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

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

STATE OF WEST VIRGINIA, et al., *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 15-1363 (and consolidated cases)
STATE OF NORTH DAKOTA, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 17-1014 (and consolidated cases)

RESPONDENT-INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS' OPPOSITION TO MOTIONS TO SEVER AND CONSOLIDATE

Respondent-Intervenors oppose the motions to sever and consolidate filed by West Virginia, *et al.*, ECF 1668952 (Mar. 31, 2017) ("States Mot."), Entergy Corporation, *et al.*, ECF 1668921 (Mar. 31, 2017) ("Entergy Mot."), and National

Association of Home Builders, ECF 1668929 (Mar. 31, 2017) ("NAHB Mot.") (collectively, "Movants"), for the same reasons stated in Respondent-Intervenors' opposition to a similar motion filed weeks ago by the UARG Movants. ECF 1663909 (Mar. 2, 2017) ("Opp. to UARG Mot.").[1]

Like the earlier motion, the current motions request that that the Court take the inefficient, prejudicial, and unnecessary step of consolidating certain petitions for review of the Environmental Protection Agency's ("EPA") denial of administrative reconsideration petitions with the main case challenging the Clean Power Plan. They should be denied.

ARGUMENT

I. Consolidation Is Not Routine, Particularly Under these Circumstances Where It Would be Inefficient and Prejudicial.

Movants suggest that this Court "routinely" or "regularly" consolidates petitions for review of an agency's reconsideration denial with ongoing challenges to the same rule. Entergy Mot. 3; NAHB Mot. 3; States Mot. 5. That is not true at this late phase of the litigation. Whether this Court consolidates depends on factors such as the stage of the litigation in the main case, the timing of EPA's resolution of the reconsideration petitions, judicial economy, and prejudice to the

[1] Our previous response summarizes the procedural background. Opp. to UARG Mot. 2-4.

parties. Opp. to UARG Mot. 4-5. Tellingly, none of the examples cited by Movants is remotely similar to this case.

In *North Dakota v. EPA*, with the assent of all parties, the Court consolidated the merits and reconsideration challenges *before* briefing had begun. Order, No. 15-1381, ECF 162550 (July 19, 2016) (consolidating merits and reconsideration cases); Opening Brs., No. 15-1381, ECF 1640969, 1640984, 1640985 (Oct. 13, 2016). So too in *Coalition for Responsible Regulation, Inc. v. EPA*, where the main and reconsideration cases were consolidated six months before the opening brief was filed. Order, No. 09-1322, ECF 1277479 (Nov. 15, 2010); Opening Brs., No. 09-1322, ECF 1309213, 1309215 (May 20, 2011).

And the same is true for *United States Sugar Corporation v. EPA*, where, with the assent of all parties, this Court held challenges to a 2011 rule in abeyance pending reconsideration – and consolidated the case with challenges to EPA's 2013 decisions on reconsideration *before* opening briefs were filed. Order, No. 11-1108, ECF 1436267 (May 15, 2013) (consolidating main and reconsideration cases); Opening Brs., No. 11-1108, ECF 1507310, 1507319 (Aug. 12, 2014); *see also* Order, *Sierra Club v. Costle*, No. 79-1565 (Feb. 29, 1980) (consolidating main and reconsideration cases); Opening Br., No. 79-1565 (July 14, 1980). Importantly, in none of these cases was there a judicial stay in place; was

consolidation opposed by any party; or was consolidation granted *after* briefing and oral argument had taken place.

Indeed, as Respondent-Intervenors documented in their earlier opposition, in a later phase of the *United States Sugar* case, after EPA completed proceedings on new administrative petitions seeking reconsideration of the *2013* rules, this Court proceeded to decide the validity of the 2011 and 2013 rules *without* consolidating the new petitions for review of that new reconsideration decision, despite the fact that EPA completed its reconsideration while the main challenge was still pending. Opp. to UARG Mot. 5-6. Likewise, in *Delaware Department of Natural Resources v. EPA*, 785 F.3d 1 (D.C. Cir. 2005), this Court did not consolidate the main and reconsideration cases even though EPA completed its reconsideration before the main case was decided. *See* Opp. to UARG Mot. 6.

Accordingly, this Court does not "routinely" consolidate issues properly raised in the reconsideration case with the main case in the same proceeding under like the circumstances here, where briefing and argument before an *en banc* court are long complete and this Court has been deliberating over its decision for more than six months. Indeed, addressing the workaday notice and record-based issues that Movants raise in their reconsideration petitions is inconsistent with this Court's practice for *en banc* review and the Federal Rules of Appellate Procedure, which provide for such review only where "necessary to secure or maintain

uniformity of the court's decisions" or to resolve "a question of exceptional importance." Fed. R. App. P. 35 (emphasis added). The issues raised by Movants in their challenges to reconsideration do not come close to meeting this standard, and would immerse the *en banc* court in numerous additional technical issues not of "exceptional importance" and that likely did not lead this Court to review the case *en banc* in the first instance. These issues should properly be decided by a three-judge panel.[2]

Consolidation also is not "routine" where, as here, the delay it would cause would severely prejudice Respondent-Intervenors. Delay in resolving the main case delays Respondent-Intervenors' opportunity to lift the stay, which will dissolve after disposition of the petitions before the *en banc* Court and any Supreme Court review. Opp. to UARG Mot. 7-8.[3] This is particularly problematic "[b]ecause [carbon pollution] in the atmosphere is long lived, it can effectively

[2] EPA's suggestion that the Court consolidate *all* pending challenges to the Reconsideration Denial with *West Virginia* despite the fact that many Petitioners do not seek consolidation would only exacerbate the inefficiency of Movants' proposal by adding further non-*en banc*-worthy issues to the case. *See* Respondents' Response to Motion to Sever and Consolidate 2, ECF 1665819 (Mar. 13, 2017).

[3] Indeed, while Respondent-Intervenors advocate minimizing any delay of the Rule's deadlines, just last week, EPA informed States that it intends to apply "day-to-day tolling" to Clean Power Plan compliance deadlines—so that the longer the stay is in effect, the later protections against harmful climate pollution will go into effect. *See, e.g.*, Letter from E. Scott Pruitt, Adm'r of EPA, to Matt Bevin, Governor of Kentucky (Mar. 30, 2017) (attached).

lock Earth and future generations into a range of impacts, some of which could become very severe." 80 Fed. Reg. 64,662, 64,682 (Oct. 23, 2015) (quoting Nat'l Research Council, *Climate Stabilization Targets: Emissions, Concentrations, and Impacts over Decades to Millennia*, 3 (2011)).

Meanwhile, denial of these motions would not harm Movants. They retain all of their rights to pursue their challenges to the denial of administrative reconsideration (including direct challenges to the Rule brought in those cases) heard in No. 17-1014. They could seek to expedite the briefing in the reconsideration case if they wish. In fact, Movants are not even pressing this Court to hear these claims in the near future. *See* EPA's Mot. to Hold Cases in Abeyance, at 2, No. 17-1014, ECF 1668936, (Mar. 31, 2017) (indicating that Movants do not oppose abeyance in the reconsideration case).

Adding to the inefficiency of Movants' proposal, many of the petitioners in the consolidated No. 17-1014 reconsideration cases have not moved to consolidate their petitions with the main case. Petitioners in only eight of those seventeen petitions (including a belated motion from North Dakota) have sought severance of their petitions and consolidation with No. 15-1363. The fifteen petitioners that have filed the other nine petitions for review do not seek to sever or consolidate, even though there is substantial overlap between the issues presented in their petitions for review (as described in their Non-Binding Statements of Issues) and

those that the Movants here seek to sever from No. 17-1014.[4] Movants' requested consolidation would therefore unnecessarily complicate and prolong the Court's deliberations in *West Virginia*, while still leaving the Court with the task of disposing of the petitions for review that remain in No. 17-1014.

The fact that *all* of the parties moving for severance and consolidation are also supporting abeyance of the main case, *see* Petitioners' and Petitioner-Intervenors' Response in Support of EPA's Motion to Hold Cases in Abeyance, in 15-1363, ECF No. 1669984 (Apr. 6, 2017), only confirms that the serious delay Movants' proposal would cause is not accidental: The consolidation motions are nothing but an alternative effort to delay the decision of the main case and to prolong the effect of the stay of the rule.

[4] Overlapping issues in this case include the opportunity for notice and comment on interstate trading rules, *compare* Pet'r [and Movant] Entergy Corp.'s Nonbinding Statement of Issues, 3, ECF 1668911 (Mar. 31, 2017), *with* Pet'rs [and Non-Movants] Ala. Power Co. *et al*.'s Nonbinding Statement of Issues, 4, ECF 1668930 (Mar. 31, 2017); the opportunity for notice and comment on the reliability safety valve, *compare* Joint Non-Binding Statement of Issues of State Pet'rs [and Movants], 5, ECF 1668946 (Mar. 31, 2017), *with* [Non-Movant] Nat'l Rural Electric Coop. Ass'n's Statement of Issues, 2, ECF 1668844 (Mar. 31, 2017); and the opportunity for notice and comment on elements of the Clean Energy Incentive Program, *compare* Petitioner [and Movant] National Association of Home Builders' Nonbinding Statement of Issues 2, ECF 1662735 (Feb. 23, 2017), *with* Petitioners [and Non-Movants] Alabama Power Co., *et al*.'s Nonbinding Statement of Issues 4, ECF 1668930 (Mar. 31, 2017).

II. The Court Need Not Resolve the Issues Raised by Movants' Petitions for Review in the Reconsideration Case to Dispose of the Main Case.

State Movants contend that the Court cannot dispose of their petitions for review in the main case without resolving various objections to the Rule raised in the reconsideration case. That argument is neither logical nor supported by this Court's precedents. It is not logical because it is not at all unusual for this Court to dispose of petitions for review challenging a rule before EPA has resolved administrative reconsideration petitions. *See* Opp. to UARG Mot. 5-7 (citing examples). There is also no *legal* barrier to disposing of the petitions for review in the main case, even after administrative reconsideration is complete. *See supra*, at 2-4. Indeed, as this Court explained in *Utility Air Regulatory Group v. EPA*, in Clean Air Act section 307(b)(1), Congress explicitly legislated that a pending petition for agency reconsideration does not deprive a rule of finality. 744 F.3d 741, 746 (D.C. Cir. 2014); *see* 42 U.S.C. § 7607(b)(1) (The filing of an administrative reconsideration petition "shall not affect the finality of such rule or action for purposes of judicial review"). The statutory text unmistakably supports this Court's established practice of adjudicating challenges to rules before challenges to administrative reconsideration denials where doing so makes sense given the posture of the litigation and the agency proceedings.

The cases State Movants cite are not to the contrary. As explained in our earlier opposition, while the Court in *Portland Cement Association v. EPA*, 665

F.3d 177 (D.C. Cir. 2011) (cited in State Mot. 4), did consolidate the petitions for review of the main case and the petitions for review of the reconsideration case, it recognized that the two sets of petitions remained distinct. *See* Opp. to UARG Mot. 4-5. After finding that petitioners had overcome the threshold requirements of section 7607(d)(7)(B), this Court concluded that "EPA's treatment of the CISWI-NESHAP interaction was arbitrary and capricious," *Portland Cement*, 665 F.3d at 189 —an issue that the petitioner could only have raised in its reconsideration case, and not in the main case. Thus, this Court explained that the petitioner "[could] not challenge the rule directly" and "grant[ed] the petition for review *with respect to EPA's denial of reconsideration*," not the petition for review with respect to the rule itself. *Id.* at 185, 194 (emphasis added).

Nor do the other cited cases support State Movants' proposition. In *Appalachian Power Co. v. EPA*, this Court concluded that the petitioner had raised its objection with adequate specificity during the notice and comment proceedings. 135 F.3d 791, 818 (D.C. Cir. 1998). Thus, the claim was properly brought in the challenge to the rule itself, and the case had nothing to do with reconsideration proceedings. And in *Mexichem Specialty Resins, Inc. v. EPA*, this Court concluded that because the petitioners could have raised their objections during the notice and comment proceedings but did not do so, those objections were statutorily barred. 787 F.3d 544, 553 (D.C. Cir. 2015). In that case, this Court denied the petitions for

review and disposed of the case even while petitions for administrative reconsideration were proceeding on a different track. *Id.* at 554, 561.

NAHB (Mot. at 3-4) and Entergy Movants (Mot. at 4) argue that the issues they seek to raise in their current petitions for review of EPA's reconsideration denial are no longer barred by section 7607(d)(7)(B) because EPA has addressed them in its reconsideration proceeding. But even assuming *arguendo* that were so, it does not mean that this Court must consolidate the reconsideration case with the main case or that it may not dispose of the petitions for review in the main case without resolving the issues Movants brought in the reconsideration case.

Respondent-Intervenors are eager to have all of the challenges to the Rule resolved expeditiously, and supplemental briefing to an *en banc* court is unlikely to be as expeditious as briefing before a regular three-judge panel. Moreover, because the Supreme Court only stayed enforcement of the Rule pending resolution of the petitions for review in only the main case, anything that slows that case down improperly prejudices Respondent-Intervenors. *See* Opp. to UARG Mot. 8 n.2.

CONCLUSION

The motions should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 2201 words.

CERTIFICATE OF SERVICE

I certify that on April 7, 2017, the foregoing Opposition was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ *Sean H. Donahue*

***West Virginia v. EPA*, No. 15-1363**
***North Dakota v. EPA*, No. 17-1014**

ATTACHMENT TO

RESPONDENT-INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS' OPPOSITION TO MOTIONS TO SEVER AND CONSOLIDATE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

March 30, 2017

The Honorable Matt Bevin
Governor of Kentucky
700 Capitol Avenue
Suite 100
Frankfort, Kentucky 40601

Dear Governor Bevin:

On February 9, 2016, the Supreme Court of the United States stayed implementation of the Clean Power Plan (CPP) effectively "suspend[ing] administrative alteration of the status quo." *Nken v. Holder,* 556 U.S. 418, 428 n.1 (2009). Further, pursuant to the Administrative Procedure Act, the Supreme Court has authority to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

Under that precedent, States and other interested parties have neither been required nor expected to work towards meeting the compliance dates set in the CPP. It is the policy of the Environmental Protection Agency (EPA) that States have no obligation to spend resources to comply with a Rule that has been stayed by the Supreme Court of the United States. To the extent any deadlines become relevant in the future, case law and past practice of the EPA supports the application of day-to-day tolling.

The days of coercive federalism are over. Accordingly, I look forward to working with you, your state experts and local communities as we develop a path forward to improve our environment and bolster the economy in a manner that is respectful of and consistent with the rule of law.

Respectfully yours,

E. Scott Pruitt