On August 28, 2015, the EPA and the Army Corps enacted the WOTUS rule to clarify what types of waters constitute a "waters of the United States" and are thus

covered by the Act. The WOTUS rule replaced the 1980s regulation, and includes seasonal streams, wetlands, and tributaries as a "water of the United States." Soon after its enactment, the WOTUS rule became embroiled in litigation, with cases being brought in district courts across the country, including the Southern District of Texas ("the Texas litigation"). The government petitioned the Judicial Panel on Multi-District Litigation to consolidate these district court actions, which the Panel denied in October 2015.

All of the challenges to the district court decisions regarding the WOTUS rule were consolidated in the Sixth Circuit. In February 2016, the Sixth Circuit ruled that it had original jurisdiction over challenges to the WOTUS rule and issued a nationwide stay of the rule. At the time that the Sixth Circuit issued its nationwide stay of the WOTUS rule, in separate proceedings the District of North Dakota had issued a preliminary injunction against the WOTUS rule effective in thirteen states. As a result of this ruling by the Sixth Circuit, the pending district court cases were either stayed or administratively closed. On January 22, 2018, the United States Supreme Court ruled that the circuit courts did not have original jurisdiction to review the WOTUS rule, and that challenges must continue to be filed in the district courts. The Sixth Circuit then vacated the nationwide stay of the WOTUS rule. The injunction against the WOTUS rule issued by the District of North Dakota stayed in place.

On February 28, 2017, President Donald Trump issued Executive Order 13, 778, which directed the Administrator of the EPA Scott Pruitt ("Pruitt") and the Assistant Secretary of the Army for Civil Works Ryan Fischer ("Fischer") to "review the . . . [WOTUS rule] . . . for consistency with . . . [administration] policy . . . and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and

consistent with [the] law." On February 6, 2018, the Suspension Rule was published in the Federal Register. The effect of the Suspension Rule was that the WOTUS rule was delayed until 2020, and in the interim period the controlling interpretation of "waters of the United States" was that prescribed by the 1980s regulation which had been in place prior to the WOTUS rule.

On the same day that the Suspension Rule went into effect, a coalition of conservation groups consisting of the South Carolina Coastal Conservation League, Charleston Waterkeeper, American Rivers, Chattahoochee Riverkeeper, Clean Water Action, Defenders of Wildlife, Friends of the Rappahannock, North Carolina Coastal Federation, and the North Carolina Wildlife Federation (collectively, "environmental plaintiffs") filed suit against the manner in which the Suspension Rule was enacted. Environmental plaintiffs allege the following claims: (1) in promulgating the Suspension Rule, the EPA and Army Corps violated the Administrative Procedure Act ("APA") by taking action with inadequate public notice and comment as prescribed by the APA; (2) the government's failure to consider the substantive implications of suspending the WOTUS rule in enacting the Suspension Rule was arbitrary and capricious under the APA, which directs federal agencies to "examine the relevant data and articulate . . . satisfactory explanation[s] for . . . [their] action[s]"; and (3) the government's failure after enacting the Suspension Rule to restore the 1980s regulation to the Federal Register violates the APA, which requires federal agencies to publish the language of any substantive regulation that they intend to have legal effect. Environmental plaintiffs ask the court to declare that the EPA and the Army Corps acted arbitrarily and unlawfully in promulgating the Suspension Rule, and to vacate the Suspension Rule.

On February 6th, 2018, the government filed a motion to transfer the case to the Southern District of Texas. ECF No. 13. Environmental plaintiffs filed a response on March 1, 2018, ECF No. 19, and the government filed a reply on March 8, 2018, ECF No. 25. On March 14, 2018, environmental plaintiffs filed a sur-reply. ECF No. 29. On February 28, 2018, the business groups filed a motion to intervene. ECF No. 16. On March 14, 2018, environmental plaintiffs filed a response. ECF No. 30. On March 21, 2018, the business groups filed a reply. ECF No. 21. Both motions have been fully briefed and are now ripe for the court's review.

II. STANDARDS

A. Motion to Transfer

Pursuant to 28 U.S.C. § 1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented. "The burden is on the movant to show that transfer pursuant to Section 1404(a) is proper." Virginia Innovation Scis., Inc. v. Samsung Elecs. Co., 928 F. Supp. 2d 863, 867 (E.D. Va. 2013). "'Decisions whether to transfer a case pursuant to 28 U.S.C. § 1404 are committed to the discretion of the transferring judge.'" Herring v. LaPolla Indus., Inc., 2013 WL 12148849, at *3 (D.S.C. Oct. 7, 2013) (quoting Brock v. Entre Computer Ctrs., Inc., 933 F.2d 1253, 1257 (4th Cir. 1991)). In exercising this discretion, courts weigh a number of factors:

> (1) the plaintiff's initial choice of forum; (2) relative ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing and unwilling witnesses; (4) possibility of a view of the premises, if appropriate; (5) enforceability of a judgment, if one is obtained; (6) relative advantage and obstacles to a fair trial; (7) other practical problems that make a trial

> easy, expeditious, and inexpensive; (8) administrative difficulties of court congestion; (9) local interest in having localized controversies settled at home; (10) appropriateness in having a trial of a diversity case in a forum that is at home with the state law that must govern the action; and (11) avoidance of unnecessary problems with conflicts of laws.

Id.

B. Intervention by Right

Under Federal Rule of Civil Procedure 24(a), on timely motion, a court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The Fourth Circuit has interpreted this rule to require that applicants seeking to intervene as of right to meet all four of the following criteria:

> (1) the application to intervene must be timely; (2) the applicant must have an interest in the subject matter of the underlying action; (3) the denial of the motion to intervene would impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the existing parties to the litigation.

Houston Gen. Ins. Co. v. Moore, 193 F.3d 838, 839 (4th Cir. 1999). The party moving to intervene "bears the burden of demonstrating to the court a right to intervene." Matter of Richman, 104 F.3d 654, 658 (4th Cir. 1997).

C. Permissive Intervention

Federal Rule of Civil Procedure 24(b) enables the court to permit, on timely motion, "anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). The decision to allow permissive intervention under Rule 24(b) "lies within the sound discretion of the trial court," though "some standards have been developed to guide the courts in making

intervention determinations." Hill v. W. Elec. Co., 672 F.2d 381, 386 (4th Cir. 1982). In the Fourth Circuit, a movant seeking permissive intervention as a plaintiff must satisfy four criteria. First, the motion must be timely. Fed. R. Civ. P. 24(b)(2); Spring Const. Co. v. Harris, 614 F.2d 374, 377 (4th Cir. 1980). Second, the movant must have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); Pa. Nat. Mut. Cas. Ins. Co. v. Perlberg, 268 F.R.D. 218, 225 (D.Md. 2010). Third, there must be an independent ground of subject matter jurisdiction. Shanghai Meihao Elec., Inc. v. Leviton Mfg. Co., 223 F.R.D. 386, 387 (D.Md. 2004). Finally, the proposed intervention must not "unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(3); see also Hill, 672 F.2d at 386 (4th Cir. 1982) (quoting Harris, 614 F.2d at 377)).

III. DISCUSSION

This matter is before the court on two motions.[1] The government seeks to have this case transferred to the Southern District of Texas under 28 U.S.C. § 1404(a), arguing that this case is "part and parcel" of the Texas litigation. The business groups seek to intervene as defendants in this case. The court denies the motion to transfer the case, and grants the business groups' motion to intervene.

A. Motion to Transfer

As a threshold matter, the government urges the court to send this suit to the Southern District of Texas by characterizing it as "the latest in a series of cases relating to

[1] The parties use different terms in their briefing to refer to the 2015 Clean Water Rule and the 2018 rescission of that rule. Any reference to the "2015 Rule" or "the Clean Water Rule" is what the court refers to as "the WOTUS rule" and any reference to "the applicability rule" or "the 2018 rule" is what the court refers to as "the Suspension rule."

the Defendant Agencies' issuance in 2015 of a regulation that defines the "waters of the United States." ECF No. 13 at 2. This is a mischaracterization of the fundamental nature of this case. This is not a case about the legality of the issuance or even the merits of the WOTUS rule. It is a case about the legality of the process by which the WOTUS rule was suspended. Having established this, the court now consider whether this action should be transferred to Texas.

In deciding whether to transfer venue, "a district court must make two inquiries: (1) whether the claims might have been brought in the transferee forum, and (2) whether the interest of justice and convenience of the parties and witnesses justify transfer to that forum." Koh v. Microtek Int'l, Inc., 250 F. Supp. 2d 627, 630 (E.D. Va. 2003).

1. Proper Venue under 28 U.S.C. § 1391

The court must first determine whether environmental plaintiffs could have brought this claim in the Southern District of Texas as the government asserts. The proper venue provision governing this analysis is § 1391(e)(1), which provides that a plaintiff may sue a federal agency or official in a judicial district where "(A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action." If the case falls within one of these three categories, venue is proper. Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 571 U.S. 49 (2013).

As to the first factor, the EPA and the Army Corps of Engineers "reside in" the District of Columbia as this is where the agencies are headquartered. A federal agency does not reside in a district merely by virtue of having an office in that district. See

Reuben H. Donnelley Corp. v. F.T.C., 580 F.2d 264, 267 (7th Cir. 1978) (reasoning that "to hold that a federal agency can be sued . . . wherever it maintains an office would, as a practical matter, render [§ 1391(e)'s other subsections] superfluous," because federal agencies are likely to maintain offices in "most, if not all, judicial districts"). Venue with respect to a federal officer is proper in the place of his or her official residence, where his or her official duties are performed. Archuleta v. Sullivan, 725 F.Supp. 602, 605 (D.D.C. 1989). The government points to Dehaemers v. Wynne, 522 F. Supp. 2d 240 (D.D.C. 2007) as instructive on this issue of where a federal agency resides. Certainly, in Dehaemers the court found that venue "might be proper" proper in Washington, D.C., where the agency in that particular case—the United States Department of the Air Force—maintained an office. Id. at 248. Notably, however, the Dehaemers court in that case held that the agency head, the Secretary of the Air Force, performed a "significant amount" of his official duties in the District of Columbia. Id. The government has not ever alleged that Pruitt or Fischer performed any amount—let alone a "significant amount"—of their official duties in the Southern District of Texas. This distinguishes Dehaemers from the case at hand. Neither Pruitt nor Fischer have official residences in the Southern District of Texas. Therefore, none of the defendants "reside in" the Southern District of Texas.

Second, the government has failed to meet its burden to show that events in Texas led to the promulgation of the Suspension Rule. Instead, it is apparent that the events leading to the suspension of the WOTUS rule took place in Washington, D.C.—Washington is where President Trump signed the executive order directing the EPA to rescind or revise the WOTUS rule and it is where the EPA drafted and issued the final

Suspension Rule. The government argues that the Suspension Rule was issued "against the backdrop of litigation" around the country, including the Texas litigation. In support, the government points to the preamble of the Suspension Rule which states that one of the rationales for the Suspension Rule includes the snowstorm of litigation surrounding the WOTUS rule and the resulting regulatory uncertainty. But the preamble to the Suspension Rule lists a number of considerations—only one of which is the "many" district cases that are pending against the WOTUS rule. The preamble does not state that the litigation that the WOTUS rule is currently embroiled in is the only—or even the most important—reason for the enactment of the Suspension Rule. Furthermore, there are more than ten separate challenges to the WOTUS rule that are pending before district courts in states from North Dakota to Georgia. Only three of these challenges are before the Texas court. Certainly, at no point does the preamble to the Suspension Rule specify that the Texas litigation is the primary reason why the Suspension Rule was enacted.

Finally, since no real property is involved in this action, the court can transfer venue if the environmental plaintiffs "reside in" the Southern District of Texas. For purposes of § 1391(e)(1)(C), venue is proper in a multi-plaintiff case if any plaintiff resides in the district. See Exxon Corp. v. Fed. Trade Commission, 588 F.2d 895 (3rd Cir. 1978) (holding that the reference to "the plaintiff" in § 1391(e)(1)(C) means "any plaintiff," as opposed to "all plaintiffs"). None of the environmental plaintiffs, which are all conservation organizations, even have offices in the Southern District of Texas. Two of the environmental plaintiffs, the South Carolina Coastal Conservation League and the Charleston Waterkeeper, operate exclusively in South Carolina. The remaining environmental plaintiffs are either headquartered in the Southeast, such as the North

Carolina Wildlife Federation, or are national organizations such as American Rivers. None of the environmental plaintiffs have any offices or significant presence in the Southern District of Texas.

The defendants in the instant action may already be defendants in the Texas litigation. But that is because of the plaintiffs in that case at least one plaintiff, namely the State of Texas, "resides in" the Southern District of Texas for venue purposes. None of the three factors set forth in § 1391(e) are applicable here. The environmental plaintiffs could have brought this suit in Washington, D.C. or in one of the districts in which one of the environmental plaintiffs resides. They chose the latter, and so this case was brought in front of this court. Because this case could not have been filed in the Southern District of Texas, it does not fulfill the first step of the venue transfer analysis. The court denies the motion to transfer on this ground alone. Nonetheless, the court proceeds to analyze the § 1404(a) factors to demonstrate that even if this action could have been filed in the Southern District of Texas, the § 1404(a) factors do not weigh in favor of transfer.

2. § 1404(a) Factors

As explained above, this case could not have been filed in the Southern District of Texas. But even if it could have been, the § 1404(a) factors would weigh against transfer.

The second step of the § 1404(a) venue transfer analysis requires the court to balance three factors: (1) the environmental plaintiffs' choice of forum; (2) convenience of the parties and witnesses; and (3) the interest of justice. The first factor obviously weighs in favor of retaining the suit in the current venue, as Charleston is the forum that

the environmental plaintiffs chose to file suit. Analysis of the second factor, the convenience to the parties and witnesses, is also relatively simple—both parties agree that this is an administrative review case, where discovery will not consist of depositions or subpoenas but a review of the closed world of documents before the EPA at the time that it promulgated the Suspension Rule. There are simply no witnesses to consider. The government is no more burdened by litigating this case in Charleston, South Carolina than it would be by litigating it in Galveston, Texas. Environmental plaintiffs, on the other hand, would be. Two of the environmental plaintiffs are Charleston-based organizations and the remainder have offices in the Carolinas and the Southeast. None have offices in Texas. This factor weighs in favor of environmental plaintiffs.

The third factor, "the interests of justice," is a more nuanced inquiry. The government argues that this case could have been brought anywhere else in the country, and that South Carolina has no more of an interest in the WOTUS rule than any other state. The court agrees that this case could have been brought elsewhere. And indeed, it was—a coalition of ten attorney generals, led by the State of New York, filed suit in the Southern District of New York alleging that the Suspension Rule was promulgated in violation of the requirements of the APA. See New York v. Pruitt, 2018 WL 1684341, at *1 (S.D.N.Y. Apr. 5, 2018). The Natural Resources Defense Council brought suit with substantially the same allegations in the Southern District of New York as well. However, the fact that other plaintiffs have brought suit does not negate South Carolina's particularized interest in the WOTUS rule.

Indeed, a review of the WOTUS rule makes clear that it grants specific protections to the Carolina bays and the pocosins of the Southeastern coastal plain, many

of which are located in South Carolina. Specifically, the WOTUS rule states that the Carolina bays, which are wetlands "most abundant in North Carolina and South Carolina" are protected under the Act. 80 Fed. Reg. at 37, 072. The WOTUS rule also afforded protections for pocosins, "shrub and tree-dominated wetlands" found from Virginia to northern Florida, necessarily encompassing South Carolina. Id. The Suspension Rule rescinds protections for these types of wetlands. The WOTUS rule went on to state, wetlands "significantly affect the chemical, physical, and biological integrity of downstream waters." Thus, the Suspension Rule affects not only pocosins and Carolina bays but also all of the rivers and lakes in South Carolina that are downstream from these wetlands. This qualifies as an interest held by South Carolina and its citizens in the protections afforded to South Carolina waterways, which communities throughout the state depend on for tourism and contribute to the state's economy. Certainly, it is not the case that South Carolina "has no discernable connection with the controversy" as the government contends. ECF No. 13 at 15.

Finally, this court is not the first to deny the government's attempt to transfer venue in a case involving the rescission of regulations promulgated by the previous administration. The court finds guidance in the Northern District of California's well-reasoned opinion in State v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054 (N.D. Cal. 2018), where the government sought to transfer a case about the United States Bureau of Land Management's proposed suspension of a rule that would delay the requirements of the Waste Prevention, Production Subject to Royalties, and Resource Conservation rule ("the Waste Prevention rule") to the District of Wyoming. The government argued that the Wyoming court was concurrently hearing challenges to the Waste Prevention rule,

and so the case about the proposed suspension of that rule was best heard in Wyoming so the action could be litigated "in a coordinated fashion." Id. The Northern District of California rejected this argument, reasoning that transfer was unwarranted because of the distinctness of the legal issues—namely, that the legal issues that the Wyoming court was concerned with "go to the substance of that regulation" whereas the present suit "addresses the BLM's alleged procedural failure to justify a different rule, the Suspension Rule." Id. This analysis demonstrates how courts have distinguished suits against the merits of a rule—such as the Texas litigation—from suits against the legality of the procedure by which these rules were rolled back—the suit before this court.

Now, the court acknowledges that there is a difference between the litigation over the suspension of the Waste Prevention rule and the litigation at hand—namely, that the Texas court is currently considering a motion for preliminary injunction to enjoin the WOTUS rule altogether. The government argues that if this court enjoins the Suspension Rule, such a ruling would reinstate the WOTUS rule which could conflict with the possibility that the Texas court issue a nationwide injunction against the WOTUS rule. Environmental plaintiffs present a different picture of the relationship between the WOTUS rule and the Suspension Rule, arguing in effect that while both the Texas litigation and this litigation involve water, the similarities end there. The court is not particularly convinced by the environmental plaintiffs' argument that this litigation will not affect the preliminary injunction motion before the Texas court. But the outcome of this litigation would affect each of the eleven currently pending challenges against the WOTUS rule in district courts across the country. This does not necessarily weigh in favor of transferring this suit to Texas.

To resolve this litigation, environmental plaintiffs argue, the court need not delve into the merits of the WOTUS rule. The agencies' refusal to grapple with the substance of the WOTUS rule, which was produced after years of public notice and comment rulemaking and with support drawn from over a thousand peer-reviewed scientific articles, forms the basis of one of the claims that environmental plaintiffs levy in this case. The court is not convinced that this litigation is "part and parcel" of the litigation over the merits of the WOTUS rule. It views the two cases as entirely separate, albeit related in subject matter. Therefore, the orderly adjudication of the cases challenging the WOTUS rule and this case challenging the Suspension rule does not require them to be combined.[2]

In sum, the Texas litigation and this litigation address different substantive issues, although both do touch on the reach of the "waters of the United States" under the Act. Under the applicable venue provision of 1391(e), federal defendants are residents of Washington D.C., not Texas. The events that gave rise to the promulgation of the Suspension Rule occurred in Washington D.C., not Texas. None of the environmental plaintiffs "reside in" Texas. Therefore, this litigation could not have been filed in the Southern District of Texas. Even assuming that this suit could have been filed in the

[2] Tangentially—yet persuasively—the panel for multidistrict litigation rejected the government's request for the centralization of the 11 original district court cases that were filed challenging the WOTUS rule. In front of the panel for multidistrict litigation too, the government argued that the "orderly adjudication" of the issue required that these district court cases be consolidated. The court takes this opportunity to reiterate that the "issue" in front of the multidistrict litigation panel was the legality of the WOTUS rule, not the legality of the WOTUS rule as well as the legality of the way in which the WOTUS rule was rescinded by way of the Suspension rule. If the first issue was not centralized enough to necessitate a multidistrict litigation, certainly the issue in this litigation is not either.

Southern District of Texas, the government has not met its burden of showing that the balance of all the § 1404(a) factors clearly favor transfer. South Carolina does have an interest in the Suspension Rule, as the WOTUS rule provided specific protection for wetlands common in the Southeast and contained within South Carolina's borders. Therefore, the court refuses to override environmental plaintiffs' choice of forum in this district and denies the motion to transfer.

B. Motions to Intervene

A coalition of eighteen business groups move to intervene in this litigation. The court makes no finding on whether the groups are entitled to intervention as of right, but rather grants them permissive intervention, given the early stage of this litigation and the participation of the business groups in the litigation challenging the WOTUS rule in district courts across the country.

To intervene of right under Rule 24(a), an applicant must satisfy all four of the following requirements: (1) the application must be timely; (2) the applicant must have an interest in the subject matter sufficient to merit intervention; (3) the denial of intervention would impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the existing parties to the litigation. See Fed. R. Civ. P. 24(a). Rule 24(b), which addresses permissive intervention, provides that "[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b).

Under either method of intervention, the intervention must be timely. Gould v. Alleco, Inc., 883 F.2d 281, 286 (4th Cir. 1989) ("Both intervention of right and permissive intervention require timely application."). To determine whether an application for intervention is timely, the Fourth Circuit has outlined the following factors: how far the suit has progressed, the prejudice that delay might cause other parties, and the reason for the tardiness in moving to intervene. Gould v. Alleco, Inc., 883 F.2d 281, 286 (4th Cir. 1989). In United States v. S. Bend Cmty. Sch. Corp., 710 F.2d 394, 396 (7th Cir. 1983), the Seventh Circuit held that prospective intervenor generally must move promptly for intervention as soon as he "knows or has reason to know that his interests might be adversely affected by the outcome of the litigation." The purpose of the timeliness requirement is to prevent a tardy intervenor from "derailing a lawsuit within sight of the terminal." Scardelletti v. Debarr, 265 F.3d 195, 202 (4th Cir. 2001) (internal citations and quotations omitted), rev'd sub nom. on other grounds, Devlin v. Scardelletti, 536 U.S. 1 (2002). These motions to intervene are timely, as they were filed within twenty-two days of the filing of the initial complaint. No discovery has been conducted or dispositive motions decided. Having determined that the intervenors meet this threshold standard of timeliness, the court moves on to the merits.

To support a right to intervene the potential intervenor's interest in the dispute "must be direct, rather than remote or contingent." Dairy Maid Dairy, Inc. v. United States, 147 F.R.D. 109, 111 (E.D. Va. 1993). Certainly, the business groups have an interest in the subject matter of the litigation. Namely, the industries that these business groups represent operate in a regulatory sphere that include regulations governing water usage in the United States. The court must then evaluate whether "denial of the motion

to intervene would impair or impede the . . . ability to protect [their] interest" and whether the proposed intervenor's "interest is []adequately represented by the existing parties to the litigation." Moore, 193 F.3d at 839. Courts generally do not define the parties' "ultimate objectives" by the specific causes of action they seek to advance; instead, they define the "ultimate objectives" in more general terms. See In re: CEI, LLC, 2016 WL 3556606, at *5 (W.D.N.C. June 29, 2016) ("The trustee and [a]ppellant share the same objective in this adversarial action based on the fact that they both seek relief and recovery for the allegedly fraudulent actions of the [d]efendants."), reconsideration denied sub nom. In re CEI, LLC, 2016 WL 4385859 (W.D.N.C. Aug. 12, 2016); Thomas v. Ford Motor Co., 2014 WL 1315006, at *4 (D.S.C. Mar. 28, 2014) (finding that proposed intervenors who advanced a claim not brought by the original plaintiffs shared "the same ultimate concerns as [p]laintiffs, namely their contention that FMC knowingly manufactures automobiles equipped with an electronic throttle control system that renders the automobiles susceptible to incidents of sudden unintended acceleration and, as a consequence, unsafe to customers").

Environmental plaintiffs argue at length that the business groups have not satisfied the standard for intervention of right set forth in Stuart v. Huff, 706 F.3d 345 (4th Cir. 2013), where the Fourth Circuit explained "that where the party who shares the intervenor's objective is a government agency, the intervenor has the burden of making a strong showing of inadequacy" because "when a statute comes under attack, it is difficult to conceive of an entity better situated to defend it than the government." Id. at 351. The Fourth Circuit reasoned that "to permit private persons and entities to intervene in the government's defense of a statute upon only a nominal showing would greatly complicate

the government's job." Id. Thus, the Fourth Circuit said that when the government agency and the would-be intervenor share the same objective, "the putative intervenor must mount a strong showing of inadequacy. To hold otherwise would place a severe and unnecessary burden on government agencies as they seek to fulfill their basic duty of representing the people in matters of public litigation." Id. at 352.

The court is not so persuaded that the business groups share the same ultimate objective as the government. The EPA is, after all, in the business of protecting the environment—not protecting business interests. The EPA's stated motivation in enacting the Suspension Rule included, certainly, creating regulatory certainty for businesses such as the industries that the business groups represent. But it also involved policy considerations of what waters in the United States deserved protection under the Act. Furthermore, while the government is defending the legality of the Suspension Rule in this court, aligning itself with the position of the business groups, the government is the adversary of the business groups in the pending WOTUS litigation in district courts across the country as it is defending. In that pending litigation, this court assumes, the government will continue to defend the merits of the WOTUS rule against these very same business groups' challenges. In short, in that pending litigation over the WOTUS rule the government is, as the business groups pointed out during the hearing on this motion, "on the opposite side of the v." But it is ultimately unnecessary for this court to speculate on whether the standards for mandatory intervention are satisfied under Stuart, because even if the business groups cannot intervene as of right, this court grants them permissive intervention under Rule 24(b).

The court sees no barriers to granting the business groups permissive intervention. The court is willing to assume that the court possesses an independent ground of subject matter jurisdiction over their claims and environmental plaintiffs have not seriously disputed that the claims the business groups seek to bring here share a common question of law or fact with the main action. Certainly, allowing the business groups to intervene in this action would lead to some delay in this litigation, as the court would possibly be required to resolve an additional motion to dismiss before moving on to discovery. This litigation is already quite complicated, and adding the business groups would only result in further complication. But the business groups filed timely motions to intervene and have a substantial stake in the outcome of this litigation. If the Suspension Rule is enjoined by this court, the WOTUS rule will be reinstated and greatly affect the regulatory burdens and associated costs on the industries that the business groups represent. All of these business groups have intervened in the maze of litigation surrounding the WOTUS rule in various district courts throughout the country, and the outcome of this case may affect those currently pending cases. Furthermore, as explained above, the government is adverse to the business groups in the pending WOTUS litigation on the merits of the rule and so will not protect the business groups' interests. And this case is in the very early stages of the litigation, so allowing the business groups permission to intervene will not delay or prejudice the timely adjudication of this case. Therefore, the court grants permissive intervention.[3]

[3] The court recognizes the environmental plaintiffs' consternation associated with adding more parties to this already complex litigation. But it notes that a review of the docket in the New York litigation, State of New York et al. v. E. Scott Pruitt et al., demonstrates that the states did not object to the permissive intervention of the business groups and took no position to the business groups' request for intervention as of right.

IV. CONCLUSION

For the foregoing reasons, the court **DENIES** the government's motion to transfer venue and **GRANTS** the business groups' motion to intervene.

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

May 11, 2018
Charleston, South Carolina

And as the business groups noted in a supplement filed after the hearing on this matter was held, the New York court also found that permissive intervention was appropriate. ECF No. 34, Ex. 1, New York litigation at 3–4.