BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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

RESPONSE BRIEF OF TEXAS, LOUISIANA, AND MISSISSIPPI TO MOTION OF THE UNITED STATES FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR CONSOLIDATION OF PRETRIAL PROCEEDINGS

INTRODUCTION

Pursuant to Rules 6.1(c) and 6.2(e) of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation, Plaintiffs State of Texas, along with the Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, and Texas Water Development Board; the State of Louisiana; and the State of Mississippi ("States") 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.

This is a response in opposition to a motion filed by the United States, on behalf of the United States Environmental Protection Agency ("EPA"), United States Army Corps of Engineers ("Corps"), and their respective officials (collectively, "federal government") to transfer 12 actions filed in nine district courts. The actions challenge the legality—and seek the vacatur—of the final agency rule titled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054 (June 29, 2015) ("Rule").

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). Here, as the federal government concedes, the lawsuits at issue implicate a fixed administrative record, Gov't Br. 9, and the essential facts necessary to resolve the merits of each lawsuit are therefore undisputed. Moreover, the federal government concedes that "it is highly unlikely that there will be discovery" or many court appearances. *Id*. Any discovery that does take place will be case-specific. Therefore, the only issues that these 12 lawsuits have in common are "strictly legal questions requiring little or no discovery." For that reason alone, the federal government's motion should be denied.

The federal government's primary argument in favor of consolidation is not that it would reduce the burdens of discovery on the parties and courts, but that there is a risk of inconsistent legal determinations by district courts, which, it worries, will make its job more difficult. In cases like these, that is a reason to *deny* transfer, not to *grant* it: the courts of appeals and Supreme Court "rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved [legal] questions" because "[d]eliberation on [such] question[s] over time winnows" the issues, leaving the core of the dispute for later appellate resolution. *California v. Carney*, 471 U.S. 386, 400-401 (1985). Granting the federal government's motion would eliminate that important deliberative process.

Even though this Panel should deny the federal government's motion, if this Panel nevertheless finds transfer warranted, the federal government's request to transfer the cases to the U.S. District Court for the District of Columbia should be denied. The federal government has not provided any persuasive reason to transfer to that court. On the contrary, the individual plaintiffs

are located throughout the country, and most are far from Washington, D.C. Should this Panel find transfer is warranted, the States propose that it should be transferred to the Southern District of Georgia, a court that is situated in a geographically and hydrographically diverse state; that is centrally and conveniently located; that has the necessary resources and expertise to handle these cases; and that has already demonstrated efficiency and engagement in this matter.[1]

I. BACKGROUND

On June 29, 2015, the EPA and the Corps took final agency action by publishing the Rule in the Federal Register. The Rule seeks to "clarif[y]" the federal government's definition of "the waters of the United States" within the meaning of the Clean Water Act ("CWA")—*i.e.*, the scope of the federal government's jurisdiction over those waters. Far from clarifying, however, the Rule further complicates the scope of federal jurisdiction over waters and even grants the federal government *additional* jurisdiction over numerous dry-land and water features. In so doing, the Rule violates the CWA, the Administrative Procedure Act ("APA"), and the United States Constitution.

The States filed this action in the Southern District of Texas on June 30, 2015. *State of Texas, et al. v. U.S. Environmental Protection Agency, et al.*, Case No. 15-cv-000162 (S.D.Tex). In it, the States allege that the federal government's action in promulgating the Rule is "arbitrary, capricious, an abuse of discretion," and "otherwise not in accordance with law" under the APA, 5 U.S.C. § 706(2)(A); "is not a 'logical outgrowth' of the proposed rule" under 5 U.S.C. §§ 553(b)–(c); violates certain provisions of the United States Constitution, including but not limited to the Commerce Clause of Article I, Section 8; and violates Tenth Amendment state sovereignty and

[1] If the Panel chooses to transfer, the States in this action would also support the Southern District of Texas as a venue for many of the same reasons.

the clear-statement canon. Compl. & Pet. for Review, at 27-28, paras. 93-97 (APA), 28-29, paras. 99-102 (Commerce Clause), and 29-30, paras. 104-107 (Tenth Amendment), *Texas v. U.S. Envtl. Prot. Agency*, No. 3:15-cv-00162 (S.D. Tex. June 29, 2015), ECF No. 1. The States seek an order vacating the Rule and enjoining its implementation or application. *Id.* at 30-31.

Besides the lawsuit brought by the States in this action, there are eleven other district court actions challenging the Rule.[2] On July 27, 2015, the federal government moved this Panel to transfer the district court actions to the U.S. District Court for the District of Columbia pursuant to 28 U.S.C. § 1407 ("Section 1407") for centralization. For the reasons below, that motion should be denied.

II. ARGUMENT

The federal government asserts that these cases meet all three grounds for Section 1407 transfer—common fact questions, convenience, and efficiency. Gov't Br. at 2, 4. But the common questions here are of law, not fact; the only convenience would be the federal government's; and the proposed efficiency is just an end-run around the normal, useful process by which federal courts develop and winnow legal issues. This Panel should deny the federal government's motion to transfer, let alone to a venue chosen by the defendants.

[2] *American Farm Bureau Fed'n v. EPA*, Case No. 3:15-cv-165 (S.D. Tex.); *Chamber of Commerce v. EPA*, Case No. 4:15-cv-386 (N.D. Ok.); *Georgia v. McCarthy*, Case No. 2:15-cv-00079 (S.D. Ga.); *Murray Energy Corp. v. EPA*, Case No. 1:15-cv-110 (N.D. W. Va.); *Ohio v. United States Army Corps of Eng'rs*, Case No. 2:15-cv-246 (S.D. Ohio); *Oklahoma v. EPA*, Case No. 4:15-cv-381 (N.D. Ok.); *North Dakota v. EPA*, Case No. 3:15-cv-59 (D.N.D.); *Southeastern Legal Found., Inc. v. EPA*, Case No. 1:15-cv-2488 (N.D. Ga.); *Washington Cattlemen's Ass'n* v. EPA, Case No. 0:15-cv-3058 (D. Minn.); *NRDC v. EPA*, Case No. 15-cv-1324 (D.D.C.); *Am. Exploration & Mining Ass'n v. EPA*, Case No. 1:15-cv-01323 (D.D.C.).

A. Transfer of this action is not appropriate.

Section 1407 provides a vehicle for the convenient and efficient resolution of common questions of fact. Because none of those items are at play here, transfer is not appropriate.

i. Transfer is not appropriate because the common questions here are of law, not fact, and the facts already have been found—rightly or wrongly—by the EPA and the Corps.

This action, and the others for which the federal government seeks transfer, are brought under the APA, which authorizes judicial review of final agency actions, including rules, for which there is no other adequate remedy in a court. 5 U.S.C. § 551(13), 5 U.S.C. § 704, *See Impro Prods., v. Block*, 722 F.2d 845, 848 (D.C.Cir. 1983), *cert. denied*, 469 U.S. 931 (1984).[3]

Courts conducting APA judicial review decide legal questions, namely, whether a final agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). This type of review is typically confined to the administrative record of the agency proceedings. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Reviewing courts do not conduct *de novo* proceedings, resolve fact disputes, or find facts; they answer legal questions. *See James*

[3] The federal government posits that there is an adequate, indeed exclusive, remedy of review in the circuit courts and notes that many parties have filed protective circuit petitions for review. Gov't Br. at 3-4. At the federal government's request, those petitions are now transferred to the Sixth Circuit. Consolidation Order, In re: Envtl. Prot. Agency & Dep't of Def., Final Rule: Clean Water Rule: Definition of "Waters of the United States," MCP No. 135 (J.P.M.L. 2015), ECF No. 3. The federal government has not sought district court stays pending resolution of the jurisdictional question by the Sixth Circuit. Instead, the federal government seeks transfer of cases that it believes the district courts lack jurisdiction over into a single district court, which, it believes, will also lack jurisdiction. Indeed, under the federal government's theory, the panel lacks jurisdiction to even consider the federal government's 1407 motion until jurisdiction at the district court level is established. *See James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (rejecting Government's suggestion that court not reach its jurisdictional arguments until after consideration of the merits, court noted its obligation to consider whether it had authority to hear each dispute in order to avoid unconstitutional advisory opinions).

Madison Ltd. v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996). The federal government concedes this and even rests its argument on this same authority. Gov't Br. at 6 (relying on *Overton Park*, *Lorion*, and *James Madison Ltd*.).

Yet the federal government claims that there are "factual issues" here because, on the merits, the plaintiffs challenge the sufficiency of the evidence, response to comments, and public notice. Gov't Br. at 5-6. The federal government emphasizes that in order to rule on these merit claims, the reviewing courts will have to "examine" and "scrutinize" the content of the record and conduct a "searching and careful" review of the facts. Gov't Br. at 5-6.

But all of this involves legal inquiry into the question of whether the agencies erred, not resolution of disputed fact questions. This distinction is illustrated in *James Madison Ltd.*, 82 F.3d at 1096. There, the plaintiff challenged bank examiners' requirement of large loan loss reserves as arbitrary and capricious, claiming that it was a question of fact. *Id*. The court disagreed: "[a]lthough Madison characterizes its arguments as raising issues of fact, we think they primarily raise issues of law." *Id*. The federal government's argument here fails to take this aspect of the opinion into account.[4]

In order to fit into the "common fact issues" prong of Section 1407, the federal government conflates two judicial duties: (i) examining already-found facts in a completed record and (ii) resolving fact questions. These are not the same. Examining already-found facts in a completed record is the core function of judicial review under the APA. Resolving common questions of fact

[4] The federal government relies on *James Madison Ltd.* primarily for the correct proposition that courts hearing challenges to an agency's decision-making process may have to resolve fact questions. Those instances are rare, ancillary to the merits claims, and may involve procedural irregularities not reflected in the record.

in multiple cases brought nationwide—and the extensive discovery necessary for developing those facts—is the core function of a court sitting to hear cases transferred under Section 1407.

Implicitly recognizing that these actions do not squarely fit the "common fact issues" prerequisite for transfer, the federal government notes that they "do not require discovery or other factual development" on the merits. Nevertheless, the federal government insists that some pre-trial matters—the completeness of the administrative record, preliminary relief, and the standing of some parties—may involve disputed facts and discovery. Gov't Br. at 6. None of those possibilities justify transfer. A dispute over whether all of the relevant documents have been gathered is hardly the sort of complex, discovery-intensive litigation for which Section 1407 was designed. As to preliminary relief, while there may be some overlap in the inquiry as to success on the merits (indeed, many plaintiffs in this MDL case have noticed and alleged the same flaws in the Rule), the question of harm is highly individual and weighs against transfer. The same is true of standing questions—a showing will need to be made for each plaintiff in each action whose standing is challenged. The commonality of fact questions necessary for transfer is not present.

ii. When, as here, a case involves primarily questions of law, and little or no discovery is anticipated, Section 1407 transfer is neither necessary nor common.

Past Panel decisions denying transfer have a common theme: when issues in the actions are predominantly legal, neither a common factual backdrop nor a requirement of little discovery will be sufficient to warrant transfer. When a set of actions involved an "individualized analysis" (as is true here for determinations of harm and standing that might require pre-trial proceedings), transfer was denied. *In re: Nat'l Ass'n for the Advancement of Multijurisdiction Practice Litig.*, 52 F. Supp. 3d 1377, 1378 (J.P.M.L. 2014). When a set of actions turned on the legal question of whether the Bankruptcy Code preempts federal or state fair debt collection statutes and the

common fact questions were neither complex nor numerous, transfer was denied. *In re: LVNV Funding, LLC, "Time-Barred" Proof of Claim Fair Debt Collection Practices Act (FDCPA) Litig.*, No. MDL 2611, 2015 WL 1518661, at *1 (J.P.M.L. 2015). When a set of actions would be decided on the basis of an administrative record, and the pre-trial proceedings would involve motions on that record and summary judgment motions—and one district was already well along in that process—transfer was denied. *See In re: Lesser Prairie-Chicken Endangered Species Act Litig.*, No. MDL2629, 2015 WL 3654675 at *1 (J.P.M.L. 2015). The present set of actions fits this pattern. The predominate issues are the legal questions associated with APA judicial review of an already-created record. The only pretrial matter common to the plaintiffs involves making sure that all the right documents are in the record—considerations of harm and standing will require individualized analysis. Therefore, transfer should be denied.

Instead of acknowledging that these actions fit the pattern for denial of transfer, the federal government relies heavily on *In re: Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008) because it ordered transfer of a case with an administrative record. It is true that the "identification of the underlying administrative record" was one pretrial event that the Panel noted would benefit from avoiding duplicative discovery and inconsistent pretrial rulings. *Id.* at 1377. But in *Polar Bear*, a number of parties—both private and governmental—sought transfer. *Id.* at 1376-77. In granting the request, the Panel listed the benefits of centralization, one of which was consolidation of the administrative record. Here, the divisions are much sharper, and only the federal government has sought transfer. When the disagreement of the parties puts the issue in sharper relief, the Panel has focused on what happens during pre-trial in a suit for judicial review. *See In re: Lesser Prairie-Chicken Endangered Species Act Litig.*, 2015 WL 3654675 at *1 ("Discovery, if any, will be minimal, as these cases will be

decided on the administrative record."). Also, as here, one district court is already well underway in terms of pre-trial motions.[5] *Id.* Just as in *Lesser Prairie-Chicken*, therefore, transfer should be denied.

B. When the federal government urges transfer for "convenience," it means *its* convenience.

The federal government's brief discussion of convenience turns the concept inside out. According to the federal government, it would not be inconvenient for the other parties to come to the District of Columbia. But Section 1407 is designed for the convenience of the parties plural, not the convenience of one. And for the federal government to claim that it would be a "significant burden" to litigate in several states (eight) in a country this size (50) is curious indeed.

Moreover, the federal government's position is inherently illogical. Its theory that "it's unlikely that there will be discovery with regard to the merits" ignores and contradicts its insistence elsewhere (on the same page of its brief, no less) that these cases will have so much fact-and-discovery intensive pretrial skirmishing that they must be transferred so that one court can handle the "numerous factual issues . . . likely to arise." Govt. Br. at 9.

C. The federal government's preference for one district court ruling should not be considered justification for transfer.

When the federal government urges transfer for the efficient and just conduct of the cases, the necessary implication is that transfer and centralization will avoid an inconvenient circuit-court split. This argument contradicts a hallmark of our judicial system—that important, complex, and novel legal issues often develop and must be winnowed by the various courts.

[5] The Southern District of Georgia heard Georgia's request for a preliminary injunction on August 12, 2015. Clerk's Minutes, *Georgia v. McCarthy*, no. 2:15-cv-0079-LGW-RSB (S.D. Ga. Aug. 12, 2015), ECF no. 70.

The federal government makes a two-fold argument that transfer would prevent inconsistent rulings and also save judicial and governmental resources. Claiming that without transfer it will be subject to conflicting rulings with which it could not possibly comply, the federal government likens the situation to the one in which the Corps was told by one court to release water and by another to not do so. Gov't Br. at 11 n.6 (relying on *In re: Operation of the Mo. River Sys Litig*., 277 F. Supp. 2d 1378 (J.P.M.L. 2003)).

Of critical distinction, *In re Operation of Missouri River System Litigation* involved a *fact-intensive* inquiry into the Corps' activities with regard to the Missouri River—not an APA challenge to an agency rule. Here, the greatest risks the federal government faces are that the administrative record in one district court action might be fatter than in another, or that the Rule's effectiveness might be enjoined in one district court action and not in another. Regardless, if the federal government's own argument is to believed—that the Rule merely seeks to "clarif[y] the scope of 'waters of the United States' protected under the Act," Final Rule at 37,054—then whether the Rule is validated or invalidated should have no effect on the federal government's own jurisdictional determinations.[6] Therefore, the federal government's concern raised by *In re Operation of Missouri River System Litigation* is both inapplicable to this action (a challenge to an agency rule) and contradictory to the federal government's own logic.

As to the second part of its efficiency argument—conservation of resources—the federal government is really arguing that only one judge should have to read such a big record as the one in this case, and that the plaintiffs should be forced to limit their arguments by filing unified briefs. The States do not want to waste any court's time, but it is a truism that multiple federal courts

[6] As detailed in their complaint, the States adamantly argue that the Rule does not clarify, but instead greatly *expands* federal jurisdiction under the Clean Water Act.

often grapple with the same legal question and reach different conclusions. This is described as "percolation" that "encourages the lower courts to act as responsible agents in the process of development of national law." *California v. Carney*, 471 U.S. 386, 401 n.11 (1985) (Stevens, J., dissenting).

Carney was a criminal case addressing whether a mobile home fit within the automobile exception for searches challenged under the Fourth Amendment. The majority was ready to say that it did; the dissent urged "greater patience" in letting the issue percolate. *Id*. at 393, 398.

D. If this Panel finds transfer appropriate, the federal government does not get to pick the venue.

If, despite all the reasons favoring denial, the Panel grants the federal government's motion to transfer, it should at least deny the federal government's request to centralize the actions in the U.S. District Court for the District of Columbia. Importantly, when the federal government filed its motion, not a single plaintiff had filed suit in that court. The federal government's arguments that it is a convenient court—because its own staff and some of plaintiffs' counsel "reside" or "maintain offices in" that district (Gov't Br.14-15)—are irrelevant. Indeed, if those were the dispositive factors, every federal rule challenge could potentially be transferred to the District of Columbia unless another court was designated by statute. As the federal government acknowledges, discovery is very unlikely, and court appearances will be few. *See* Gov't Br. 9. The federal government's only other argument—that the District Court for the District of Columbia has the "capacity and expertise" to handle a consolidated proceeding (Gov't Br. 13)—can be similarly made about every U.S. district court. The States are confident—as this Panel should be—that the other courts where the State plaintiffs have filed suit are equally equipped with capacity and expertise to handle a consolidated proceeding.

Furthermore, if Congress wanted all Clean Water Act rule challenges to be heard in the District of Columbia, it could pass a law requiring that.[7] Instead, Congress chose not to provide D.C. venue in Clean Water Act challenges like this, nor did it choose to provide it under the APA. The Panel should not allow the federal government to use Section 1407 as the *de facto* venue designation that Congress did not itself make.

Instead, if the Panel grants the federal government's motion to transfer, it should select a plaintiff's choice of forum. *See In re U.S. Postal Serv. Privacy Act Litig.*, 545 F. Supp. 2d 1367, 1369 (J.P.M.L. 2008). And while the States would prefer that the cases not be transferred out of the Southern District of Texas, the States would alternatively suggest the Southern District of Georgia as an appropriate transfer venue. In the Southern District of Georgia action, *Georgia v. McCarthy*, Case No. 2:15-cv-79-LGW-RSB (S.D. Ga), eleven states filed suit, and the case has already progressed at a rate that shows efficiency, engagement, as well as "capacity and expertise". The convenience to the parties and the progress of this case both favor the Southern District of Georgia as an appropriate MDL venue.[8]

CONCLUSION

For the foregoing reasons, the States respectfully request that 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.

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[7] An example of where this is done is 42 U.S.C. § 7607(b)(1), which requires any Petition for Review of a Clean Air Act rule of national applicability to be filed in the U.S. Court of Appeals for the D.C. Circuit.

[8] Should the Panel decide that the actions should not be transferred to Southern District of Georgia, the States in this action would also propose the Southern District of Texas, a court situated in a geographically and hydrologically diverse state where a plurality of the actions have been filed, and where the court's judge has demonstrated the capacity and expertise to handle MDL proceedings. Moreover, that forum is centrally located for the convenience of the parties.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 19, 2015, a copy of the foregoing Response Brief of Texas, Louisiana, and Mississippi To Motion of the United States for Transfer of Actions Pursuant To 28 U.S.C. § 1407 for Consolidation of Pretrial Proceedings was served electronically through the Judicial Panel on Multidistrict Litigation's CM/ECF system on all registered counsel.

/s/ Matthew B. Miller

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INTRODUCTION

Pursuant to Rules 6.1(c) and 6.2(e) of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation, Plaintiffs State of Texas, along with the Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, and Texas Water Development Board; the State of Louisiana; and the State of Mississippi ("States") 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.

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II. ARGUMENT

The federal government asserts that these cases meet all three grounds for Section 1407 transfer—common fact questions, convenience, and efficiency. Gov't Br. at 2, 4. But the common questions here are of law, not fact; the only convenience would be the federal government's; and the proposed efficiency is just an end-run around the normal, useful process by which federal courts develop and winnow legal issues. This Panel should deny the federal government's motion to transfer, let alone to a venue chosen by the defendants.

[2] *American Farm Bureau Fed'n v. EPA*, Case No. 3:15-cv-165 (S.D. Tex.); *Chamber of Commerce v. EPA*, Case No. 4:15-cv-386 (N.D. Ok.); *Georgia v. McCarthy*, Case No. 2:15-cv-00079 (S.D. Ga.); *Murray Energy Corp. v. EPA*, Case No. 1:15-cv-110 (N.D. W. Va.); *Ohio v. United States Army Corps of Eng'rs*, Case No. 2:15-cv-246 (S.D. Ohio); *Oklahoma v. EPA*, Case No. 4:15-cv-381 (N.D. Ok.); *North Dakota v. EPA*, Case No. 3:15-cv-59 (D.N.D.); *Southeastern Legal Found., Inc. v. EPA*, Case No. 1:15-cv-2488 (N.D. Ga.); *Washington Cattlemen's Ass'n* v. EPA, Case No. 0:15-cv-3058 (D. Minn.); *NRDC v. EPA*, Case No. 15-cv-1324 (D.D.C.); *Am. Exploration & Mining Ass'n v. EPA*, Case No. 1:15-cv-01323 (D.D.C.).

A. Transfer of this action is not appropriate.

Section 1407 provides a vehicle for the convenient and efficient resolution of common questions of fact. Because none of those items are at play here, transfer is not appropriate.

i. Transfer is not appropriate because the common questions here are of law, not fact, and the facts already have been found—rightly or wrongly—by the EPA and the Corps.

This action, and the others for which the federal government seeks transfer, are brought under the APA, which authorizes judicial review of final agency actions, including rules, for which there is no other adequate remedy in a court. 5 U.S.C. § 551(13), 5 U.S.C. § 704, *See Impro Prods., v. Block*, 722 F.2d 845, 848 (D.C.Cir. 1983), *cert. denied*, 469 U.S. 931 (1984).[3]

Courts conducting APA judicial review decide legal questions, namely, whether a final agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). This type of review is typically confined to the administrative record of the agency proceedings. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Reviewing courts do not conduct *de novo* proceedings, resolve fact disputes, or find facts; they answer legal questions. *See James*

[3] The federal government posits that there is an adequate, indeed exclusive, remedy of review in the circuit courts and notes that many parties have filed protective circuit petitions for review. Gov't Br. at 3-4. At the federal government's request, those petitions are now transferred to the Sixth Circuit. Consolidation Order, In re: Envtl. Prot. Agency & Dep't of Def., Final Rule: Clean Water Rule: Definition of "Waters of the United States," MCP No. 135 (J.P.M.L. 2015), ECF No. 3. The federal government has not sought district court stays pending resolution of the jurisdictional question by the Sixth Circuit. Instead, the federal government seeks transfer of cases that it believes the district courts lack jurisdiction over into a single district court, which, it believes, will also lack jurisdiction. Indeed, under the federal government's theory, the panel lacks jurisdiction to even consider the federal government's 1407 motion until jurisdiction at the district court level is established. *See James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (rejecting Government's suggestion that court not reach its jurisdictional arguments until after consideration of the merits, court noted its obligation to consider whether it had authority to hear each dispute in order to avoid unconstitutional advisory opinions).

Madison Ltd. v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996). The federal government concedes this and even rests its argument on this same authority. Gov't Br. at 6 (relying on *Overton Park*, *Lorion*, and *James Madison Ltd*.).

Yet the federal government claims that there are "factual issues" here because, on the merits, the plaintiffs challenge the sufficiency of the evidence, response to comments, and public notice. Gov't Br. at 5-6. The federal government emphasizes that in order to rule on these merit claims, the reviewing courts will have to "examine" and "scrutinize" the content of the record and conduct a "searching and careful" review of the facts. Gov't Br. at 5-6.

But all of this involves legal inquiry into the question of whether the agencies erred, not resolution of disputed fact questions. This distinction is illustrated in *James Madison Ltd.*, 82 F.3d at 1096. There, the plaintiff challenged bank examiners' requirement of large loan loss reserves as arbitrary and capricious, claiming that it was a question of fact. *Id*. The court disagreed: "[a]lthough Madison characterizes its arguments as raising issues of fact, we think they primarily raise issues of law." *Id*. The federal government's argument here fails to take this aspect of the opinion into account.[4]

In order to fit into the "common fact issues" prong of Section 1407, the federal government conflates two judicial duties: (i) examining already-found facts in a completed record and (ii) resolving fact questions. These are not the same. Examining already-found facts in a completed record is the core function of judicial review under the APA. Resolving common questions of fact

[4] The federal government relies on *James Madison Ltd.* primarily for the correct proposition that courts hearing challenges to an agency's decision-making process may have to resolve fact questions. Those instances are rare, ancillary to the merits claims, and may involve procedural irregularities not reflected in the record.

in multiple cases brought nationwide—and the extensive discovery necessary for developing those facts—is the core function of a court sitting to hear cases transferred under Section 1407.

Implicitly recognizing that these actions do not squarely fit the "common fact issues" prerequisite for transfer, the federal government notes that they "do not require discovery or other factual development" on the merits. Nevertheless, the federal government insists that some pre-trial matters—the completeness of the administrative record, preliminary relief, and the standing of some parties—may involve disputed facts and discovery. Gov't Br. at 6. None of those possibilities justify transfer. A dispute over whether all of the relevant documents have been gathered is hardly the sort of complex, discovery-intensive litigation for which Section 1407 was designed. As to preliminary relief, while there may be some overlap in the inquiry as to success on the merits (indeed, many plaintiffs in this MDL case have noticed and alleged the same flaws in the Rule), the question of harm is highly individual and weighs against transfer. The same is true of standing questions—a showing will need to be made for each plaintiff in each action whose standing is challenged. The commonality of fact questions necessary for transfer is not present.

ii. When, as here, a case involves primarily questions of law, and little or no discovery is anticipated, Section 1407 transfer is neither necessary nor common.

Past Panel decisions denying transfer have a common theme: when issues in the actions are predominantly legal, neither a common factual backdrop nor a requirement of little discovery will be sufficient to warrant transfer. When a set of actions involved an "individualized analysis" (as is true here for determinations of harm and standing that might require pre-trial proceedings), transfer was denied. *In re: Nat'l Ass'n for the Advancement of Multijurisdiction Practice Litig.*, 52 F. Supp. 3d 1377, 1378 (J.P.M.L. 2014). When a set of actions turned on the legal question of whether the Bankruptcy Code preempts federal or state fair debt collection statutes and the

common fact questions were neither complex nor numerous, transfer was denied. *In re: LVNV Funding, LLC, "Time-Barred" Proof of Claim Fair Debt Collection Practices Act (FDCPA) Litig.*, No. MDL 2611, 2015 WL 1518661, at *1 (J.P.M.L. 2015). When a set of actions would be decided on the basis of an administrative record, and the pre-trial proceedings would involve motions on that record and summary judgment motions—and one district was already well along in that process—transfer was denied. *See In re: Lesser Prairie-Chicken Endangered Species Act Litig.*, No. MDL2629, 2015 WL 3654675 at *1 (J.P.M.L. 2015). The present set of actions fits this pattern. The predominate issues are the legal questions associated with APA judicial review of an already-created record. The only pretrial matter common to the plaintiffs involves making sure that all the right documents are in the record—considerations of harm and standing will require individualized analysis. Therefore, transfer should be denied.

Instead of acknowledging that these actions fit the pattern for denial of transfer, the federal government relies heavily on *In re: Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008) because it ordered transfer of a case with an administrative record. It is true that the "identification of the underlying administrative record" was one pretrial event that the Panel noted would benefit from avoiding duplicative discovery and inconsistent pretrial rulings. *Id.* at 1377. But in *Polar Bear*, a number of parties—both private and governmental—sought transfer. *Id.* at 1376-77. In granting the request, the Panel listed the benefits of centralization, one of which was consolidation of the administrative record. Here, the divisions are much sharper, and only the federal government has sought transfer. When the disagreement of the parties puts the issue in sharper relief, the Panel has focused on what happens during pre-trial in a suit for judicial review. *See In re: Lesser Prairie-Chicken Endangered Species Act Litig.*, 2015 WL 3654675 at *1 ("Discovery, if any, will be minimal, as these cases will be

decided on the administrative record."). Also, as here, one district court is already well underway in terms of pre-trial motions.[5] *Id.* Just as in *Lesser Prairie-Chicken*, therefore, transfer should be denied.

B. When the federal government urges transfer for "convenience," it means *its* convenience.

The federal government's brief discussion of convenience turns the concept inside out. According to the federal government, it would not be inconvenient for the other parties to come to the District of Columbia. But Section 1407 is designed for the convenience of the parties plural, not the convenience of one. And for the federal government to claim that it would be a "significant burden" to litigate in several states (eight) in a country this size (50) is curious indeed.

Moreover, the federal government's position is inherently illogical. Its theory that "it's unlikely that there will be discovery with regard to the merits" ignores and contradicts its insistence elsewhere (on the same page of its brief, no less) that these cases will have so much fact-and-discovery intensive pretrial skirmishing that they must be transferred so that one court can handle the "numerous factual issues . . . likely to arise." Govt. Br. at 9.

C. The federal government's preference for one district court ruling should not be considered justification for transfer.

When the federal government urges transfer for the efficient and just conduct of the cases, the necessary implication is that transfer and centralization will avoid an inconvenient circuit-court split. This argument contradicts a hallmark of our judicial system—that important, complex, and novel legal issues often develop and must be winnowed by the various courts.

[5] The Southern District of Georgia heard Georgia's request for a preliminary injunction on August 12, 2015. Clerk's Minutes, *Georgia v. McCarthy*, no. 2:15-cv-0079-LGW-RSB (S.D. Ga. Aug. 12, 2015), ECF no. 70.

The federal government makes a two-fold argument that transfer would prevent inconsistent rulings and also save judicial and governmental resources. Claiming that without transfer it will be subject to conflicting rulings with which it could not possibly comply, the federal government likens the situation to the one in which the Corps was told by one court to release water and by another to not do so. Gov't Br. at 11 n.6 (relying on *In re: Operation of the Mo. River Sys Litig*., 277 F. Supp. 2d 1378 (J.P.M.L. 2003)).

Of critical distinction, *In re Operation of Missouri River System Litigation* involved a *fact-intensive* inquiry into the Corps' activities with regard to the Missouri River—not an APA challenge to an agency rule. Here, the greatest risks the federal government faces are that the administrative record in one district court action might be fatter than in another, or that the Rule's effectiveness might be enjoined in one district court action and not in another. Regardless, if the federal government's own argument is to believed—that the Rule merely seeks to "clarif[y] the scope of 'waters of the United States' protected under the Act," Final Rule at 37,054—then whether the Rule is validated or invalidated should have no effect on the federal government's own jurisdictional determinations.[6] Therefore, the federal government's concern raised by *In re Operation of Missouri River System Litigation* is both inapplicable to this action (a challenge to an agency rule) and contradictory to the federal government's own logic.

As to the second part of its efficiency argument—conservation of resources—the federal government is really arguing that only one judge should have to read such a big record as the one in this case, and that the plaintiffs should be forced to limit their arguments by filing unified briefs. The States do not want to waste any court's time, but it is a truism that multiple federal courts

[6] As detailed in their complaint, the States adamantly argue that the Rule does not clarify, but instead greatly *expands* federal jurisdiction under the Clean Water Act.

often grapple with the same legal question and reach different conclusions. This is described as "percolation" that "encourages the lower courts to act as responsible agents in the process of development of national law." *California v. Carney*, 471 U.S. 386, 401 n.11 (1985) (Stevens, J., dissenting).

Carney was a criminal case addressing whether a mobile home fit within the automobile exception for searches challenged under the Fourth Amendment. The majority was ready to say that it did; the dissent urged "greater patience" in letting the issue percolate. *Id*. at 393, 398.

D. If this Panel finds transfer appropriate, the federal government does not get to pick the venue.

If, despite all the reasons favoring denial, the Panel grants the federal government's motion to transfer, it should at least deny the federal government's request to centralize the actions in the U.S. District Court for the District of Columbia. Importantly, when the federal government filed its motion, not a single plaintiff had filed suit in that court. The federal government's arguments that it is a convenient court—because its own staff and some of plaintiffs' counsel "reside" or "maintain offices in" that district (Gov't Br.14-15)—are irrelevant. Indeed, if those were the dispositive factors, every federal rule challenge could potentially be transferred to the District of Columbia unless another court was designated by statute. As the federal government acknowledges, discovery is very unlikely, and court appearances will be few. *See* Gov't Br. 9. The federal government's only other argument—that the District Court for the District of Columbia has the "capacity and expertise" to handle a consolidated proceeding (Gov't Br. 13)—can be similarly made about every U.S. district court. The States are confident—as this Panel should be—that the other courts where the State plaintiffs have filed suit are equally equipped with capacity and expertise to handle a consolidated proceeding.

Furthermore, if Congress wanted all Clean Water Act rule challenges to be heard in the District of Columbia, it could pass a law requiring that.[7] Instead, Congress chose not to provide D.C. venue in Clean Water Act challenges like this, nor did it choose to provide it under the APA. The Panel should not allow the federal government to use Section 1407 as the *de facto* venue designation that Congress did not itself make.

Instead, if the Panel grants the federal government's motion to transfer, it should select a plaintiff's choice of forum. *See In re U.S. Postal Serv. Privacy Act Litig.*, 545 F. Supp. 2d 1367, 1369 (J.P.M.L. 2008). And while the States would prefer that the cases not be transferred out of the Southern District of Texas, the States would alternatively suggest the Southern District of Georgia as an appropriate transfer venue. In the Southern District of Georgia action, *Georgia v. McCarthy*, Case No. 2:15-cv-79-LGW-RSB (S.D. Ga), eleven states filed suit, and the case has already progressed at a rate that shows efficiency, engagement, as well as "capacity and expertise". The convenience to the parties and the progress of this case both favor the Southern District of Georgia as an appropriate MDL venue.[8]

CONCLUSION

For the foregoing reasons, the States respectfully request that 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.

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[7] An example of where this is done is 42 U.S.C. § 7607(b)(1), which requires any Petition for Review of a Clean Air Act rule of national applicability to be filed in the U.S. Court of Appeals for the D.C. Circuit.

[8] Should the Panel decide that the actions should not be transferred to Southern District of Georgia, the States in this action would also propose the Southern District of Texas, a court situated in a geographically and hydrologically diverse state where a plurality of the actions have been filed, and where the court's judge has demonstrated the capacity and expertise to handle MDL proceedings. Moreover, that forum is centrally located for the convenience of the parties.

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CERTIFICATE OF SERVICE

I certify that on August 19, 2015, a copy of the foregoing Response Brief of Texas, Louisiana, and Mississippi To Motion of the United States for Transfer of Actions Pursuant To 28 U.S.C. § 1407 for Consolidation of Pretrial Proceedings was served electronically through the Judicial Panel on Multidistrict Litigation's CM/ECF system on all registered counsel.

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