

**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**

NORTH DAKOTA, et al.,

*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY, et al.,

*Respondents.*

No. 17-1014  
(and consolidated cases)

STATE OF WEST VIRGINIA, et al.,

*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY, et al.,

*Respondents.*

No. 15-1363  
(and consolidated cases)

**DENBURY ONSHORE, LLC'S MOTION TO SEVER AND CONSOLIDATE**

Petitioner Denbury Onshore, LLC respectfully moves the Court to (1) sever its petition for review in *Denbury Onshore, LLC v. EPA*, No. 17-1092, from the proceedings in *North Dakota v. EPA*, No. 17-1014; (2) consolidate that petition with proceedings in *West Virginia v. EPA*, No. 15-1363; and (3) order the parties in

*West Virginia v. EPA* to submit a proposal to govern the scheduling of supplemental briefing if the Court does not hold that case in abeyance.

### **BACKGROUND**

On October 23, 2015, respondent U.S. Environmental Protection Agency promulgated a final rule entitled “*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*,” 80 Fed. Reg. 64,661 (the “Final Rule”).

On December 21, 2015, Denbury sought reconsideration of the Final Rule from EPA. At the same time, Denbury filed a petition in this Court, challenging the Final Rule directly. *See Denbury Onshore, LLC v. EPA*, No. 15-1475. The Court consolidated Denbury’s challenge to the Final Rule with other petitions under *West Virginia v. EPA*, No. 15-1363. The Court heard argument in these consolidated challenges on September 27, 2016. It has yet to issue a decision.

On January 17, 2017, EPA rejected Denbury’s reconsideration petition, along with similar petitions filed by dozens of other parties, in a final action entitled “*Denial of Reconsideration and Administrative Stay of the Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units*,” 82 Fed. Reg. 4,864 (the “Reconsideration Denial”). Denbury filed a petition with this Court appealing the Reconsideration Denial on March 17, 2017. *See Denbury Onshore, LLC v. EPA*, No. 17-1092 (the

“Reconsideration Appeal”). By order the Court’s order of March 21, 2017, Denbury’s Reconsideration Appeal was consolidated with *North Dakota v. EPA*, No. 17-1014, along with other petitions challenging the Reconsideration Denial, *see* ECF No. 1666994.

On March 28, 2017, EPA moved to hold *West Virginia v. EPA* and consolidated challenges in abeyance. *See* Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance, No. 15-1363, ECF No. 1668274. Denbury does not oppose this motion. Nor does Denbury oppose EPA’s motion to hold *North Dakota v. EPA* and its consolidated cases in abeyance. *See* 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 (Mar. 31, 2017). This Court has not yet ruled on either motion.

### **REASONS WHY RELIEF SHOULD BE GRANTED**

1. Consolidating Denbury’s Reconsideration Appeal with related challenges to the CPP Final Rule would serve judicial economy and avoid duplicative proceedings. This Court routinely consolidates challenges to an agency’s denial of petitions to reconsider a final rule with ongoing challenges to the same rule, and Denbury’s objections to the Reconsideration Denial implicate the CPP Final Rule’s legality and scope just as the other challenges do. *See, e.g.,*

Petitioners' and Petitioner-Intervenors' Unopposed Motion to Consolidate, *State of North Dakota, et al. v. EPA*, No. 15-1381, ECF No. 1624282 (July 12, 2016); Order, *State of North Dakota, et al. v. EPA*, No. 15-1381, ECF No. 1625550 (July 19, 2016).

2. Consolidation is all the more appropriate here because the Reconsideration Denial has ripened Denbury's post-comment-period objections to the CPP Final Rule. Those objections must be resolved in order to dispose of Denbury's petition for review in No. 15-1475, already consolidated with the *West Virginia v. EPA* case. See *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, 185 (D.C. Cir. 2011).

3. Finally, Denbury's objections to the Reconsideration Denial overlap with objections raised by other petitioners seeking to consolidate *their* appeals from the Reconsideration Denial with the CPP Final Rule challenges, including EPA's failure to provide adequate notice and opportunity to comment on a provision to be codified at 40 C.F.R. § 60.5860(f)(2) imposing burdensome regulations on carbon capture and sequestration in conjunction with off-site enhanced oil recovery (EOR) operations. See Joint Mot. to Sever and Consolidate, No. 17-1022, ECF No. 1668952 (Mar. 31, 2017); Joint Non-Binding Statement of

Issues of State Petitioners, No. 17-1022, ECF No. 1668946 (Mar. 31, 2017).

Granting these motions together would serve judicial economy.

For the foregoing reasons, Denbury respectfully requests that the Court grant this motion, sever its petition in case No. 17-1092 from the proceedings in *North Dakota v. EPA*, No. 17-1014, consolidate its petition with the petitions pending in *West Virginia v. EPA*, No. 15-1363, and order the parties to submit proposals to govern supplemental briefing in the event the case is not held in abeyance.

Respectfully submitted,

/s/Catherine E. Stetson

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Dated: April 17, 2017

**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 764 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.

/s/Catherine E. Stetson  
Catherine E. Stetson

**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2017, I caused a copy of the foregoing to be served electronically through the Court's CM/ECF system on all registered counsel.

/s/Catherine E. Stetson  
Catherine E. Stetson