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

REPLY IN SUPPORT OF 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") hereby reply to the oppositions filed by Respondent-Intervenors to Movants' Joint Motion to Sever and Consolidate. Respondent EPA filed a response indicating that it does not oppose the motion but requests that consolidation include all petitions for review of the denial of reconsideration. Respondent's Response to Mots. to Sever and Consolidate, ECF No. 1670437 (Apr. 10, 2017).

Respondent-Intervenors' oppositions fail to persuasively respond to Movants' contention that consolidation is now necessary to resolve Movants' petitions for review in *West Virginia v. EPA*, No. 15-1363. As Respondent-Intervenors acknowledge, EPA's denial of reconsideration of the Rule ripened objections that Movants raised in their petitions in *West Virginia v. EPA*, No. 15-1363.[1] Under this Court's case law, all objections to the Rule, including those issues ripened by the denial of reconsideration, must be resolved in order to dispose of Movants' *West Virginia v. EPA*, No. 15-1363 petitions for review. *See Portland Cement Ass'n v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998).

[1] *See* State and Municipal Respondent-Intervenors' Opp. to Mots. to Sever and Consolidate at 6, ECF No. 1670118 (Apr. 7, 2017) ("State Opp.").

Appalachian Power and *Portland Cement* together show that this Court has considered itself obligated to review all ripened issues, including those ripened by denials of administrative reconsideration. *Appalachian Power* stands for the proposition that this Court must resolve all issues presented in a petition for review of a rule if those issues have been presented before the agency and are ripe. *Appalachian Power Co.*, 135 F.3d at 818. In *Appalachian Power*, this Court rejected EPA's argument that an issue was not ripe because it was not identical to an issue raised during the public comment period. *Id.* Given its conclusion that the issue was ripe, this Court considered it necessary to decide the issue. *Id.* Respondent-Intervenors argue that because that case concerned an issue raised during the comment period rather than in reconsideration, it is irrelevant.[2] But that argument ignores the central point from *Appalachian Power* that this Court must resolve ripe issues.

Following *Appalachian Power* in *Portland Cement*, this Court consolidated petitions for review of EPA's denials of reconsideration with petitions for review of the challenged rules. *Portland Cement*, 665 F.3d at 184. This Court considered the petitions for review of the rule and the petitions concerning reconsideration in the same proceeding despite the fact that at least one of the issues was raised only

[2] Respondent-Intervenor Public Health and Environmental Organizations' Opp. to Mots. To Sever and Consolidate at 9, ECF No. 1670227 (Apr. 7, 2017) ("Envt'l Opp.").

in the reconsideration petition. *Id.* at 188. That issue concerned whether EPA's rule was arbitrary and capricious based on the enactment of another rule after close of the period for public comment. *Id.* Accordingly, when this Court agreed that the rule failed in that respect, it granted the petition concerning reconsideration. *Id.* at 194.

Respondent-Intervenors argue that this Court's decision in *Portland Cement* to treat the petitions separately in granting relief undermines consolidation here. Envt'l Opp. at 9. But that is not the case. The existence of some distinct issues does not undermine the Court's decision to address issues raised in both the reconsideration and the original petitions. *Portland Cement*, 665 F.3d at 184. In fact, the case for consolidation is even stronger here where there is greater alignment of the issues. Together *Appalachian Power* and *Portland Cement* demonstrate that this Court considers it necessary to review all ripened issues, including those ripened by the denial of reconsideration.

Respondent-Intervenors' reliance on cases decided *before* denial of reconsideration is misplaced. *See* State Opp. at 5. In those cases, the court concluded it could not decide issues that were not yet ripe because petitions for reconsideration were still pending before the agency. *EME Homer Generation, L.P. v. EPA*, 795 F.3d 118, 137 (D.C. Cir. 2015); *Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 549 (D.C. Cir. 2015); *Util. Air Regulatory Grp. v. EPA*, 744

F.3d 741, 743 (D.C. Cir. 2014). This case is entirely different because EPA has now denied Movants' petitions for reconsideration before this court issued a decision in *West Virginia v. EPA*, No. 15-1363. Now that all of Movants' claims are ripe for review, this Court must resolve all issues presented in order to dispose of Movants' petitions for review. *See Appalachian Power*, 135 F.3d at 818.

Even if this Court concludes consolidation is not mandatory but within its discretion, it should exercise such discretion to consolidate and resolve Movants' post-comment period claims along with the main case. The only argument that Respondent-Intervenors offer against exercising that discretion is delay. Envt'l Opp. at 7; State Opp. at 8. But resolving the challenges piecemeal will just as likely prolong resolution of the litigation involving this Rule. If the main petitions are denied by this Court or the Supreme Court, litigation on the reconsideration petitions will still have to proceed. As the public health and environmental organizations observe, Movants "retain all of [our] rights to pursue" these challenges. Envt'l Opp. at 6.

The flaw in Respondent-Intervenors' remaining objections is that the newly-ripened issues are somehow distinct from the "main case." Envt'l Opp. at 10. But that is not true, and is belied by their own briefing. As the state intervenors admit, these are issues "this Court previously declined to sever and hear separately." State Opp. at 8. That is why the fact that *West Virginia v. EPA*, No. 15-1363 is before

the *en banc* court does not bar consolidation, as Respondent-Intervenors argue. When the Court granted *en banc* review, it did so for all of the challenges made to the Rule—including those that arguably had not yet ripened. Similarly, contrary to Respondent-Intervenors' arguments, Envt'l Opp. at 5; State Opp. at 8, the Supreme Court did not distinguish between the resolution of ripened and not-yet-ripened challenges in issuing its stay. The stay provides 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." Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016). Disposition of those petitions includes resolution of issues previously raised and now ripened by EPA's reconsideration denial.

Finally, supplemental briefing is appropriate to address the new arguments and authorities made in EPA's Basis for Denial of Reconsideration Petitions document.[3] That document contains 257 pages and 140 pages of appendices explaining EPA's denial of reconsideration on post-comment-period issues. When deciding such post-comment-period issues this Court considers the reconsideration record in addition to the original rulemaking record. *Sierra Club v. Costle*, 657

[3] EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, 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 (Jan. 11, 2017), https://www.epa.gov/cleanpowerplan/clean-power-plan-petitions-reconsideration-january-2017.

F.2d 298, 361 nn. 253, 256, 384 (D.C. Cir. 1981). Accordingly, fairness dictates that this Court grant supplemental briefing to allow Movants an opportunity to address the new arguments and authorities presented in the reconsideration record.

CONCLUSION

This Court should grant the motion.

Dated: April 14, 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 1,251 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: April 14, 2017 /s/ Elbert Lin

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of April 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