BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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

BRIEF IN OPPOSITION TO THE UNITED STATES' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR CONSOLIDATION OF PRETRIAL PROCEEDINGS

The States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming, and the New Mexico Environment Department and New Mexico State Engineer (the "States"), by and through undersigned counsel and pursuant to JPMDL L.R. 6.1(c), respectfully submit this Brief in Opposition to the United States' Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407(a) for Consolidation of Pretrial Proceedings (Dkt. No. 1).

INTRODUCTION

The United States seeks to transfer and consolidate various challenges brought by a variety of differently situated plaintiffs to the U.S. Army Corps of Engineers' ("Corps") and the U.S. Environmental Protection Agency's ("EPA") (collectively "the Agencies") promulgation of the *Clean Water Rule: Definition of "Waters of the United States"*, 80 Fed. Reg. 37,054 (June 29, 2015) (the "WOTUS Rule" or the "Rule") pursuant to 28 U.S.C. § 1407(a). Absent injunctive relief, which is currently being considered by several district courts, the Rule will become effective on August 28, 2015.

The Agencies seek transfer and consolidation despite the fact that the various challenges to the Rule raise predominantly legal issues and do not present the requisite complex common

issues of fact to justify transfer and consolidation. The Agencies also inappropriately seek to have the District Court for the District of Columbia, a court where no challenge to the WOTUS Rule is pending, designated as the transferee court.

Transfer and consolidation is particularly inappropriate here because, as the Agencies acknowledge, challenges to the Rule will be resolved on motions for summary judgment, and thus do not involve the types of complex discovery issues that warrant transfer and consolidation for pretrial proceedings. Dkt. No. 1-1, at 11. Rather, the challenges will be adjudicated on the administrative record—depositions and discovery are unlikely—and will be determined as matters of law. Indeed, the Agencies' concession that these cases will almost certainly be decided on motions for summary judgment coupled with their request to have a court where none of the cases are currently pending designated as the transferee court reveals their true motive in seeking transfer and consolidation—to have the cases adjudicated on the merits in the venue of their choice rather than the plaintiffs' chosen venue. This is not an appropriate use of § 1407(a). Congress did not intend for transfer and consolidation for pre-trial proceedings to be a mechanism to defeat plaintiffs' choice of venue. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (citing S.Rep. No. 454, 90th Cong., 1st Sess., p. 5 (1967)).

This Panel should reject the Agencies' Motion. The Agencies have failed to demonstrate that these cases share sufficiently complex common questions of fact to justify transfer and consolidation in light of the minimal convenience to the Agencies, inconvenience to the States, and slight potential judicial efficiency that could be gained by transfer and consolidation. Thus the Agencies fail to carry their burden of demonstrating that transfer and consolidation is warranted

BACKGROUND

The Clean Water Act ("CWA") establishes a system of cooperative federalism that recognizes states have the "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" and to "consult with the administrator in the exercise of [her] authority under this chapter." 33 U.S.C. § 1251(b). Contrary to the plain language of the CWA and the longstanding history of partnership between states and the federal government, the WOTUS Rule impermissibly infringes on the sovereign interests of the States, despite the Agencies' unsupported assertion that the WOTUS Rule "does not have federalism implications." 80 Fed. Reg. at 37,102.

The States filed their Compliant challenging the WOTUS Rule on June 29, 2015—the same day the Rule was published in the Federal Register—to protect their sovereign rights, interest, and authority over land and water within their borders from the Rule's unprecedented and illegal expansion of the Agencies' regulatory authority. Because of their status as sovereign entities, regulatory partners with the Agencies in implementing the CWA, and, at times, regulated entities, the States are uniquely situated to challenge the WOTUS Rule. Moreover, the States are all western and mid-western states uniquely impacted by the WOTUS Rule due to their climate and topography.

In their First Amended Complaint, the States raise seven claims for relief, each of which provides an independent basis for vacating the WOTUS Rule. The States claim that the WOTUS Rule should be vacated because it: (1) exceeds the Agencies' authority under the CWA; (2) improperly extends the Agencies' authority beyond the limits of the Commerce Clause; (3) violates the Tenth Amendment; (4) was promulgated in violation of the National Environmental Policy Act ("NEPA"); (5) is arbitrary and capricious in violation of the Administrative

Procedures Act ("APA"); (6) was promulgated in violation of the procedural mandates of the APA; and (7) violates the due process clause of the Fifth Amendment. *See* First Amended Complaint, attached as Exhibit A. These claims for relief are all based on the unique status of the States and impacts they will bear from implementation of the WOTUS Rule.

The Agencies seek to have the States' case consolidated with other cases brought by a variety of plaintiffs challenging the WOTUS Rule and transferred to the District Court for the District of Columbia. As the Agencies note, some of the claims in the States' First Amended Complaint are similar to claims made by plaintiffs in the other cases they seek to have consolidated; however, the States also raise unique claims not made by other plaintiffs.

On August 10, 2015, the States filed a Motion for Preliminary Injunction, supported by numerous declarations that detail the specific and unique harm that the States will suffer if the Rule is implemented. The Court has scheduled a hearing on that Motion for August 21, 2015.

ARGUMENT

Transferring and consolidating cases for coordinated pre-trial proceedings, pursuant to 28 U.S.C. § 1407(a), should only be granted where the cases present "unusually complex" common questions of fact such that a "***substantial*** benefit may accrue to courts and litigants through consolidated or coordinated pretrial proceedings." *In re Scotch Whiskey*, 299 F. Supp. 543, 544 (J.P.M.L. 1969) (emphasis added) (quoting Senate Report 454 to accompany S. 159, pages 4-5, U.S. Code Cong. & Admin. News 1968, p. 1901). While common questions of fact amongst the cases is a prerequisite to transfer and consolidation, it does not alone justify transfer. 28 U.S.C. § 1407(a). The proponent must also demonstrate that transfer and consolidation "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of [the cases]." *Id*; *see also In re Best Buy Co.*, 804 F. Supp. 2d 1376, 1379 (J.P.M.L 2011) (denying

transfer and consolidation because "the proponents of centralization have not met their burden of demonstrating the need for centralization"). The Agencies have not met their burden here because the actions they seek to have transferred and consolidated (1) raise claims that will be decided as matters of law and do not present the type of complex fact issues justifying consolidation, (2) the convenience of centralization to the Agencies does not justify transfer and consolidation, and (3) the efficiencies gained by centralization are insufficient to justify transfer and consolidation. Moreover, the Agencies have failed to present any compelling reason to override this Panel's general disfavor for transferring cases to districts where none of the cases to be consolidated are pending.

I. These Cases Do Not Involve Complex Factual Questions Justifying Transfer and Consolidation.

The existence of common questions of fact among actions pending in different districts "is the initial criteria which must be satisfied before any such actions may be transferred under section 1407." *In re Photocopy Paper*, 305 F. Supp. 60, 61 (J.P.M.L. 1969) (internal quotations and citations omitted). To justify transfer and consolidation the common questions of fact must be "unusually complex" so that it would be a "substantial benefit . . . to courts and litigants" to consolidate proceedings. *In re Scotch Whiskey*, 299 F. Supp. at 544; *In re Boeing Company Employment Practices Litigation*, 293 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) (transfer and consolidation is inappropriate where the moving party fails to "persuade [the Panel] that the[] actions involve sufficient common questions of fact to warrant Section 1407 centralization").

A. Transfer and consolidation are not appropriate because legal issues predominate.

Here the States' First Amended Complaint alleges that the WOTUS Rule extends the Agencies' regulatory authority beyond the limits of both the Constitution and the CWA and that

the process through which the Agencies promulgated the Rule was defective in violation of the APA and NEPA. *See* Exhibit A. While many of these claims are similar to claims made by plaintiffs in the other cases the Agencies seek to have consolidated, they do not present common complex issues of fact sufficient to justify transfer and consolidation.

First, the claims that the Rule extends the Agencies' regulatory authority beyond the limits of the Constitution and the CWA do not present complex issues of fact. This Panel has recognized that cases challenging federal agencies' authority to act are not appropriately transferred and consolidated under § 1407(a). *In re Natural Gas Liquids Regulation Litigation*, 434 F. Supp. 665, 667-68 (J.P.M.L 1977) (deny transfer and consolidation where "[t]he principal aspect which these actions have in common is the legal question of the [Federal Energy Administration]'s statutory authority to regulate natural gas liquids"). This Panel has also recognized that transfer and consolidation are not warranted where the common question raised "is a legal question of statutory interpretation." *In re EPA Pesticide Listing Confidentiality*, 434 F. Supp. 1235, 1236 (J.P.M.L 1977). Here the challenged WOTUS Rule further defines the term "waters of the United States" in the CWA to establish the scope of the Agencies' jurisdiction over "waters." 80 Fed. Reg. at 37,054. The common question raised in the cases the Agencies seek to consolidate is whether this interpretation exceeds the limits on the Agencies' authority imposed by both the Constitution and the CWA. These questions will be resolved as matters of law—while courts will necessarily look to the facts in the record to resolve these legal questions, such inquiry does not transform the issue into a question of fact. These legal questions regarding the Rule's impermissible extension of the Agencies authority beyond the limits of the Constitution and the CWA do not justify transfer and consolidation. *In re EPA Pesticide Listing Confidentiality*, 434 F. Supp. at 1236.

Second, the claims regarding the sufficiency of the procedures employed by the Agencies in promulgating the Rule similarly do not present the type of complex factual questions necessary to justify transfer and consolidation. As the Agencies concede, the claims that they violated NEPA and the APA in promulgating the Rule will not require any "discovery or other factual development," let alone the complex discovery generally involved in cases transferred and consolidated by this Panel. Dkt. No. 1-1, at 6. Rather, in adjudicating these claims courts are generally limited to the administrative record and "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)) (internal citations and quotations omitted). While the inquiry into the administrative record "must be searching and careful," the standard of review is narrow. *Id*. Ultimately, the question before the court is a question of law. *See Am. Forest Res. Council v. Hall*, 533 F. Supp. 2d 84, 89 (D.D.C.2008) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir.1985) ("'the function of the district court is 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'") (emphasis added)).

The Agencies' attempt to skirt the requirement that common complex questions of fact must be shared by the cases they seek to consolidate by arguing that the presence of facts relevant to the legal questions raised is sufficient to justify transfer and consolidation. Dkt. No. 1-1, at 6. This assertion is unavailing. This Panel has repeatedly recognized that transfer and consolidation is not warranted where legal questions predominate, as they do here. *In re Natural Gas Liquids Regulation Litigation*, 434 F. Supp. at 667-68; *In re Medi-Cal Reimbursement Rate Litigation*, 652 F. Supp. 2d 1378 (J.P.M.L. 2009).

The Agencies' reliance on *In re: Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation* to support its contention is unpersuasive. 588 F. Supp. 2d 1376 (J.P.M.L. 2008). There, the Panel ordered transfer and consolidation, but only after noting the unusualness of doing so in an administrative record review case. *Id.* Importantly, the Panel's order was premised on the fact that almost all of the plaintiffs and defendants supported transfer and consolidation. *Id.* at 1377 (noting that only two intervenors objected to centralization). Here, all of the States oppose transfer and consolidation and anticipate that the majority of other plaintiffs will not support the Agencies' Motion.

In re: Polar Bear is further distinguishable from the present case because in that case the Panel noted that transfer and consolidation would "eliminate duplicative discovery;" however, as the Agencies concede, discovery is not likely to be an issue here. *Id.* Indeed, although the Agencies argue that there may be a dispute over the content of the administrative record no such dispute exists yet—the Agencies should not be allowed to fabricate the basis for transfer and consolidation by threatening to improperly compile the administrative record. Speculative potential disputes over the content of the record do not justify transfer and consolidation.

Indeed, the unusualness of the Panel's decision in *In re: Polar Bear*, and it's inapplicability here, is underscored by the fact that the Panel has twice rejected attempts by the Federal government to transfer and consolidate administrative record review cases since. *See In re: Removal From U.S. Marine Corps Reserve Active Status List Litigation*, 787 F. Supp. 2d 1350, 1351 (J.P.M.L 2011) (denying transfer and consolidation of cases brought pursuant to the APA because it would not "create significant efficiencies, avoid inconsistent rulings, and result in the overall fairer adjudication of the litigation for the benefit of all involved parties"); *In re:Lesser Prairie-Chicken Endangered Species Act Litigation*, MDL No. 2629, 2015 WL

3654675, at *1 (J.P.M.L. June 9, 2015) (denying transfer and consolidation of APA challenges because "[d]iscovery, if any, will be minimal, as these cases will be decided on the administrative record…[a]nd motion practice will consist of motions regarding that record and summary judgment motion or petitions for review").

B. Fact Questions that are unique to each case do not support transfer and consolidation.

The Agencies' attempt to cover up the fact that legal issues predominate the challenges to the WOTUS Rule by pointing to several instances where factual issues may arise in the cases they seek to consolidate. However, the Agencies' examples are illustrative of factual issues unique to each case, not common factual issues, and do not justify transfer and consolidation. *See In re EPA Pesticide Listing Confidentiality*, 434 F. Supp. at 1236 (denying transfer because the predominate issue common to the cases was a legal question and "[a]ny factual issues are primarily, if not entirely, unique questions…in each case").

First, the Agencies' assert that the requests for injunctive relief already filed in several of the cases, including the States' case, present issues of fact, because they are supported by various declarations detailing the irreparable harm implementation of the Rule will cause. Dkt. No. 1-1, at 8-9. While it is uncontested that the declarations detailing this irreparable harm contain facts, these facts are unique to the particular circumstances of the plaintiffs in the various cases. Similarly, the Agencies' contention that these motions for injunctive relief will raise factual issues regarding standing is also irrelevant. The facts relevant to any particular plaintiff's standing to bring suit are unique to that particular plaintiff.

Second, the Agencies point to the claims made by the States and other plaintiffs that the Agencies failed to properly respond to the comments they submitted during the public comment period as requiring factual inquiry. Dkt. No. 1-1, at 5. However, the factual inquiry required to

assess these claims is specific to the individual comments submitted. These are not common questions of fact, and do not justifying transfer and consolidation.

II. The Convenience To The Agencies and Potential Efficiencies To Be Gained Are Insufficient to Justify Transfer and Consolidation.

Even if the Agencies could carry their burden of satisfying the prerequisite demonstration that these cases share common complex questions of fact sufficient to justify transfer, they fail to demonstrate that transfer and consolidation will result in substantial conveniences or judicial efficiencies warranting transfer and consolidation. This Panel has reiterated that the proponent of transfer and consolidation bears the burden of demonstrating that the conveniences and efficiencies to be gained are substantial enough to justify transfer. *See e.g. In re CVS Caremark Corp. Wage and Hour Employment Practices Litigation*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010) (denying transfer despite the existence of common questions of fact sufficient to justify transfer because the circumstances did not persuade the Panel that "centralization here would sufficiently further the purposes of the statute") Similarly, the Agencies' arguments that centralization will further the purposes of the statute are unpersuasive here.

First, the Agencies' contention that transfer and consolidation "will be convenient for the parties" overstates the burden on the Agencies of not transferring and consolidating the cases. The Agencies concede "it is highly unlikely that there will be discovery" and it is almost certain that the legality of the WOTUS Rule will all be decided on motions for summary judgment. Thus, even if these cases are transferred and consolidated, the bulk of the work in litigating these cases will be unchanged—the Agencies will still be forced to address the claims, contentions and arguments raised by each plaintiff.

Moreover, there is little reason to suspect that any witnesses or attorneys for the Agencies will be forced to travel extensively to litigate these cases. The Agencies are represented by the

Department of Justice who employs qualified attorneys capable of attending hearings and addressing matters that arise in each of the district courts where challenges to the Rule are pending. Thus the Agencies' assertion that they will be substantially burdened if these cases are not transferred and consolidated are unfounded.

Second, the Agencies have failed to demonstrate that transfer and consolidation will result in sufficient efficiencies to outweigh the States' and other plaintiffs' interest in proceeding with their cases in the venues they selected. Indeed, the Agencies' main contention is that transfer and consolidation will prevent inconsistent rulings. While inconsistent rulings are possible, this alone is not a sufficient basis for transferring and consolidating these cases. *See In re Circuit City Stores, Inc., Restocking Fee Sales Practices Litigation*, 528 F. Supp. 2d 1363, 1364 (J.P.M.L 2007) (denying motion to transfer and consolidate despite the potential for inconsistent pre-trial rulings).

Contrary to the Agencies' contention, allowing these challenges to proceed in multiple forums will promote the just and efficient resolution of the challenges to the WOTUS Rule. As the Agencies acknowledge, the challenges to the Rule they seek to consolidate will likely remain unresolved "until there is Supreme Court review." Dkt. No. 1-1, at 12. Because the issues raised are predominantly questions of law associated with unique facts, allowing the various challenges to the Rule to proceed in the various districts in which they were brought will allow for the full exploration of the issues by judges familiar and informed on those issues, before the matter may be elevated to the Supreme Court.

Third, sufficient alternatives to transfer exist that can minimize the impact of proceeding in multiple forums. *See In re Circuit City Stores, Inc.*, 528 F. Supp. 2d at 1364 (denying motion to transfer and consolidate because "[a]lternatives to transfer exist that can minimize whatever

possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings"). For example, the Agencies' main concern regarding inconsistent rulings on the merits from various courts is easily resolved by the Agencies acknowledging the merits of the request from the Attorneys General and other representatives of 32 states that implementation of the Rule be postponed until the courts are provided an opportunity to adjudicate the Rule's legality. *See* Letter to Gina McCarthy and Jo Ellen Darcy (July 28, 2015), attached as Exhibit B.

Accordingly, transfer and consolidation are not warranted here. The Agencies have failed to demonstrate that these cases present sufficiently complex common questions of fact to justify centralization of pretrial proceedings under the circumstances. The legal questions at issue in the States' challenge to the WOTUS Rule should be allowed to proceed in the District Court for North Dakota.

III. The District Court For The District Of Columbia Is Not An Appropriate Transferee Court.

The Agencies' request for transfer and consolidation is particularly inappropriate in that it requests transfer and consolidation in the District Court for the District of Columbia, despite the fact that none of the cases it seeks to have transferred and consolidated are pending in that court. This Panel generally disfavors transfer to a district where none of the actions sought to be consolidated are pending, and the Panel should not make an exception here. *See In re Upjohn Co. Antibiotic "Cleocin" Products Liability Litigation*, 450 F. Supp. 1168, 1170-71 (J.P.M.L. 1978).

The Agencies assert that D.C. is an appropriate transferee district because the named defendants reside there in "their official capacity" and much of the decision making behind the challenged Rule was made there. Dkt. No. 1-1, at 15. These factors are not relevant here. First, these cases will be based on the administrative record and will not likely require any

participation from the named defendants. Thus the fact that they officially reside in D.C. should not persuade this Panel to break from its traditional practice of appointing a transferee court from among the courts with actions currently pending before them. Second, the fact that decisions were made regarding the rulemaking in D.C. is irrelevant. The WOTUS Rule is a nationally applicable rule, the effects of which will be felt across the country.

Moreover, the Agencies' contention that the District Court for D.C. has relevant specialized knowledge is unpersuasive. *See* Dkt. No. 1-1, at 13-14. Almost every court in the country has adjudicated disputes over the Agencies' jurisdiction under the CWA in recent years. *See e.g. United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007); *U.S. v. Donovan*, 661 F.3d 174 (3rd Cir. 2011); *San Francisco Baykeeper v. Cargill*, 481 F.3d 700 (9th Cir. 2007); *U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *U.S. v. Bailey*, 571 F.3d 791 (8th Cir. 2009). Accordingly, even if this Panel determines consolidation is appropriate, it should not indulge the Agencies' attempt to select their preferred venue by appointing the District Court for D.C. as the transferee district.[1]

[1] While the States are confident that transfer and consolidation under § 1407(a) is not appropriate, should the Panel grant the Agencies' Motion, the States request consolidation in the District of North Dakota (Case No. 3:15-cv-00059-RRE-ARS). Pending Preliminary Injunction Motion and a hearing on that motion will be held on August 21, 2015. The District Court in North Dakota has already invested substantial time and effort familiarizing itself with the issues regarding the WOTUS Rule. Thus judicial resources would be conserved by consolidating the challenges to the Rule in that court. The case proceeding in the Sothern District of Georgia (Case No. 2:15-cv-00079-LGW-RSB) is on a similar path. As such, the States will continue to apprise the Panel of pertinent developments in these cases.

CONCLUSION

For the reasons set forth above, the States respectfully request this Panel deny the Agencies' Motion to transfer and consolidate and allow the States' case to proceed in the District Court for North Dakota.

DATED this 19th day of August, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 19th, 2015, a true and correct copy of the above **BRIEF IN OPPOSITION TO THE UNITED STATES MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR CONSOLIDATION OF PRETRIAL PROCEEDINGS** was served via the Court's CM/ECF system.

/s/ Paul M. Seby