

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

Petitioner National Association of Home Builders (“NAHB”) respectfully  
moves the Court to (1) sever its petition for review in *North Dakota v. EPA*, No.

17-1014,<sup>1</sup> which challenges the final agency action of respondent United States Environmental Protection Agency (“EPA”) 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 (Jan. 17, 2017) (“CPP Reconsideration Denial”); (2) consolidate that petition with NAHB’s petition for review in *West Virginia v. EPA*, No. 15-1363,<sup>2</sup> which challenges the final EPA rule entitled “*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units.*” 80 Fed. Reg. 64,661 (October 23, 2015) (“CPP Final Rule”); and (3) order the parties in *West Virginia v. EPA* to submit a proposal to govern the scheduling of supplemental briefing in that case, if the Court does not hold that case in abeyance.<sup>3</sup>

In support of this motion, NAHB states as follows:

1. NAHB’s challenge to the CPP Reconsideration Denial raises issues fundamental to the legality and scope of the CPP Final Rule. Consolidating

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<sup>1</sup> In *North Dakota v. EPA*, NAHB is the petitioner in No. 17-1023. NAHB’s petition was consolidated with lead case No. 17-1014, by the Court’s order of January 25, 2017, ECF No. 1657354.

<sup>2</sup> In *West Virginia v. EPA*, NAHB is the petitioner in No. 15-1379. NAHB’s petition was consolidated with lead case No. 15-1363.

<sup>3</sup> On March 28, 2017, EPA filed a motion to hold *West Virginia v. EPA* and consolidated challenges in abeyance. This Court has not yet ruled on the motion. 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 (Mar. 28, 2017). NAHB does not oppose EPA’s motion to hold *West Virginia v. EPA* and consolidated cases in abeyance.

NAHB's challenge to the CPP Reconsideration Denial with its closely-related challenge to the CPP Final Rule would promote judicial efficiency and economy and avoid duplication of effort by the Court and the parties. This Court routinely consolidates challenges to an agency's denial of petitions for reconsideration of a rule with ongoing challenges to that same rule.<sup>4</sup>

2. NAHB's challenge to the CPP Reconsideration Denial shares common issues with those raised by other petitioners seeking consolidation of their respective CPP Reconsideration Denial and CPP Final Rule challenges.<sup>5</sup> These shared issues include objections to EPA's failure to provide adequate notice of and opportunity to comment on elements of the CPP Final Rule that were not available for public comment because they were introduced only when the final rule was published ("Notice Issues"). Granting all pending motions to consolidate would promote judicial efficiency and economy and avoid having this Court hear shared issues in separate proceedings.

3. NAHB's Notice Issues are of central relevance to the outcome of the CPP Final Rule. These Notice Issues are now indisputably ripe for judicial review

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<sup>4</sup> See, e.g., Order, *North Dakota v. EPA*, No. 15-1381 (and consolidated cases), ECF No. 1625550 (July 19, 2016); Order, *United States Sugar Corporation v. EPA*, No. 11-1108 (and consolidated cases), ECF No. 1436267 (May 15, 2013); Order, *Coalition for Responsible Regulation, Inc., et al. v. EPA*, No. 09-1322 (and consolidated cases), ECF No. 1277479 (Nov. 15, 2010).

<sup>5</sup> See, e.g., Joint Motion to Sever and Consolidate by Utility Air Regulatory Group and the American Public Power Association ("UARG") and LG&E and KU Energy LLC ("LKE"), Nos. 17-1014 and 15-1363, ECF No. 1663047 and ECF No. 1663046 (Feb. 24, 2017).

in light of the CPP Reconsideration Denial. *See Portland Cement Ass'n. v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011) (proceeding to the merits of petitioner's objection after determining that petitioner "is not jurisdictionally barred from petitioning EPA for reconsideration and that it may therefore seek review in this Court of EPA's denial"). Consolidating NAHB's CPP Reconsideration Denial and CPP Final Rule challenges and ordering supplemental briefing in the CPP Final Rule challenges would avoid piecemeal review of the CPP Final Rule.

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

March 31, 2017

Respectfully submitted,

/s/ Megan H. Berge

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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 691 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.

March 31, 2017

/s/ Megan H. Berge

Megan H. Berge

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of March, 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/ Megan H. Berge

Megan H. Berge