IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

OAK RIDGE ENVIRONMENTAL PEACE ALLIANCE, NUCLEAR WATCH OF NEW MEXICO, NATURAL RESOURCES DEFENSE COUNCIL, RALPH HUTCHINSON, ED SULLIVAN, JACK CARL HOEFER, and LINDA EWALD, Plaintiffs, v. JAMES RICHARD PERRY, SECRETARY, UNITED STATES DEPARTMENT OF ENERGY, and FRANK G. KLOTZ, ADMINISTRATOR, NATIONAL NUCLEAR SECURITY ADMINISTRATION, Defendants.	Case 1:17-cv-01446-RJL

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER CASE TO THE EASTERN DISTRICT OF TENNESSEE

The central issue raised by Defendants' transfer motion is whether this case is primarily local or national in character. As demonstrated by Defendants' opening memorandum, the matters at issue in this case are local at every turn. Plaintiffs raise claims under the National Environmental Policy Act ("NEPA") that exclusively concern the local environmental effects of a construction and upgrade project ("Project") at the Y-12 Complex in Oak Ridge, Tennessee. The challenged environmental review documents were prepared locally, the public outreach for

the Project occurred entirely in Tennessee, and, critically, the facilities and environmental effects of the Project are entirely local to the Oak Ridge area. Although Plaintiffs attempt to characterize this case as a challenge to the safety of the nation's nuclear weapons program and actions purportedly originating in the District of Columbia, that characterization is inaccurate. This case is a NEPA case, concerning the local environmental impacts of the challenged Project, not a broad-scale challenge to the nation's nuclear weapons program. Plaintiffs themselves concede that this case "is a garden-variety action under the Administrative Procedure Act." Pls.' Opp'n Mem. (ECF No. 9) ("Resp.") at 1. In these circumstances, the Court should exercise its discretion to transfer this action to the Eastern District of Tennessee, given the overriding public interest in hearing this local environmental dispute in the district where the projected environmental effects of the challenged action will occur.

ARGUMENT

I. The public interest factors strongly favor transfer, given the overriding public interest in deciding in the Eastern District of Tennessee the local environmental issues at the heart of this case.

A. The local interest factor should be controlling.

As discussed in Defendants' opening memorandum (ECF No. 7-1) ("U.S. Br.") at 7, the local interest factor is "[p]erhaps the most important factor in the motion-to-transfer balancing test." *Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 116 (D.D.C. 2015) (citation, internal quotation marks, and alterations omitted)); *see also Shawnee Tribe v. United States*, 298 F. Supp. 2d 21, 26 (D.D.C. 2002) ("What the Court finds to be the most persuasive factor favoring transfer of this litigation to Kansas is the local interest in deciding a sizeable local controversy at home."). Indeed, "[c]ourts prefer to resolve cases in the forum where people 'whose rights and interests are in fact most vitally affected by the suit,'" and "the interests of

justice are promoted when a localized controversy is resolved in the region it impacts." *W. Watersheds Project v. Pool*, 942 F. Supp. 2d 93, 102 (D.D.C. 2013) (quoting *Adams v. Bell*, 711 F.2d 161, 167 n. 34 (D.C.Cir.1983)). "[A] court's analysis of the local interest factor depends on whether the decision will directly affect citizens of the transferee district." *Id*.

Given the critical nature of this factor, the Court should exercise its discretion to transfer this case to the Eastern District of Tennessee. *See* U.S. Br. at 7–8 (citing cases where transfer was granted to location of projected environmental impacts and district where local officials played leading role in challenged action). Here, virtually every aspect of the challenged action – including the location of the property at issue, the area in which the projected environmental effects of the challenged action will occur, the place at which the challenged NEPA documents were prepared, and the site at which public outreach for the Project was completed – is local. *See id*. at 8–9. The Court should therefore transfer the case to the district where this action originated and where those who will be "most vitally affected by the suit" are located. *W. Watersheds*, 942 F. Supp. 2d at 102 (citation omitted).

The limited involvement of federal officials in Washington, D.C. in ultimately signing, but making no substantive changes to, the 2016 Amended Record of Decision (and the preceding 2011 Record of Decision) does not change this conclusion. As demonstrated by the cases cited by Defendants, the nominal involvement of federal officials in Washington, D.C. does not transform a fundamentally local action into one that should be heard in the District of Columbia. *See* U.S. Br. at 9–10. For instance, in *Otter v. Salazar*, 718 F. Supp. 2d 62, 64 (D.D.C. 2010), this Court appropriately granted transfer where "the role played by officials in Washington was minor, and the Secretary did not have any special involvement in the listing decision." Likewise, in *Shawnee Tribe*, 298 F. Supp. 2d at 25–26, this Court correctly recognized that "mere

involvement on the part of federal agencies, or some federal officials who are located in Washington D.C. is not determinative" and ultimately granted transfer where, although "some officials from the GSA and the Department of Interior who work in the Washington, D.C. area" were involved with the challenged decision, "the decisionmaking process, by and large, [was not] substantially focused in this forum." *Shawnee Tribe*, 298 F. Supp. 2d at 25 (footnotes omitted); *see also Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 67 (D.D.C. 2003) ("Here, the parties' presence in the District of Columbia is overshadowed by the lack of evidence that federal officials in this forum played 'an active or significant role' in the decision to issue the permits."). Although Plaintiffs attempt to give a cramped reading to these cases that would confine them to their facts, *see* Resp. at 9–10, these cases are squarely on point here, where there has been limited federal involvement by officials in Washington, D.C., local officials played the leading role in the challenged Project, and its environmental effects are exclusively local.

Plaintiffs' reliance upon *Wilderness Society v. Babbitt*, 104 F. Supp. 2d 10 (D.D.C. 2000) (cited in Resp. at 8 n.2, 9) only underscores this point. In denying transfer in that case, the Court emphasized the heavy involvement of the Secretary of the Interior in the challenged decision:

> Secretary Babbitt's involvement in the DOI's review of the impact of oil and gas leasing on the environment in the NPR–A was far from routine. He made a six-day visit to the area, and met with and was briefed by local Inupiaq Eskimo residents, government and industry officials, and scientists. NPR–A Planning Team, BLM, *NPR–A Update*, Issue 3, Aug. 1997 at 1 (Pls.' Opp'n, Ex. D.) The DOI literature covering the event reported Secretary Babbitt to have said that he would prevent leasing if the environmental impact study conducted by his department did not support his general impression that oil and gas development was compatible with subsistence. *Id.* at 2. Secretary Babbitt also signed the Record of Decision in the District of Columbia and briefed the public on his decision here. *See* Press Release, *News, Babbitt Presents Biologically Based NPR–A Plan That Balances Protection for Wildlife Habitat With Oil and Gas Development*, Aug. 5, 1998 (Pl.'s Opp'n, Ex. F.) Secretary Babbitt's heavy involvement thus highlights the significance of this issue to the entire nation. By contrast, the Secretary of the Interior was not directly involved in the local

> environmental controversies at issue in *Trout Unlimited* and *Hawksbill*, and all decision-making in those cases took place outside of the District of Columbia.

Id. at 14. There is no parallel between these facts and those at issue in the present case, as the role played by D.C. Headquarters in the challenged decision was limited and in no way close to that of Secretary Babbitt's direct and heavy involvement in *Wilderness Society*. Again, the NEPA documents at issue in this case were all prepared at the local level, the challenged Supplement Analysis was issued locally, and Headquarters provided no substantive changes to the Amended Record of Decision once it was transmitted there for review. *See* Declaration of Geoffrey L. Beausoleil (ECF No. 7-2) ("Beausoleil Decl.") at ¶¶ 12–13. Likewise, all public outreach in this case occurred in the Oak Ridge area, *see id.* at ¶ 11, contrasting sharply with the situation in *Wilderness Society*, where, "according to one of its press releases, DOI held hearings in Washington, D.C. and San Francisco 'because of the national public interest in this resource issue.'" *Wilderness Soc'y*, 104 F. Supp. 2d at 14 (citation omitted). Thus, the indisputable local nature of this action weighs heavily in favor of transfer.

B. Plaintiffs seek to minimize the local nature of this action and overstate its national significance.

In response to these arguments, Plaintiffs seek to downplay significance of the local interest factor and the importance of deciding local controversies at home. In fact, Plaintiffs go so far as to assert that "Defendants have proffered no offsetting reasons why any party's interest would be served through transfer under the circumstances here." Resp. at 7. Not only does this position entirely disregard the heavy public interest in deciding localized environmental disputes locally, it also seeks to characterize this action as something that it is not. Of particular importance, Plaintiffs' opposition to transfer is largely premised upon their mistaken assertion that this case is a challenge to the nation's nuclear weapons program. As stated by Plaintiffs,

"this case concerns the safety of the nation's nuclear weapons program, a nationally significant issue most suitable for litigation in the nation's capital." Resp. at 12; *see also id*. at 7 (characterizing this action as "a case concerning the nationally important issue of the safety of the United States[']s nuclear weapons program."); *id*. at 8 ("while the resulting nuclear and toxic contamination would impact an area with[in] a 50-mile radius, including the city of Knoxville, Tennessee, the consequences to the U.S. nuclear weapons program would be felt across the entire nation."); *id*. at 9 ("the consequences of the inadequate review claimed by Plaintiffs would not be limited to Tennessee but would have a significant impact on the nation's nuclear weapons program, military preparedness, and U.S. participation in global nuclear non-proliferation programs").

Plaintiffs err in their characterization of this action. At its heart, this case is a NEPA case that concerns the sufficiency of the environmental review completed for a local construction and upgrade project at the Y-12 Complex in Oak Ridge. Granted, the Y-12 Complex does play an important national security role in, among other things, providing "enriched uranium . . . used in nuclear weapons" and serving as "one of the primary manufacturing facilities for maintaining the U.S. nuclear weapons stockpile." Beausoleil Decl. at ¶ 2. However, that national security role is not at issue in this litigation.

NEPA is a procedural statute that directs federal agencies to prepare an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). It is not a statute that dictates any substantive results, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), much less a statute that provides Plaintiffs a vehicle for challenging the security of the nation's nuclear weapons program. Plaintiffs' efforts to cast this case as one concerning national security issues rather

than localized environmental impacts therefore mischaracterize the nature of this suit. Indeed, the situation is much like that at issue in *Western Watersheds*, 942 F. Supp. 2d at 102–103, where the Court properly focused on who would be directly and uniquely affected by the environmental effects of the challenged action in rejecting plaintiffs' attempts to transform a localized dispute into one of purported national significance:

> Plaintiffs also assert that the local interest factor does not support transfer because "this case concerns an issue of indisputably national import," relying on *Otay Mesa Prop.*[,] 584 F.[ ]Supp.[ ]2d 122. *See* Pls.' Opp'n at 15–16. But that reliance is also misplaced. Defendants do not contend that *only* Utah residents have an interest in the resolution of this case (as plaintiffs characterize defendants' argument, *see* Pls.' Opp'n at 15); rather, defendants correctly observe that *because* Utah residents have a broad interest in the issues, and because it will impact them directly, the controversy is local in nature. *See* Defs.' Mot. at 8; *Otay Mesa Prop.*[,] 584 F.[ ]Supp.[ ]2d at 126–28 (challenging an Endangered Species Act critical habitat designation that affected only plaintiff's individual parcels of land). The impacts of this case will be direct and unique on Utah residents and over the greater Grand Staircase and Glen Canyon area.

(Footnote omitted). Plaintiffs themselves elsewhere concede that this case is effectively a challenge to a local construction and upgrade project when they state that "[t]his case concerns the NNSA's failure to consider critical information when deciding not to build a single new UPF facility but instead to continue to rely on old buildings with clear structural vulnerabilities." Resp. at 4.

Plaintiffs also greatly overstate the connections of the District of Columbia to this case. For instance, Plaintiffs emphasize that the 2011 Record of Decision and the 2016 Amended Record of Decision were signed in Washington, D.C., and attempt to call into question whether federal officials in D.C. may have played a greater role in the challenged action than is evidenced by the declaration submitted by Defendants in support of their motion to transfer. *See* Resp. at 8 n. 2, 11 n.3. These arguments fail on multiple levels.

First, Plaintiffs discount the facts that (1) all of the NEPA documents at issue in this action were prepared locally; (2) the 2016 Supplement Analysis and 2011 Site-Wide Environmental Impact Statement were both issued locally; and (3) no substantive changes to the 2011 Record of Decision and the 2016 Amended Record of Decision were made after they were transmitted to federal officials in the District of Columbia for review. In fact, notwithstanding Plaintiffs' unfounded suggestion that there may have been a greater level of D.C. involvement during the drafting process for the 2011 and 2016 Records of Decision, *see* Resp. at 11 n.3, a supplemental declaration prepared in response to this suggestion only emphasizes the limited nature of Headquarters' involvement. *See* Suppl. Decl. of Geoffrey Beausoleil at ¶ 3, attached as Exh. 2.

Second, Plaintiffs' heavy reliance on the Amended Record of Decision in opposing transfer, *see* Resp. at 8 n.2, overlooks the fact that their Complaint focuses to a far greater degree on alleged deficiencies in the Supplement Analysis. A simple review of Plaintiffs' Complaint reveals that their concerns with the NEPA review completed in 2016 are directed at the Supplement Analysis, not the Amended Record of Decision. *Compare* Compl. (ECF No. 1) at ¶¶ 81–93 (extensive discussion of Supplement Analysis) with *id*. at ¶ 94 (providing brief summary of Amended Record of Decision). The Court should disregard Plaintiffs' efforts to shift the focus of their claims to a document that is scarcely discussed in the Complaint.

Plaintiffs likewise err in focusing upon a handful of documents cited in their Complaint that purportedly originated from federal agencies in the Washington, D.C. area. *See* Resp. at 10–11. As an initial matter, it is important to put these documents in context. Although the Defense Nuclear Facilities Safety Board correspondence admittedly issued from the D.C. area, the U.S. Geological Survey report cited by Plaintiffs originated in Virginia, not the District of Columbia,

as Plaintiffs acknowledge. *See* Resp. at 4 n.1. Plaintiffs are incorrect in suggesting that the District of Columbia and Virginia are synonymous for purposes of transfer considerations. The other document cited by Plaintiffs – the Department of Energy's Inspector General Report – contains little discussion of the Y-12 Complex, and that limited discussion pertains to a facility (the 9201-05 Alpha 5 Facility) that is not even at issue in this litigation. *See* Pl. Exh. B (Dkt. No. 9-2) at 3-4. Further, the excerpts from this document that Plaintiffs quote in the Complaint do not even specifically pertain to the Y-12 Complex and are of such a general nature as to be of questionable relevance to Plaintiffs' claims. *Compare* Compl. at ¶¶ 75–78 with Pl. Exh. B at 2-3, 8-10 (containing quoted excerpts). In any event, there can be no dispute that the central document at issue in this action – the 2016 Supplement Analysis – was issued at the local level.[1]

Even more critically, Plaintiffs offer no case law support for their suggestion that the originating source of these documents, rather than their subject matter, is the determinative factor. Regardless where these documents originated, their significance for purposes of the transfer motion is that they allegedly concern environmental risks associated with the challenged Project at the Y-12 Complex in Oak Ridge. Plaintiffs' attempt to shift the focus of these documents to the District of Columbia emphasizes form – *i.e.*, where the documents were issued – over function – *i.e.*, what they allegedly concern. Thus, for all these reasons, Plaintiffs' attempts to de-emphasize the local nature of this action and establish a strong nexus with the District of Columbia are predicated upon a false characterization of what this action is about and the significance of the underlying documents at issue. The Court should reject these misplaced arguments and transfer this case to the district where the actual environmental effects of the

[1] It also bears noting that Defendants' responses to an October 27, 2016 letter from two of the Plaintiffs and upon which Plaintiffs heavily rely in their Complaint, *see* Compl. at ¶¶ 95–104, were issued locally rather than from federal officials in the District of Columbia. *See* Beausoleil Decl. at ¶ 14.

challenged Project will be directly felt. Simply put, this self-styled "garden-variety action under the Administrative Procedure Act" should be heard locally. Resp. at 1.

C. Docket congestion and familiarity with applicable law are neutral factors.

Aside from compelling local interest that heavily favors transfer, the other two public interest considerations – familiarity with applicable law and docket congestion – are neutral and of negligible significance. As previously discussed, all federal courts are "competent to decide federal issues correctly." *Flowers*, 276 F. Supp. 2d at 70 n.6 (discussed in U.S. Br. at 11 n. 3). Therefore, neither potential venue has greater familiarity with the governing law, given that the claims in this action are based entirely on NEPA, which is federal law.[2] Plaintiffs seem to

[2] The Eastern District of Tennessee routinely hears cases specifically involving the Y-12 Complex and other nuclear facilities in the Oak Ridge area. *See*, *e.g.*, *Legal Envtl. Assistance Found., Inc. v. Hodel*, 586 F. Supp. 1163, 1166 (E.D. Tenn. 1984) (concerning "1) Whether the Y–12 Plant is subject to the provisions of the RCRA, and 2) Whether defendants have violated the CWA by allowing unpermitted discharges of pollution at Y–12."); *Ball v. Union Carbide Corp.*, 212 F.R.D. 380, 382 (E.D. Tenn. 2002), *aff'd*, 376 F.3d 554 (6th Cir. 2004), *opinion amended and superseded*, 385 F.3d 713 (6th Cir. 2004), and *aff'd*, 385 F.3d 713 (6th Cir. 2004) (class action arising "out of claims of dangerous exposure to radioactive and other toxic substances in Oak Ridge, Tennessee, and surrounding areas over the more than 50 year period that atomic bombs were manufactured there."); *Dyer v. United States*, 96 F. Supp. 2d 725, 727 (E.D. Tenn. 2000) (concerning claims that "the Government is liable under the Federal Tort Claims Act, 28 U.S.C. section 1346(b) . . . for damages resulting from the injuries Mrs. Dyer incurred while she was employed by Lockheed Martin Energy Systems, Inc. . . . during the dismantling of a government nuclear facility at Oak Ridge, Tennessee, the K–25 nuclear facility.") (footnote omitted); *Nuclear Transp. & Storage, Inc. v. United States Through Dep't of Energy*, 703 F. Supp. 660, 662 (E.D. Tenn. 1988), *aff'd sub nom. Nuclear Transp. & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989) (concerning claims that "the Department of Energy would not store UH [uranium hexafluoride] in competition with private industry," including plaintiff who provided unenriched uranium to "nuclear facilities which use nuclear fuel for which the Department of Energy provides enrichment services."); *MACTEC, Inc. v. Bechtel Jacobs Co.*, Nos. 3:05-CV-255, 3:06-CV-265, 2007 WL 2385953, at *1 (E.D. Tenn. Aug. 16, 2007) (contract claims arising "out of contracts for the demolition and disposal of several radioactively contaminated buildings at the K-25 Gaseous Diffusion Plant operated by the Department of Energy in Oak Ridge, Tennessee."); *Harris-Bethea v. Babcock & Wilcox Tech. Servs. Y-12, LLC*, No. 3:13-CV-669-TAV-HBG, 2016 WL 4379232, at *1 (E.D. Tenn. Aug. 16, 2016) (employment dispute with operator of "national security complex that manufactures and dismantles nuclear warhead components, and houses the nation's supply of

recognize this point in acknowledging that "there is no evidence that the transferee court has any greater experience with relevant issues." Resp. at 14 (emphasis added).

Likewise, docket congestion is a neutral factor. Although Plaintiffs cite to the United States District Court's National Judicial Caseload Profile to argue that docket congestion favors their position, *see* Resp. at 13, the cited statistics are inconclusive. For the year ending June 30, 2017, these statistics do show a median time of 6.9 months from filing to disposition of civil cases in the District of Columbia compared to a median time of 12.7 months in the Eastern District of Tennessee. However, those numbers hardly tell the whole story. For instance, for this same period of time, the median time from filing to trial in civil cases is 46 months in the District of Columbia compared to 25.5 months in the Eastern District of Tennessee. And, the portion of civil cases that are over three years old as of June 30, 2017 is 12.5% in the District of Columbia compared to 6% in the Eastern District of Tennessee. Although the cause of these discrepancies is not self-evident, the significantly higher completion time for cases taken to trial (46 months vs. 25.5 months) and the more-than-double percentage of pending cases that are over three years old (12.5% vs. 6%) in the District of Columbia suggest that certain types of complex cases, including those that go to trial, may take longer to resolve in this District.

Complicating things further, these statistics reveal a total of 53.9 "vacant judgeship months" for the one-year period ending June 30, 2017 in the District of Columbia compared to no vacant judgeship months in the Eastern District of Tennessee. These vacant judgeship

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weapons-grade, highly-enriched uranium."); Judgment Order & Memorandum, *Bell v. Moniz*, No.: 3:13-cv-00190 (E.D. Tenn. Feb. 23, 2015) (First Amendment and Administrative Procedure Act challenges related to fencing installed at Y-12 which restricted Plaintiffs from protesting in a particular area); and *United States v. Walli*, No. 3:12-CR-107, 2013 WL 1837152, at *1 (E.D. Tenn. Jan. 2, 2013) (concerning defense that charges of sabotage and injury-to-property at the Y-12 Plant "must be dismissed because the production, processing, and storage of nuclear weapons is illegal under United States and international law.").

months presumably have a further effect on docket congestion in this District. The bottom line is that these statistics do not clearly reflect that one district is more or less congested than the other, as the cited differences could be attributable to any number of other factors. As the Court explained in *Douglas v. Chariots for Hire*, 918 F. Supp. 2d 24, 34 (D.D.C. 2013):

> While courts in this District have granted motions to transfer based, in part, on differences in docket congestion between two districts, *see, e.g.*, *Treppel*[,] 793 F.[ ]Supp.[ ]2d at 439 (finding transfer warranted based on median-time-interval differences between District of Columbia and Eastern District of Virginia); *Parkridge 6, LLC v. U.S. Dep't of* [*Transp*]., 772 F.[ ]Supp.[ ]2d 5, 8–9 (D.D.C.2009) (same), the statistical differences here do not weigh strongly in favor of transfer. *See U.S. v. H & R Block, Inc.*[,] 789 F.[ ]Supp.[ ]2d 74, 84–85 (D.D.C.[ ]2011) (treating relative congestion of dockets as neutral factor in transfer analysis, noting that "statistics provide, at best, only a rough measure of the relative congestion of the dockets in the two districts. They do not, for example, reflect the differences in the caseloads carried by different individual judges in each district. Any disparities between the lengths of time from filing to trial may also reflect differences other than congestion, such as differences in the types of cases that are likely to be tried in each district and the level of discovery and pre-trial motion practice required in those cases").

Thus, docket congestion is also a neutral factor, as the statistics cited by Plaintiffs are inconclusive, neither court would be delayed by having to familiarize itself with the facts of this case at its early stages, *see Trout Unlimited v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 19 (D.D.C. 1996), and this Court has no "reason to suspect" that the docket of the Eastern District of Tennessee "could not accommodate this case." *Harris v. U.S. Dep't of Veterans Affairs*, 196 F. Supp. 3d 21, 25 (D.D.C. 2016) (quotation marks and citation omitted). The Court should therefore determine that the public interest weighs heavily in favor of transfer, given the strong public interest in hearing this environmental dispute locally and the neutrality of the other public interest factors.

II. The private interest factors also favor transfer.

A. Any deference to be given Plaintiffs' choice of forum is undermined by the fundamentally local nature of this action and Plaintiffs' limited connection to the District of Columbia.

The private interest factors also support transfer. Plaintiffs' choice of forum ordinarily qualifies for some level of deference. S*ee Trout Unlimited*, 944 F. Supp. at 17. However, this deference is lessened where the chosen forum lacks meaningful ties to the controversy and the parties, *see id*., and "lessened further still when the forum to which transfer is sought has 'substantial ties' to both the plaintiff and 'the subject matter of the lawsuit.'" *Chariots for Hire*, 918 F. Supp. 2d at 31–32 (quoting *Trout Unlimited*, 944 F. Supp. at 17 (additional citations omitted)). Given these considerations, any weight to be given to Plaintiffs' chosen forum should be limited.

Again, this action concerns environmental issues that are fundamentally local in character, refuting Plaintiffs' contentions that this action will decide national security issues of allegedly nation-wide significance that should be heard in this District. Therefore, much like the situation in *Western Watersheds*, 942 F. Supp. 2d at 102–03, this Court should reject Plaintiffs' attempts to color this action as one of predominantly nation-wide significance and transfer the case to the Eastern District of Tennessee, whose residents will be directly and uniquely affected by the environmental effects of the action.

Moreover, Plaintiffs' limited connections to this forum further undermine their position. As previously discussed, five of the seven Plaintiffs are residents of the Eastern District of Tennessee, and only one of the Plaintiffs – the Natural Resources Defense Council ("NRDC") – maintains an office in the District of Columbia, albeit not its principal place of business. *See* U.S. Br. at 13. Further, NRDC has a marginal connection to this litigation, given that it

"submitted no comments on the 2011 EIS, did not subsequently exchange any correspondence with NNSA concerning the Y-12 Complex, and never requested the NNSA to prepare a new or supplemental EIS concerning the actions approved in the 2016 Amended Record of Decision." Beausoleil Decl. at ¶ 15. Thus, any weight to be given Plaintiffs' chosen forum by virtue of NRDC's maintenance of an office in the District of Columbia is far outweighed by the local public interest in deciding the local environmental issues raised by Plaintiffs' Complaint in the region impacted by the challenged Project.

B. Defendants' choice of forum favors transfer.

For similar reasons, the Court should give some weight to Defendants' preferred forum. Just as any deference to Plaintiffs' chosen forum is lessened where that forum lacks meaningful ties to the controversy, the courts should give some weight to a defendant's chosen forum when it is where the effects of the challenged actions will be "felt most directly." *Gulf Restoration Network v. Jewell*, 87 F. Supp. 3d 303, 313 (D.D.C. 2015). Thus, given the predominantly localized effect of the challenged Project, Defendants' chosen forum further tips the scales in favor of transfer to the Eastern District of Tennessee where the effects of the challenged action "will be felt most acutely." *Id.*

C. The remaining public interest factors are largely neutral, but would marginally favor transfer to the extent they become relevant.

The remaining private interest factors – the convenience of the parties, the convenience of the witnesses, and the ease of access to sources of proof – are largely neutral in this case brought under the Administrative Procedure Act. *See* U.S. Br. at 15–16. As previously discussed, this case is likely to be reviewed based upon an administrative record compiled by the

agency rather than live testimony of witnesses, and these factors would only favor transfer in the event that access to original documents or live testimony were to become necessary.[3] *Id*.

Plaintiffs generally concede this point as to the convenience of the witnesses and access to proof factors. *See* Resp. at 14. However, they argue that the convenience of the parties favors keeping this case in the District of Columbia on the grounds that their counsel are located in this District and litigating in this Court "will certainly be more affordable for Plaintiffs." *Id*. This argument falls short. As discussed in *In re AT&T Access Charge Litig.*, No. CIV.A. 05-1360 ESH, 2005 WL 3274561 (D.D.C. Nov. 16, 2005), a case which Plaintiffs cite in support of their position, *see* Resp. at 12, convenience of counsel typically carries little, if any, weight in the transfer analysis:

> [A]s plaintiffs' counsel candidly admitted at the initial scheduling conference, plaintiffs' choice of forum is driven by their counsel's location in the District of Columbia. Typically, the "location of counsel carries little, if any, weight in an analysis under § 1404(a)," *Armco Steel Co. v. CSX Corp.*[,] 790 F. Supp. 311, 324 (D.D.C.[ ]1991), since this factor can easily be manipulated thereby permitting forum shopping. Nevertheless, where "convenience of counsel bears directly on the cost of litigation, it becomes a factor to consider." *Blumenthal v. Mgmt. Assistance*[,] 480 F. Supp. 470, 474 (N.D.[ ]Ill.[ ]1979); *see also Green v. Footlocker Retail, Inc.*[,] Civ. Action No. 04-1875, 2005 WL 1330686 (D.D.C.[ ]2005). Although plaintiffs' argument rests on this cost factor, they do no more than merely assert that a transfer to the District of New Jersey will drive up litigation costs by requiring local counsel to be hired and increasing travel expenses. (Pls.' Opp'n at 16-17.) There is no showing that plaintiffs collectively are not in a position to absorb the difference in cost.

Id. at *4 (footnotes omitted). This ruling is particularly applicable here in this Administrative Procedure Act record review case, which will presumably have no trial, depositions, or other case activities requiring a heavy travel schedule. Plaintiffs' unsupported statement that litigating

[3] Plaintiffs' suggestion that Defendants can file another transfer motion, should live testimony become necessary, would result in a highly inefficient use of the Court's and the parties' resources. *See* Resp. at 14 n.5.

in this Court "will certainly be more affordable for Plaintiffs" is akin to the unsupported allegation that the Court rejected in that case claiming that "transfer to the District of New Jersey will drive up litigation costs by requiring local counsel to be hired and increasing travel expenses." *Id*. The Court should similarly reject Plaintiffs' conclusory assertion of increased costs here and, consistent with the above discussion, conclude that the relevant private interest factors, like the public interest factors, weigh in favor of transfer.

CONCLUSION

The Court should reject Plaintiffs' attempt to improperly characterize this action concerning local environmental issues into a case concerning national security issues and grant transfer to the Eastern District of Tennessee where the environmental impacts of the challenged Project will be felt.

Respectfully submitted this 19th day of October, 2017.

JEFFREY H. WOOD
Acting Assistant Attorney General

/s/ Thomas K. Snodgrass
Thomas K. Snodgrass, Senior Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section

Counsel for Defendants

Of Counsel
Terri Slack
NNSA Production Office Counsel
Oak Ridge, Tennessee

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2017, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Carla Valentino
Paralegal
United States Department of Justice
Environment & Natural Resources Division

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

OAK RIDGE ENVIRONMENTAL PEACE ALLIANCE,

NUCLEAR WATCH OF NEW MEXICO,

NATURAL RESOURCES DEFENSE COUNCIL,

RALPH HUTCHINSON,

ED SULLIVAN,

JACK CARL HOEFER, and

LINDA EWALD,

Plaintiffs,

v.

JAMES RICHARD PERRY, SECRETARY, UNITED STATES DEPARTMENT OF ENERGY, and

FRANK G. KLOTZ, ADMINISTRATOR, NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants.

Case 1:17-cv-01446-RJL

SUPPLEMENTAL DECLARATION OF GEOFFREY L. BEAUSOLEIL

I, Geoffrey L. Beausoleil, pursuant to 28 U.S.C. § 1746, declare as follows based upon my personal knowledge:

1. I previously submitted a Declaration in support of Defendants' Motion to Transfer Case to the Eastern District of Tennessee. *See* Dkt. No. 7-2. This Supplemental Declaration supplements that prior Declaration.

2. I have reviewed Plaintiff's Opposition to Defendants' Motion to Transfer Case to the Eastern District of Tennessee, including particularly the portion that attempts to call into

question the involvement of National Nuclear Security Administration ("NNSA") Headquarters "during the drafting of the documents at issue." *See* Dkt. No. 9 at 11 n.3. I assume that the reference to the "documents at issue" refers to the 2016 Supplement Analysis and the 2016 Amended Record of Decision discussed in my prior Declaration.

3. In response to the referenced portion of Plaintiffs' memorandum, I state as follows:

a. Department of Energy ("DOE") Headquarters in Washington, D.C. had no involvement in the preparation, drafting, and review of the Supplement Analysis.

b. NNSA Office of General Counsel ("OGC") staff in Washington, D.C. provided editorial comments on the Supplement Analysis during its drafting, as well as some comments suggesting the need for further explanation of various points. However, NNSA staff and contractors in Oak Ridge had lead drafting responsibilities for the Supplement Analysis, including how to incorporate NNSA OGC's comments, and the entirety of that document was prepared at the local level, subject only to the previously described input provided by NNSA OGC. Other than the involvement of NNSA OGC staff described in this paragraph, to the best of my knowledge, no other NNSA staff in Washington, D.C. were involved in the review and drafting of the Supplement Analysis.

c. DOE Headquarters had no involvement in the preparation and initial drafting of the Amended Record of Decision. Once drafted, DOE OGC and DOE Office of NEPA Policy and Compliance generally provided minor editorial comments and requested that more explanatory information related to the environmental impacts from the Supplement Analysis be included in the Amended Record of Decision, which was

consistent with other DOE Records of Decision. After careful consideration of the comments, NNSA staff in Oak Ridge decided to make such limited revisions, and specific language summarized from the Supplement Analysis was drafted by field personnel and included in the Amended Record of Decision.

d. NNSA Headquarters also had no involvement in the preparation and initial drafting of the Amended Record of Decision. Once drafted, NNSA Headquarters personnel provided minor editorial comments and suggested that an explanatory sentence be added to the Summary of Impacts regarding certain accident analysis scenarios. After careful consideration of the comments, NNSA staff in Oak Ridge decided to make such limited revisions, and specific language was drafted by field personnel and included in the Amended Record of Decision. While other program offices within NNSA concurred in the Amended Record of Decision, I am unaware that any other changes were made as a result of these reviews.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of October, 2017.

Geoffrey L. Beausoleil