BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re.	)	MDL No. 2663
	)	
Clean Water Rule:	)	Filed Electronically
Definition of "Waters of the United States"	)	
	)	Oral Argument Requested

BRIEF IN OPPOSITION TO THE MOTION OF THE UNITED STATES TO TRANSFER UNDER 28 U.S.C. § 1407

INTRODUCTION

The transfer[1] request by the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively "the Agencies") is exceedingly unusual and should be denied. To begin with, the Agencies are asking this Panel for transfers to the U.S. District Court for the District of Columbia ("DDC") even while they are arguing before various district courts that jurisdiction properly lies in the U.S. Court of Appeals for the Sixth Circuit. In addition, the Agencies' request to centralize facial challenges to a federal regulation under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, is something this Panel has done only in one even arguably relevant instance. As explained below, the Agencies' reasons for transfer fail to explain why this Panel should grant such an extraordinary request.

The eleven States filing this Opposition brought a lawsuit in the Southern District of Georgia ("SDGA"), *see* Compl., *Georgia v. McCarthy*, No. 2:15-cv-00079 ("SDGA Action") (Dkt. No. 1), seeking vacatur of the final Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("WOTUS Rule"). The States allege that through

[1] The Agencies seek to "transfer and consolidate," Mot. to Transfer ("MDL Mot.") at 1-2, MDL No. 2663 (Dkt. No. 1-1), but the proper terminology is "transfer" or "centralization." *In re Bear Creek Techs., Inc. Patent Litig.*, 858 F. Supp. 2d 1375, 1376-77 (J.P.M.L. 2012). This Panel transfers civil actions to a court that may, in its discretion, consolidate the pre-trial proceedings.

the Rule, the Agencies seized numerous acres of sovereign waters and land that are rightly under the States' protection. The claims in the complaint are typical of most actions challenging agency action: the Rule violates the underlying statute (the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*), the APA, and the Constitution. None of these claims involves factual disputes. The States expect that after Chief Judge Lisa Godbey Wood issues her ruling on the fully briefed and argued motion for a preliminary injunction, the case will quickly proceed to cross-motions for summary judgment and final judgment.

The Agencies' request to transfer the SDGA Action and other legally similar actions should be denied, first and foremost, as blatant forum shopping. The Agencies have argued before SDGA that *all* district courts lack jurisdiction to review the WOTUS Rule. Yet they ask this Panel to transfer the SDGA Action to DDC, where no plaintiff had challenged the Rule at the time of the Agencies' filing, rather than seeking to dismiss the suit.

The Agencies' request should also be denied as contrary to the MDL statute and this Panel's caselaw. With regard to the statutorily required predicate of "common questions of fact" (28 U.S.C. § 1407(a)), the Agencies point to *entirely legal* disputes on the merits of the States' CWA and APA claims, as well as disputes as to the *legal* import of the harm to the States. Under the statutory text and this Panel's caselaw, such legal arguments are insufficient for MDL centralization. And as to the follow-on considerations of convenience and judicial efficiency, the Agencies make arguments that would apply to virtually every APA challenge of an agency rule. But Congress has shown that it does not want every APA challenge centralized; for those specific APA challenges that Congress wants centralized, it has granted the Courts of Appeals exclusive jurisdiction and instituted a system under 28 U.S.C. § 2112(a) to select a single venue.

Finally, even if this Court decides that MDL transfer is appropriate, SDGA—not the Agencies' hand-picked forum of DDC—is the proper venue. As the Agencies themselves have admitted, Chief Judge Wood has extensive experience with the legal issues common to all of the challenges to the WOTUS Rule, including the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The SDGA Action has also progressed further than the other challenges to the WOTUS Rule, given that the motion for preliminary injunction has been fully briefed and argued, with a decision expected shortly. In sharp contrast, the lawsuits in DDC were filed less than a week ago. Granting the Agencies' request would take the case away from an experienced judge, who has extensive familiarity with both the present case and the legal issues involved, without any reason to believe the transferee judge would be better equipped.

BACKGROUND

On June 29, 2015, the Agencies published the WOTUS Rule, which will become effective on August 28, 2015. The Rule is a nationally-applicable regulation interpreting the term "waters of the United States," as used throughout the CWA. 33 U.S.C. § 1362(7). The Rule seeks to enlarge the jurisdictional definition in the CWA to include broad new categories of intrastate waters and sometimes-wet lands not presently subject to federal regulation.

The day after the Rule's publication nine States filed a complaint in SDGA challenging the legality of the Rule, joined shortly thereafter by one additional plaintiff State and one State resource agency in an amended complaint. *See* Compl., SDGA Action (Dkt. No. 1); Am. Compl., SDGA Action (Dkt. No. 31). Both as originally filed and as amended, the complaint alleges that the WOTUS Rule: (1) violates the CWA, under the Supreme Court's decision in *Rapanos*; (2) is arbitrary and capricious in violation of the APA; (3) was promulgated without sufficient opportunity for notice and comment as required by the APA; (4) violates the States'

constitutional rights with respect to intrastate water and lands guaranteed by the Tenth Amendment; and (5) renders the CWA in violation of Congress's powers under the Commerce Clause. Compl. at 26-33, SDGA Action (Dkt. No. 1); Am. Compl. at 28-35, SDGA Action (Dkt. 31). Resolution of all five claims will be based entirely on the administrative record, the statutory text, constitutional provisions, and applicable caselaw, with no discovery or disputed issues of material fact.

On July 21, 2015, the States filed a motion for a preliminary injunction in the SDGA Action, seeking to prevent the irreparable harm that the Rule will impose upon the States, starting on the August 28 effective date. Mot. for Prelim. Inj., SDGA Action (Dkt. No. 32). As of August 17, all briefing and oral argument on this motion had been completed. Chief Judge Wood has stated that she will issue a decision on the motion by August 28, assuming she finds that jurisdiction is proper. *See* Aug. 12, 2015 Hr'g Tr. at 60, SDGA Action (Dkt. No. 70). After decision on the preliminary injunction motion, the States expect the case to progress quickly to cross-motions for summary judgment, bringing the dispute to a prompt final judgment.

Several other district court lawsuits challenging the Rule have been filed. Many of these cases raise similar legal claims to those presented in the SDGA Action. But no common issues of fact exist between those actions and the SDGA Action because, *inter alia*, all of the claims in the SDGA Action are purely legal allegations of statutory and constitutional violations.

Proceedings on the WOTUS Rule are also before the U.S. Court of Appeals for the Sixth Circuit. Many of the parties in the district court actions filed protective petitions for review in the Courts of Appeals challenging the WOTUS Rule, while arguing that jurisdiction in the

district court was proper.[2] Pursuant to the statutory procedure under 33 U.S.C. § 1369(b)(1), those cases were transferred by lottery to the Court of Appeals for the Sixth Circuit. *See* MCP No. 135 (Dkt. No. 3) (July 28, 2015). The Agencies have argued that the Courts of Appeals, and not the district courts, have jurisdiction over challenges to the Rule. *See* U.S. Opp'n to Mot. for Prelim. Inj. ("PI Opp'n") at 5-7, SDGA Action (Dkt. No. 50).

Nonetheless, on July 27, 2015, the Agencies moved this Panel to transfer the district court actions challenging the WOTUS Rule to DDC.

ARGUMENT

I. The MDL Motion Should Be Denied As Improper, Preemptive Forum Shopping

This Panel should not permit the Agencies' clear attempt at preemptive forum shopping to hedge against the possibility that they do not prevail on the jurisdictional arguments before the Sixth Circuit. Just four days after the Agencies moved this Panel to transfer the SDGA action to DDC, the Agencies filed a brief opposing the States' motion for a preliminary injunction in SDGA arguing that *all* district courts lack jurisdiction over challenges to the WOTUS Rule. PI Opp'n at 5-7. Put another way, the Agencies ask the Panel to transfer the SDGA Action from one court they believe lacks jurisdiction to another court they believe lacks jurisdiction. The proper course would have been for the Agencies to move to dismiss the SDGA Action, but they have not done so. Nor have they informed this Panel of their view of jurisdiction. This Panel should not allow the Agencies to manipulate the MDL process in this way.

II. Transfer Of The SDGA Action Is Not Warranted

A decision on a motion to centralize involves three separate determinations. First, the movant must demonstrate that the cases at issue "involve[] one or more common questions of

[2] *See, e.g.*, *Georgia v. EPA*, No. 15-13252 (11th Cir.) (July 20, 2015); *North Dakota v. EPA*, No. 15-2552 (8th Cir.) (July 17, 2015); *Texas v. EPA*, No. 15-60492 (5th Cir.) (July 16, 2015).

fact." 28 U.S.C. § 1407(a). Second, if common questions of fact are found to exist, the movant must then show that centralization "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). Finally, if common issues of fact exist and centralization is proper under these Section 1407 factors, the Panel must select the transferee forum, giving "due credit to the plaintiffs' choice of forum." *In re U.S. Postal Serv. Privacy Act Litig.*, 545 F. Supp. 2d 1367, 1369 (J.P.M.L. 2008).

A. Transfer Is Not "Authorized" Because The SDGA Action Is A Typical APA Lawsuit, Involving No Common Questions Of Fact With Any Other Case

1. By statute, an MDL transfer requires common issues of fact, not common issues of law. 28 U.S.C. § 1407(a). "The presence of common issues of law has no effect on transfer: it is neither a necessary nor sufficient condition for transfer." David F. Herr, Multidistrict Litigation Manual: Practice Before the Judicial Panel on Multidistrict Litigation § 5.4 (2015). "Where the issues in a case are primarily legal in nature, even though some fact issues may exist, the Panel is nearly certain to conclude that transfer is not appropriate." *Id.*

APA cases are typically legal in nature. The question in APA cases is "not whether there are contested fact questions in the underlying administrative record, but rather *the legal question* whether the agency action was arbitrary and capricious or not supported by substantial evidence." *Castillo v. Army & Air Force Exch. Serv.*, 849 F.2d 199, 203 (5th Cir. 1988) (emphasis added). "[W]hen an agency action is challenged[] . . . *[t]he entire case* on review is a question of law, and only a question of law." *Marshall Cnty. Healthcare Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (emphasis added).

Accordingly, absent special circumstances, facial challenges to regulations promulgated under the APA fail to satisfy the threshold requirement of "involving one or more common questions of fact" and therefore centralization is not "authorized." 28 U.S.C. § 1407(a). The

Panel thus has regularly denied motions for MDL centralization in the few APA cases in which centralization has been sought, including denying transfer in an APA case just two months ago. *See In re Lesser Prairie-Chicken Endangered Species Act Litigation*, MDL No. 2629 (J.P.M.L. June 9, 2015). In the vast majority of APA district court challenges, centralization is never sought because the parties understand that there are "common questions of fact."

The only even arguably contrary case to which the Agencies point—*In re Polar Bear Endangered Species Act Listing and §4(d) Rule Litigation*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008)—is an outlier. In that case, the Panel concluded that there were "factual questions springing from the listing of the polar bear as a threatened species under the Endangered Species Act," without explaining what these factual questions were. *Id.* at 1377. This single sentence should not be read to override the general rule for APA challenges that "[t]he entire case on review is a question of law, and only a question of law." *Marshall*, 988 F.2d at 1226-27. While there may have been special factual disputes in *In re Polar Bear* that are not apparent from the face of the opinion, such disputes do not exist in the typical APA rule challenge. Moreover, the decision to transfer in *In re Polar Bear* appeared to be largely driven by the fact that the defendant and three of the four non-intervening plaintiffs supported transfer. *See id.* at 1376-77. The States urge this Panel to definitively hold that *In re Polar Bear* did not call into doubt the hornbook principle that APA actions generally involve no "questions of fact."[3]

2. Consistent with the above-described principles, MDL centralization is not appropriate in the present case. As a typical APA rule challenge, the SDGA Action involves exclusively legal questions and no questions of fact. First, the States alleged that the rule is "arbitrary and

[3] Neither *In re Operation of Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003), nor *In re Tri-State Water Rights Litig.*, 481 F. Supp. 2d 1351 (J.P.M.L. 2007), involved an APA challenge to an agency rule; in contrast to this case, both presented significant risk of conflicting obligations upon the Corps.

capricious," based upon the administrative record. Am. Compl. at 29-31, SDGA Action (Dkt. No. 31). This is a standard APA claim, which involves "only a question of law." *Marshall*, 988 F.2d at 1226-27. Second, the States alleged that the Agencies violated the notice-and-comment requirement. Am. Compl. at 33-35, SDGA Action (Dkt. No. 31). Again, this is a purely legal claim. *See Miami-Dade Cnty. v. EPA*, 529 F.3d 1049, 1058 (11th Cir. 2008). Finally, the States alleged that the Rule violates the CWA and the Constitution. Am. Compl. at 31-33, SDGA Action (Dkt. No. 31). These, too, are typical APA claims, confined to the administrative record and based upon the argument that the action is "not in accordance with law." 5 U.S.C. § 706(2)(A). Resolving these claims will require the district court, for example, to compare the Rule to the reasoning in *Rapanos* and *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). And the Agencies have conceded that proper application of the *Rapanos* "significant nexus" test is a legal question, not a factual or scientific one. WOTUS Rule, 80 Fed. Reg. at 37,065.

3. The Agencies' attempts to generate "common issues of fact" as between the SDGA Action and the other WOTUS actions are meritless.

The Agencies assert that the States' claims that the Rule is arbitrary and was promulgated in violation of the APA's notice-and-comment requirement raise common issues of fact. MDL Mot. at 5-6. But APA claims of this sort involve purely legal questions, not factual ones. *See Castillo*, 849 F.2d at 203; *Marshall*, 988 F.2d at 1226; *Miami-Dade*, 529 F.3d at 1058. Accordingly, the Agencies' reliance on a "voluminous administrative record" and a "searching and careful" review of that record (MDL Mot. at 5-6) is irrelevant for purposes of determining whether the SDGA action involves "common questions of fact" with the other WOTUS Actions.

Similarly irrelevant is the Agencies' speculation that parties may, perhaps, file pre-trial motions regarding the sufficiency of the administrative record. MDL Mot. at 8.

The Agencies also argue that disputes over standing and irreparable harm could raise factual issues. MDL Mot. at 8-9. But there can be no serious argument that the States lack standing, and any material disputes as to irreparable harm are purely legal. As the States demonstrated in their preliminary injunction motion, they will suffer irreparable injury as a direct result of the Rule because the Rule deprives them of their sovereign right to manage intrastate waters as they see fit. Preliminary Inj. Mot. ("PI Mot.") at 21, SDGA Action (Dkt. No. 32) (citing *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001),); *Wyoming v. Hoffman*, 423 F. Supp. 450, 453 (D. Wyo. 1976) (State has standing to challenge expansion of CWA jurisdiction)). The Agencies' *only* response to this argument was to make purely legal points, regarding the States' remaining sovereign rights. Opp'n to Prelim. Inj. Mot. ("PI Opp'n") at 17-18, SDGA Action (Dkt. No. 50). The States also demonstrated that the Rule will impose upon them irreparable economic harms. PI Mot. at 21 (citing *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1273-74 (11th Cir. 2013); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) ("palpable economic injuries have long been recognized as sufficient to lay the basis for standing")). While the Agencies' have quibbled with the amount of these economic harms (PI Opp'n at 18-24), they could not seriously argue that the States would suffer no harms from the Rule because their own Economic Analysis had definitively concluded otherwise (*see* U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (May 2015) at 12–13). Accordingly, the Agencies were forced to rely upon a *legal* argument that financial harms imposed by federal regulators do not constitute irreparable harm. PI Opp'n at 23. In any event, Chief Judge Wood did not, in the Agencies' words, find it

necessary to "conduct factual inquiries into the standing of parties in challenges to final agency actions." MDL Mot. at 9. She has explained that she will issue a decision on the States' motion for a preliminary injunction by the Rule's effective date, August 28, 2015, assuming she determines that she has jurisdiction. Aug. 12, 2015 Hr'g Tr. at 60, SDGA Action (Dkt. No. 70).

B. Even If Common Questions Of Fact Existed, Transfer Would Not Serve The Convenience Of The Parties Or Promote Just And Efficient Resolution

Assuming a case involves "common questions of fact," the movant must demonstrate that transfer will forward "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The Agencies have not carried that burden with regard to the SDGA Action.

1. The Section 1407 factors militate against centralization here. The States, including the State of Georgia as the lead plaintiff, have determined that SDGA is the most convenient forum. "It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice should not be lightly disturbed." *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir.1970); *accord Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 228 (1981) ("ordinarily a strong presumption in favor of the plaintiff's choice of forum"). Nor are there benefits to be gained from transfer in terms of convenience of witnesses given that, as the Agencies' have said, it is "highly unlikely that there will be discovery." MDL Mot. at 9; *accord In re Lesser Prairie-Chicken*, 2015 WL 3654675 at *1; *In re Removal from USMC Reserve*, 787 F. Supp. 2d 1350, 1350-51 (J.P.M.L. 2011).

Moreover, since the States' motion for a preliminary injunction has been fully briefed and argued, transfer would be contrary to principles of judicial efficiency. The MDL Panel regularly denies transfer of even factual cases that are "proceeding expeditiously toward trial" (*In re*

Disposable Diaper Patent Validity Litig., 362 F. Supp. 567, 568 (J.P.M.L. 1973)), a consideration that applies with even stronger force here, given that no trial would occur. The SDGA action will soon move to cross-motions for summary judgment, which will lead promptly to a final judgment. A transfer would force a new judge to become familiar with the arguments that the States raised in their preliminary injunction motion, which are many of the same merits arguments they expect to raise in their motion for summary judgment.

2. The Agencies' convenience and judicial efficiency arguments are unavailing. The Agencies argue that the absence of discovery favors MDL transfer (MDL Mot. at 9), which is the opposite of what the law provides. *See In re Lesser Prairie-Chicken*, 2015 WL 3654675 at *1. They also claim that transfer would avoid burdens on the Agencies in having to litigate in multiple districts, "[i]nconsistent rulings by different district courts," "inconsistent rulings in the appellate courts," and "conserving the resources of the judiciary and the United States." MDL Mot. at 8-13. This Panel rejected these same arguments just two months ago, in the APA context. *In re Lesser Prairie-Chicken*, 2015 WL 3654675, at *1; United States MDL Motion, *In re Lesser Prairie-Chicken*, Doc. 1-1 at 14, MDL No. 2629 ("serious risk of inconsistent decisions regarding pretrial matters"); *Id.* at 15 ("present a significant risk of disparate decisions"); *Id.* at 14 ("proceed[ing] separately in different districts will waste the efforts and resources of both the parties and the judiciary"). The Agencies' concern that inconsistent rulings could mean that "federal and state agencies charged with implementing the Clean Water Act will be faced with the impossible task of attempting to comply with conflicting court orders" (MDL Mot. at 11), misunderstands the nature of facial APA challenges. If a court determines that the Rule is unlawful on its face, the Rule will simply be "set aside" (5 U.S.C. § 706), on a nationwide basis (*see Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a

reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.")).

More generally, the Agencies' convenience and judicial efficiency arguments—just like their common issues of fact arguments—would apply to virtually *every* APA case. Under the Agencies' approach, almost every instance of multiple challenges to the same agency action, brought in multiple districts, would be centralized. After all, almost all such APA cases would involve the possibility of conflicting district court rulings and the expenditure of resources by the courts and the United States. This would create the district court version of the automatic transfer process for challenges to rules in the Courts of Appeals. *See* 28 U.S.C. § 2112(a).

But Congress has shown that it does not want every APA challenge centralized. For those specific APA challenges that Congress wants centralized, it has granted the Courts of Appeals exclusive jurisdiction and instituted a system to select a single venue. Otherwise, it has designed a regime where most APA challenges are first brought in district courts, including those involving agency actions of national scope and tremendous importance. *See, e.g.*, *Oklahoma ex rel. Pruitt v. Burwell*, 51 F. Supp. 3d 1080 (E.D. Okla. 2014); *King v. Sebelius*, 997 F. Supp. 2d 415 (E.D. Va. 2014); *Halbig v. Sebelius*, 27 F. Supp. 3d 1 (D.D.C. 2014); *Indiana v. I.R.S.*, 38 F. Supp. 3d 1003 (S.D. Ind. 2014). This system honors the "ordinarily [] strong presumption in favor of the plaintiff's choice of forum" (*Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981)), while allowing for the robust vetting of difficult *legal* issues, before review by higher courts (*see E.I. du Pont v. Train*, 430 U.S. 112, 135 n.26 (1977)).

III. In The Alternative, SDGA Is The Appropriate Transferee Court

A. In deciding upon the location of an MDL transfer, this Court looks to the plaintiffs' choice of forum (*In re U.S. Postal Serv.*, 545 F. Supp. 2d at 1369), the convenience to the parties

(*In re Air Disaster Near Brunswick, Ga.*, 794 F. Supp. 393, 394 (J.P.M.L. 1992)), the progress of the relative jurisdictions in adjudicating the case (*In re Convergent Tel. Consumer Prot. Act Litig*., 981 F. Supp. 2d 1385, 1387 (J.P.M.L. 2013)), the familiarity of the transferee judge with the issues (*In re L.E. Lay & Co. Antitrust Litig*., 391 F. Supp. 1054, 1056 (J.P.M.L. 1975)), and the docket conditions of the transferee court (*See In re Nat'l Student Mktg. Litig.*, 368 F. Supp. 1311, 1318 (J.P.M.L. 1972)). All of these factors favor SDGA as the transferee forum, should this Panel determine transfer is warranted.

First, the plaintiffs' choice of forum strongly favors SDGA. SDGA is the preferred venue of the eleven States in the SDGA Action, as well as those States that have filed in other jurisdictions but have expressed their desire that SDGA be the transferee jurisdiction. In the CWA context, the strong preference of these States carries special weight, as Congress has recognized the primacy of States in this area. 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.").

Second, the convenience to the parties and the progress of this case both favor SDGA. As noted above, SDGA is the furthest along in this litigation, having now received extensive briefing and oral presentation on the States' motion for a preliminary injunction. A new district judge would almost certainly require re-briefing, and a new oral argument, on issues relating to preliminary injunctive relief. That would undermine the efforts that the parties and Chief Judge Wood put into the States' motion for a preliminary injunction. In addition, Chief Judge Wood's engagement with the preliminary injunction briefing makes her well-positioned to rule upon the merits of many of the same arguments at the impending summary judgment stage.

Third, Chief Judge Wood is intimately familiar with the subject-matter at issue in the challenges to the WOTUS Rule. Even before this case started, Chief Judge Wood had several cases involving the CWA. *See Altamaha Riverkeeper, Inc. v. Rayonier, Inc*., 2015 WL 1505971 (S.D. Ga. Mar. 31, 2015) (Wood, C.J.); *United States v. St. Mary's Ry. W., LLC*, 989 F. Supp. 2d 1357 (S.D. Ga. 2013) (Wood, C.J.). As the Agencies went out of their way to point out, Judge Wood "is clearly familiar with the statute involved in this action." PI Opp'n at 1 (citing *Jones Creek Investors v. Columbia Cnty., Ga.*, No. CV 111-74, 2015 WL 1541409 (S.D. Ga. Mar. 31, 2015) (Wood, C.J.). The *Jones Creek* decision that the Agencies cite—decided by Chief Judge Wood just months ago in March 2015—involved a detailed application of the Supreme Court's *Rapanos* decision, a legal issue that is common to all of the cases here. The Agencies based the Rule upon their reading of *Rapanos*, and cited that decision thirty eight times in the Rule.

Finally, considerations of caseload support transfer to SDGA. For civil cases, SDGA has only 3.5% of its cases that are more than three years old.[4] And no other MDL cases are currently pending in SDGA.[5] Thus, centralization in SDGA would "permit[] the Panel to assign the litigation to a less-utilized district with an experienced judge who is not presently overseeing a multidistrict litigation." *In re Simply Orange Orange Juice Mktg. & Sales Practices Litig*., 867 F. Supp. 2d 1344, 1345-46 (J.P.M.L. 2012).

B. These same factors disfavor transfer to the Agencies' handpicked forum of DDC.

First, the vast majority of the parties—and all of the sovereign States—oppose transfer to DDC. This Court has previously rejected attempts by the federal government to select DDC over fora selected by the plaintiffs. *See In re U.S. Postal Serv.*, 545 F. Supp. 2d at 1369. That a party

[4] http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/03/31-2 (last visited Aug. 19, 2015).
[5] www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2015.pdf (last visited Aug. 19, 2015).

has now filed in DDC, in an apparent effort to assist in the Agencies' forum shopping, does not change this analysis. If anything, this only highlights the manner in which the Agencies are attempting to manipulate the MDL process. *See supra* at 5.

Second, the convenience to the parties and the progress of the case both disfavor DDC, at least as compared to SDGA. As explained above, the parties can most conveniently litigate this case in a court familiar with the legal issues at stake, and which is poised to a rule upon a fully briefed and argued motion for a preliminary injunction. *See supra* at 13-14. The recently filed DDC cases are in their infancy, so any transfer to DDC would likely require re-briefing of the preliminary injunction issues and a new judge to become familiar with those issues.

The Agencies' argument that DDC is convenient to the Agencies and some of the non-State plaintiffs (MDL Mot. at 2, 9-10, 13-15) is a red herring. This case will not involve any discovery, and the record can easily be produced in any court. The lottery system for consolidation of Court of Appeals challenges provides no thumb-on-the-scales for the D.C. Circuit, and there is no reason for this Panel to apply such a preference with regard to DDC. *See In re U.S. Postal Serv.*, 545 F. Supp. 2d at 1369.

Third, the Agencies could not possibly argue that the judge that may be assigned to this case in DDC would be more experienced in the relevant subject-matter—the CWA and the *Rapanos* decision—than Chief Judge Wood. While many of this nation's respected district judges would be able to adjudicate this case fairly, the Agencies present no reasons for removing this case from a judge of Chief Judge Wood's deep experience with the relevant subject matter.

Finally, considerations of caseload favor SDGA over DDC. 16.2% of DDC's civil cases are more than three years old, as compared to 3.5% of SDGA's civil cases.[6] And while DDC is shouldering the load of five MDL cases, SDGA currently has no MDL cases.[7]

CONCLUSION

The motion to transfer should be denied. If centralization is to be ordered, however, it should occur in SDGA.

[6] http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/03/31-2 (last visited Aug. 19, 2015).
[7] www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2015.pdf (last visited Aug. 19, 2015).

Respectfully Submitted,

s/ Britt C. Grant

Samuel S. Olens
Attorney General
Britt C. Grant – *Lead Counsel*
Solicitor General
Timothy A. Butler
Deputy Solicitor General
James D. Coots
Sr. Asst. Attorney General
OFFICE OF THE ATTORNEY GENERAL
40 Capitol Square, S.W.
Atlanta, Georgia 30334
bgrant@law.ga.gov
Telephone: (404) 651-9453
Fax: (404) 657-8733
Counsel for Plaintiff Georgia

Patrick Morrisey
Attorney General
Elbert Lin
Solicitor General
Misha Tseytlin
General Counsel
Erica N. Peterson
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
State Capitol
Building 1, Rm 26-E
Charleston, West Virginia 25305
Elbert.Lin@wvago.gov
Telephone: (304) 558-2021
Fax: (304) 558-0140
Counsel for Plaintiff West Virginia

Luther Strange
Attorney General
Andrew Brasher
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
501 Washington Ave.
Montgomery, Alabama 36130
abrasher@ago.state.al.us
Telephone: (334) 353-2609
Fax: (334) 242-4891
Counsel for Plaintiff Alabama

Pamela Jo Bondi
Attorney General
Jonathan A. Glogau
Attorney For the State of Florida
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, Florida 32399-1050
jon.glogau@myfloridalegal.com
Telephone: (850) 414-3300
Fax: (850) 410-2672
Counsel for Plaintiff Florida

Gregory F. Zoeller
Attorney General
Thomas M. Fisher
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
302 West Washington Street
Indiana Government Center - South, Fifth Floor
Indianapolis, Indiana 46204
Telephone: (317) 232-6255
Fax: (317) 232-7979

Sam M. Hayes
General Counsel
Craig A. Bromby
Deputy General Counsel
Andrew J. Norton
Deputy General Counsel
NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
215 W. Jones Street
Raleigh, North Carolina 27603
sam.hayes@ncdenr.gov

Tom.Fisher@atg.in.gov
Counsel for Plaintiff Indiana

Derek Schmidt
Attorney General
Jeffrey A. Chanay
Chief Deputy Attorney General
Burke W. Griggs
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
120 SW 10th Ave., 3d Floor
Topeka, Kansas 66612
jeff.chanay@ag.ks.gov
burke.griggs@ag.ks.gov
Telephone: (785) 368-8435
Fax: (785) 296-6296
Counsel for Plaintiff Kansas

Jack Conway
Attorney General
Sean J. Riley
Chief Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601
sean.riley@ag.ky.gov
Telephone: (502) 696-5650
Fax: (502) 564-2894
Counsel for Plaintiff Kentucky

craig.bromby@ncdenr.gov
andrew.norton@ncdenr.gov
Telephone: (919) 707-8600
Fax: 919-715-0720
Counsel for Plaintiff North Carolina Department Of Environment and Natural Resources

Alan Wilson
Attorney General
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
1000 Assembly Street, Room 519
Columbia, South Carolina 29201
bcook@scag.gov
Telephone: (803) 734-3680
Fax: (803) 734-3970
Counsel for Plaintiff South Carolina

Sean D. Reyes
Attorney General
Parker Douglas
Chief of Staff & Federal Solicitor
OFFICE OF THE UTAH ATTORNEY GENERAL
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, Utah 84114-2320
pdouglas@utah.gov
Telephone: (801) 538-9600
Fax: (801) 538-1121
Counsel for Plaintiff Utah

Brad D. Schimel
Attorney General
Karla Z. Keckhaver
Assistant Attorney General
WISCONSIN DEPARTMENT OF JUSTICE
17 West Main Street
Madison, Wisconsin 53707
keckhaverkz@doj.state.wi.us
Telephone: (608) 264-6365

Fax: (608) 267-2779
Counsel for Plaintiff Wisconsin

CERTIFICATE OF SERVICE

I certify that on this 19th day of August, 2015, a copy of the foregoing Brief In Opposition To The Motion Of The United States To Transfer Under 28 U.S.C. § 1407 was served electronically through the Court's CM/ECF system on all registered counsel.

s/ Britt C. Grant