

**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 REPLY IN SUPPORT OF
MOTION TO SEVER AND CONSOLIDATE**

The State of North Dakota respectfully submits this reply in support of its motion to sever its petition for review in *State of North Dakota, et al. v. EPA*, No. 17-1014 (*North Dakota v. EPA*), North Dakota’s Motion to Sever and Consolidate,

ECF No. 1670187 (Apr. 7, 2017) (“N.D. Motion to Sever”), and consolidate that petition with North Dakota’s petition for review in *State of West Virginia et al. v. EPA*, No. 15-1363 (*West Virginia v. EPA*).¹ Respondent-Interveners have opposed the motion. Respondent EPA filed a response indicating that it does not oppose the motion but requests that consolidation include all petitions for review of EPA’s denial of reconsideration now pending in *North Dakota v. EPA*. Respondent’s Response to Mots. to Sever and Consolidate, ECF No. 1670437 (Apr. 10, 2017).

Fundamentally, as North Dakota made clear in the N.D. Motion to Sever, North Dakota supports EPA’s motions to hold in abeyance proceedings in both *West Virginia v. EPA* and *North Dakota v. EPA*. All other Petitioners in both cases likewise support EPA’s abeyance motions,² which are well-founded and should be granted given EPA’s ongoing formal review of the “Clean Power Plan” Rule at issue in these cases and issuance of an “advanced notice of forthcoming rulemaking proceedings consistent with the President’s policies” set forth in the March 28, 2017 Executive Order discussed in EPA’s abeyance motions. *See* EPA’s Notice of Executive Order, EPA Review of Clean Power Plan and

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

² Notice of Executive Order, EPA Review of Rule and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance, No. 15-1381, ECF No. 1668276 (March 28, 2017); Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance, No. 17-1014, ECF No. 1668936 (March 31, 2017),

Forthcoming Rulemaking and Motion to Hold Cases in Abeyance at 5, ECF No. 1668274 (Mar. 28, 2017).

If EPA's abeyance motions are granted, the Court can defer ruling on North Dakota's motion to sever and consolidate and may never need to address that motion if the Clean Power Plan Rule is revised or rescinded. EPA's response advocates that same course, emphasizing EPA's request for abeyance of these cases "until 30 days after the conclusion of EPA's review and any resulting forthcoming rulemaking" and requesting that "motions to govern further proceedings [in these cases be] due upon expiration of the abeyance period." Respondent's Response to Motions to Sever and Consolidate at 2-3, ECF No. 1670437 (Apr. 10, 2017).

In essence, North Dakota's motion to sever and consolidate was filed on a protective basis, in the event EPA's abeyance motions are not granted.³ If EPA's abeyance motions are not granted, the N.D. Motion to Sever should be granted, together with the other similar motions filed by other Petitioners.

The Court should reject Respondent-Interveners' contrary proposal that the Court address Petitioners' various legal objections to the Clean Power Plan Rule in piecemeal fashion – partly in *West Virginia v. EPA* and partly in *North Dakota v.*

³ To underscore that point and avoid misleadingly suggesting that the Court needs to rule on the N.D. Motion to Sever, North Dakota noted its support for abeyance in that motion and filed it only after Petitioners' consolidated responses supporting abeyance in both cases were filed. *See* Motion to Sever at 8 n.4.

EPA. Doing so would be contrary to this Court’s precedent requiring that all ripe challenges to a rule be considered together. *See, e.g., Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (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 Ass’n v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011). Piecemeal consideration of the various legal challenges to the Clean Power Plan Rule would also compound the inefficiency and wastefulness of proceeding with these cases while EPA is reviewing – and may well revise or rescind – the Clean Power Plan Rule at issue.

North Dakota’s petition for review of EPA’s reconsideration denial, pending in *North Dakota v. EPA*, demonstrates the inefficiency of piecemeal proceedings in compelling fashion. As noted in North Dakota’s motion to sever and consolidate, all of North Dakota’s objections to the Clean Power Plan Rule, set forth in its petition challenging EPA’s reconsideration denial, stem from EPA’s failure to provide notice and an opportunity to comment on elements of the Rule that were introduced only upon its final promulgation. *See* N.D. Motion to Sever at 3. Similar “notice-and-comment” objections were briefed by Petitioners in *West Virginia v. EPA*, *see* Opening Brief of Petitioners on Procedural and Record-Based Issues at 13-17, ECF No. 1599898 (Feb. 19, 2017), but both EPA, in its response brief, and the Court, at oral argument, questioned whether those objections were

barred for lack of ripeness. *See, e.g.*, Respondent EPA's Initial Brief at 116, ECF No. 1605911 (Mar. 28, 2016).

Thus, notice-and-comment objections are currently before the Court in *West Virginia v. EPA*, but unlike at the time of EPA's brief or of argument, such objections are now indisputably ripe given EPA's denial of the reconsideration petitions including North Dakota's. It would be wasteful and inefficient to start from scratch to brief those types of objections in *North Dakota v. EPA*. And for essentially the same reasons, should EPA's abeyance motions not be granted, all of Petitioners' objections to the Clean Power Plan Rule that are now ripe given EPA's denial of reconsideration should be addressed and resolved at once, rather than in piecemeal proceedings before this Court.

But the most sensible and efficient course for the Court to follow is to grant EPA's abeyance motions and defer – and perhaps avoid altogether – the need to rule on the N.D. Motion to Sever and the other similar pending motions seeking to consolidate all objections to the Clean Power Plan Rule into one proceeding.

Dated: April 24, 2017	Respectfully submitted, STATE OF NORTH DAKOTA WAYNE STENEHJEM ATTORNEY GENERAL <i>s/ Paul M. Seby</i>
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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27(d)(2) and 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that North Dakota's Reply In Support of its Motion to Sever and Consolidate complies with the type-volume limitation of FED. R. APP. P. 27(d)(2)(B) because the motion contains 2,113 words, as counted by Microsoft Office Word 2010 used to prepare the brief; and complies with the typeface and type style requirements of FED. R. APP. P. 32(a)(5) and 32(a)(6) because the motion was prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 pt. Times New Roman font.

s/ Paul M. Seby _____

Paul M. Seby
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State of North Dakota

CERTIFICATE OF SERVICE

I hereby certify that on this day, April 24, 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 _____

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