BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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

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

INTRODUCTION

Since June 29, 2015, ten separate complaints have been filed by 72 plaintiffs in eight federal district courts facially challenging the "Clean Water Rule," issued jointly by the United States Environmental Protection Agency ("EPA") and the Department of the Army ("Army"). *See* 80 Fed. Reg. 37,054 (June 29, 2015). Additional district court actions raising facial challenges to the Clean Water Rule are expected to be filed in the very near future. All of the pending lawsuits and claims, as well as anticipated additional complaints, arise from a common set of facts and a single agency action.

The existence of these closely-related actions in district courts across the country poses a substantial risk of inconsistent pretrial decisions, including those regarding preliminary relief. It would also be extremely inefficient and burdensome for the judiciary and the defendants to address the claims in these cases, all of which arise from the same set of operative facts, in separate actions across the country. Centralizing the pending cases would pose no significant burden or inconvenience on the plaintiffs. For these reasons, the United States seeks to transfer

and consolidate the pending actions, and any later filed actions seeking judicial review of the Clean Water Rule, pursuant to 28 U.S.C. § 1407.

As explained in detail below, these cases satisfy the standard for transfer and consolidation because: (a) they involve one or more common questions of fact; (b) transfer and consolidation of the cases would further the convenience of parties; and (c) transfer and consolidation would promote the just and efficient conduct of the actions. *See* 28 U.S.C. § 1407(a). And, as explained below, the United States District Court for the District of Columbia is well-suited to handle these overlapping and complex cases and it is the court most convenient for the parties.

BACKGROUND

The actions that the United States seeks to transfer and consolidate all challenge a final rule, known as the "Clean Water Rule" ("the Rule"), that clarifies the definition of "waters of the United States" under the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1251-1387. *See* 80 Fed. Reg. at 37,054. The Rule is the result of an extensive rulemaking process begun by EPA and the Army in response to several Supreme Court decisions and to requests made by states, tribes, local governments, water agencies, the regulated community, and environmental organizations, all of which sought greater clarity as to the scope of waters that are protected under the CWA after the most recent Supreme Court decisions. *See* http://www2.epa.gov/cleanwaterrule/persons-and-organizations-requesting-clarification-waters-united-states-rulemaking (listing requestors). By defining the scope of waters protected under the CWA, the Rule informs all persons as to the applicability of regulatory requirements under the Act. In developing the Rule, EPA and the Army Corps of Engineers ("Corps") held over 400

meetings with stakeholders across the country, reviewed more than one million comments on the proposed rule, and considered a plethora of scientific studies and technical data.

Even before the final Rule was published in the Federal Register, a "deluge of legal challenges" was predicted. *See* Annie Snider, *Contentious Rule Set for Publication, with Lawsuits Waiting in the Wings*, GREENWIRE, June 26, 2015, http://www.eenews.net/greenwire/stories/1060020972 (Attachment 1). That prediction has proven true, as 72 plaintiffs to date have filed challenges to the Rule in eight different district courts across the country. All of the suits are brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-704, which provides for review of final agency action for which there is no other adequate remedy in a court, *id.* § 704. In each case, the plaintiffs allege that the Clean Water Rule should be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of Section 706(2)(a) of the APA.

In addition, multiple parties, including many of the plaintiffs in the pending district court actions, have filed twelve petitions for review of the Clean Water Rule in eight circuit courts of appeals, pursuant to CWA section 509(b)(1), 33 U.S.C. § 1369(b)(1). CWA section 509(b)(1) of the CWA provides for exclusive judicial review in the courts of appeals for certain enumerated actions of the EPA Administrator.[1] 33 U.S.C. § 1369(b)(1). As this Panel is aware, 28 U.S.C. § 2112(a) provides a neutral, orderly, and swift mechanism for consolidating multiple petitions for review of the same agency action in a single court of appeals. Pursuant to section 2112(a), the Panel will designate by random selection one circuit court of appeals from among those courts in which eligible petitions were filed within ten days of the date the Rule was issued, in which to

[1] As noted in the preamble to the Clean Water Rule, the Supreme Court and lower courts have reached different conclusions as to the types of actions that fall within section 509(b)(1). *See* 80 Fed. Reg. at 37,104/2 (citing cases).

consolidate current and future petitions for review. 28 U.S.C. § 2112(a)(1), (a)(3), (a)(5). In accordance with 40 C.F.R. part 23, the Rule was issued for purposes of judicial review on July 13, 2015. 80 Fed. Reg. at 37,054/1. On July 27, 2015, the United States filed a notice with the MDL Panel initiating such consolidation proceedings under 28 U.S.C. § 2112(a).

ARGUMENT

Each of the prerequisites for transfer and consolidation under 28 U.S.C. § 1407 is presented by the pending actions challenging the Clean Water Rule, and considerations other than those specifically enumerated in the statute underscore the benefits of consolidation.

I. There Are Multiple Actions in Different District Courts Involving Common Questions of Fact.

As noted, there are ten pending lawsuits in eight district courts. *See* Schedule of Actions. In addition, the United States has been notified that additional plaintiffs will soon be filing a district court challenge to the Rule in the District of Columbia District Court, and other district court actions are anticipated. The pending actions, and those anticipated, share common questions of fact and law arising under a complex set of statutes and regulations and Supreme Court case law relating to the scope of waters that are protected under the Clean Water Act and to the agencies' rulemaking process.[2]

A. Common Factual Issues Relating to the Merits of Plaintiffs' Claims.

In the pending actions here, factual issues as to the merits of plaintiffs' claims arise in at least three different contexts.

[2] The presence of questions of law should not result in denial of a motion to transfer and consolidation under 28 U.S.C. § 1407, provided there are "sufficient common questions of fact." 15 Wright, Miller, Cooper & Freer, *Federal Practice & Procedure* § 3863 at 468 (4th Ed. 2014).

First, the sufficiency of the factual and scientific evidence relied upon by EPA and the Army in promulgating the Clean Water Rule has been called into question by the plaintiffs. *See, e.g.*, *American Farm Bureau Fed'n v. EPA*, Case No. 3:15-cv-165 (S.D. Tex.), Dkt. No. 1 ¶¶ 60, 75(m), 77-78; *Chamber of Commerce v. EPA*, 4:15-cv-386-JED-PJC (N.D. Ok.), Dkt. No. 2 ¶¶ 112-116; *Georgia v. McCarthy*, Case No. 2:15-cv-79-LGW-RSB (S.D. Ga.), Dkt. No. 31 ¶¶ 114-19; *Murray Energy Corp. v. EPA*, Case No. 1:15-cv-110-IMK (N.D. W. Va.), Dkt. No. 1 ¶ 43; *Ohio v. United States Army Corps of Eng'rs*, Case No. 2:15-cv-2467-EAS-NMK (S.D. Ohio), Dkt. No. 20 ¶ 58; *Oklahoma v. EPA*, Case No. 4:15-cv-381-CVE-FHM (N.D. Ok.), Dkt. No. 8 ¶¶ 57-58, 62; *North Dakota v. EPA*, Case No. 3:15-cv-59-RRE-ARS (D.N.D.), Dkt. No. 1 ¶ 72; *Southeastern Legal Found., Inc. v. EPA*, Case No. 1:15-cv-2488-TCB (N.D. Ga.), Dkt. No. 1 ¶¶ 71, 74, 81, 83, 87, 91; *Texas v. EPA*, Case No. 3:15-cv-162 (S.D. Tex.), Dkt. No. 1 ¶¶ 101-02. Resolution of plaintiffs' claims will thus require that the reviewing court examine the factual, scientific, and technical information contained in a voluminous administrative record to determine whether the rationale provided by EPA and the Army, and the Rule itself, are reasonable based on the evidence contained in the record.[3]

Second, several of the plaintiffs assert that EPA and the Army failed to respond to comments submitted by those plaintiffs, *see, e.g.*, *Murray Energy Corp.*, Dkt. No. 1 ¶ 22; *North Dakota*, Dkt. No. 1 ¶ 82, which will require a court to scrutinize the content of the comments submitted and the agencies' responses thereto.

[3] The Technical Support Document alone is nearly 400 pages and cites to hundreds of scientific and technical documents. *Available at* http://www2.epa.gov/cleanwaterrule/technical-support-document-clean-water-rule-definition-waters-united-states. In addition, EPA's Office of Research and Development considered additional peer-reviewed literature for the completion of a scientific report entitled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." Available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414.

Third, nearly all of the plaintiffs challenge the sufficiency of the notice to the public of the proposed rule and the subjects and issues involved. *See American Farm Bureau*, Dkt. No. 1 ¶¶ 54, 58, 75(a), 84; *Chamber of Commerce*, Dkt. No. 2 ¶¶ 118-22; *Georgia*, Dkt. No. 31 ¶¶ 132-39; *Murray Energy*, Dkt. No. 1 ¶ 42; *Ohio*, Dkt. No. 20 ¶ 59; *Oklahoma*, Dkt. No. 8 ¶¶ 94-101; *North Dakota*, Dkt. No. 1 ¶ 79, 81; *Southeastern Legal Found.*, Dkt. No. 1 ¶¶ 122-29; *Texas*, Dkt. No. 1 ¶¶ 96-97; *Washington Cattlemen's Ass'n v. EPA*, Case No. 0:15-cv-3058, Dkt. No. 1 ¶¶ 57-62. District courts regularly "resolve factual issues regarding the process the agency used in reaching its decision," *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996), and will be called on to do so in these pending actions.

Thus, while the pending actions do not require discovery or other factual development with respect to the *merits* of plaintiffs' claims, there will be issues of fact presented in this litigation. With respect to the merits of plaintiffs' claims, 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. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *see also* 5 U.S.C. § 706 (courts "shall review the whole record or those parts of it cited by a party"). Nevertheless, even where a court's review of challenged agency action is largely based on an existing administrative record, its review of the facts must be "searching and careful." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see, e.g.*, *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1524 (10th Cir. 1992) (recognizing that a "factual inquiry concerning whether an agency decision was 'arbitrary or capricious'" is required by a reviewing court); *id.* at 1527 (describing the court's "careful review of the record" regarding impacts of a project on wetlands in a wilderness area).

Thus, the fact that the merits of an APA challenge to agency action will likely be resolved based on an administrative record does not bar centralization under section 1407; nor does it mean that there will be not be common factual issues. For example, following the United States Fish and Wildlife Service's listing and regulation of the polar bear as a "threatened" species under the Endangered Species Act, and the promulgation of an associated rule defining the circumstances under which a prohibition on the "take" of the species would and would not apply, the Panel consolidated four actions challenging the listing and associated rule. *In re Polar Bear Endangered Species Act Listing and §4(d) Rule Litigation*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008). In its order, the Panel recognized that the cases were "unlike many others that the Panel routinely encounters" due to the presence of an administrative record. *Id.* at 1377.[4] But the Panel concluded that the actions "shared factual questions springing from the listing of the polar bear as a threatened species." *Id.* As is amply demonstrated by the resulting MDL proceedings in those matters, the transferee court engaged in a detailed analysis of the facts and information contained in the administrative record in order to "determine whether the agency 'considered the factors relevant to its decision and articulated a rational connection between the facts found and the choice made.'" *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 225 (D.D.C. 2011) (describing standard of review); *id.* at 222-25 (setting

[4] The United States notes that the motion to consolidate the polar bear listing litigation in the District of Columbia District Court was brought by the Alaska Oil and Gas Association, and supported by several parties in that litigation that have also filed complaints challenging the Clean Water Rule, including the American Petroleum Institute, the Chamber of Commerce of the United States, the National Mining Association, and the National Association of Manufacturers. *In re Polar Bear Endangered Species Act Listing and §4(d) Rule Litig.*, 588 F. Supp. 2d at 1376 and n.1. The United States also supported the motion to consolidate those actions. *Id*. at 1376-77.

out factual background), 230-34 (examining and citing facts in the administrative record to determine whether it supported the agency's conclusion).

In addition, the United States anticipates that there will be pre-trial motions involving the sufficiency of the administrative record. Although the record presented by an agency is entitled to a presumption of regularity, *Overton Park*, 401 U.S. at 415, when an agency does not include materials that were part of its administrative record, whether by design or mistake, then supplementation of the record is appropriate. *Franks v. Salazar*, 751 F. Supp. 2d 62, 67 (D.C. Cir. 2010) (citing *Natural Res. Def. Council v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975)). In addition, some plaintiffs are likely to argue that they are entitled to discovery or that the court should consider extra-record evidence, notwithstanding the clear judicial precedent normally confining review of final agency action to the administrative record. *Fla. Power & Light Co.*, 470 U.S. at 743. Inconsistent decisions issued by different district courts regarding the sufficiency of the administrative record or consideration of extra-record evidence can be avoided by consolidating all matters in a single district court.

B. Common Factual Issues Relating to Preliminary Relief.

Beyond the factual issues presented in the ten pending complaints, there will be factual issues raised in any pretrial proceedings. For example, several of the plaintiffs indicate in their requests for relief that they will be seeking preliminary injunctive relief. *See, e.g.*, *Chamber of Commerce*, Dkt. No. 2 at 28; *Georgia*, Dkt. No 31 at 37; *Ohio*, Dkt. No. 1 at 17. The plaintiffs in three of the cases have already filed a motion for preliminary injunction and provided declarations in support thereof. *Georgia*, Dkt. Nos. 32, 32-1, 32-2, 32-3, 32-4, 32-5; *Oklahoma*,

Dkt. Nos. 17, 18-1, 18-2; *Chamber of Commerce*, Dkt. No. 27.[5] District courts also often conduct factual inquiries into the standing of parties in challenges to final agency actions. *See, e.g.*, *City of Duluth v. National Indian Gaming Comm'n*, 7 F. Supp. 3d 30, 39-40 (D.D.C. 2013) (examining contractual terms in standing analysis); *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 73-75 (D.D.C. 2013) (examining declarations of plaintiffs regarding injury prong of standing); *Laughlin v. Orthofix Int'l, N.V.*, 293 F.R.D. 40, 41 (D. Mass. 2013) (describing discovery sought in the context of a motion for preliminary injunction).

Thus, numerous factual issues are likely to arise throughout the district court proceedings. The need for consistency in these inquiries is obvious.

II. Transfer and Consolidation of the Pending Cases Will Further the Convenience of Parties.

Consolidation of the pending matters will be convenient for the parties through the avoidance of duplication of effort in multiple cases raising nearly identical claims and based on the same administrative record. It would be a significant burden on the United States to litigate pretrial proceedings simultaneously in eight or more district courts scattered across the country. And because it is highly unlikely that there will be discovery with regard to the merits of plaintiffs' claims, any burden on them would be minimal, as there will be a decreased amount of travel. *Cf. In re Polar Bear Endangered Species Act Listing and §4(d) Rule Litigation*, 588 F.

[5] A plaintiff seeking a preliminary injunction "must establish" that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 20 (2008). An injunction is appropriate only where a plaintiff makes a "clear showing" and presents "substantial proof" that an injunction is warranted, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). A showing as to irreparable harm is not limited to the administrative record, and extrinsic evidence is often considered by courts in evaluating the harm alleged.

Supp. 2d at 1377 (noting that "pretrial discovery may be less onerous than in other litigations and . . . common legal issues may predominate the unresolved matters").

III. Transfer and Consolidation Will Promote the Just and Efficient Conduct of the Cases.

"Multidistrict litigation was developed in response to a demand for innovative and effective methods for handling complex cases." 15 Wright, Miller, Cooper & Freer, *Federal Practice & Procedure*, § 3861. As the legislative history of section 1407 makes clear, "the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be avoided or minimized by such centralized management." H. R. Rep. No. 90-1130, at 2-3, reprinted in 1968 U.S.C.C.A.N. 1898, 1899-1900 (1968). Indeed, the third prerequisite to MDL transfer and consolidation – showing that just and efficient conduct will be served thereby – is considered by many to be the most important. 15 Wright, Miller, Cooper & Freer, *Federal Practice & Procedure*, § 3863 at 464 (4th Ed. 2014).

Centralization of the pending actions here (and anticipated subsequent actions) will promote justice by avoiding inconsistent rulings on issues of fact and law that will have consequences in this litigation for all parties and the larger community. The Panel has routinely emphasized the possibility of inconsistent decisions or the imposition of conflicting standards of conduct as factors favoring transfer and consolidation. *See, e.g.*, *In re Operation of the Mo. River Sys. Litig.*, 277 F. Supp. 2d 1378, 1379 (J.P.M.L. 2003) (ordering transfer and consolidation of six actions involving administrative record review); *In re Tri-State Water Rights Litig.*, 481 F. Supp. 2d 1351 (J.P.M.L. 2007). Centralization of multiple actions seeking review of agency decisionmaking "prevent[s] inconsistent pretrial rulings, particularly those with respect to the identification of the underlying administrative record." *In re Polar Bear Endangered Species Act*

Listing & § 4(d) Rule Litig., 588 F. Supp. 2d at 1377. The same is true in this case, especially since the agencies will be certifying an extremely large administrative record.

Moreover, it is well settled that "pretrial proceedings" encompass dispositive motions, including motions for summary judgment. David F. Herr, *Multidistrict Litigation Manual* § 9:20 n.4 (2014) (citing cases); *see, e.g.*, *In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145 (D. Minn. 2004). The Panel has recognized that resolution of consolidated matters through summary judgment is a compelling factor in favor of transfer for coordinated pretrial purposes. *In re Multidistrict Litig. Involving Butterfield Patent Infringment*, 328 F. Supp. 513 (J.P.M.L. 1970). If the cases here are not consolidated and if different district courts reach different conclusions on summary judgment regarding identical or overlapping legal and record-based challenges to the Clean Water Rule, federal and state agencies charged with implementing the Clean Water Act will be faced with the impossible task of attempting to comply with conflicting court orders.[6] Conflicting decisions would likewise create confusion regarding the status of the Clean Water Rule, to the detriment of the plaintiffs, the regulated community, and the public. *In re Vision Serv. Plan Tax Litig.*, 484 F. Supp. 2d 1356, 1357 (J.P.M.L. 2007) (finding that the

[6] The circumstances of the Missouri River litigation are instructive. In *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003), interested states and parties had brought a series of related challenges to the Corps of Engineers' operation of the dams and reservoirs of the Missouri River and the Fish and Wildlife Service's biological opinions related to that operation. *In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1150-51 (D. Minn. 2004), *aff'd in relevant part, vacated in part*, 421 F.3d 618 (8th Cir. 2005). Those plaintiffs obtained conflicting injunctions that both required the Corps to release more water to the Missouri and barred it from doing so. The Corps was unable to comply with all of the orders. *American Rivers v. United States Army Corps of Eng'rs*, 274 F. Supp. 2d 62, 71 (D.D.C. 2003) (holding that "impossibility" was not a defense to contempt despite the existence of injunctions with conflicting terms). The conflict was ultimately resolved when the Panel transferred and consolidated all the cases to a single forum. *In re Operation of the Mo. River Sys. Litig.*, 277 F. Supp. 2d at 1378.

presence of "identical legal questions" in the pending actions supports the need for centralization in one district court).

Consolidation will also prevent inconsistent rulings in the appellate courts. There can be no question that the Clean Water Rule is of significant importance to states, local governments, tribes, the regulated community, environmental organizations, and the public. The Rule was promulgated in response to a fractured Supreme Court decision, which demonstrates the complexity of the interpretive issues that underlie the Rule. 80 Fed. Reg. at 37,056-57 (discussing *Rapanos v. United States*, 547 U.S. 715 (2006)). Thus it is not surprising that there is a large number of challenges to the Rule, and it is also foreseeable that the challenges could "remain unresolved for years" until there is Supreme Court review. If the pending and subsequent district court cases are not consolidated, it is all but certain that there will be overlapping appeals in the circuit courts, with the continuing potential for inconsistent rulings and confusion for the parties and the public. Consolidation of the cases will eliminate this problem by streamlining the review process and enabling all parties to be heard in a manner that avoids district and circuit splits, while expediting the anticipated appeals process.

Centralization of the Clean Water Rule challenges will also promote efficiency by conserving the resources of the judiciary and the United States. Rather than eight or more district judges having to manage substantially similar litigation regarding preliminary relief, the sufficiency of the voluminous record, and dispositive motions, one district judge should oversee all these proceedings.[7] The pending cases were filed between June 29 and July 15, 2015 and all are in very early stages of litigation. The United States has not filed an answer or otherwise

[7] In addition, in the likely event of appeals of the district court cases, it would be more efficient for one circuit court of appeals, rather than several, to resolve the issues raised on appeal.

responded to any of the complaints (other than to seek stays pending resolution of the present motion by this Panel), and the courts have not issued any substantive rulings.[8] Thus, transfer and consolidation should not disrupt pretrial proceedings.

IV. The District of Columbia District Court Is the Most Appropriate Forum for Consolidation of the Pending Cases.

Although there is no district court matter that has been filed (as yet) in the District Court for the District of Columbia, the United States respectfully requests that the pending actions, and any future-filed challenges to the Clean Water Rule, be centralized there. The experience and capacity of the district is a significant factor in the Panel's decisions. *In re Janus Mut. Funds Inv. Litig.*, 310 F. Supp. 2d 1359 (J.P.M.L. 2004). The District Court for the District of Columbia has the resources and experience to conduct multidistrict litigation. *Cf. In re Pilgrim's Pride Fair Labor Standards Litig.*, 489 F. Supp. 2d 1381 (J.P.M.L. 2007) (noting the court's resources to manage multidistrict litigation); *In re Gator Corp. Software Trademark & Copyright Litig.*, 259 F. Supp. 2d 1378, 1380 (J.P.M.L. 2003) (recognizing that the court is "an accessible metropolitan court" with "necessary resources and expertise"). That court often hears challenges to administrative actions by agencies that are headquartered in the District of Columbia, and is well-equipped to handle a complex challenge to a national rulemaking, as it regularly resolves matters that involve large administrative records, administrative law issues, and environmental statutes. *See, e.g.*, *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 818 F.

[8] The United States also anticipates that the process under 28 U.S.C. § 2112(a) for designating a single court of appeals to hear all petitions for review of the Clean Water Rule will be completed in the very near future. If the Panel grants the United States' motion under 28 U.S.C. § 1407 to consolidate the district court cases, there will still be parallel proceedings in one district court and one appellate court. In any event, whether the litigation ultimately proceeds in district court or in the court of appeals, all plaintiffs will have ample opportunity to press their claims in a timely fashion.

Supp. 2d 214; *Mingo Logan Coal Co., Inc. v. EPA*, Civil Action No. 10-0541(ABJ), 2014 WL 4828883 (D.D.C. Sept. 30, 2014) (reviewing challenge to EPA's decision to withdraw its specification of two locations in a CWA permit as disposal sites); *Anacostia Riverkeeper v. Jackson*, 798 F. Supp. 2d 210 (D.D.C. 2011) (reviewing EPA's approval of a total maximum daily load under the CWA). The District of Columbia District Court also has a minimal multidistrict litigation docket at this time, consisting of five MDL matters with only 22 consolidated actions in total.

In addition, as noted above, the District of Columbia is an appropriate forum because all of the federal defendants reside there. *See, e.g., In re: Endangered Species Act Section 4 Deadline Litigation*, 716 F. Supp. 2d 1369, 1370 (J.P.M.L. 2010) (selecting transferee district court in part because it was the location of defendants' headquarters); *In re American Gen. Life & Accident Ins. Co. Indus. Life Ins. Litig.*, 175 F. Supp. 2d 1380, 1381 (J.P.M.L. 2001) (selecting transferee district in part because defendants resided there). The named federal defendants – Administrator McCarthy, Secretary McHugh, Assistant Secretary Darcy, and Lieutenant General Bostick – officially reside in the Washington, D.C. metropolitan area, where they perform their official duties.

Many of the plaintiffs and their counsel maintain offices in Washington, D.C., making it a convenient forum for most of the parties.[9] And with respect to those plaintiffs that do not maintain offices in Washington, the district is geographically convenient and reasonably

[9] The following plaintiffs are either located in Washington, D.C. or have offices there: American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Association, Leading Builders of America, National Alliance of Forest Owners, National Association of Home Builders, National Association of Manufacturers, National Cattlemen's Beef Association, National Corn Growers Association, National Mining Association, National Pork Producers Council, Public Lands Council, Chamber of Commerce of the United States, and National Federation of Independent Business.

accessible for purposes of travel. *Cf. In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Prods. Liability Litig.*, 406 F. Supp. 540, 543 (J.P.M.L. 1977) (selecting geographically central transferee forum in nationwide litigation). In addition, many of the plaintiffs and their counsel are regularly engaged in advocacy and federal litigation in Washington, D.C. and would not be significantly inconvenienced by an order consolidating the actions there. *See, e.g., Chamber of Commerce,* Dkt. No. 1 ¶¶, and *American Farm Bureau Fed'n*, Dkt. No. 1¶¶ (identifying parties who have offices in Washington, D.C.); *see also In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015); *Miss. Comm'n on Envtl. Quality v. EPA*, No. 12–1309 (and consolidated cases), 2015 WL 3461262 (D.C. Cir. June 2, 2015) (reviewing consolidated petitions brought by industry associations and states including Indiana, Mississippi, Texas, Utah for review of EPA's area designations in connection with national ambient air quality standards for fine particulate matter issued under the Clean Air Act).

Moreover, a substantial part of the decisions giving rise to the claims in the pending actions occurred in Washington, D.C. The Clean Water Rule was signed by Administrator McCarthy and Assistant Secretary Darcy in Washington, D.C., and EPA and Army officials and representatives have briefed Congress and the public on the Rule in Washington.

Finally, it is noteworthy that any appeals from any decisions by the District of Columbia District Court would go to the D.C. Circuit, the forum for some of the largest and most complex rulemaking challenges in the country. There can be no doubt that the D.C. Circuit is well-equipped to handle any appeals in this litigation.

Respectfully submitted,

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