BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

In re: **Clean Water Rule:** **Definition of "Waters of the United States"**	MDL No. 2663

MURRAY ENERGY CORPORATION'S OPPOSITION TO MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR CONSOLIDATION OF PRETRIAL PROCEEDINGS

Murray Energy Corporation ("Murray") respectfully opposes Defendants United States Environmental Protection Agency ("EPA") and United States Army Corps of Engineers (the "Corps") (collectively, the "Agencies") Motion to transfer and consolidate (the "Motion"). The suits the Agencies seek to consolidate do not share any significant common factual issues. To the contrary, the suits primarily raise *legal* issues that would benefit from consideration and resolution by the district courts in which they were originally filed. Given the nature of the claims – statutory and constitutional challenges to the rule at issue – the actions are likely to be resolved on dispositive motions. And, even in the unlikely event that discovery is necessary, the risk of duplicative discovery is exceedingly low. Thus, centralizing the cases before a single court would not reduce inconvenience or promote judicial efficiency. Quite simply, the Agencies have fallen well short of carrying their burden under 28 U.S.C. § 1407(a). For these reasons, the Motion is not well taken and the Panel should deny it in all respects.

INTRODUCTION

This matter involves challenges to the Agencies' final rule entitled "*Definition of 'Waters of the United States' Under the Clean Water Act*" (the "final rule") which expanded the Agencies' jurisdictional reach under the Clean Water Act ("CWA"). *See* 80 Fed. Reg. 37,054 (June 29, 2015). Murray filed suit in the Northern District of West Virginia, home to several of its coal mines which will be adversely affected by the final rule, alleging that the final rule violates the United States Constitution, the CWA, and the Administrative Procedure Act ("APA"). Others parties negatively impacted by the final rule have filed suit in nine additional cases (in seven other district courts). (Doc. 1-1 at 1). These ten challenges, and any others that may follow, are not appropriate for transfer and consolidation.

ARGUMENT

The Agencies, as the parties seeking to transfer and consolidate actions before the Judicial Panel on Multidistrict Litigation must carry the burden of meeting the criteria set forth in 28 U.S.C. § 1407. Pursuant to that statute, the Panel may transfer actions to any district for pretrial consolidated proceedings if: (1) the cases at issue "involv[e] one or more common questions of fact"; (2) consolidated proceedings would serve "the convenience of the parties and witnesses"; and (3) consolidated proceedings would "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). As described below, none of the three factors supports transfer and consolidation. Rather, the factors demonstrate that review of the claims by the district courts where the suits were originally filed is proper.

A. The Cases Do Not Involve Common Questions of Fact And Resolution of the Cases Will be Made Under the APA as a Matter of Law.

In order for transfer and consolidation to be appropriate, the Agencies must demonstrate that "a sufficient number of common questions of fact [] justify their transfer to a single district

for centralized pretrial proceedings." *In re Litigation Involving the State of Iran*, 1980 U.S. Dist. LEXIS 16558, *2 (J.P.M.L. July 8, 1980). Here, there are no common factual questions. Instead, purely legal questions will predominate. The Agencies admit as much in stating that "the pending actions do not require discovery or other factual development with respect to the *merits* of the plaintiff's claims…." (Doc. 1-1 at 6) (emphasis in the original).

The Agencies correctly note that all of the cases raise challenges pursuant to the APA. (Doc. 1-1 at 3). Significantly, the Panel has found that cases "brought under the Administrative Procedure Act, are unlike many others that the Panel routinely encounters because there may be less pretrial discovery, and common legal issues, rather than factual questions, may predominate the unresolved matters." *In re Removal from United States Marine Corps Reserve Active Status List Litig.*, 787 F. Supp. 2d 1350, 1350-51 (J.P.M.L. 2011) (denying centralization). This view is consistent with the D.C. Circuit's reasoning: "when an agency action is challenged [under the APA,] [t]he entire case on review is a question of law, and only a question of law." *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993).

In other words, "when a party seeks review of agency action under the APA before a district court, the district judge sits as an appellate tribunal. The entire case on review is a question of law, and the complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (citations and quotations omitted and punctuation altered). In this context, the court is simply not called upon to decide questions of fact.

Here, the Agencies' assert that the sufficiency of factual and scientific evidence they relied on, the completeness of their response to public comments, and the adequacy of their

public notice will be at issue. (Doc. 1-1 at 4-6). That is true, but these issues will be resolved based upon the administrative record as questions of law and not as questions of fact. *Marshall*, 988 F.2d at 1226; *Rempfer*, 583 F.3d at 860; *San Diego Navy Broadway Complex Coalition v. U.S. Coast Guard*, 2011 U.S. Dist. LEXIS 34174, *6 (S.D. Cal. Mar. 30, 2011) ("The court's role in reviewing agency actions under the APA is not to resolve facts, but to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.") (internal quotations omitted); *Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 979 (S.D. W.Va. 2009) ("A court conducting judicial review under the APA does not resolve factual questions, but instead determines whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.") (internal quotations omitted).

Moreover, the Agencies' Motion in no way attempts to explain how the final rule's effect on very specific geographic features on Murray's mine sites in West Virginia are at all similar to those faced by parties in other cases as far away as Alaska. Indeed, Murray specifically noted in its Complaint that particular streams, ponds, wetlands, and ditches located at its mines sites will be impacted from the final rule. These impacts are unique to those specific geographic features and are distinct from others located elsewhere. *See, e.g., CNX Land Res., Inc. v. Williams*, 2013 U.S. Dist. LEXIS 121746, *11-12 (N.D. W. Va. Aug. 27, 2013) (noting that each parcel of land is unique, thus serving as a basis for different treatment under the law).

Even if the Agencies could demonstrate that there would be common questions of fact (which they cannot), they still would not have met their burden. Clearly, legal issues predominate (as the cases will be squarely decided on them) and even if certain factual issues existed they would be so far on the periphery of the cases that the Agencies have not shown that

they "are sufficiently complex and that the accompanying discovery will be so time-consuming as to justify transfer under Section 1407." *In re 21st Century Productions, Inc. "Thrilsphere" Contract Litigation*, 448 F. Supp. 271, 273 (J.P.M.L. 1978).

The Agencies' reliance on *In re Polar Bear Endangered Species Act Listing & § 4 Rule Litig.*, 588 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008) does not change this analysis. As a threshold matter, the Panel there specifically asserted that centralization would eliminate duplicative discovery while here the Agencies admit that "the pending actions do not require discovery." (Doc. 1-1 at 6). Further, the Agencies' assertion that the subsequent proceedings in *Polar Bear* demonstrate that a detailed factual analysis was necessary is incorrect. The transferee court's summary judgment order was an APA review that resolved questions of law (not fact) in a manner that is consistent with the host of cases cited above. *See In re Polar Bear Endangered Species Act Listing*, 818 F. Supp. 2d 214 (D.D.C. 2011).

Likewise, the Agencies' assertion that pending (or potential) motions for preliminary relief somehow require a separate factual inquiry distinct from adjudication on the merits is misplaced. As the Panel is well aware, preliminary relief requires that the movant demonstrate a likelihood of success on the merits. (*E.g.*, Doc. 1-1 at 9 n.5). As noted above, the merits of the cases will be resolved as questions of law and adjudication of preliminary relief would not deviate from that course. In fact, the prospect of preliminary relief (even in non-APA cases where factual decisions may be required) is not sufficient by itself to warrant transfer and consolidation. *In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litigation*, 446 F. Supp. 242, 243 (J.P.M.L. 1978) (finding argument that consolidation was necessary to prevent "possibility of inconsistent pretrial rulings" on multiple requests for preliminary injunction "unpersuasive").

Accordingly, the Agencies cannot satisfy the first prong of the Section 1407 test because only legal issues will be decided by the cases. Namely, the APA challenges to the final rule will be resolved as a matter of law. However, "these common legal questions are insufficient to satisfy Section 1407's requirement of common factual questions." *In re Nat'l Ass'n*, 52 F. Supp. 3d 1377, 1378 (J.P.M.L. 2014). The Panel should deny transfer and consolidation on this basis alone because "if the common questions are purely legal, the statutory requirement for transfer literally is not satisfied." 15 Wright, Miller, Cooper & Freer, *Federal Practice and Procedure*, § 3863 (4th ed. 2013).

B. The Judicial Districts Where the Cases Were Originally Filed Are Most Convenient to the Parties and There Will be No Witnesses.

These cases likely will be resolved by dispositive motions. *See Rempfer*, 583 F.3d at 865. There will be no trial, no jury, no witnesses, and no questions of material fact for the courts to resolve. *Id*. Rather, this will largely be an exercise in filing papers – the administrative record, motions, responses, and the like. Under these circumstances, Section 1407's second prong -- that consolidated proceedings would serve "the convenience of the parties and witnesses" -- can hardly be a factor weighing in favor of transfer and consolidation.

As to the paper aspects of the cases, consolidation of the cases would be of no benefit to the parties as electronic filing has made the "location of relevant documents [] largely a neutral factor in today's world of faxing, scanning, and emailing documents." *Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Lafarge N. Am., Inc*., 474 F. Supp. 2d 474, 484 (S.D.N.Y. 2007).

The physical appearances made by counsel to the parties in these cases will be minimal and generally limited to any hearings that may arise associated with preliminary relief or dispositive motions. These appearances should be infrequent and well within the capability of the Agencies to defend as they are the best equipped of all parties to do so. That is, the Agencies

are some of the most prolific litigants in the country, both as plaintiffs and as defendants, having appeared in various suits in every state in the Union. They are supported by the U.S. Department of Justice which has an office in every judicial district and they are, clearly, the best suited parties in the nation to handle litigation of this type. Further, requiring the Plaintiffs in the various suits to travel to one location – away from where they originally filed suit would place a burden on the various Plaintiffs. At a minimum, transfer and consolidation would represent "shifting inconvenience from one party to another [which] is an insufficient basis for transfer." *Internap Corp. v. Noction Inc*., 2015 U.S. Dist. LEXIS 94438 (N.D. Ga. June 29, 2015); *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 256, 260 (11th Cir. 1996) (affirming lower court ruling stating same).

In sum, the Agencies are unable to carry their burden as to the second prong of 28 U.S.C. § 1407.

C. Transfer and Consolidation Will Not Substantially Increase Judicial Economy But Will Undermine the Critical Role of Diverse District Courts Resolving the Dispositive Legal Issues.

As to the third prong under 28 U.S.C. §1407, the Panel generally considers the likelihood that cases will result in duplicative discovery, inconsistent pretrial rulings, and a strain on the resources of the parties, counsel, and the judiciary as evidence that transfer and consolidation is appropriate. *E.g., In re Portfolio Recovery Assocs*., LLC, 846 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011); 15 Wright, Miller, Cooper & Freer, *Federal Practice and Procedure*, §3863 (4th ed. 2013) ("the factors most commonly cited by the Panel (often in combination) are: to avoid duplicative discovery activities, to prevent the entry of inconsistent pretrial rulings, and to conserve the human and financial resources of the parties, their counsel, and the judiciary."). Here, these factors are not present.

As noted above, the Agencies admit that there will be no discovery in this case. (Doc. 1-1 at 9) ("[I]t is highly unlikely that there will be discovery with regard to the merits of plaintiff's claims."). The Agencies' admission undercuts the most significant rationale for asserting that judicial economy would be enhanced by transfer and consolidation. *See* H.R. Rep. No. 90-1130 at 2-3 (1968), as reprinted in 1968 U.S.C.C.A.N. 1898, 1899-1900 (noting that "the possibility for conflict and duplication of discovery and other pretrial procedures in related cases can be avoided or minimized by such centralized management").

As explained above, the principal "pretrial" rulings that can be expected will not concern factual or evidentiary matters as would be typical of cases transferred by the Panel, but matters on pure questions of law. While a transferee court may rule on dispositive motions, in this matter, this consideration should counsel against transfer and consolidation because such a ruling would only resolve legal issues and not factual issues. *See In re Real Estate Transfer Tax Litig*., 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) ("merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization.") (internal quotation and citation omitted); *In re Keith Russell Judd Voting Rights Litig.*, 816 F. Supp. 2d 1383, 1383 (J.P.M.L. 2011) (denying transfer where "[t]he overriding question in each action is one that is largely legal in nature, making these actions unsuitable for centralization"); *In re: Removalfrom U.S. Marine Corps Reserve Active Status List Litig.*, 787 F. Supp. 2d 1350, 1351 (J.P.M.L. 2011) (denying transfer where "factual questions . . . are largely undisputed," and observing that "there may be less pretrial discovery, and common legal issues, rather than factual questions, may predominate the unresolved matter").

Most concerning is that transfer and consolidation would virtually guarantee that there would be only one district court in the nation to ever hear the critical issues raised in these

challenges. This surely is not the purpose of 28 U.S.C. § 1407. These issues are of national importance – with the Agencies having twice been rebuffed by the Supreme Court over the same concerns. *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). The cases before the Panel challenge the Agencies' third attempt to expand the jurisdictional reach of the CWA through the issuance of their final rule.

That the common legal issues will be decided by dispositive motion is a reason *for* the original district courts to retain their respective cases. That is, when courts differ, "they provide the reasoned alternatives from which the resolver of the conflict can derive a more informed analysis. The many circuit courts act as 'laboratories' of new or refined legal principles . . . providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments." Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 Cal. L. Rev. 913, 929 (1983); *see also Cobra Natural Res., LLC v. Fed. Mine Safety & Health Review Comm'n*, 742 F.3d 82, 88, n.11 (4th Cir. 2014) ("Put simply, there is nothing wrong with creating a circuit split when it is justified. At the end of the day, justice is served by reaching the correct result.").

Here, the effective result of a Panel decision to transfer and consolidate would be just the thing that the Supreme Court has counseled against: "Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). In sum, the third prong of the Section 1407 analysis (along with the first

two prongs) weighs against transfer and consolidation. The Panel should deny the Agencies' Motion.

D. The Original District Courts Should Retain the Cases, But Should the Panel Conclude Otherwise, the Northern District of West Virginia or the Southern District of Georgia Would be Most Appropriate for Transfer and Consolidation.

Should the Panel decide to consolidate and transfer the cases (which it should not), the districts where cases are the most procedurally advanced – the Northern District of West Virginia and the Southern District of Georgia – would be equally appropriate forums. We join the arguments of other parties in favor of transfer to the Southern District of Georgia (and do not repeat them here), and additionally note that the Northern District of West Virginia would also be a proper forum.

In the West Virginia case, Judge Irene M. Keeley has scheduled a hearing on Murray's Motion for Preliminary Injunction for August 24, 2015, making this case as procedurally advanced as the Georgia case. No other cases – and certainly not the District Court for the District of Columbia ("D.D.C.") have held hearings, let alone considered the substantive merits (and the likelihood of success) of the claims. That the Georgia case and the West Virginia case are furthest along favors those locations for transfer. *See In re Land Rover LR3 Tire Wear Prods. Liab. Litig.*, 598 F. Supp. 2d 1384, 1386 (J.P.M.L. 2009) (noting transfer appropriate to judicial district because "the first-filed and most procedurally advanced actions are pending there").

Likewise, Judge Keeley in West Virginia, having considered Murray's Motion for Preliminary Injunction, would be "already [] familiar with the factual and legal issues raised by this litigation" by the time the Panel reached its decision. *In re Auto Body Shop Antitrust Litig.*, 37 F. Supp. 3d 1388, 1391 (J.P.M.L. 2014). Such familiarity counsels in favor of the Northern

District of West Virginia being an appropriate forum for consolidation because the court could immediately proceed with pretrial matters more efficiently than other courts that have not reviewed the complex allegations and legal framework which are the backdrop for these challenges. As a result of hearing the arguments on Murray's Motion for Preliminary Injunction, Judge Keeley will be appraised of the "contours of this litigation by virtue of having ruled on [the] motion []." *In re Bank of Am. Credit Prot. Mktg. & Sales Practices Litig*., 804 F. Supp. 2d 1372, 1373 (J.P.M.L. 2011). As a result of "becom[ing] thoroughly acquainted with the issues in this litigation[,]" the Northern District of West Virginia would be "in the best position to supervise these actions toward their most expeditious termination." *In re L. E. Lay & Co. Antitrust Litigation*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975).

In addition to being familiar with the issues presented in these cases, Judge Keeley is also experienced with multidistrict litigation and is currently presiding over a small multidistrict matter of just (20) twenty actions. *See In re: Monitronics International, Inc., Telephone Consumer Protection Act Litigation*, MDL No. 2493; *see also* MDL Statistics Report – Distribution of Pending MDL Dockets by District (July 15, 2015).[1] The cases here (currently just ten) would not be unduly burdensome. Rather, that Judge Keeley would be assigned two small multidistrict matters would be a benefit in that the cases would profit from having "an experienced jurist in multidistrict litigation." *In re Merscorp Inc.*, 473 F. Supp. 2d 1379, 1380 (J.P.M.L. 2007).

Finally, Judge Keeley has significant experience with cases involving the CWA. *See W. Va. Highlands Conservancy v. Monongahela Power Co.*, 2012 U.S. Dist. LEXIS 744 (N.D. W. Va. 2012) (Keeley, J.) (regarding citizens suit under CWA); W. *Va. Highlands Conservancy, Inc.*

[1] *Available at* www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2015.pdf.

v. Huffman, 651 F. Supp. 2d 512 (S.D. W. Va. 2009) (Keeley, J.) (same). And the judicial district has been involved in numerous other CWA cases. *E.g., Lois Alt v. United States EPA*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013) (regarding EPA "Findings of Violation and Order for Compliance" under the CWA); *Pennsylvania v. Consol Energy, Inc*., 2012 U.S. Dist. LEXIS 124763 (N.D. W. Va. Sept. 4, 2012) (regarding CWA preemption); *Sierra Club v. ICG Eastern, LLC*, 833 F. Supp. 2d 571 (N.D. W. Va. 2011) (regarding citizen suit under CWA); *Shenandoah Riverkeeper v. Ox Paperboard*, LLC, 2011 U.S. Dist. LEXIS 52318 (N.D. W. Va. May 16, 2011) (same). The familiarity of Judge Keeley and the Northern District of West Virginia also favor consolidation, if it is to take place, in that court.

CONCLUSION

For the foregoing reasons, the Agencies' motion to transfer and consolidate should be denied. In the alternative, if the Panel should grant the motion, the cases should be transferred and consolidated in the Northern District of West Virginia or the Southern District of Georgia.

Dated: August 19, 2015

Respectfully submitted,

MURRAY ENERGY CORPORATION

By: */s/ Brooks M. Smith*
Of Counsel

Brooks M. Smith
Counsel for Murray Energy Corporation
TROUTMAN SANDERS LLP
1001 Haxall Point
Richmond, Virginia 23219
Telephone: (804) 697-1414
Facsimile: (804) 697-1339
Email: brooks.smith@troutmansanders.com

PROOF OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that copies of the foregoing Corporate Disclosure Statement were served via U.S. Mail and electronic mail as indicated below on August 19, 2015.

Case No.: 1:15-cv-110 (Keeley)
Murray Energy Corp., v. U.S. EPA et al.

Daniel R. Dertke
U.S. Department of Justice
601 D. Street NW
Suite 8000
Washington, DC 20004
Tel.: (202) 514-0994
Fax: (2002) 514-8865
Email: Daniel.dertke@usdoj.gov

Erin Carter
U.S. Attorney's Office
PO Box 591
Wheeling, WV 26003
Tel.: (304) 234-0100
Fax: (304) 234-0112
Email: erin.carter@usdoj.gov

Martha C. Mann
U.S. Department of Justice
601 D. Street NW
Suite 8000
Washington, DC 20004
Tel.: (202) 514-2664
Fax: (202) 514-8865
Email: martha.mann@usdoj.gov

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Respectfully Submitted

*/s/ Brooks M. Smith*_____
Brooks M. Smith
Troutman Sanders LLP
1001 Haxall Point
Richmond, VA 23219
Tel.: (804) 697-1414
Fax: (804) 697-1339
brooks.smith@troutmansanders.com