

**BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

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

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

Pursuant to 28 U.S.C. § 1407, the United States respectfully requests that the Judicial Panel on Multidistrict Litigation (“the Panel”) transfer multiple pending actions facially challenging a regulation issued jointly by the United States Environmental Protection Agency (“EPA”) and the Department of the Army (“Army”) that defines the scope of waters protected under the Clean Water Act, as well as any actions that may be subsequently filed asserting related or similar claims, to the District of Columbia District Court for consolidated pretrial proceedings. The pending actions presently subject to this motion are identified in the accompanying Schedule of Actions.

In support of this motion, the United States states the following:

1. Existence of Multidistrict Litigation. As described in detail in the accompanying memorandum in support of this motion, since the June 29, 2015 publication of the “Clean Water Rule” (“the Rule”) which defines the scope of “waters of the United States” protected under the Clean Water Act, 33 U.S.C. § 1251-1387, ten separate district court actions have been filed in eight different district courts challenging the regulation. The United States anticipates that additional actions challenging the regulation may also be filed in the coming weeks.

2. Existence of Common Questions of Fact. Common questions of fact (in addition to common issues of law) will predominate in the pending suits. Specifically:

a. The disposition of all of the pending suits will require examination and consideration of a voluminous administrative record relating to the Clean Water Rule.

b. The pending claims raise common questions regarding whether there is factual support for the Rule's delineation of what waters are protected under the Clean Water Act and the technical findings and rationale that are the basis for the regulation.

c. In addition to the factual material contained in the administrative record, additional facts may be presented to the district courts in connection with plaintiffs' standing, or in connection with motions for preliminary relief.

d. The United States anticipates that there will be overlapping motions regarding the sufficiency of the administrative record, and a possibility of motions seeking to supplement the record via presentation of extra-record evidence or discovery.

3. Benefits of Consolidation. Consolidating the pending actions for pretrial proceedings will serve the convenience of the parties and potential witnesses and promote the just and efficient conduct of the actions for at least the following reasons:

a. The claims made, issues presented, and factual and technical issues raised by plaintiffs regarding the Rule are identical or substantially overlap.

b. These actions would be decided on pretrial motion, and no trial will occur.

c. Issues regarding the completeness of the administrative record, and consideration of extra-record evidence, are anticipated to arise in each of the pending lawsuits.

d. Transfer to a single district court will not significantly inconvenience any party.

e. Transfer of these actions for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407 will ensure uniform rulings on issues of law and fact that will have consequences in this litigation for all parties.

f. Transfer and consolidation of the pending lawsuits will also eliminate the very substantial potential for inconsistent pretrial decisions regarding the administrative record, extra-record evidence and discovery, intervention, preliminary injunctive relief, and summary judgment. In addition, centralization of the pending actions will eliminate the high likelihood of multiple appeals in different courts of appeals, which would otherwise lead to the likelihood of inconsistent results in those courts.

4. Potential Detriment if Transfer and Consolidation is Not Granted. If transfer is not granted, and the federal defendants are required to defend the ten (or more) actions in eight (or more) separate district courts, there is a significant potential for conflicting pretrial rulings regarding, *inter alia*, the scope and content of the administrative record, intervention, preliminary injunctive relief, and whether summary judgment should be granted in favor of a plaintiff or the United States. Separate litigation of the district court cases would create the likelihood that the United States (and other parties) would then be required to simultaneously litigate multiple appeals in multiple circuit courts, which could then result in conflicting appellate decisions.

5. Choice of Forum. The United States District Court for the District of Columbia is the most appropriate forum for the pretrial proceedings because:

a. The District of Columbia District Court has the resources and judicial experience to properly conduct these complex proceedings, and the court has a small number of MDL matters.

b. As of the date of this motion, none of the pending actions has progressed beyond the early pretrial stages. When it became clear that the United States would seek centralization of the pending actions, the government filed a motion to stay in each pending district court action; two of the motions are unopposed. The plaintiffs have filed motions for preliminary injunctions in three of the cases thus far, but briefing has not yet been completed in any of those cases. To date, no responsive pleadings have been filed, no administrative record has been filed, and no merits briefing has occurred.

c. The only locus of operative facts regarding the pending lawsuits and claims is Washington, D.C., where the decisions were made and where the decisionmakers are located. The challenged regulation applies nationwide. Many of the parties have headquarters or offices in Washington, D.C., and many of plaintiffs' counsel are located in Washington, D.C. The administrative record is housed at the D.C. offices of EPA and the Department of the Army.

6. Procedures Followed. As set forth in the accompanying certificate of service, copies of this motion, the Schedule of Actions, and the accompanying brief in support have been served on the clerk of each district court identified in the Schedule of Actions and on counsel for all parties listed in the Schedule of Actions.

Respectfully submitted,

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