

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**

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NORTH DAKOTA)	
)	
Petitioner,)	
)	
v.)	No. 17-1014 and
)	consolidated cases
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	
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WEST VIRGINIA)	
)	
Petitioner,)	
)	
v.)	No. 15-1363 and
)	consolidated cases
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
Respondents.)	
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**REPLY IN SUPPORT OF NATIONAL ASSOCIATION OF HOME
BUILDERS’ MOTION TO SEVER AND CONSOLIDATE**

Petitioner National Association of Home Builders (“NAHB”) submits this reply to the oppositions filed by Respondent-Intervenor Public Health and Environmental Organizations (“Environmental Respondent-Intervenors”), ECF

#1670227 (No. 17-1014); ECF #1670225 (No. 15-1363), and Respondent-Intervenor States and Municipalities (“State Respondent-Intervenors”), ECF #1670118 (No. 17-1014); ECF #1670114 (No. 15-1363), to NAHB’s Motion to Sever and Consolidate, ECF #1668929 (No. 17-1014); ECF #1668937 (No. 15-1363). Respondent United States Environmental Protection Agency (“EPA”) does not oppose NAHB’s motion.¹

For the following reasons, Respondent-Intervenors’ arguments lack merit:

1. Respondent-Intervenors do not deny that this Court repeatedly has consolidated petitions for review of an agency’s reconsideration denial with ongoing challenges to the same rule. *See* *Envtl. Resp.-Intvs.’ Mtn.* at 3-4, 9; *State Resp.-Intvs.’ Mtn.* at 6-7. Respondent-Intervenors argue that such consolidation is inappropriate here given the “late phase of the litigation” in the main *West Virginia* cases, *Envtl. Resp.-Intvs.’ Mtn.* at 2; *see also* *State Resp.-Intvs.’ Mtn.* at 5, 7-8, but Respondent-Intervenors cite no authority for the proposition that this Court may grant consolidation only at an early phase of the litigation (*e.g.*, before briefing has begun) in the main case. It is within this Court’s authority to grant

¹ EPA, *Respondents’ Response to Motions to Sever and Consolidate* at 2, No. 17-1014, ECF #1670437 (Apr. 10, 2017); No. 15-1363, ECF #1670438 (Apr. 10, 2017) (“EPA does not object to consolidation of the challenges to the Clean Power Plan [in *West Virginia v. EPA*, No. 15-1363]. . . with the challenges to EPA’s action denying reconsideration petitions” of the Clean Power Plan in *North Dakota v. EPA*, No. 17-1014).

consolidation even after briefing and oral argument is complete in the main case, especially if doing so would promote judicial economy.²

2. In its challenge to the reconsideration denial, NAHB raises notice issues that are of central relevance to the outcome of the Clean Power Plan and are now indisputably ripe for judicial review in *West Virginia* in light of the reconsideration denial. See NAHB Mtn. at ¶ 3. If NAHB's arguments are accepted by this Court, they could result in partial vacature of the rule. Contrary to what Respondent-Intervenors' claim, Env'tl. Resp.-Intvs.' Mtn. at 5; State Resp.-Intvs.' Mtn. at 7-8, these issues are of "exceptional importance" and appropriate for review before the *en banc* panel in *West Virginia*. Fed. R. App. P. 35.

3. Respondent-Intervenors also argue that consolidation would prejudice their interests by delaying resolution of *West Virginia* and the opportunity to lift the U.S. Supreme Court's stay of the Clean Power Plan. Env'tl. Resp.-Intvs.' Mtn. at 5; State Resp.-Intvs.' Mtn. at 8. EPA recently filed motions with this Court to hold the *West Virginia* and *North Dakota* cases in abeyance pending EPA's administrative review of the Clean Power Plan and any resulting rulemakings to

² As explained in NAHB's motion, consolidating NAHB's challenge to the Clean Power Plan reconsideration denial with its closely-related challenge to the Clean Power Plan would promote judicial efficiency and economy and avoid duplication of effort by the Court and the parties. See NAHB Mtn. at ¶¶ 1-3.

rescind or modify the rule.³ This Court has not yet ruled on EPA's motions. If this Court grants EPA's motion to hold *West Virginia* in abeyance, then Respondent-Intervenors' concerns that consolidation would delay resolution of that case likely would become moot.

4. Even if this Court does not grant EPA's motion to hold *West Virginia* in abeyance, the stay of the Clean Power Plan will remain in place until after the resolution of any Supreme Court review of this Court's *en banc* decision in that case, as Respondent-Intervenors acknowledge. *See* Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016); *Envtl. Resp.-Intvs.' Mtn.* at 5. Such final resolution may not occur for months or more. Given this extended timeframe for the potential lifting of the stay of the Clean Power Plan, any additional delay in the resolution of the underlying case from consolidation would not unduly prejudice the interests of Respondent-Intervenors.

5. Finally, not consolidating the challenges would prejudice NAHB, as well as regulated entities and states. In both challenges, NAHB and other petitioners that have similarly moved for consolidation of their respective

³ *See Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance* ("Abeyance Motion"), No. 15-1363, ECF #1668274 (Mar. 28, 2017); No. 17-1014, ECF #1668936 (Mar. 31, 2017); *see also* 82 Fed. Reg. 16,329 (Apr. 4, 2017) (announcing administrative review of Clean Power Plan). NAHB does not oppose EPA's motions to hold the cases in abeyance.

challenges⁴ raise issues that, if accepted by the court, could result in full or partial vacature of the Clean Power Plan. Unless the cases are consolidated, it is possible that this Court or the U.S. Supreme Court could issue a decision in *West Virginia* that would result in lifting the stay of the rule while *North Dakota* remains pending. A subsequent decision in *North Dakota* could then result in full or partial vacature of the rule, after the stay is lifted. Under this scenario, states would end up wasting substantial resources implementing a rule that ultimately would be significantly altered or eliminated—resources that could be devoted to other environmental programs and priorities.⁵ This scenario also would create substantial uncertainty for NAHB's members, which could be affected by state

⁴ See, e.g., Entergy, et al., *Joint Motion to Sever and Consolidate*, No. 17-1014, ECF #1668921 (Mar. 31, 2017), No. 15-1363; ECF #1668932 (Mar. 31, 2017); Utility Air Regulatory Group and the American Public Power Association and LG&E and KU Energy LLC, *Joint Motion to Sever and Consolidate*, No. 17-1014, ECF #1663047 (Feb. 24, 2017); No. 15-1363, ECF #1663046 (Feb. 24, 2017).

⁵ In light of its administrative review of the Clean Power Plan, EPA already has withdrawn proposed guidance that would have assisted states in crafting their implementation plans for the rule. See EPA, *Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details*, 82 Fed. Reg. 16,144 (Apr. 3, 2017). Should the stay of the rule be lifted before EPA's administrative review and any forthcoming rulemakings are complete, states would be left to implement the highly-complex and resource-intensive rule in a vacuum.

implementation plans.⁶ To avoid the inefficiency and prejudice that would result, this Court should consider *all* arguments that could undermine the Clean Power Plan in *West Virginia* before issuing a decision in that case.⁷

For the foregoing reasons, NAHB respectfully requests that the Court grant its motion.

April 14, 2017

Respectfully submitted,

/s/ Megan H. Berge

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⁶ EPA has identified residential energy efficiency programs as a potential element of state plans. *See* EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662, 64,666 (Oct. 23, 2015). NAHB members implement residential energy efficiency programs as part of their home building and remodeling activities, and would be directly affected by the incorporation of such measures into state plans. *See* NAHB, *Addendum to Docketing Statement*, No. 15-1379, ECF # 1589519 (Dec. 18, 2015) at 3.

⁷ Contrary to what Respondent-Intervenors contend, *see* State Resp.-Intvs.' Mtn. at 8; Env'tl. Resp.-Intvs.' Mtn. at 5, consolidation would effectuate expedited review of the Clean Power Plan by allowing this Court to review the entirety of the rule in one go, instead of a piecemeal approach across two separate proceedings.

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 1,247 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

April 14, 2017

/s/ Leslie Couvillion

Leslie Couvillion

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2017, I caused a copy of the foregoing to be served by the Court's CM/ECF System on all counsel of record in this matter who have registered with the CM/ECF System.

/s/ Leslie Couvillion

Leslie Couvillion