

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

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

STATE OF NORTH DAKOTA, ET AL.,)

Petitioners,)

v.)

**UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, ET AL.,)**

Respondents.)

No. 17-1014 (and consolidated cases)

STATE OF WEST VIRGINIA, ET AL.,)

Petitioners,)

v.)

**UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, ET AL.,)**

Respondents.)

No. 15-1363 (and consolidated cases)

NORTH DAKOTA’S MOTION TO SEVER AND CONSOLIDATE

Subject to the outcome of the motions to hold the above cases in abeyance filed by Respondents, the State of North Dakota respectfully moves the Court: 1) to sever its petition for review in *State of North Dakota, et al. v. EPA*, No. 17-1014

(*North Dakota v. EPA*), which involves post-comment period objections to EPA’s final rule addressing carbon dioxide emissions from existing electric generating units (the “Rule”), which objections are now ripe for judicial review because the U.S. Environmental Protection Agency (“EPA” of the “agency”) denied North Dakota’s petition for administrative reconsideration presenting those objections; 2) consolidate that petition for review with North Dakota’s petition for review in *State of West Virginia et al. v. EPA*, No. 15-1363 (*West Virginia v. EPA*);¹ and 3) 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. These now-ripened challenges to the Rule must be resolved in order to dispose of the petitions for review of the Rule that are currently pending before the Court in *West Virginia v. EPA*.

This motion and the relief requested are substantially identical to the motions filed and relief sought by several other petitioners, who are facing the same circumstance of post-comment period challenges to the Rule being newly-ripened by EPA’s denial of their petitions for administrative reconsideration. *See* Joint Motion to Sever and Consolidate, Nos. 17-1014 & 15-1363 (Feb. 24, 2017); Joint Motion to Sever and Consolidate, Nos. 17-1014 & 15-1363 (Mar. 31, 2017).

In support of this motion, North Dakota states as follows:

¹ North Dakota is petitioner in No. 15-1380, which is consolidated with lead case *West Virginia v. EPA*, No. 15-1363.

1. EPA took final action promulgating the Rule on October 23, 2015. 80 Fed. Reg. 64,662 (Oct. 23, 2015). Thirty-nine separate petitions seeking review of the Rule were filed in this Court. All of the petitions were subsequently consolidated under lead docket *State of West Virginia v. EPA*, No. 15-1363. The case was briefed on an expedited schedule, and oral argument was held before this Court, sitting *en banc*, on September 27, 2015. A decision in the case is pending.

2. While litigation in *State of West Virginia v. EPA* was proceeding in this Court, EPA received administrative petitions for reconsideration of various aspects of the Rule from North Dakota and 37 other parties. North Dakota's petition set forth several objections to the Rule, all of which stemmed from EPA's having failed to provide notice and an opportunity to comment on elements of the Rule that were introduced only upon its final promulgation. For example, the final Rule mandated a carbon dioxide emissions limit for North Dakota that is four times more stringent than the reductions EPA outlined in its proposed rule.

3. The Agency had argued in its briefing in the *State of West Virginia v. EPA* litigation that such notice-and-comment objections were not ripe for resolution by this Court in that case because of the pending motion to reconsider. At oral argument, several members of the *en banc* Court also voiced concerns about the appropriateness of the Court's addressing in that litigation objections that

were pending before the Agency in administrative petitions for reconsideration and subject to section 307(d)(7)(B) of the Clean Air Act.

4. On January 12, 2017, EPA informed this Court that the Agency had taken final action denying all the pending petitions for reconsideration.² Numerous petitions were filed in this Court, prior to the statutory deadline of March 20, 2017, seeking review of EPA's final action denying the administrative petitions for reconsideration. Those petitions have been consolidated under the lead docket *State of North Dakota v. EPA*, No. 17-1014, which was filed on January 17, 2017.

5. In the situation presented here, where the original petitions challenging a final EPA rule are still pending before the Court, petitions seeking review of the Agency's denial of reconsideration are routinely consolidated with those original petitions. For instance, this Court recently did so in *State of North Dakota v. EPA*, No. 15-1381, a case challenging EPA's final rule establishing 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, No. 15-1381, ECF No. 1624282 (July 12, 2016); Order, ECF No. 1625550 (July 19, 2016) (consolidating

² *See* Letter from E. Hostetler, U.S. Dept. of Justice, to M. Langer, Clerk (Jan. 12, 2017); *see also* 82 Fed. Reg. 4864 (Jan. 17, 2017) (EPA "received 38 petitions for reconsideration" of the Rule, and is "providing notice that it denied those petitions for reconsideration except to the extent they raise topics concerning biomass and waste-to-energy," and it is "deferring action on the petitions to the extent they raised those topics.").

petitions to review EPA's denial of administrative reconsideration petitions with ongoing case). The Court has long taken this approach. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). In such circumstances, a petitioner may both (1) challenge EPA's failure to grant the request for administrative reconsideration; and (2) challenge the final rule itself, based on an objection to the rule that ripened as a result of the denial of administrative reconsideration.

6. Importantly, the issues for which North Dakota seek severance, consolidation, and supplemental briefing in *West Virginia* involve objections to the Rule itself, not only objections to EPA's denial of reconsideration. The Clean Air Act's limits on review of post-comment period objections are not jurisdictional and, in any event, cease upon EPA's denial of a reconsideration request. *See Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring). Because EPA denied North Dakota's reconsideration petition before this Court's disposition of the *West Virginia v. EPA* petitions for review, North Dakota's post-comment period objections became justiciable under its petition in *West Virginia* when notice of the denial was published in the Federal Register on January 17, 2017. 82 Fed. Reg. 4864 (January 17, 2017). Now all of North Dakota's objections to the Rule – those already briefed and those now indisputably ripened – must be resolved in order to dispose of North Dakota's petition for review in *West Virginia*. *See, e.g., Appalachian Power Co. v. EPA*, 135 F.3d 791,

818 (D.C. Cir. 1998) (court addressing ripened objections after determining administrative procedures were exhausted); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 (D.C. Cir. 2015); *Portland Cement*, 665 F.3d at 186. If this motion to sever and consolidate is granted, North Dakota's petition for review in *North Dakota et al. v. EPA* will remain pending to challenge EPA's denial of North Dakota's petition for administrative reconsideration.

7. EPA's denial of the numerous petitions seeking administrative reconsideration of the Rule was accompanied by a 257-page, single-spaced Basis for Denial of Petitions to Reconsider and 140 pages of appendices (Denial Decision).³ That Denial Decision, which addressed North Dakota's reconsideration petition at length, ripened the objections raised in North Dakota's reconsideration petition and requires supplemental briefing focused on both the rulemaking record and on the new reconsideration denial record. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298, 361, 365, 366, 371-72 (D.C. Cir. 1981) (citing the original rulemaking record (44 Fed. Reg. at 33,592) and the reconsideration record (45 Fed. Reg. at 8225) in resolving objections to final rule).

8. In its 257-page, single-spaced Basis for Denial of Reconsideration Petitions document, EPA offers extensive new arguments and authorities regarding

³ EPA, Clean Power Plan Petitions for Reconsideration January 2017, <https://www.epa.gov/cleanpowerplan/clean-power-plan-petitions-reconsideration-january-2017>.

the notice-and-comment issues raised by North Dakota in its *West Virginia* petitions. *See, e.g.*, EPA, Basis for Denial of Petitions to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units, EPA-HQ-OAR-2013-0602-37338 (Jan. 11, 2017) at 48-53, 82-88. Fundamental fairness requires supplemental briefing on these issues now, in light of these new arguments and authorities, in order to determine the Rule's validity. The notice-and-comment objections are now indisputably ripe and, if North Dakota's arguments are accepted, would require vacatur of the Rule.

9. On February 9, 2016, the U.S. Supreme Court issued orders staying the Rule in response to stay applications filed by several parties, including one filed by North Dakota. The orders state that the Rule is “stayed pending disposition of the applicants’ petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants’ petition for writ of certiorari, if such writ is sought.” *See, e.g., North Dakota v. EPA*, 136 S.Ct. 999 (Mem. 2016). The Supreme Court order anticipates that this Court would address and resolve all of the “applicants’ petitions for review” of the Rule that might be filed, including post-comment period objections that are ripened as a result of requests for reconsideration being denied. *See id.* Moreover, the Supreme Court’s stay of the Rule contemplates “disposition of” the *West Virginia*

petitions for review. Disposition of the *West Virginia* petitions requires this Court to resolve whether *any* ripened objection to the Rule justifies granting any or all of the petitions for review.

10. On March 28, 2017, in both *West Virginia v. EPA* and *North Dakota v. EPA*, Respondents filed a Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Case in Abeyance. Those abeyance motions request the Court to hold both cases in abeyance pending action by EPA to review the Rules at issue and initiate rulemaking proceedings to potentially revise or rescind the Rules. On March 30, 2017, Petitioners and Petitioner-Interveners in *North Dakota v. EPA* filed a response supporting Respondents' motion to hold that case in abeyance, which North Dakota joined and supports, and on April 6, 2017, Petitioners and Petitioner-Interveners in *West Virginia v. EPA* filed a response supporting Respondents' motion to hold that case in abeyance, which North Dakota also joined and supports. If the Court grants the abeyance motion in *West Virginia v. EPA* (or in both cases), the Court need not address this motion until the abeyance(s) terminate or the case(s) are dismissed.⁴

⁴ Because North Dakota supports the abeyance motions and in order to avoid any conflict between that position and this motion, North Dakota deferred filing this motion until promptly after the filing of both responses to the abeyance motions noted in this paragraph of text, which North Dakota joined. North Dakota is mindful of the deadlines established in *North Dakota v. EPA* by this Court's orders of January 25 and February 24, 2017. Although North Dakota does not believe this motion is a "procedural motion" covered by those orders, to the extent there

11. North Dakota respectfully requests that, subject to the outcome of the abeyance motions and upon granting this motion, the Court issue an order in *West Virginia v. EPA*, directing the parties to submit proposals (to include briefing format and schedule) to govern the supplemental briefing of the now-ripened issues identified in North Dakota's reconsideration petition to EPA. For the foregoing reasons, North Dakota respectfully requests that the Court grant this motion.

may be disagreement about that North Dakota respectfully requests leave to file this motion at this time.

Dated: April 7, 2017	<p>Respectfully submitted,</p> <p>STATE OF NORTH DAKOTA WAYNE STENEHJEM ATTORNEY GENERAL</p> <p><i>s/ Paul M. Seby</i> _____ Paul M. Seby Special Assistant Attorney General Jerry Stouck Special Assistant Attorney General Greenberg Traurig, LLP 1200 17th Street, Suite 2400 Denver, CO 80202 Telephone: (303) 572-6584 Fax: (720) 904-6151 sebyp@gtlaw.com stouckj@gtlaw.com</p> <p>Margaret Olson Assistant Attorney General North Dakota Attorney General's Office 600 E. Boulevard Avenue #125 Bismarck, ND 58505 Telephone: (701) 328-3640 Email: ndag@nd.gov maiolson@nd.gov</p> <p><i>Counsel for Petitioner State of North Dakota</i></p>

CERTIFICATE OF SERVICE

I hereby certify that on this day, April 7, 2017, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

s/ Paul M. Seby _____

Paul M. Seby

Special Assistant Attorney General

State of North Dakota

***Counsel for Petitioner State of North
Dakota***