

**ORAL ARGUMENT NOT YET SCHEDULED IN NO. 17-1014
ORAL ARGUMENT HELD SEPTEMBER 27, 2016 IN NO. 15-1363**

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NORTH DAKOTA,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

No. 17-1022 (consolidated
under 17-1014)

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Respondents.

No. 15-1363 and
consolidated cases

JOINT MOTION TO SEVER AND CONSOLIDATE

The States of West Virginia, Texas, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming and the Arizona Corporation Commission, the State of Mississippi Department of Environmental Quality, and

the State of Mississippi Public Service Commission (collectively, “Movants”) respectfully move this Court to sever their petition for review in *North Dakota, et al. v. EPA*, No. 17-1014,¹ and consolidate it with their petition for review in *West Virginia v. EPA*, No. 15-1363. Movants also respectfully move this Court to issue an order directing the parties in *West Virginia v. EPA* to submit a proposal to govern the scheduling of supplemental briefing of the newly-ripened objections to the Rule.

In support of the motion, Movants state as follows:

1. EPA took final action promulgating its final emission guideline for carbon dioxide emissions from existing electric utility generating units on October 23, 2015. 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the “Rule”). Movants filed petitions for review in this Court, which were then consolidated with other petitions under the lead case *State of West Virginia v. EPA*, No. 15-1363. The case was briefed on an expedited schedule with oral argument held on September 27, 2016 before this Court, sitting *en banc*. A decision is pending.

2. Between October 23, 2015 and January 28, 2016, at least 38 separate administrative petitions for reconsideration were filed with EPA objecting to various aspects of the Rule, including EPA’s failure to provide notice and an

¹ Movants are petitioners in No. 17-1022, which has been consolidated under the lead case *North Dakota v. EPA*, No. 17-1014.

opportunity to comment on elements of the Rule. The Agency argued that those objections were not yet ripe. *See, e.g.*, EPA Br., *West Virginia v. EPA*, No. 15-1363, ECF No. 1609995 at 108 n.97 (Apr. 22, 2016). At oral argument several members of the *en banc* court expressed concerns about addressing those objections prior to any action by EPA citing section 307(d)(7)(B) of the Clean Air Act. *See, e.g.*, Transcript, *West Virginia v. EPA*, No. 15-1363, ECF No. 1646159 at 231, 237–42.

3. Section 307(d)(7)(B) of the Clean Air Act provides that “[o]nly an objection to a rule or a procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review,” but that “if the grounds for such objection arose after the period for public comment (but within the time specific for judicial review) and if such objection is of central relevance to the outcome of the rule, [EPA] shall convene a proceeding for reconsideration of the rule. . . .” 42 U.S.C. § 7607(d)(7)(B). If EPA “refuses to convene such a proceeding,” the person raising the objection “may seek review of such refusal in the United States court of appeals for the appropriate circuit.” *Id.* This Court has interpreted section 307(d)(7)(B) to require challenges that were not raised during the notice and comment period but were raised in an administrative petition for reconsideration to “await EPA’s action on that petition,” *id.* at 747

“even if [those] objections could not have been raised during the comment period,” *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 (D.C. Cir. 2015).

4. On January 11, 2017, EPA denied the pending petitions for reconsideration. *See* 82 Fed. Reg. 4,864 (Jan. 17, 2017). The next day, EPA informed this Court of its final action denying the petitions.² A notice of the denial of reconsideration was published in the Federal Register on January 17, 2017. 82 Fed. Reg. 4,864 (Jan. 17, 2017). Seventeen separate petitions for review, including Movants’ petition, have been filed in this Court seeking judicial review of EPA’s action denying the petitions for reconsideration. Those petitions have been consolidated under the lead case of *North Dakota v. EPA*, No. 17-1014.

5. Movants’ petition for review consolidated under *North Dakota v. EPA* should be consolidated with the other challenges to the Rule in *West Virginia v. EPA*. Now that EPA has denied the petitions for reconsideration, those post-comment period objections are now ripe. And those objections must be resolved in order to dispose of the Movants’ petitions for review in the *West Virginia v. EPA* case. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998); *Portland Cement Ass’n v. EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 (D.C. Cir. 2015).

² Letter from E. Hostetler, U.S. Dept. of Justice, to M. Langer, Clerk (Jan. 12, 2017), *West Virginia v. EPA*, No. 15-1363, ECF No. 1655632.

6. This Court regularly consolidates petitions for review of the denial of reconsideration with the original petitions for review when, as here, the original petitions are still pending. The Court has long taken this approach. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298, 316 (D.C. Cir. 1981). And it recently did so in a case challenging EPA's final rule concerning new source performance standards for greenhouse gas emissions from new, modified, and reconstructed electric utility steam generating units. *See* Petitioners and Petitioner-Intervenors' Unopposed Motion to Consolidate, *State of North Dakota, et al. v. EPA*, No. 15-1381, ECF No. 1624282 (July 12, 2016); Order, *State of North Dakota, et al. v. EPA*, No. 15-1381, ECF No. 1625550 (July 19, 2016).

7. Movants respectfully request that this Court sever Movants' petitions for review of the denial of reconsideration in *North Dakota v. EPA* and consolidate with the petitions for review challenging the Rule in *West Virginia v. EPA*. Movants also respectfully request that after consolidation this Court issue an order in *West Virginia v. EPA* directing the parties to submit proposals to govern supplemental briefing of issues that are indisputably ripe now that EPA has denied reconsideration.

Movants respectfully request that the Court grant this motion.

Dated: March 31, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27(d)(2) and 32(g) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(e)(1), I hereby certify that the foregoing document contains 978 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limits set by the Court.

Dated: March 31, 2017

/s/ Elbert Lin

CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of March 2017, a copy of the foregoing document was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Elbert Lin

ORAL ARGUMENT NOT YET SCHEDULED**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
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STATE OF NORTH DAKOTA,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

No. 17-1022 (consolidated
under 17-1014)**PETITIONERS' CERTIFICATE AS TO PARTIES AND *AMICI CURIAE***

Pursuant to Circuit Rule 27(a)(4), Petitioners the States of West Virginia, Texas, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming and the Arizona Corporation Commission, the State of Mississippi Department of Environmental Protection, and the State of Mississippi Public Service Commission state as follows:

A. Parties, Intervenors, and Amici Curiae

These cases involve the following parties:

Petitioners:

No. 17-1014: State of North Dakota

No. 17-1015: Murray Energy Corporation

No. 17-1018: Utility Air Regulatory Group and American Public
Power Association

No. 17-1019: LG&E and KU Energy LLC

No. 17-1020: National Rural Electric Cooperative Association

No. 17-1022: State of West Virginia; State of Texas, State of Alabama,
State of Arizona Corporation Commission, State of Arkansas, State of
Georgia; State of Indiana; State of Kansas; State of Louisiana; State of
Mississippi Department of Environmental Quality; State of Mississippi
Public Service Commission; State of Montana; State of Nebraska; State of
New Jersey; State of Ohio; State of South Carolina; State of South Dakota;
State of Utah; State of Wisconsin; and State of Wyoming

No. 17-1023: National Association of Home Builders

No. 17-1031: Alabama Power Company; Georgia Power Company;
Gulf Power Company; and Mississippi Power Company

No. 17-1035: Peabody Energy Corporation

No. 17-1037: Entergy Corporation

Respondents:

Respondents are the United States Environmental Protection Agency in all cases and the Administrator of the United States Environmental Protection Agency in Nos. 17-1015, 17-1022, and 17-1031.

Intervenors and Amici Curiae:

The following parties are Movant-Intervenors for Petitioners: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Foundry Society; American Iron and Steel Institute; American Wood Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association.

The following parties are Movant-Intervenors for Respondents: State of California; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of Minnesota; State of New Mexico; State of Oregon; Commonwealth of Virginia; State of Rhode Island; State of Vermont; District of Columbia; State of Washington; City of New York; City of Philadelphia; City of Boulder; City of Chicago; Broward County, Florida; City of South Miami;

American Lung Association; Environmental Defense Fund; Natural Resources Defense Council; Clean Air Council; Clean Wisconsin; Conservation Law Foundation; The Ohio Environmental Council; Center for Biological Diversity; Sierra Club; West Virginia Highlands Conservancy; Ohio Valley Environmental Coalition; Coal River Mountain Watch; Kanawha Forest Coalition; Mon Valley Clean Air Coalition; Keeper of the Mountain Foundation; and State of New York.

Dated: March 31, 2017

Respectfully submitted,

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