

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,)	
)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 19-cv-2181 (TJK)
)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,)	
)	
)	
Defendants.)	
)	

DEFENDANTS’ PARTIAL OBJECTION TO NOTICE OF RELATED CASES

Plaintiff in this case filed a related-case designation asserting that this case is related to two other civil matters, *Center for Biological Diversity v. EPA*, No. 19-688 (“*CBD I*”) and *Center for Biological Diversity v. EPA*, No. 19-2198 (“*CBD II*”). See Notice of Designation of Related Civ. Cases, ECF No. 6. While this case is related to *CBD II*, it is not related to *CBD I*, which involves entirely distinct matters and contains unrelated legal claims. Consequently, this case and *CBD I* do not involve common issues of fact and do not grow out of the same event or transaction, and they are not related under Local Civil Rule 40.5(a)(3). Because this case and *CBD II* are related, however, *CBD II* should be reassigned to this Court.

LEGAL STANDARD

Under Local Civil Rule 40.5, cases may be assigned to the same judge when they “(i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event or transaction, or (iv) involve the validity or infringement of the same patent.” Loc. Civ. R. 40.5(a)(3); see Loc. Civ. R. 40.5(c)(1). If a plaintiff designates a case as related to an earlier case and the defendant objects to the designation, the defendant must file an objection with its first

responsive pleading or motion. *See* Loc. Civ. R. 40.5(b)(2). “The party requesting related-case designation and seeking to avoid random assignment bears the burden of showing that the cases are related under a provision of Local Civil Rule 40.5.” *Volvo Constr. Equip.*, 922 F. Supp. 2d at 68 (quoting *Autumn Journey Hospice, Inc. v. Sebelius*, 753 F. Supp. 2d 135, 140 (D.D.C. 2010)).

ARGUMENT

Plaintiff cannot meet its burden of showing that this case is “related” to *CBD I*. According to Plaintiff, this case “involves common issues of fact” and “grows out of the same event or transaction” as *CBD I*. *See* Notice of Designation of Related Civ. Cases, ECF No. 3. Both claims are incorrect. There is no common event or transaction, nor any common issues of fact linking this case to *CBD I*. Indeed, there are not even any common issues of law.

The above-captioned matter concerns Plaintiff’s challenges to certain changes that the EPA recently made to its Freedom of Information Act (“FOIA”) regulations. EPA made those changes “to implement statutory updates, correct obsolete information, and reflect internal EPA realignment and processing changes to improve the Agency’s FOIA response process.” 84 Fed. Reg. 30028, 30029. Plaintiff challenges EPA’s changes on procedural and substantive grounds. First, Plaintiff claims that EPA violated the APA because it did not provide notice and an opportunity for comment for this limited rulemaking. *Am. Compl.* ¶¶ 39, 48-53. Next, it claims that EPA’s regulatory changes were “arbitrary and capricious” and “contrary to law” under the APA. *Id.* ¶¶ 54-60. Plaintiff also includes a claim under the FOIA “in the alternative” “[i]nsofar as the [APA] claim alleged [in another count] is deemed to seek relief challenging an unlawful FOIA policy or practice[.]” *Id.* ¶ 61. Plaintiff seeks declaratory and injunctive relief, including an order vacating the current regulations and directing EPA to reinstate its prior regulations. *Id.* at 19. The complaint contains no claim seeking access to any records under the FOIA.

The complaint in *CBD II* also challenges these same changes by EPA to its FOIA regulations, on procedural and substantive grounds. It alleges that EPA violated the APA by not providing notice and an opportunity for comment before amending its FOIA regulations. *CBD II*, ECF No. 1 ¶¶ 96-105. And it alleges that the amendments are arbitrary and capricious in violation of the APA. *Id.* ¶¶ 106-13. That complaint also claims that EPA has “adopted several FOIA directives . . . without first providing notice through publication of the proposed directives and affording an opportunity for public comment” allegedly in violation of the FOIA, *id.* ¶ 80, and that EPA has a “pattern, policy, and/or practice of adopting” such internal FOIA directives without notice and comment, allegedly in violation of the APA, *id.* ¶¶ 114-16. The plaintiffs seek declaratory and injunctive relief, including an order vacating EPA’s amendments to its regulations. *Id.* at 26. The complaint contains no claim seeking access to any records under the FOIA. Defendants therefore agree that this case and *CBD II* are related.¹

In contrast to the instant case and *CBD II*, *CBD I* does not contain any challenge to EPA’s changes to its FOIA regulations or any challenge to the adoption of internal “FOIA directives.” *See generally CBD I*, ECF No. 1. Indeed, *CBD I* was filed months before EPA’s FOIA amendments were announced and therefore could not possibly relate to them. *Compare id.* (filed March 12, 2019) *with* 84 Fed. Reg. at 30028 (dated June 26, 2019). Instead, *CBD I* is a garden-variety FOIA action seeking access to records from EPA in response to the plaintiff’s FOIA requests. *See generally CBD I*, ECF No. 1. Although it tacks on an APA claim to its FOIA claims for records, that claim is entirely duplicative of its FOIA claims—it alleges that EPA violated the

¹ There is another case similar to this case and *CBD II* pending in the U.S. District Court for the Northern District of California. *See Ecological Rights Foundation v. EPA*, No. 19-4242 (N.D. Cal.). EPA recently moved to transfer that case to this district so that it can be litigated in coordination with this case and *CBD II*.

APA by failing to conduct adequate searches, make timely determinations, and provide records in response to the plaintiff's FOIA requests. *Id.* ¶¶ 93-107. As such, the claims in *CBD I* are entirely distinct from the claims in this case and therefore do not raise any common issues of fact. Accordingly, *CBD I* is not related to this case.

Nor is *CBD I* related to *CBD II*. Again, *CBD I* is a garden-variety FOIA action seeking access to records whereas *CBD II* contains no claims seeking access to records. The factual issues that will have to be resolved in *CBD I* are limited to whether EPA conducted a reasonable search for responsive records and whether EPA produced all reasonably segregable, non-exempt responsive material. *See CBD I*, ECF No. 1 ¶ 1 (characterizing suit as challenging EPA's alleged FOIA violations "resulting from the agency's failure to conduct adequate searches, to make timely determinations, and to provide records in response to three of the Center's FOIA requests . . ."). None of those factual issues will arise in *CBD II* (or this case). Plaintiff apparently believes *CBD I* and *CBD II* are related because the subject matter of two of the three FOIA requests at issue in *CBD I* relate to "directives and/or policies" concerning FOIA, *see CBD I*, ECF No. 1 ¶¶ 28, 40, 51, and *CBD II* contains claims alleging that EPA has adopted internal "FOIA directives" without providing notice and an opportunity for public comment, *CBD II*, ECF No. 1 ¶¶ 80, 114-16. But that does not show any common issue of fact or that the cases grow out of the same event or transaction. *See Comm. on the Judiciary v. McGahn*, 2019 U.S. Dist. LEXIS 136869, *12 (D.D.C. Aug. 14, 2019) (relatedness is met in "narrow circumstances, such as when virtually identical and highly overlapping issues of fact are likely to be resolved in two cases").

For these reasons, the Court should find that this case is related to *CBD II* but not *CBD I*.

Respectfully submitted,

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