BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE:	)	
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Clean Water Rule: Definition of "Waters of the United States"	)	**MDL No. 2663**
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RESPONSE OF SOUTHEASTERN LEGAL FOUNDATION, INC.; GEORGIA AGRIBUSINESS COUNCIL, INC.; AND GREATER ATLANTA HOMEBUILDERS ASSOCIATION, INC.

IN OPPOSITION TO

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

Pursuant to Rule 6.1(c) of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation, Plaintiffs in *Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc. v. EPA, et al.*, Case No. 1:15-cv-02488 (N.D. Ga.) ("Georgia Plaintiffs") respectfully submit this Response in Opposition to the Motion of the United States for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Consolidation of Pretrial Proceedings.

I. Introduction

Defendants' request to consolidate the legal challenges to the "Clean Water Rule: Definition of 'Waters of the United States'" ("WOTUS Rule"), 80 Fed. Reg. 37,053-37,127 (Jun. 29, 2015), pursuant to the multidistrict litigation statute is highly irregular and legally unsupportable. The case law is overwhelming that in litigation such as this where legal questions predominate and fact questions are few and not common, consolidation must be denied. The Georgia Plaintiffs request this Panel deny Defendants' motion. However, to the extent this Panel disagrees, the Georgia Plaintiffs submit that the United States District Court for the Southern District of Georgia is the better choice for transfer rather than the District of Columbia which lacks any compelling connection to this litigation.

The multidistrict litigation process has only one purpose: to consolidate the pretrial proceedings of "civil actions involving one or more common questions of fact." 28 U.S.C. § 1407(a). To that end,

> The job of the Panel is to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings.

See United States Judicial Panel on Multidistrict Litigation, "Overview of Panel," available at http://www.jpml.uscourts.gov/panel-info/overview-panel.

In this litigation that task is simple. Although common issues of *law* are present in all the WOTUS Rule challenges, the various cases have no common questions of *fact*. Few fact questions even exist in this litigation, and they are all unique to each individual case. Every complaint generally alleges the WOTUS Rule is a violation of the Administrative Procedure Act and extends beyond the authority of the United States Army Corps of Engineers (USACE) and the United States Environmental Protection Agency (EPA) under the Clean Water Act and U.S. Constitution. These challenges will be decided on the administrative record, and, as Defendants' concede, "it is highly unlikely that there will be discovery with regard to the merits of plaintiffs' claims." Def.'s Br. in Support, p. 9 (Doc. 1-1). Instead, the ultimate resolution in these cases will turn on the courts' application of the controlling legal precedent, such as *Rapanos v. United States*, 547 U.S. 715 (2006) and *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), to the legal question of whether the USACE and EPA acted within their statutory and constitutional authority.

This Panel "will, as a general rule, decline to transfer such actions if they appear to present 'strictly legal questions requiring little or no discovery.'" *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, 764 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011) (brackets and ellipses omitted). Indeed,

"[t]he presence of common issues of law has no effect on transfer: it is neither a necessary nor sufficient condition for transfer." Multidistrict Litig. Manual § 5.4. "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.*. For example, in *In re: Medi-Cal Reimbursement Rate Reduction Litig.*, 652 F. Supp. 2d 1378 (J.P.M.L. 2009), the Panel denied consolidation because the cases "by and large, raise strictly legal issues." The Panel explained:

> One of the Panel's prime considerations is often the need to avoid inconsistent rulings on similar issues. Usually, that consideration is bolstered by the concern for duplicative and burdensome discovery leading up to the legal issues. Here, very little discovery appears necessary prior to the joinder of the legal issues. Merely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization.

See also In re EPA Pesticide Listing Confidentiality Litig., 434 F. Supp. 1235, 1236 (J.P.M.L. 1977):

> [T]he predominant, and perhaps only, common aspect in these actions is a legal question of statutory interpretation. Any factual issues are primarily, if not entirely, unique questions pertaining to the specific data sought to be exempt from disclosure in each action. Thus, since these actions involve a common question of law and share few, if any, questions of fact, transfer under Section 1407 is inappropriate.

See also, e.g., In re Real Estate Transfer Tax Litig., 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (denying consolidation because the dispute involved "primarily a *legal* question") (emphasis in original); *In re Multijurisdiction Practice Litig.*, 52 F. Supp. 3d 1377, 1378 (J.P.M.L. 2014) ("[T]hese common legal questions are insufficient to satisfy Section 1407's requirement of common factual questions.").

The few isolated factual questions in this litigation are either plaintiff- or case-specific. For example, the question of how each plaintiff was harmed by the WOTUS Rule may arise in the early stages of this litigation, both in the context of any challenge to the plaintiff's standing and in any motions for preliminary injunction. Also, the litigation may explore whether the USACE and EPA responded adequately to the plaintiffs' comments on the WOTUS Rule. Each plaintiff was uniquely harmed by the WOTUS Rule, because each plaintiff's specific operations are regulated in different ways by the Clean Water Act and each plaintiff is subject to different state standards that would

apply in the absence of federal jurisdiction. Because of the different posture of the various plaintiffs, each submitted separate comments, which now must be analyzed separately to determine if the USACE and EPA adequately considered the specific concerns. These few isolated fact questions are each case-specific. Consolidation will not aid in their resolution but would instead place a compounded burden into the hands of a single judge.

Because the multidistrict litigation statute does not support consolidation, the Georgia Plaintiffs request this Panel deny Defendants' request for consolidation and transfer. However, if this Panel disagrees, the Georgia Plaintiffs request this Panel transfer these actions to the United States District Court for the Southern District of Georgia before Judge Lisa Godbey Wood. Eleven state entities have filed suit in that district, and that litigation has progressed the furthest to date. With the WOTUS Rule taking effect in less than ten days, the Georgia Plaintiffs seek a speedy resolution with a judge already well-versed in this litigation rather than further delay before a judge who will require time to become familiar with the issues. The Southern District of Georgia also has a sufficiently open docket to give this matter focused attention and progress this litigation expeditiously.

II. The Georgia Plaintiffs incorporate the U.S. Chamber of Commerce Brief by reference.

Other plaintiffs in this litigation have provided this Panel with thorough explanations of the controlling legal precedent. To avoid duplicate submissions of the same case law, the Georgia Plaintiffs join in the brief of the Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and Portland Cement Association (Doc. 66), and incorporate that brief by reference as if fully set forth herein. The Georgia Plaintiffs file this separate Response to explain the unique factual posture of *Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc. v. EPA, et al.*, Case No. 1:15-cv-02488 (N.D. Ga.).

III. The WOTUS Rule cases present only unique questions of fact, making separate adjudications more just and convenient.

Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc. v. EPA, et al., Case No. 1:15-cv-02488 (N.D. Ga.) and the other subject actions do not meet the requirements for consolidation and transfer under the MDL statute. The statute provides that "when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). But even then, this Court will grant the transfer only if it determines that doing so would be "for the convenience of parties and witnesses" and would "promote the just and efficient conduct of such actions." *Id.* On neither count does Plaintiffs' action qualify.

A. The Georgia Plaintiffs' legal challenge involves only a few questions of fact, but these are all specific to its case alone.

This litigation is primarily a legal challenge, but to the extent any facts are at issue, they are nearly all entirely case-specific and peripheral to the controversy. The only fact questions that will arise are the extent to which the plaintiffs are harmed by the WOTUS Rule (to determine standing and evaluate a motion for preliminary injunction) and whether the USACE and EPA considered the plaintiffs' comments on the proposed rule. These points are intertwined, because each plaintiff's unique harms factored heavily into the written comments they submitted to the agencies. The plaintiffs have diverse businesses with varying water needs and operate in states with a range of water availability and regulatory requirements. For these very limited preliminary questions of fact that may arise early in this litigation, the facts will be different for every plaintiff.

The Georgia Plaintiffs are all Georgia-based entities that represent the interests of Georgia farmers, Georgia home builders, and other Georgia landowners and businesses. The water-related issues the Georgia Plaintiffs' members confront in their operations are unique to the Georgia

environment and the dominant agricultural crops of that state.[1] Not only do the specific Georgia crops have unique water needs, but the humidity, temperature, sunshine, wind speed, rain amounts, and water table of the state also contribute to highly localized water use practices. For this reason both the USACE and EPA have regional offices throughout the country staffed with agents who can become familiar with the unique local needs of each state or region. For example, if one of the Georgia Plaintiffs' members required a Clean Water Act § 404 wetland permit, the permitting authority would be the Savannah District of the USACE.

Following any changes to the Clean Water Act, the regional staff would have to learn how to apply those changes to the distinctive water landscape of Georgia. From the Georgia coast to the north Georgia mountains to the south Georgia swamps, Georgia's waters are interconnected in special ways that require particularized training. In contrast, the shallow water table of Florida, the irrigation needs of the Midwest, the deserts of the Southwest, the drought in California, and the plush Northwest are only a fraction of the myriad different water issues across the country. The USACE and EPA staff in those regions have been educated as to their localized water needs, trained to apply the current Clean Water Act rules and regulations to the specific landscape of those regions, and would need to understand and tailor any changes to the rules in similarly particularized ways.

The WOTUS Rule itself even accounts for such regional differences. For example, in describing the implicated wetlands features, the WOTUS Rule identifies five different types, each appearing in completely distinct regions of the country. These include "prairie potholes" ("a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural

[1] There are 42,257 farms in Georgia encompassing 9,620,836 acres of land. In almost two-thirds of Georgia's counties, agribusiness and directly related industries are the largest or second-largest economic engines. Georgia is consistently the nation's top producer of peanuts, broilers (chickens), pecans and blueberries. Georgia is near the top in the production of cotton, watermelon, peaches, eggs, rye, sweet corn, bell peppers, tomatoes, onions, cantaloupes and cabbage. Georgia also has more commercial forest land (24.4 million acres) than any other state.

outlets, located in the upper Midwest"); "Carolina bays and Delmarva bays" ("ponded, depressional wetlands that occur along the Atlantic coastal plain"), "pocosins" ("evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain"); "Western vernal pools" ("seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers"); and "Texas coastal prairie wetlands" ("freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast"). *See, e.g.,* 80 Fed. Reg. 37053, 37125 (June 29, 2015). These features highlight well the dichotomous water landscapes that exist across this country. The lack of a permanent natural outlet of the prairie potholes implicates different aspects of the WOTUS Rule than the seasonal and intermittent nature of the Western vernal pools. Entities located in each of those regions have specific harms that are not shared by other plaintiffs in other states.

Another portion of the WOTUS Rule targets the waters surrounding the Great Lakes. In the definition of "adjacent," the WOTUS Rule includes "all waters within 1,500 feet of the ordinary high water mark of the Great Lakes." *See, e.g.,* 80 Fed. Reg. 37053, 37126 (June 29, 2015). Clearly no Great Lakes exist in Georgia, but any plaintiffs in the Great Lakes states have distinctive harms not shared by other plaintiffs in other parts of the country.

Also important to the question of harm is an analysis of what regulations would otherwise apply to the newly jurisdictional waters under the WOTUS Rule. These state and local regulations drive both what changes and costs the WOTUS Rule imposes on the plaintiffs and how much environmental benefit will result from the rule. Many plaintiffs contend the USACE and EPA overstated the WOTUS Rule's benefits by not accounting for state-level water protections. With fifty different state water laws and countless city, county, and local regulations, the task of ascertaining the legal protections of every water is daunting and beyond the reasonable time

limitations of any one judge. Each state has completely different water regulations, many of which are nearly impenetrable to out-of-state practitioners. Indeed, even EPA and USACE, with local field staff in every state and trained environmental expertise, deemed this task too large to complete as part of the rule-making process. But the individual judges in different parts of the country can, and likely already have, wrestled with state water law.

Georgia has an unusual method of protecting state waters called the "buffer" rule, which appears in Georgia's Erosion and Sedimentation Act. It protects a 25-foot buffer along state waters, a 50-foot buffer along trout streams, and a 25-foot buffer along coastal marshlands from certain land-disturbing activities. *See* Ga. Code Ann. § 12-7-6(b)(15)-(17). As an additional layer of complication, the coastal marshlands category only takes effect December 31, 2015. The proper interpretation of this provision was hotly contested and Georgia courts spent years grappling with this rule. *See Turner v. Georgia River Network*, No. S14G1780, 2015 WL 3658823 (Ga. June 15, 2015). The result is that it has been thoroughly briefed and argued at every judicial level and Georgia's courts are especially well-qualified to apply its concepts, which are entirely different from the laws protecting the waters of other states. The differences between Georgia's stream buffer rule and the WOTUS Rule will determine both the added permitting and operational costs to the Georgia Plaintiffs and whether the WOTUS Rule actually provides any added benefits to Georgia's waters.

Moreover, because regional field staff implement the Clean Water Act, it is subject to some interpretative variation. Because of regional differences in how waters connect and are used (both because of hydrogeological and industry differences and the unique practices of each agency field office), the degree of change required under the WOTUS Rule will also have regional variation. This will underlie questions of harm and the costs of the rule, because it will impact the calculations of regulatory costs to the states, education costs to the regulated community, added permitting costs to various operations, and exactly how many new jurisdictional determinations will result from the

revised regulations. Georgia's judges have already analyzed these issues and will not require any additional time to become familiar with the current landscape in order to determine the costs of change. No one judge could apply the unique practices of fifty states to the WOTUS Rule and thoroughly sift through the specific challenges of various industries and operations across the country to fully analyze the issues. But many different judges could do this for the various geographic regions represented and then develop the necessary record for any ultimate appellate process.

B. Separate adjudications advance both justice and convenience.

For the very few factual issues in question, justice and convenience are both best served by separate adjudications. Importantly, the factual issues here will all occur early in the litigation, when standing might be challenged and the plaintiffs will move for a preliminary injunction. Consolidation before these matters can be resolved will do nothing to advance the litigation. Once the litigation evolves, the fact questions largely fall away, and the legal issues will predominate. At that stage, separate adjudication is actually a hallmark of our judicial system. While consolidated review may appear to have some surface-level logic, further analysis reveals that it would deprive the various district courts of the opportunity to fully develop the record and narrow the legal debate.

As noted in the other briefs, allowing the various courts across the country to develop the record fully before any consolidated appellate review is an intentional part of the justice system that enhances the judicial review process. *See, e.g., United States v. Mendoza*, 464 U.S. 154, 160 (1984); *E.I. du Pont v. Train*, 430 U.S. 112, 135 n.26 (1977); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). This is precisely such a situation where allowing Georgia judges to compile a complete record on the issues unique to that state will both simplify the task of the appellate courts and allow a full consideration of all the issues. Consolidation at this preliminary stage will necessarily result in a

cursory analysis of each of the fifty states' water landscapes, needs, uses, regulatory protections, costs, and enforcement protocols. That does not advance either justice or judicial economy.

Because of the unique claims of the Georgia Plaintiffs and all the other parties, both justice and judicial economy are best served by separate adjudications to allow the fullest development of the record before any more consolidated appeals.

IV. If the Panel decides to consolidate the cases, the appropriate transferee district is the Southern District of Georgia.

Although the Georgia Plaintiffs do not support consolidation, the Georgia Plaintiffs join the Chamber of Commerce of the United States of America, National Federation of Independent Business, State Chamber of Oklahoma, Tulsa Regional Chamber, and Portland Cement Association, and the States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, South Carolina, Utah, Wisconsin, Texas, Louisiana, Mississippi, Oklahoma, Ohio, Michigan, and Tennessee, the Commonwealth of Kentucky, and the North Carolina Department of Environment and Natural Resources, in their position that the United States District Court for the Southern District of Georgia before Judge Lisa Godbey Wood would be the appropriate venue.

The case of *States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, South Carolina, Utah, and Wisconsin, the Commonwealth of Kentucky, and the North Carolina Department of Environment and Natural Resources v. McCarthy, Administrator, EPA and Darcy, Assistant Secretary, Army Corps of Engineers*, Case No. 2:15-cv-00079-LGW-RSB (S.D. Ga.) is already before Judge Wood and is the most procedurally advanced of all the WOTUS Rule challenges. This factor is the most controlling of all factors in determining the appropriate transferee district. *See, e.g., In re: Monitronics Int'l, Inc., Tel. Consumer Prot. Act Litig.*, 988 F. Supp. 2d 1364 (J.P.M.L. 2013); *In re Convergent Tel. Consumer Prot. Act Litig.*, 981 F. Supp. 2d 1385, 1387 (J.P.M.L. 2013); *In re L'oreal Wrinkle Cream Mktg. & Sales Practices Litig.*, 908 F. Supp. 2d 1381 (J.P.M.L. 2012); *In re Air Crash Near Peixoto De Azeveda, Brazil on Sept. 29,*

2006, 493 F. Supp. 2d 1374 (J.P.M.L. 2007); *In re Dollar Gen. Corp. Fair Labor Standards Act Litig.*, 346 F. Supp. 2d 1368 (J.P.M.L. 2004); *In re L. E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054 (J.P.M.L. 1975); *In re Boise Cascade Sec. Litig.*, 364 F. Supp. 459 (J.P.M.L. 1973).

The eleven States in that case represent a substantial portion of state challengers to the rule, the Georgia Plaintiffs also consider the Southern District of Georgia a home forum, and the undersigned understands additional actions are soon forthcoming in that district. One of the plaintiffs in the action currently venued in the United States District Court for the District of Columbia is even located in Brunswick, Georgia, which is the same district as the *State of Georgia* case. The complaint describes that plaintiff as follows:

> One Hundred Miles is a not-for-profit membership organization headquartered in Brunswick, Georgia. One Hundred Miles has approximately 180 members. Its mission is to protect, preserve, and enhance Georgia's 100-mile coast, which includes the conservation of water and wetlands in the coastal region. Among other things, One Hundred Miles works to preserve the integrity of fresh and saltwater ecosystems along the coast.

Natural Resources Defense Council, National Wildlife Federation, One Hundred Miles, and South Carolina Coastal Conservation League v. EPA, et al., Case 1:15-cv-01324 (D.D.C.) (Doc. 1), ¶ 11. Venue in the Southern District of Georgia has the most support among the plaintiffs, and this majority support is a powerful factor in the determination process. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litigation*, 483 F. Supp. 2d 1353 (J.P.M.L. 2007) (court selected district favored by the "majority" of parties); *In re Automotive Wire Harness Systems Antitrust Litigation*, 844 F. Supp. 2d 1367 (J.P.M.L. 2012) (court selected district favored by "most" of the parties).

The *State of Georgia* case was among the first-filed of the WOTUS Rule challenges, filed only the day after the rule was published. That is another of the factors this Panel considers. *See In re: Monitronics Int'l, Inc., Tel. Consumer Prot. Act Litig.,* 988 F. Supp. 2d 1364 (J.P.M.L. 2013); *In re Air Crash Near Peixoto De Azeveda, Brazil on Sept. 29, 2006*, 493 F. Supp. 2d 1374 (J.P.M.L. 2007).

Judge Wood is also highly qualified to hear the challenges to the WOTUS Rule, both because she has extensive Clean Water Act experience and because she has already familiarized herself with the issues in this litigation in particular. Judge Wood's extensive Clean Water Act case history makes her an expert among district court judges. *See, e.g., Jones Creek Investors, LLC v. Columbia Cnty.*, Ga., No. CV 111-174, 2015 WL 1541409 (S.D. Ga. Mar. 31, 2015); *Jones Creek Investors, LLC v. Columbia Cnty., Ga.*, No. CV 111-174, 2013 WL 1338238 (S.D. Ga. Mar. 28, 2013); *Jones Creek Investors, LLC v. Columbia Cnty., Ga.*, No. CV 111-174, 2013 WL 164516 (S.D. Ga. Jan. 15, 2013); *Jones Creek Investors, LLC v. Columbia Cnty., Ga.*, No. CV 111-174, 2012 WL 694316 (S.D. Ga. Mar. 1, 2012); *Altamaha Riverkeeper, Inc. v. Rayonier, Inc.*, No. CV 214-44, 2015 WL 1505971 (S.D. Ga. Mar. 31, 2015); *United States v. St. Mary's Ry. W., LLC*, 989 F. Supp. 2d 1357 (S.D. Ga. 2013). Therefore, as in *In re Progressive Corp. Ins. Underwriting & Rating Practices Litig.*, 259 F. Supp. 2d 1370 (J.P.M.L. 2003), Judge Wood's experience in handling similar matters will give her a significant advantage in quickly parsing the legal issues in the challenges to the WOTUS Rule.

"[T]he familiarity of the transferee judge" is an important factor in determining where to transfer an action. *In re Peruvian Rd. Litig.*, 380 F. Supp. 796, 798 (J.P.M.L. 1974). *See also In re Ampicillin Antitrust Litig.*, 315 F. Supp. 317, 319 (J.P.M.L. 1970) (although not controlling, the "availability of an experienced and capable judge familiar with the litigation is one of the more important factors in selecting a transferee forum"). In the *Peruvian Rd. Litig.* case, the judge had already heard a motion to dismiss, and here, Judge Wood heard a motion for preliminary injunction. In the preliminary injunction hearing, Judge Wood explained, "Please know that I have had the opportunity to read and review all the briefing that has been submitted including the most recent brief … that was the reply in support of the Federal Defendants' motion to stay the proceedings. I have had the opportunity to study not only the briefs but the cases that are cited and the statutes involved." Preliminary Injunction Hearing Transcript, Aug. 12, 2015, at p. 7:3-8 (attached as Exhibit

A). Judge Wood is already familiar with the issues and will require less time now to assess the merits than a District of Columbia judge presiding over a WOTUS Rule challenge filed only days ago. *See In re BRCA1- & BRCA2-Based Hereditary Cancer Test Patent Litig.*, 999 F. Supp. 2d 1377, 1380 (J.P.M.L. 2014) (consolidating cases before the judge who already heard preliminary injunction motions); *In re Bank of Am. Credit Prot. Mktg. & Sales Practices Litig.*, 804 F. Supp. 2d 1372, 1373 (J.P.M.L. 2011).

Finally, the Southern District of Georgia has a much lighter case load than the District of Columbia. According to the Statistical Tables for the Federal Judiciary – December 2014 (available at http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-december-2014), the Southern District of Georgia has only 870 civil cases pending, compared to the District of Columbia's 2,411. A "significantly lighter civil action docket" means "the transferee judge will be able to devote quick attention to this litigation," and so weighs in favor of transfer to that court. *In re Peruvian Rd. Litig.*, 380 F. Supp. 796, 798 (J.P.M.L. 1974). Judge Wood already demonstrated an ability to clear her schedule for an all-morning hearing on August 12th to be the first judge to hear any preliminary injunction motion in this case. She will likewise be in the best position to move this litigation along expeditiously, which will be critical because the rule is scheduled to take effect in less than ten days. *See In re Paxil Products Liab. Litig.,* 296 F. Supp. 2d 1374, 1375 (J.P.M.L. 2003) (Panel "searched for a transferee judge with the time and experience to steer this complex litigation on a prudent course").

Defendants complain that the federal agencies are headquartered in the District of Columbia, and a majority of documents are located there, but those factors are "not here controlling." *In re IBM*, 302 F. Supp. 796, 800 (J.P.M.L. 1969). Instead, "the just and efficient conduct of these actions will be best furthered by their transfer to a district wherein the assigned judge is already familiar with the proceedings and will be able to insure that consolidated pretrial

proceedings are conducted fairly and expeditiously." *Id.* Defendants concede "it is highly unlikely that there will be discovery with regard to the merits of plaintiffs' claims." Def.'s Br. in Support, p. 9. Instead, "the scope of a court's review of final agency action in an APA matter is typically limited to the administrative record the agency presents to the reviewing court." *Id.*, at p. 6. Therefore, the location of any witnesses near Defendants' headquarters is inconsequential.

Moreover, the District of Columbia has no inherent interest in this litigation. It is an urban area not known for its wetlands or other of the specific water features identified in the WOTUS Rule. The majority of the commercial and industrial operations affected the WOTUS Rule occur far away from the District of Columbia, either in rural areas or industrial centers. Almost none of the regulated entities challenging the WOTUS Rule operate in the District of Columbia. Almost any other district in the country would have a better claim on the water regulation issues inherent in the WOTUS Rule than the District of Columbia.

None of the Georgia Plaintiffs have headquarters, offices or counsel in the District of Columbia, and travel to the District of Columbia for this litigation would be a serious inconvenience that would greatly increase the costs of seeking justice. In contrast, counsel for the Georgia Plaintiffs were recently able to attend the preliminary injunction hearing before Judge Wood and could easily participate in continued litigation in that venue. Similarly, the local USACE field office is located in nearby Savannah, meaning the personnel responsible for enforcing CWA § 404 could also easily participate. And EPA's Region 4 is headquartered not far away in Atlanta.

Judge Wood is a highly qualified judge who has already wrestled with the Clean Water Act and the concepts set forth in the highly complicated decision of *Rapanos v. United States*, 547 U.S. 715 (2006). She has the time and expertise to give all parties a fair, just and, most importantly, expeditious hearing on the merits of the WOTUS Rule challenges.

V. Conclusion

For the reasons stated above, the Georgia Plaintiffs Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; and Greater Atlanta Homebuilders Association, Inc. request this Panel deny the Motion of the United States for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Consolidation of Pretrial Proceedings. Although the Georgia Plaintiffs oppose any consolidation, if this Panel decides to grant consolidation of these cases, the Georgia Plaintiffs request this Panel transfer them to the United States District Court for the Southern District of Georgia before Judge Lisa Godbey Wood.

This 19th day of August, 2015.

/s/ Richard A. Horder

Richard A. Horder
Georgia Bar No. 366750
Shelly Jacobs Ellerhorst
Georgia Bar No. 243743
Jennifer A. Simon
Georgia Bar No. 636946
Kazmarek Mowrey Cloud Laseter LLP
1230 Peachtree Street, NE, Suite 3600
Atlanta, GA 30309
Tel.: (404) 812-0843
Fax: (404) 812-0845
rhorder@kmcllaw.com
sellerhorst@kmcllaw.com
jsimon@kmcllaw.com

Attorneys for the Georgia Plaintiffs, Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; and Greater Atlanta Homebuilders Association, Inc.