

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

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SAFER CHEMICALS HEALTHY )  
FAMILIES, ET AL., )

Petitioners, )

v. )

No. 17-72260

UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY, ET AL., )

Respondents. )

\_\_\_\_\_  
ENVIRONMENTAL DEFENSE FUND, )

Petitioner, )

v. )

No. 17-72501

UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY, ET AL., )

Respondents. )

**MOTION TO TRANSFER AND  
HOLD CASES IN ABEYANCE**

Respondents United States Environmental Protection Agency and Scott Pruitt, Administrator, United States Environmental Protection Agency (collectively “EPA”) move to transfer these two related cases to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 2112(a)(5). Three petitions for review of the same EPA rule (filed in the Second, Fourth, and Ninth Circuits)

were ordered to be consolidated in this Court by the Judicial Panel on Multidistrict Litigation. However, having the cases heard in the Fourth Circuit would be more convenient for the parties, because all counsel of record are located in Washington, DC, or New York. Moreover, it would be in the interest of justice that the cases be transferred to the Fourth Circuit, because they should be heard by the same panel deciding petitions for review of a second EPA rule with some overlapping issues. And the Fourth Circuit will likely be able to rule on the petitions more quickly.

EPA also moves to hold these cases in abeyance until the later of: (1) one week after this Court's resolution of EPA's motion to transfer, or (2) October 10, 2017, which is approximately one week<sup>1</sup> after the statutory deadline for interested persons to file petitions for review of the final rule challenged in these cases.

Safer Chemicals Healthy Families, *et al.* (collectively, "the Safer Chemicals Petitioners"), Petitioners in Case No. 17-72260, and Environmental Defense Fund, Petitioner in Case No. 17-72501, oppose the relief requested in this motion.

## **BACKGROUND**

### **A. Petitions for Review of the Prioritization Rule**

In these two related cases, the Safer Chemicals Petitioners and Environmental Defense Fund both seek judicial review of an EPA rule entitled "Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic

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<sup>1</sup> October 9, 2017 is a federal holiday.

Substances Control Act,” 82 Fed. Reg. 33,753 (July 20, 2017) (“Prioritization Rule”). The Prioritization Rule establishes the process and criteria that EPA will use to identify chemicals as either high or low priority for purposes of risk evaluation, as required by section 6(b)(1) of the amended Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2605(b)(1).

The Safer Chemicals Petitioners filed their petition for review of the Prioritization Rule in this Court on August 10, 2017, and served the petition on EPA on August 11, 2017. *See Safer Chemicals Healthy Families v. EPA*, No. 17-72260 (9th Cir.). Under Federal Rule of Appellate Procedure 17(a), EPA’s certified index of the administrative record for the Prioritization Rule is due September 20, 2017. Under the briefing schedule issued by this Court, Safer Chemicals Petitioners’ opening brief is due October 30, and EPA’s response brief is due November 28. No. 17-72260, Order, Dkt. 1 (9th Cir. Aug. 10, 2017).

On August 11, 2017, additional petitions for review of the Prioritization Rule were filed in the United States Courts of Appeals for the Second and Fourth Circuits. *See Environmental Defense Fund v. EPA*, No. 17-2403 (2d Cir.); *Alliance of Nurses for Healthy Environments v. EPA*, No. 17-1927 (4th Cir.).

#### **B. Petitions for Review of the Risk Evaluation Rule**

On July 20, 2017, the same day the Prioritization Rule was published in the Federal Register, a second EPA rule was published, entitled “Procedures for

Chemical Risk Evaluation Under the Amended Toxic Substances Control Act,” 82 Fed. Reg. 33,726 (July 20, 2017) (“Risk Evaluation Rule”). The Risk Evaluation Rule establishes the process for EPA to conduct risk evaluations to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment, as required by section 6(b)(4) of TSCA, 15 U.S.C. § 2605(b)(4).

In addition to seeking review of the Prioritization Rule at issue in these cases, the Safer Chemicals Petitioners filed a separate petition for review of the Risk Evaluation Rule on August 10 in this Court. *See Safer Chemicals Healthy Families v. EPA*, No. 17-72259 (9th Cir.).

Two additional petitions for review of the Risk Evaluation Rule were filed in the Second and Fourth Circuits on August 11. *See Environmental Defense Fund v. EPA*, No. 17-2464 (2d Cir.); *Alliance of Nurses for Healthy Environments v. EPA*, No. 17-1926 (4th Cir.).

In their petitions for review of the Prioritization Rule and Risk Evaluation Rule in the Fourth Circuit, the Alliance of Nurses petitioners stated that consolidation of the two petitions would be “appropriate to promote judicial economy” because “the legal issues raised by the challenges to the Risk Evaluation and Prioritization Rules substantially overlap.” *E.g., Alliance of Nurses for Healthy Environments v. EPA*, 17-1926, Petition for Review, Dkt. 3 at 2 (4th Cir. Aug. 11, 2017). On August 11, the Fourth Circuit consolidated the two petitions.

*See, e.g., Alliance of Nurses for Healthy Environments v. EPA*, No. 17-1926, Order, Dkt. 6 (4th Cir. Aug. 11, 2017).<sup>2</sup>

In their mediation questionnaires filed with this Court, the Safer Chemicals Petitioners stated that their challenge to each Rule “will involve issues that are substantially similar or related to some of the issues presented” in their petition for review of the other Rule. *See* No. 17-72259, Mediation Questionnaire, Dkt. 7 (9th Cir. Aug. 30, 2017); No. 17-72260, Mediation Questionnaire, Dkt. 7 (9th Cir. Aug. 30, 2017).

### **C. Multidistrict Litigation Proceedings**

On August 31, 2017, EPA notified the Judicial Panel on Multidistrict Litigation that three petitions for review of the Prioritization Rule had been filed in more than one circuit and requested consolidation pursuant to 28 U.S.C. § 2112. *See* No. 17-72260, Notice to the Judicial Panel on Multidistrict Litigation of Multicircuit Petitions for Review, Dkt. 8-2 (9th Cir. Aug. 31, 2017). EPA filed a similar notice with respect to the three petitions for review of the Risk Evaluation Rule. *See* No. 17-72259, Notice to the Judicial Panel on Multidistrict Litigation of Multicircuit Petitions for Review, Dkt. 8-2 (9th Cir. Aug. 31, 2017). In these notices, EPA stated that the Agency “believes it would be in the interest of justice

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<sup>2</sup> Following the proceedings of the Judicial Panel on Multidistrict Litigation, discussed *infra*, the Fourth Circuit deconsolidated the two cases.

and judicial efficiency for challenges to both rules to be litigated in the same court.” *E.g., id.* ¶ 4.

On September 1, 2017, the Panel ordered the three petitions for review of the Prioritization Rule to be consolidated in this Court. *See* Exhibit A. The Panel ordered the three petitions for review of the Risk Evaluation Rule to be consolidated in the Fourth Circuit. *See* Exhibit B.

#### **D. Transferred Petitions for Review of the Prioritization Rule**

On September 6, 2017, the Second Circuit transferred Environmental Defense Fund’s petition for review of the Prioritization Rule to this Court, which has been docketed as *Environmental Defense Fund v. EPA*, No. 17-72501 (9th Cir.). Under Federal Rule of Appellate Procedure 17(a), EPA’s certified index of the administrative record for the Prioritization Rule is due September 20, 2017. Under the briefing schedule issued by this Court, Environmental Defense Fund’s opening brief is due November 27 and EPA’s response brief is due December 26. No. 17-72501, Order, Dkt. 1 (9th Cir. Sept. 7, 2017).

On September 11, 2017, the Fourth Circuit transferred *Alliance of Nurses for Healthy Environments v. EPA*, No. 17-1927 (4th Cir.) to this Court. As of the time of this filing, this Court had not yet opened a new docket for this transferred case.<sup>3</sup>

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<sup>3</sup> Once *Alliance of Nurses for Healthy Environments v. EPA*, No. 17-1927 (4th Cir.), is docketed in this Court, EPA requests that it be transferred to the Fourth Circuit and held in abeyance along with these two related cases.

## ARGUMENT

Under 28 U.S.C. § 2112(a)(5), this Court may transfer cases consolidated by the Judicial Panel on Multidistrict Litigation to another Court of Appeals “[f]or the convenience of the parties in the interest of justice.” This Court should transfer the petitions for review of the Prioritization Rule to the Fourth Circuit for three reasons.

First, it is in the interest of judicial economy for the same court to hear the challenges to both EPA Rules. *See ITT World Comm’cns, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980) (“[T]here is a policy of unifying related proceedings in a single court, and obtaining consistent results.”). Although the two Rules are distinct and have separate administrative records, the parties anticipate that there will be some overlap of issues. As noted above, the Alliance of Nurses petitioners in the Fourth Circuit cases specifically sought consolidation of their two petitions for review for this reason. And the Petitioners in these cases have expressly stated that challenges to the two Rules will involve issues that are substantially similar or related. Moreover, the Fourth Circuit has already decided that the two petitions filed in that court should be consolidated, and deconsolidated them only following the Judicial Panel for Multidistrict Litigation’s order. Second, it would be more convenient for the parties and conserve travel resources for these cases to be heard in the Fourth Circuit, because all counsel of record are located in Washington, DC,

or New York. Third, the Fourth Circuit may be able to resolve the petitions for review more quickly than this Court given the respective complexity of the courts' dockets. *See, e.g.*, Judicial Caseload Report: U.S. Court of Appeals Summary -- 12-Month Period Ending June 30, 2017, *available at* <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2017/06/30-2> (data table showing that the Fourth Circuit had a median time of 5.1 months to resolve appeals in the 12-month period ending June 30, 2017, while the Ninth Circuit had a median time of 13.3 months).

EPA further requests that these cases, including the Agency's deadline to file the administrative record, be held in abeyance temporarily for two reasons. First, it will conserve party resources to wait until resolution of EPA's motion to transfer before completing any scheduled filings, particularly because the two cases have different schedules. Second, the deadline for interested persons to file petitions for review of the Prioritization and Risk Evaluation Rules has not yet expired. Under TSCA's judicial review provision, interested persons may file petitions for review up to 60 days after promulgation of those rules. 15 U.S.C. § 2618(a)(1)(A).<sup>4</sup> Thus, additional petitions for review of the Prioritization and Risk Evaluation Rules could be filed as late as October 2, 2017. It would conserve

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<sup>4</sup> Under 40 C.F.R. § 23.5, the 60-day period began "two weeks after the date when the document [wa]s published in the Federal Register," or August 3, 2017.



the parties' resources to be able to focus on preparing any procedural motions needed to address any new petitions for review before completing the scheduled filings in these cases. Finally, EPA requests that this Court hold these cases in abeyance one additional week after the Court's ruling on the motion to transfer and the expiration of the deadline to file petitions for review (whichever occurs later). This additional time will allow the parties to confer on any outstanding procedural and scheduling issues regarding the cases.

### CONCLUSION

In sum, EPA requests that this Court transfer these cases to the United States Court of Appeals for the Fourth Circuit. EPA also requests that these cases be held in abeyance until the later of (1) one week after this Court rules on the motion to transfer, or (2) October 10, 2017. Once *Alliance of Nurses for Healthy Environments v. EPA*, No. 17-1927 (4th Cir.), which the Fourth Circuit transferred to this Court, is docketed, EPA requests the same relief with respect to that case.

Dated: September 14, 2017

Respectfully submitted,

JEFFREY H. WOOD  
Acting Assistant Attorney General  
Environment and Natural Resources  
Division

s/ Erica Zilioli  
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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 14, 2017. I certify that all participants in the case registered as CM/ECF users will receive service via the appellate CM/ECF system.

s/ Erica Zilioli

# Exhibit A

UNITED STATES JUDICIAL PANEL  
on  
MULTIDISTRICT LITIGATION

IN RE: ENVIRONMENTAL PROTECTION AGENCY, FINAL RULE:  
PROCEDURES FOR PRIORITIZATION OF CHEMICALS FOR RISK  
EVALUATION UNDER THE TOXIC SUBSTANCES CONTROL ACT,  
82 FED. REG. 33,753, PUBLISHED ON JULY 20, 2017.

MCP No. 148

(SEE ATTACHED SCHEDULE)

CONSOLIDATION ORDER

The U.S. Environmental Protection Agency published a Final Order dated July 20, 2017. On August 31, 2017, the Panel received, pursuant to 28 U.S.C. § 2112(a)(3), a notice of multicircuit petitions for review of that order. The notice included petitions for review pending in three circuit courts of appeal as follows: Second Circuit Court, Fourth Circuit Court, Ninth Circuit Court.

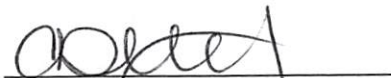
The Panel has randomly selected the United States Court of Appeals for the Ninth Circuit in which to consolidate these petitions for review.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 2112(a)(3), the petitions on the attached schedule are consolidated in the Ninth Circuit and that this circuit is designated as the circuit in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.

FOR THE PANEL:



Dana L. Johnson, Operations Support Specialist  
Random Selector



Crystal Dorsey, Case Administrator  
Witness

IN RE: ENVIRONMENTAL PROTECTION AGENCY, FINAL RULE  
PROCEDURES FOR PRIORITIZATION OF CHEMICALS FOR RISK  
EVALUATION UNDER THE TOXIC SUBSTANCES CONTROL ACT,  
82 FED. REG. 33,753, PUBLISHED ON JULY 20, 2017.

MCP No. 148

**SCHEDULE OF PETITIONS**

**CIRCUIT NO.**

**CASE CAPTION**

Second Circuit, No. 17-2403

Environmental Defense Fund v. EPA, et al.

Fourth Circuit, No. 17-1927

Alliance of Nurses for Healthy Environments, et al. v. EPA

Ninth Circuit, No. 17-72260

Safer Chemicals Healthy Families, et al. v. EPA, et al.

# Exhibit B

**UNITED STATES JUDICIAL PANEL  
on  
MULTIDISTRICT LITIGATION**

**IN RE: ENVIRONMENTAL PROTECTION AGENCY, FINAL RULE:  
PROCEDURES FOR CHEMICAL RISK EVALUATION UNDER THE  
AMENDED TOXIC SUBSTANCES CONTROL ACT,  
82 FED. REG. 33,726, PUBLISHED ON JULY 20, 2017.**

MCP No. 149

(SEE ATTACHED SCHEDULE)

**CONSOLIDATION ORDER**

The U.S. Environmental Protection Agency published a Final Order dated July 20, 2017. On August 31, 2017, the Panel received, pursuant to 28 U.S.C. § 2112(a)(3), a notice of multicircuit petitions for review of that order. The notice included petitions for review pending in three circuit courts of appeal as follows: Second Circuit Court, Fourth Circuit Court, Ninth Circuit Court.

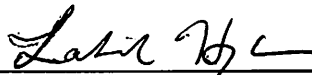
The Panel has randomly selected the United States Court of Appeals for the Fourth Circuit in which to consolidate these petitions for review.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 2112(a)(3), the petitions on the attached schedule are consolidated in the Fourth Circuit and that this circuit is designated as the circuit in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.

FOR THE PANEL:



Shawnte McGee, Case Administrator  
Random Selector



Lakhia Hyson, Case Administrator  
Witness



IN RE: ENVIRONMENTAL PROTECTION AGENCY ORIGINAL REGULATIONS  
PROCEDURES FOR CHEMICAL RISK EVALUATION UNDER THE  
AMENDED TOXIC SUBSTANCES CONTROL ACT,  
82 FED. REG. 33,726, PUBLISHED ON JULY 20, 2017.

MCP No. 149

**SCHEDULE OF PETITIONS**

**CIRCUIT NO.**

**CASE CAPTION**

Second Circuit, No. 17-2464

Environmental Defense Fund v. EPA, et al.

Fourth Circuit, No. 17-1926

Alliance of Nurses for Healthy Environments, et al. v. EPA

Ninth Circuit, No. 17-72259

Safer Chemicals Healthy Families, et al. v. EPA, et al.