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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAVE OUR COUNTY, COMMUNITY INPOWER AND DEVELOPMENT ASSOCIATION INC., UNITED CONGREGATIONS OF METRO EAST, and SIERRA CLUB, Plaintiffs, v. UNITED STATES DEFENSE LOGISTICS AGENCY, DARRELL K. WILLIAMS, in his official capacity as Director of the Defense Logistics Agency, UNITED STATES DEPARTMENT OF DEFENSE, MARK T. ESPER, in his official capacity as Secretary of the Department of Defense, HERITAGE ENVIRONMENTAL SERVICES, LLC, and TRADEBE TREATMENT AND RECYCLING, LLC, Defendants.	No. 3:20-cv-01267 **FEDERAL DEFENDANTS' MOTION TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a) and LOCAL RULE 7 OR, IN THE ALTERNATIVE, MOTION TO DISMISS** Date: August 12, 2020 Time: 2:00 p.m. Judge: Hon. Saundra Brown Armstrong 1301 Clay Street Oakland, CA 94612

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NOTICE OF MOTION AND MOTION TO TRANSFER OR, IN THE ALTERNATIVE, MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL

Notice is hereby given that on August 12, 2020, or as soon as this matter may be heard, in the Courtroom of the Honorable Saundra Brown Armstrong, Defendants Department of Defense, Defense Logistics Agency, Darrell K. Williams, Director of the Defense Logistics Agency, and Mark T. Esper, Secretary of the Department of Defense, will move this Court to transfer the case pursuant to 28 U.S.C. § 1404(a) or, in the alternative, dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6). Undersigned counsel certifies that the parties met and conferred regarding the motion on May 14, 2020 and were unable to resolve any of the matters that are at issue in the Federal Defendants' motion to transfer or motion to dismiss.

MEMORANDUM OF LAW

I. INTRODUCTION

This case involves contracts that enable the Department of Defense (DOD) to transition from and dispose of legacy aqueous film-forming foam (AFFF), and dispose of other materials containing per- and polyfluoroalkyl substances (PFAS) (*e.g.*, cleanup of sites where AFFF was discharged). DOD has used AFFF since the early 1970s to rapidly extinguish petroleum fires to protect against the catastrophic loss of life and property. Due to drinking water concerns about two PFAS compounds in the legacy AFFF, in 2016 DOD recommended transitioning, where practical, to AFFF with non-detectable levels of these compounds. Additionally, DOD has engaged in cleanup on certain installations that have elevated PFAS levels. The contracts at issue in this case are involved in both of these efforts.

Plaintiffs assert that the Defense Logistics Agency's (DLA's) decision to apply a categorical exclusion to the award of these contracts violates the National Environmental Policy Act (NEPA) (First Claim for Relief) and the Administrative Procedure Act ("APA"). Plaintiffs also assert that DLA's performance under the contracts violates Section 330 of the 2020 National Defense Authorization Act (2020 NDAA or NDAA), Pub. L. No. 116-92, (Second Claim of Relief).

Plaintiffs claim that their members "live, work, and play in the communities where Defendants are sending firefighting foam for incineration," and yet have chosen to bring this action in a district—indeed a Circuit—where no incineration is occurring and that has no connection to the environmental harm complained of in this lawsuit. Plaintiffs have done so solely on the basis that, one of the organizational plaintiffs, the Sierra Club, is headquartered in this district. The Court should transfer this action pursuant to 28 U.S.C. § 1404(a) to a judicial district in a state where the complained of incineration is occurring so that this dispute can be resolved where there is a localized interest in the dispute. Doing so is in the "interest of justice." In addition to permitting a localized determination of this dispute, transfer works no prejudice to plaintiffs. Three of the four associational plaintiffs purport to be headquartered in or around incineration sites. And the Sierra Club purports to have members in those sites as well. To establish standing to proceed, moreover, plaintiffs must demonstrate a geographic connection to the environmental harm alleged in any event; venue properly lies in that identified area.

Should the Court not transfer the matter, the action should be dismissed because plaintiffs have failed to carry their burden of establishing standing. The associational plaintiffs have failed to make "specific allegations establishing that at least one *identified member* [has] suffered harm or would suffer harm," as required by the Supreme Court. And plaintiffs' second claim for relief under the NDAA should be dismissed because plaintiffs improperly attempt to retroactively apply that statute to contracts that were planned, solicited and awarded well before the enactment of the 2020 NDAA, pursue a private right of action that Congress failed to create, and to seek review of agency action that is not reviewable under the APA.

II. BACKGROUND

DLA contracts to transport and dispose of legacy inventories of AFFF, and other PFAS materials, from numerous installations for each of the military service departments. At issue in this lawsuit are three regional contracts that DLA entered into in 2018 and 2019 for the transportation and incineration of legacy AFFF, and other PFAS materials. Compl. (Doc. 1)

¶¶ 73-92. The military services have used and continue to use these contracts to dispose of the legacy AFFF that is being replaced and, among other things, to dispose of PFAS materials in soil and other media that is recovered and removed from remediation sites.

The associational plaintiffs—Save Our County, Community In-Power and Development Association, United Congregations of Metro East, and the Sierra Club—challenge the Federal Defendants' authority and decision to apply a categorical exclusion (CE) to the award of these contracts to comply with its NEPA obligations. Plaintiffs assert that the action violates NEPA and the APA. Plaintiffs seek declaratory and injunctive relief, including an order invalidating and vacating the contracts in their entirety, alleging that DLA failed to fully consider the environmental impacts of the contracts. Compl. ¶¶ 102-121, prayer for relief para. 2 and 3.

Plaintiffs also bring suit under the 2020 NDAA, enacted on December 20, 2019, Pub. L. No. 116-92 (Compl. ¶ 123). Plaintiffs' NDAA claims rest upon two provisions in Section 330 of the statute, which directs the Secretary of Defense (Secretary) to ensure that:

- Incineration of AFFF is conducted "at a temperature range adequate to break down PFAS chemicals while also ensuring the maximum degree of reduction in emission of PFAS, including elimination of such emissions where achievable." (Compl. ¶ 124 (quoting NDAA § 330, 133 Stat. at 258–259); and

- "When materials containing [AFFF] are disposed . . . any materials containing PFAS that are designated for disposal are stored in accordance with the requirement[s] under part 264 of title 40, Code of Federal Regulations" ("Part 264") (Compl. ¶ 129) (quoting *id*.)

Ignoring that Congress did not include any provision in Section 330 permitting retroactive application, plaintiffs allege that the Federal Defendants violated that provision by failing to include a contract term regarding Part 264 compliance, Compl. ¶ 131, in contracts planned, solicited and awarded before that provision was enacted. Plaintiffs also assert that the Federal Defendants violated the NDAA by issuing task orders under the contracts[1] that did not ensure the

[1] The contracts are indefinite delivery/indefinite quantity (IDIQ) contracts, which set forth minimum and maximum amounts of the services or supplies to be provided by the contractors. *See* Federal Acquisition Regulation (FAR) 52.216-22 (1995) - *Indefinite Quantity*. Delivery or performance under the contracts is made by issuing the task orders for specific quantities or units. *See* Defense Federal Acquisition Supplement (DFARS) 252.216-7006 - *Ordering*.

incineration of AFFF at the temperature ranges described in Section 330 of the NDAA. *Id*. ¶¶ 127-28. Plaintiffs further challenge the Federal Defendants' storage and incineration practices under the NDAA, generally. *Id*. ¶¶ 128, 133. No facts are alleged in the Complaint to support these claims that would permit the Court to identify the discrete agency action challenged. Plaintiffs nonetheless claim that the task orders and their generalized challenges to the Federal Defendants' storage and incineration practices are "final agency action" of the Federal Defendants that are reviewable under the APA. *Id*. ¶¶ 126, 133.

The associational plaintiffs' assertion of standing to pursue these statutory claims rests on generalized claims of harm to unidentified members. Plaintiffs allege that their "members live, work and play in the communities where [the Federal] Defendants are sending firefighting foam for incineration." Compl. ¶ 6; *see also* ¶¶ 10-14. The Sierra Club also alleges that it and its members have suffered procedural harm by purportedly being denied the procedural right to review and submit comments in connection with a NEPA review. *Id*. ¶ 15. But plaintiffs fail to identify any member(s) by name, much less any members from the geographic regions where the incineration is occurring—or otherwise set forth any individualized harm in the Complaint.

II. ARGUMENT

A. The Action Should be Transferred Pursuant to 28 U.S.C. § 1404(a) to a Judicial District that has a Local Connection to the Claims

Given plaintiffs' failure to establish associational standing to proceed, the Court could dismiss this action for lack of Article III jurisdiction. Indeed, at this juncture, there is no factual basis to conclude that any of the associational plaintiffs are even "plaintiff[s]" entitled to proceed under the venue provisions of 28 U.S.C. § 1391(e)(1). The matter could be dismissed under Rule 12(b)(3). But to facilitate the orderly transfer of this action to a judicial district with a localized interest in the dispute, the Federal Defendants request that the Court exercise its authority to transfer this case pursuant to 28 U.S.C. § 1404(a). "For 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." *Id*. "The idea behind § 1404(a) is that where a 'civil action' to vindicate a wrong—however brought in a court—presents issues . . . that

make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court." *Cont'l Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 26 (1960). The statute's purpose 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) (internal citations and quotation marks omitted).

Section 1404(a) vests the Court with broad discretion to transfer claims to another judicial district. *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1098 (N.D. Cal. 2006). In exercising that discretion, courts employ a two-step analysis when determining whether to transfer an action pursuant to Section 1404(a). *First*, a court considers whether the action could have been brought in the district to which the transfer is sought. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). *Second*, a court undertakes "an individualized, case-by-case consideration of convenience and fairness[,]" taking into account the convenience of the parties and the interests of justice. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (citation omitted). While the burden is on the moving party to demonstrate that the action should be transferred, *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979), this burden decreases "[a]s deference to a plaintiff's choice of forum decreases," *Chesapeake Climate Action Network v. Exp.-Imp. Bank of the U.S.*, No. C 13-03532 WHA, 2013 WL 6057824, at *2 (N.D. Cal. Nov. 15, 2013). Both of these prerequisites are satisfied here.

1. This action could have been brought in the judicial districts where the incineration is occurring

Assuming that plaintiffs fulfill their obligation to establish associational standing to proceed, transfer to a judicial district within the sites of incineration would permit this action to be brought in a judicial district with a localized interest in this dispute. Under 28 U.S.C. § 1391(e)(1), which governs venue in civil actions where the United States or any of its officers or agencies is a defendant, venue lies 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 (C) the plaintiff resides . . . ." *Id.* Were the associational plaintiffs to establish standing, venue would be appropriate under paragraph (B) and (C), given that three of the associational plaintiffs

purport to reside in districts close to the incineration sites. *See* Compl. ¶¶ 11-13. Any one of these venues would thus be appropriate under section 1391(e)(1).

2. The Section 1404(a) factors favor transfer

In deciding whether to transfer, the Court "considers public factors which go to the interests of justice, and private factors, which speak to the convenience of the parties and witnesses." *Holliday v. Lifestyle Lift, Inc.*, No. C 09-4995 RS, 2010 WL 3910143, at *5 (N.D. Cal. Oct. 5, 2010) (citing *Jones*, 211 F.3d at 498). These factors include the following:

> (1) plaintiff's choice of forum; (2) convenience to the parties; (3) convenience to witnesses; (4) ease of access to the evidence; (5) familiarity of each forum with the applicable law; (6) feasibility of consolidation with other claims; (7) any local interest in the controversy; and (8) the relative court congestion and time of trial in each forum.

Holliday, 2010 WL 3910143, at *6 (citing *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001)). "[I]n most environmental cases, the issue of which federal district should adjudicate the issues is determined by weighing a plaintiff's choice of forum against the competing interest in 'having localized controversies decided at home.'" *Id.* (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)). The latter consideration tilts heavily in favor of permitting this action be considered by a judicial district that has a localized concern in the dispute. Indeed, in environmental cases such as this, the concrete interest in the dispute necessary to establish standing requires a geographic nexus between the claim and the location purportedly suffering environmental impact. *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001); *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1015 (9th Cir. 2003), *rev'd*, 541 U.S. 752 (2004). "That is, environmental plaintiffs must allege that they will suffer harm by virtue of their geographic proximity to and use of areas that will be affected by the [challenged] policy" or activity. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 971 (9th Cir. 2003).

a.) The Sierra Club's choice of forum is entitled to minimal deference

Although courts typically afford "substantial weight" to a plaintiff's choice of forum, less deference is due "where the forum lacks a significant connection to the activities alleged in the complaint." *Williams*, 157 F. Supp. 2d at 1106 (quoting *Fabus Corp. v. Asiana Exp. Corp.*, No.

C-00-3172 PJH, 2001 WL 253185, at *1 (N.D. Cal. Mar. 5, 2001)). This "substantially reduced" deference applies "*even if* the plaintiff is a resident of the forum." *Chesapeake Climate*, 2013 WL 6057824, at *2; *see also Knapp v. Wachovia Corp.*, No. C 07-4551 SI, 2008 WL 2037611, at *2 (N.D. Cal. May 12, 2008) ("[W]here the transactions giving rise to the action lack a significant connection to the plaintiff's chosen forum, the plaintiff's choice of forum is given considerably less weight, even if the plaintiff is a resident of the forum.").

The only connection that this district has to the claims presented is that the Sierra Club has its headquarters here; it is otherwise disconnected to the facts and claims. Courts in this district have repeatedly held—often in cases involving Sierra Club—that a single plaintiff's residence is insufficient to preserve venue if the district has no connection to the subject matter of the litigation.[2] In *Chesapeake Climate*, for example, Judge Alsup declined to defer to Sierra Club's chosen forum because "the Northern District does not have a particular interest in the subject matter of this action as none of the environmental impacts alleged in the complaint occurred in this district." 2013 WL 6057824, at *2. Similarly, in *Sierra Club II*, Judge Illston transferred a case to the District of Minnesota because "[n]one of the operative facts occurred in this district" and "this district has little interest in the parties or subject matter, other than the

[2] *See, e.g.*, *Alec L. v. Jackson*, No. C-11-2203 EMC, 2011 WL 8583134, at *3 (N.D. Cal. Dec. 6, 2011) (Chen, J.) (transferring to District of Columbia despite the residence of two plaintiffs in this District, "as the operative facts did not occur in the Northern District"); *Ctr. for Food Safety v. Vilsack*, No. C 11-00831 JSW, 2011 WL 996343, at *6 (N.D. Cal. Mar. 17, 2011) (White, J.) (transferring to District of Columbia despite Sierra Club's residence, because the challenged decision did not affect the District); *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. C 10-02673 JSW, 2011 WL 89644, at *2 (N.D. Cal. Jan. 11, 2011) (White, J.) (transferring to Eastern District of Virginia despite Sierra Club's residence, because "the underlying action is not connected to the Northern District of California"); *Ctr. for Biological Diversity v. Rural Utils. Serv.*, No. C-08-1240 MMC, 2008 WL 2622868, at *1 (N.D. Cal. June 27, 2008) (Chesney, J.) (transferring to Eastern District of Kentucky, despite Sierra Club's residence, "because no part of their claims arose in the instant district"); *Ctr. for Biological Diversity & Pac. Env't v. Kempthome*, No. C 070894 EDL, 2007 WL 2023515, at *1, 6 (N.D. Cal. July 12, 2007) (Laporte, J.) (transferring case to District of Alaska even though a plaintiff maintained its "organizational headquarters in San Francisco," because the "case, at its core, involves the environmental impact of oil and gas industry activities in the Beaufort Sea and adjacent coast of Northern Alaska").

single plaintiff (Sierra Club) whose headquarters are located in San Francisco." *Sierra Club v U.S. Dep't of State*, No. C 09-04086 SI, 2009 WL 3112102, at *3 (N.D. Cal. Sept. 23, 2009).

The residences of the other associational plaintiffs further underscore the minimal deference that should be afforded to the choice of venue here. Aside from Sierra Club, the other three associational plaintiffs purport to reside around the sites of the incineration. Compl. ¶¶ 11-13. That consideration further weighs in favor of transfer. *See Chesapeake Climate*, 2013 WL 6057824, at *2 (declining to defer to plaintiffs' chosen forum because "only two of the six plaintiffs are headquartered in this district"); *Alec L.*, 2011 WL 8583134, at *3 (similarly declining deference when "[p]laintiffs' only connection to the Northern District is that two of the five individual [p]laintiffs reside" here); *Sierra Club II*, 2009 WL 3112102, at *3 (similarly declining deference where "three out of four plaintiff organizations are located outside of California"). This is not a case "[w]here there are only two parties to a dispute" and thus "good reason why it should be tried in the plaintiff's home forum if that has been his choice." *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). Instead, with numerous plaintiffs, "all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Koster*, 330 U.S. at 524. This interest is further weakened by the Sierra Club's claim (Compl. ¶ 15) to represent members from the states where the incineration is occurring.

b.) The local interest in the controversy supports transfer

The factor that is "arguably the most important" under Section 1404(a) is the interest in deciding local controversies at home. *S. Utah Wilderness v. Norton*, No. Civ.A. 01-2518(CKK), 2002 WL 32617198, at *5 (D.D.C. June 28, 2002); *see also Bay.org v. Zinke*, No. 17-CV-03739-YGR, 2017 WL 3727467, at *1 (N.D. Cal. Aug. 30, 2017) ("any local interest in the controversy" is one of the "most important factors" to consider in venue transfers "in environmental cases brought pursuant to the APA") (citations omitted). As the Supreme Court has stated,

> In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it

> by report only. *There is a local interest in having localized controversies decided at home.*

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947) (emphasis added). Such concerns are especially relevant in environmental cases, which "often provide a particularly strong basis for finding a localized interest in the region touched by the challenged action." *Sierra Club II*, 2009 WL 3112102, at *3. Indeed, as discussed, courts must insist upon a showing of a geographic connection to the environmental harm alleged to find standing. Accordingly, this factor weighs decisively in favor of transferring the matter to the sites of the incineration challenged.[3]

B. The Court Lacks Subject-Matter Jurisdiction

Should the Court not transfer this matter, then the action should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction. Plaintiffs lack associational standing to proceed. And there is no basis—under either the terms of Section 330 of the 2020 NDAA or the APA—for plaintiffs' second set of claims to proceed past Rule 12(b)(1) or (b)(6) dismissal.

1. Plaintiffs fail to demonstrate associational standing

An organization has associational standing to sue on behalf of its members only where at least one member would have standing to sue in his or her own right. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 917-18 (9th Cir. 2018); *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). "[P]laintiff-organizations [are thus required to] make specific allegations establishing that at least *one identified member* ha[s] suffered or w[ill] suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added); *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 483 (9th Cir. 2011) (emphasis in original) (quoting *Summers*, 555 U.S. at 498). Alleged "generalized harm . . . will not . . . support

[3] Because "environmental cases are typically resolved by the court examining the administrative record to decide cross-motions for summary judgment," many of the other factors are not implicated. *Ctr. for Biological Diversity*, 2007 WL 2023515, at *5. Accordingly, they need not be considered here, particularly when the number of parties, the connection to the facts and claims, and the need for localized determinations in environmental matters tilt so heavily in favor of transfer.

standing."" *Id*. (quoting *Summers*, 555 U.S. at 494). And finally, as explained, a concrete interest in the dispute requires an associational plaintiff to plead a geographic nexus between the harm alleged by an associational member and the location purportedly suffering environmental impact. Plaintiffs fail to satisfy ***any*** of these pleading obligations necessary for standing.

Dismissal is appropriate; where, as here, plaintiffs have chosen not to plead facts sufficient to establish standing, the Court does "not have subject matter jurisdiction and dismissal [is] appropriate." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). Plaintiffs' "self-descriptions of their membership" (Compl. ¶¶ 6, 10-15) are not entitled to any weight in evaluating standing. *Summers*, 555 U.S. at 499. "[T]he court has an independent obligation to assure that standing exists." *Id*. That plaintiffs claim procedural harm in the Complaint (Compl. ¶ 15) does not alter their burden; alleged procedural harm does not absolve them of the burden of identifying a concrete and particularized injury that is "fairly traceable" to the actions they challenge. The Supreme Court was clear in *Summers* that a "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural *in vacuo*—is insufficient to create Article III standing." 555 U.S. at 496. A "procedural injury, standing on its own, cannot serve as injury-in-fact." *Wilderness Soc'y v. Rey*, 622 F.3d 1251, 1260 (9th Cir. 2010).[4]

2. The Court should also dismiss plaintiffs' NDAA claims

The Court should also dismiss the NDAA claims presented in the second set of claims of the Complaint. None of the claims present cognizable causes of action or matters subject to judicial review.

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[4] To the extent the associational plaintiffs assert in paragraph 16 of the Complaint to have standing to proceed on their own, that is assertion is also wrong. Mere organizational interest in the environment, "no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render [an] organization adversely affected or aggrieved within the meaning of the APA." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (internal quotation marks omitted) (holding that the Sierra Club's well-established interest in protecting the environment was not enough to give the organization standing to challenge governmental action that was harmful to the environment).

a.) The contract-based NDAA allegations claims fail

Plaintiffs seek to apply the terms of the NDAA retroactively to contracts that were planned, solicited and awarded well before the enactment of the NDAA in December 2019. *See* Compl. ¶ 131. The Supreme Court has outlined a two-step process for determining whether a civil statute may apply retroactively: The first question for the Court is whether Congress expressly provided that the statute should apply retroactively. If the answer is no, then the court must proceed to the second step and determine whether the statute would have a retroactive effect. *Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1115 (9th Cir. 2013) (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)) (internal quotation marks and citations omitted); *Lopez v. Sessions*, 901 F.3d 1071, 1076 (9th Cir. 2018). To assess the retroactivity of the statute under the first step, the court must apply the *Landgraf* factors and evaluate whether the retroactive application would (a) impair rights the person possessed when he or she acted; (b) increase liability for past conduct; or (c) impose new duties with respect to transactions already completed. *Landgraf*, 511 U.S. at 280. If the statute meets any of these three factors, the traditional presumption against retroactivity applies, and the statute may not be applied retroactively. Here, retroactive application of Section 330 triggers all three of the *Landgraf* factors—(i) it would impair the contractual rights of the contractor defendants, (ii) it would potentially impose liability for past activities under the contract, and (iii) it would potentially impose new duties on both the Federal Defendants and contractor defendants as to pre-NDAA transactions like the contracts here. Section 330 of the 2020 NDAA thus does not apply to the preexisting contracts challenged. Plaintiffs' contract-based NDAA claims must be dismissed.

b.) The task order-based NDAA claims should also be dismissed

Plaintiffs also challenge task orders issued under the contracts for the incineration of AFFF and the Defendants' storage and incineration of AFFF, generally, asserting that these activities also violate Section 330 of the NDAA. *See* Compl. ¶¶ 123-28, 132, 133. It is unclear whether plaintiffs are attempting to sue directly under the NDAA or are seeking review of "final agency action" under the APA. Regardless, neither can proceed past Rule 12(b)(6) or (b)(1) dismissal.

(i) The NDAA does not create a private right of action

Private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. "Without it, a cause of action does not exist and courts may not create one . . . ." *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (internal citations omitted). The starting and ending point for the analysis is the "text and structure" of the statute at issue. *Sandoval*, 532 U.S. at 288; *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285-86 (2002). Here, the Court can stop with the text of Section 330 of the NDAA.

The entire focus of Section 330 of the NDAA is on the Secretary—not on providing a private remedy or cause of action to plaintiffs or anyone else. This alone evidences Congress' intent not to create a private right of action. *Sandova*l, and the Ninth Circuit's decision in *San Carlos Apache Tribe v. United States*, 417 F.3d 1091 (9th Cir. 2005), are both instructive on this point. In *Sandoval*, the Court considered whether section 602 of Title VI of the Civil Right Act of 1964 created a private right of action to enforce disparate-impact regulations promulgated under the Act. The Court noted that the language of that provision was directed at government actors ("Federal department" and "agency"), not individuals. 532 U.S. at 288-89. In holding that section 602 of Title VI of the Civil Rights Act failed to create a private right of action, the Court ruled that statutes like section 330 of the NDAA that "focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Id*. at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)).

The same approach was taken by the Ninth Circuit in *San Carlos Apache Tribe*, where the court considered whether section 106 of the National Historic Preservation Act (NHPA) created a private right of action. That section requires that federal agencies "take into account the effect of their undertaking[s] on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." In ruling that plaintiffs' claims were properly dismissed, the Ninth Circuit started and ended its analysis with the text of the provision. Finding the provision "strikingly similar" to section 602 of Title VI of the Civil Rights Act considered in *Sandoval* in its focus on "federal government actors"—not

individuals—the court found "little reason to infer a private right of action" under the language of the NHPA. *Id*. at 1095.

Plaintiffs' attempt to proceed under section 330 of the NDAA should be rejected for the same reason. This is particularly so here, where Congress previously created not only express private rights of action under other, previous NDAA provisions—but jurisdiction to hear those claims. *See e.g., Owens v. Republic of Sudan*, 864 F.3d 751, 765 (D.C. Cir. 2017) (recognizing that Section 1083 of the 2008 NDAA authorized suits against state sponsors of terrorism for "personal injury or death" arising from certain predicate acts by "claimants or victims" who were U.S. nationals, members of armed forces, and government employees or contractors, and that provision granted jurisdiction to courts to hear such claims), *certified question answered*, 194 A.3d 38 (D.C. App. 2018). These provisions demonstrate that Congress knows how to create private causes of action and jurisdiction when it intends to do so, and that it purposely did not do so under Section 330 of the NDAA.

(ii) Nor does the APA provide jurisdiction

Plaintiffs also seek to establish subject matter jurisdiction for their NDAA claims by bringing those claims under the APA. But plaintiffs' attempt to do so fails because they have not challenged "final agency action" that is reviewable under the APA. The task orders at issue here are routine, ministerial activities that order performance of the preexisting contracts (that, again, *predate* the 2020 NDAA). To qualify as "final," the action challenged must "mark the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177–78, (1997). Because routine task orders issued by DLA contracting officers on a 2018 or 2019 contract do not mark DOD's consummation of its decisionmaking process for the implementation of the 2020 NDAA, they are not "final agency action" that can be adjudicated under the APA. *See e.g., Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 801 (9th Cir. 2013) (holding operation of gates that divert water from downstream merely implements plans for hatchery and, thus, "[c]onstitute[] day-to-day operations," not reviewable "final agency action"); *Mont. Wilderness Ass'n, Inc. v. U.S. Forest Serv.*, 314 F.3d 1146, 1150 (9th Cir. 2003), *vacated on other grounds, Blue Ribbon Coal., Inc. v. Mont. Wilderness Ass'n, Inc.*, 542 U.S. 917 (2004)

(agency's "routine maintenance work" implementing existing travel and forest plans do not mark the consummation of agency decisionmaking process that is reviewable under the APA).[5]

And plaintiffs' programmatic challenge to the Federal Defendants' arrangement for storage and incineration of AFFF, in addition to asserting a claim under a statute for which there is no private right of action, fails to challenge "*discrete* agency action" necessary to trigger APA review. *Norton v. S. Utah Wilderness All.* ("*SUWA* "), 542 U.S. 55, 64 (2004). Given the inability for a court to function in such a day-to-day managerial role over agency operations, the APA limits judicial review to challenges of discrete agency action and prohibits the broad programmatic challenge plaintiffs make to the Federal Defendants' storage and incineration practices. *Id*. at 62–64, 66–67; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (rejecting broad programmatic attack on Bureau of Land Management land withdrawal program couched as unlawful agency action); *Wild Fish Conservancy*, 730 F.3d at 801 (ruling that challenge to federal defendants' operation of dam fails to challenge discrete agency action reviewable under the APA).

CONCLUSION

For the foregoing reasons, this case should be transferred pursuant to section 1404(a) or, in the alternative, dismissed under Rule 12(b)(1) and 12(b)(6).

Respectfully submitted this 15th day of May, 2020,

PRERAK SHAH

Deputy Assistant Attorney General
Environment and Natural Resources Division

[5] Indeed, as the Fourth Circuit has explained, an agency's ongoing contract performance is not even agency "action" under the APA. *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013). That term is a "term of art that does not include all conduct such as, for example, constructing a building, operating a program, or *performing a contract*." *Id*. (emphasis added).

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CERTIFICATE OF SERVICE

I, Paul Freeborne, hereby certify that, on May 15, 2020, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Paul G. Freeborne
TAYLOR N FERRELL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAVE OUR COUNTY, COMMUNITY INPOWER AND DEVELOPMENT ASSOCIATION INC., UNITED CONGREGATIONS OF METRO EAST, and SIERRA CLUB,

Plaintiffs,

v.

UNITED STATES DEFENSE LOGISTICS AGENCY, DARRELL K. WILLIAMS, in his official capacity as Director of the Defense Logistics Agency, UNITED STATES DEPARTMENT OF DEFENSE, MARK T. ESPER, in his official capacity as Secretary of the Department of Defense, HERITAGE ENVIRONMENTAL SERVICES, LLC, and TRADEBE TREATMENT AND RECYCLING, LLC,

Defendants.

No. 3:20-cv-01267

[PROPOSED] ORDER GRANTING FEDERAL DEFENDANTS' MOTION TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a)

HONORABLE SAUNDRA BROWN ARMSTRONG

This matter is before the Court on the Federal Defendants' Motion to Transfer, or in the Alternative, Motion to Dismiss. Having considered the Federal Defendants' submission, it is hereby ORDERED that Federal Defendants' motion to transfer to is GRANTED, and this matter is transferred to the United States District Court of _____, where the incineration complained of is occurring so that it can be considered in a district with a localized interest. The FEDERAL DEFENDANTS' motion to dismiss can be considered, as appropriate, upon transfer.

IT IS SO ORDERED.

DATED: _____

_____
SAUNDRA BROWN ARMSTRONG
Senior United States District Judge