IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAPE HATTERAS ACCESS PRESERVATION ALLIANCE, Plaintiff, v. KENNETH LEE SALAZAR, et al., Defendants, and DEFENDERS OF WILDLIFE, et al., Defendant-Intervenors.	)	Case No. 1:12-CV-00219 (EGS)

INTERVENORS' RESPONSE TO PLAINTIFF'S OBJECTION TO *SUA SPONTE* TRANSFER AND MEMORANDUM IN SUPPORT OF TRANSFER

This Court indicated its inclination to transfer this case, *sua sponte*, to the United States District Court for the Eastern District of North Carolina ("EDNC"), both at a status hearing held on July 26, 2012, and by Minute Order of the same date, and set deadlines for the parties to file objections and responses to objections. Pursuant to that Minute Order, Intervenors Defenders of Wildlife, the National Audubon Society, and the National Parks Conservation Association submit this memorandum in support of the *sua sponte* transfer of this matter to EDNC, and in response to the objection to transfer filed by Plaintiff (the "Objection") [Docket No. 24].

STATEMENT OF FACTS

Congress created Cape Hatteras National Seashore in 1937 as the nation's first national seashore, 77 Fed. Reg. 3124, and instructed that "no development of the project or plan for the convenience of visitors shall be undertaken which would be incompatible with the preservation of the unique flora and fauna or the physiographic conditions now prevailing in this area." 16

U.S.C. § 459a-2. In 1972, President Nixon signed Executive Order 11644, declaring that the "widespread use of [ORVs] on the public lands" was "in frequent conflict with wise land and resource management practices, environmental values, and other types of recreational activity." 37 Fed. Reg. 2877 (Feb. 9, 1972). The requirements of the Executive Order were codified at 36 C.F.R. § 4.10. Together, the Executive Order and regulation require the National Park Service ("NPS") to issue special regulations for each unit of the National Park System to manage ORV use before allowing any ORV use to take place at a particular park unit, including Cape Hatteras.

As of 2007, though, NPS had not yet complied by adopting a special regulation for Cape Hatteras, but instead was allowing ORV use on the Seashore's beaches pursuant to an "interim strategy," with no regulation in place to govern it. The interim strategy, by its own terms, was not developed as a long-term solution for managing ORV use at Cape Hatteras, but rather expressly stated that it was intended only to be implemented temporarily until a long-term ORV management plan was developed. NPS, *Cape Hatteras National Seashore Interim Protected Species Management Strategy/Environmental Assessment*, at i, 1, 172-75 (Jan. 2006).

Concerned about the dramatic declines and disappearance of some species from the Seashore under the interim strategy, Intervenors Defenders of Wildlife and National Audubon Society filed a complaint against NPS and other federal defendants in October 2007 in the EDNC (the "North Carolina Case") seeking an order requiring them to comply with federal law and to protect wildlife and other natural resources from the adverse effects of ORV use. Most of the parties to the North Carolina Case are the same as the parties to this case. Two of the three intervenors in this case are plaintiffs in the North Carolina Case. Defendants in the present case are also defendants in the North Carolina Case: the U.S. Department of the Interior, the NPS, the

Secretary of the Interior (then Dirk Kempthorne), and the Director of the NPS (then Mary Bomar). In addition, Plaintiff in this case ("CHAPA") intervened in the North Carolina Case.

The parties in the North Carolina Case reached a settlement and memorialized their agreement in a Consent Decree, which the court approved and entered on April 30, 2008. A copy of the Consent Decree was attached as Exhibit A to the Motion to Intervene filed with this Court. [Docket No. 5.] Among the terms agreed to by all parties in the North Carolina Case, including CHAPA, was that the federal agency defendants would "complete an ORV Management Plan for the Seashore" and then "complete and promulgate [a] final Special Regulation" (referred to in CHAPA's complaint in this case and herein as the "ORV Management Plan" and "Final Rule") to govern ORV use at the Seashore. Consent Decree ¶1. The Consent Decree provided that Cape Hatteras management would impose certain beach driving restrictions and wildlife protections until such time as the special regulation governing ORV use was implemented. *Id.* ¶ 2. The defendants completed the ORV Management Plan and promulgated the Final Rule as a special regulation with an effective date of February 15, 2012. 77 Fed. Reg. 3123. The Consent Decree also provided that "the Court retains jurisdiction to resolve any disputes arising under the Consent Decree and for issuing such further orders or directions as may be necessary or appropriate to construe, implement, modify, or enforce the terms of this Consent Decree." Consent Decree ¶ 43. Despite agreeing to these terms, CHAPA nevertheless initiated the present action to challenge the Final Rule on February 9, 2012.

Since entry of the Consent Decree in the North Carolina Case, the court has held hearings under its retained jurisdiction on: March 5, 2009; June 2, 2009; March 22, 2010; December 2, 2010; April 7, 2011; February 24, 2012; and July 27, 2012. In those hearings, the court has heard testimony and argument regarding the federal defendants' progress on developing the

ORV Management Plan and Final Rule, the contents of that plan and rule, the implementation of the wildlife protections and driving restrictions imposed under the Consent Decree (which mirror those ultimately imposed under the Final Rule that CHAPA now challenges), and the effects of the Consent Decree's terms on wildlife, tourism, the local economy, and law enforcement actions under those same protections and restrictions. At the most recent hearing, the court indicated its intention to schedule another status conference in December 2012.

ARGUMENT

Because of the pendency of the related, earlier-filed North Carolina Case, transfer of this case to the EDNC, while not required, is warranted in order to conserve judicial resources, avoid subjecting the parties to inconsistent judgments, and thereby promote justice.

Under 28 U.S.C. § 1404(a), "a district court may transfer any civil action to any other district . . . where it might have been brought" for "the convenience of parties and witnesses, in the interest of justice." *Id.* As CHAPA admits in its Objection, the purpose of section 1404(a) "is to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (citation omitted). The decision whether to transfer under section 1404(a) is left to the sound discretion of the transferor district court under an "'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen*, 376 U.S. at 622). In deciding whether to transfer venue, a district court engages in "a multi-part analysis: first, the court must determine that venue is proper in the transferor district; next, it must ensure both jurisdiction and venue will lie in the proposed transferee district; and finally, it must weigh several private and public interest factors to

determine whether transfer would, indeed, be 'in the interest of justice.'" *Elemary v. Holzmann*, 533 F. Supp. 2d 144, 149 (D.D.C. 2008).

I. Venue

The parties appear to agree that jurisdiction and venue are proper both before the transferor district, the District of Columbia, and before the proposed transferee district, the EDNC. *See* Defs.' Resp. to Pl.'s Obj. to Sua Sponte Transfer at ¶ 1 [Docket No. 25]. Indeed, this case could have been brought originally in the EDNC, as CHAPA effectively concedes in its Objection at page 6 by arguing that transfer to the EDNC is unnecessary without claiming it would be improper.

Under 28 U.S.C. § 1391(e), venue in an action in which a defendant is an agency of the United States is proper "in any judicial 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." Here, the EDNC is a proper venue because the ORV Management Plan and Final Rule govern ORV use of a national park located in eastern North Carolina, squarely within the territory of that court. *See Wyo. Lodging & Rest. Ass'n v. U.S. DOI*, 398 F. Supp. 2d 1197, 1203 (D. Wyo. 2005) (holding that venue in the District of Wyoming was proper where plaintiff challenged a rule governing ORV use in national parks located in Wyoming). In addition, plaintiff CHAPA is a North Carolina resident; it describes itself as "a project of the Outer Banks Preservation Association" (Compl. ¶ 7 [Docket No. 1]), which is registered with the North Carolina Secretary of State as a North Carolina corporation and has both its principal office and registered agent in Buxton, North Carolina (a village within

the boundaries of Cape Hatteras National Seashore).[1] Jurisdiction lies in the EDNC under the same laws identified by CHAPA in its Complaint in this case [Docket No. 1, ¶4], including 28 U.S.C. § 1331 (federal question jurisdiction), and CHAPA has not argued to the contrary.

In sum, although venue is proper in this Court, it is also proper in the EDNC.

II. Public Interest Factors

A district court considers public interest factors when determining whether transfer would promote justice. Those public interest factors include: "(1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home" *Trout Unltd. v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 16, 20 (D.D.C. 1996); *see also Elemary v. Holzmann*, 533 F. Supp. 2d at 150; *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 65 (D.D.C. 2003). Courts also consider the "pendency of a related case" in the transferee forum, *Greater Yellowstone Coal. v. Bosworth*, 180 F. Supp. 2d 124, 129 (D.D.C. 2001); and the "proper conservation and utilization of judicial resources." *Indus. Union Dep't v. Bingham*, 570 F.2d 965, 972 n.14 (D.C. Cir. 1977). These factors weigh in favor of transfer to the EDNC.

First, several related factors weigh heavily in favor of transfer: the conservation of judicial resources, the transferee court's familiarity with the governing law, and the pendency of related actions in the transferee's forum. While both this Court and the ENDC are equally well equipped to interpret and apply the federal laws at issue in this case, it would be wasteful for two courts to be burdened with resolving the present controversy between the parties, when the EDNC has already been doing so for nearly five years. Since the North Carolina Case was filed in 2007, the EDNC has held numerous hearings on the legal requirement for an ORV Rule, the

[1] The corporate records are on file with the North Carolina Secretary of State and available on its website at: http://www.secretary.state.nc.us/corporations/Corp.aspx?PitemId=5280951.

development of such a rule, the specific provisions of the rule, the management of ORV driving on the National Seashore while the rule was being developed, recovery of protected species under the provisions implemented in the Final Rule, and related issues. That court is extremely familiar with the facts and laws that give rise to both that case and the present one. Upon learning of the present case in a hearing in February 2012, the presiding judge in the North Carolina Case even expressed concern over the risk of inconsistent judgments. The same judge is often assigned other cases involving driving at Cape Hatteras National Seashore and is uniquely familiar with its history, geography, and landscape. *See, e.g.*, *United States v. Matei*, Criminal Case No. 2:07-M-1075-BO (EDNC) (case involving misdemeanor ORV driving infraction at Cape Hatteras). Thus, the proposed transfer to a court already familiar with the factual and legal predicate to this case would promote judicial economy.

The mere existence of the related case, filed first in time (in 2007), weighs heavily in favor of transfer. *Wash. Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980) (explaining long-standing rule that, when "two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first.'") (citation omitted). While the claims in the current two cases are not exactly identical (the North Carolina Case challenged Defendants' failure to codify an ORV regulation, while the current litigation challenges Defendants' codification of an ORV regulation), the claims essentially arise out of the same facts and law: both cases arise out of Defendants' management of ORV driving at Cape Hatteras National Seashore; allege claims under the Administrative Procedure Act (5 U.S.C. §§ 701-706) for violations of National Environmental Policy Act (42 U.S.C. §§ 4321-4370f), the Cape Hatteras National Seashore Recreation Area Enabling Legislation (16 U.S.C. §§ 459-459a-10), and the

NPS Organic Act (16 U.S.C. §§ 1 *et seq*.); and involve interpretation of the requirements of Executive Order 11644.

Second, this Court recently declared that "the most important of the public interest factors is the 'local interest in having localized controversies decided at home' . . . because matters should generally be resolved in the forum where the people whose rights and interests are most affected by the suit are located." *S. Utah Wilderness Alliance v. Lewis*, 2012 U.S. Dist. LEXIS 25618, Civ. Action No. 08-2187, **20-21 (D.D.C. Feb. 29, 2012) (granting motion to transfer, quoting *S. Utah Wilderness Alliance v. Norton*, 2002 U.S. Dist. LEXIS 27414, *5 (D.D.C. June 28, 2002), and citing several cases for same proposition). This Court has often ordered transfer of a case to the venue where the federal land at issue is located, on the basis of the importance of deciding local controversies locally. *See, e.g., Nat'l Wildlife Fed'n v. Harvey*, 437 F. Supp. 2d 42, 46-47 (D.D.C. 2006); *Trout Unltd.*, 944 F. Supp. at 22; *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 71 (D.D.C. 2003) (collecting numerous cases for same proposition).

In the present case, while there is national interest in the issue of ORV use on national seashores, the fact that the federal land is located in the transferee forum and the outcome of the litigation will affect wildlife, activities, and people there weighs heavily in favor of transfer. The land at issue is located within Cape Hatteras National Seashore on the North Carolina coast. The ORV use that is the subject of the Final Rule and the litigation will affect wildlife that lives, breeds, and winters in North Carolina and migrates through it. As CHAPA's complaint alleges, the "residents, visitors, and local businesses" of Cape Hatteras National Seashore are keenly interested in "access to and over the area's beaches" for "commercial and residential purposes." [Docket No. 1 at ¶ 29.] Like the North Carolina Case, the outcome of this litigation could affect the nature and amount of different kinds of tourism, land use, and wildlife in coastal North

Carolina, as well as the local economy in and around Cape Hatteras, either adversely as CHAPA predicts in its Complaint or beneficially as early economic indicators such as park visitation and hotel/rental occupancy rates are showing. [Docket No. 1 at ¶¶ 82, 86, 101-09.] Local government officials weighed in during the comment period on the draft plan, including the state Senate Pro Tem, the state Wildlife Resources Commission, and members of the board of County Commissioners of Dare County, in which much of Cape Hatteras is located. In sum, the outcome of the litigation – specifically, whether the ORV Management Plan and Final Rule remain in force – will affect local interests, and the controversy should therefore be decided locally. As this Court has declared, "justice requires that such localized controversies should be decided at home." *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 561 F. Supp. 1238, 1240 (D.D.C. 1983).

The last public interest factor, the relative congestion of the courts, is inconclusive. Although CHAPA argues that this factor weighs against transfer, it admits that its own calculations show only that this Court is "*slightly* less congested than the" EDNC. [Docket No. 24 at 10 (emphasis added).] Moreover, CHAPA's calculations do not take into account such factors as the relative complexity of the cases being handled by the two courts, the number of judges on senior status still actively hearing cases, and so on. For example, while CHAPA states that the EDNC has only four judgeships, there are six judges actively handling cases. *See* EDNC website at http://www.nced.uscourts.gov/judges/. The two courts are in the best position to determine their own relative congestion.

In sum, the public interest factors weigh in favor of transfer to EDNC.

III. Private Interest Factors

A court also considers several private interest factors to determine whether transfer would promote justice. Those factors include: "(1) the plaintiff's choice of forum . . .; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses . . .; and (6) the ease of access to sources of proof." *Elemary*, 533 F. Supp. 2d at 149-50; *Trout Unltd.*, 944 F. Supp. at 16; *Sierra Club*, 276 F. Supp. 2d at 65.

Although CHAPA chose to bring its complaint in this Court, the deference due that choice is diminished because this is not its home forum and because other factors weigh in favor of transfer to the EDNC. In one recent case, this Court explained its decision to accord the plaintiff's choice of forum less deference, noting that "[m]ere involvement . . . on the part of federal agencies, or some federal officials who are located in Washington, D.C. is not determinative." *Stockbridge-Munsee Cmty. v. United States*, 593 F. Supp. 2d 44, 47 (D.D.C. 2009). The Court elaborated: "Though the administrative action at issue in this case arose in Washington, 'the only real connection [the] lawsuit has to the District of Columbia is that a federal agency headquartered here . . . is charged with generally regulating and overseeing the [administrative] process.'" *Id.* (quoting *DeLoach v. Phillip Morris Co.*, 132 F. Supp. 2d 22, 25 (D.D.C. 2000) (alterations in original)). The *Stockbridge* court also explained that the plaintiff's "choice is conferred less deference" when it "is not the plaintiff's home forum." *Id. See also Intrepid Potash-N.M., LLC v. U.S. DOI*, 669 F. Supp. 2d 88, 95-98 (D.D.C. 2009) (plaintiff's choice of forum not entitled to deference where case concerned drilling in the transferee state, plaintiff was not a resident of the transferor forum, and most of the material events occurred elsewhere). Indeed, the Court of Appeals for the D.C. Circuit warned that this Court must

"guard against the danger that a plaintiff might manufacture venue in the District of Columbia . . . [b]y naming high government officials as defendants" to "bring a suit here that properly should be pursued elsewhere." *Cameron v. Thornburgh*, 983 F.2d 253, 256 (D.C. Cir. 1993).

Here, CHAPA is a resident of North Carolina, not this forum, and the primary connection to this forum that CHAPA identified is that the federal agencies it chose to sue are headquartered in Washington, D.C. That showing is insufficient. *Norton*, 2002 U.S. Dist. LEXIS 27414, at *11 (plaintiff wishing to sue federal agency in District of Columbia must show "substantial personalized involvement by a member of the Washington, D.C." office in order to show meaningful ties to the district).

In contrast, numerous events that provide the factual predicate of this case took place in North Carolina, and thus the claim arose in North Carolina. The activity – the ORV driving – that is governed by the ORV Management Plan and Final Rule challenged by CHAPA takes place at Cape Hatteras National Seashore, on the North Carolina coast. The "challenged FEIS [which contains the ORV Management Plan] appears to have been drafted primarily in North Carolina." [CHAPA Objection, Docket No. 24 at 8.] All thirteen or so meetings of the "negotiated rulemaking meetings" took place in North Carolina. Three of the four scoping meetings took place in North Carolina (the fourth took place in Washington, D.C.), as did three of the four "public information meetings" (the fourth took place in Richmond, Virginia). Four of the five public meetings at which citizens could comment on the draft environmental impact statement took place in North Carolina (the fifth took place in nearby Hampton, Virginia).[2] The rulemaking generally took place in North Carolina.

[2] Schedules and notices are available at the NPS website for the Rule: http://parkplanning.nps.gov/documentsList.cfm?parkID=358&projectID=10641.

The convenience of the parties also clearly weighs in favor of the EDNC. The parties all have North Carolina counsel who handled (and continue to handle) the related North Carolina Case and who are intimately familiar with Cape Hatteras National Seashore, the laws that give rise to the claims in this case, the terms of the ORV Management Plan and Final Rule, the history of their development and codification, and the facts, law, and science that relate to them. The parties are all entities with representatives and/or employees who reside and work in North Carolina and are able to attend hearings in North Carolina. CHAPA and Intervenors each have numerous members who live in and around Cape Hatteras who will be benefitted by transfer, which will better enable them to attend proceedings in the case.

In addition, the convenience of witnesses and ease of access to sources of proof weigh in favor of the EDNC. In the North Carolina Case, the only witnesses to testify in any of the hearings have been NPS employees who work at Cape Hatteras, and CHAPA has not given the Court any reason to conclude that the same would not be true in this present case. Should the court presiding over this case ever need to visit the site to better understand the case, the EDNC again offers more convenient access to the North Carolina coast and Cape Hatteras National Seashore.

In sum, all of the private interest factors except the plaintiff's choice of forum, which is due only diminished deference, weigh in favor of transfer to EDNC.

CONCLUSION

For the reasons stated above, although venue is proper in either the District of Columbia or EDNC, a balancing of the private and public factors favors transfer of this case to EDNC.

Respectfully submitted, this 13th day of August, 2012.

DEFENDERS OF WILDLIFE
/s/ Jason C. Rylander
Jason C. Rylander
DC Bar No. 474995
1130 17th Street N.W.
Washington, D.C. 20036-4604
Telephone: (202) 682-9400
Facsimile: (202) 682-1331
Email: jrylander@defenders.org

SOUTHERN ENVIRONMENTAL LAW CENTER
/s/ Julia F. Youngman
Julia F. Youngman
Admitted pro hac vice, NC Bar No. 21320
200 W. Franklin Street, Suite 330
Chapel Hill, NC 27516
Telephone: (919) 967-1450
Facsimile: (919) 929-9421
Email: jyoungman@selcnc.org
Attorneys for Defendant-Intervenor-Applicants

CERTIFICATE OF SERVICE

I hereby declare that on this 13th day of August, 2012, I have served the foregoing Intervenors' Response to Plaintiff's Objection to *Sua Sponte* Transfer and Memorandum in Support of Transfer on the parties listed below by electronically filing the foregoing with the Court on this date using the CM/EF system:

Jonathan D. Simon
Asha Venkataraman
Van Ness Feldman, PC
1050 Thomas Jefferson St., NW
Seventh Floor
Washington, DC 20007
Email : jxs@vnf.com

Joseph H. Kim
Trial Attorney
Natural Resources Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Email: joseph.kim@usdoj.gov

and on the party listed below by placing a copy of the same in the United States mail, first-class postage prepaid, and addressed as follows:

Michael Stevens
Department of the Interior
Office of the Regional Solicitor
75 Spring Street, S.W., Suite 304
Atlanta, Georgia 30303

/s/ Julia F. Youngman
Julia F. Youngman
Attorney for Defendant-Intervenors