

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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STATE OF NORTH DAKOTA, <i>et al.</i> ,	)	
	)	
<i>Petitioners,</i>	)	
	)	No. 15-1381 (and
v.	)	consolidated cases)
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, <i>et al.</i> ,	)	
	)	
<i>Respondents.</i>	)	
	)	
	)	

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**PETITIONERS AND PETITIONER-INTERVENORS’  
MOTION TO SUSPEND BRIEFING SCHEDULE**

Petitioners and Petitioner-Intervenors hereby jointly move for a suspension of the briefing schedule in these consolidated cases to allow the filing of petitions for review of the United States Environmental Protection Agency’s (“EPA”) denial of administrative petitions to reconsider the rule before this Court in these cases and to allow consolidation of those petitions for review with the petitions for review in these cases. Respondent EPA and Respondent-Intervenors oppose this motion. In support of this motion, Petitioners and Petitioner-Intervenors state the following:

1. This case involves petitions for review of an EPA final action entitled “Standards of Performance for Greenhouse Gas Emissions From New, Modified,

and Reconstructed Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,510 (Oct. 23, 2015) (“New Source Rule”).

2. On May 6, 2016, EPA published a notice in the Federal Register entitled “Reconsideration of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Notice of final action denying petitions for reconsideration.” 81 Fed. Reg. 27,442 (May 6, 2016) (“Reconsideration Denial”). In the Reconsideration Denial, EPA announced it was denying five petitions that had been filed asking EPA to reconsider the New Source Rule.<sup>1</sup> *Id.*

3. Three of the five petitions for reconsideration that EPA denied were filed by Petitioners in this case: the State of Wisconsin (No. 15-1399), the Energy & Environmental Legal Institute (No. 15-1397), and the Utility Air Regulatory Group (No. 15-1448). Those Petitioners will file petitions for review challenging the Reconsideration Denial, and it is possible that other entities (which may or may not be parties to this case) will file petitions for review as well. Parties have until July 5,

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<sup>1</sup> The Reconsideration Denial also announced EPA’s decision to defer action on the issue of treatment of biomass that was raised in a sixth petition for reconsideration that was filed by the Biogenic CO<sub>2</sub> Coalition and was raised in the State of Wisconsin’s petition for reconsideration (along with other issues that were denied). 81 Fed. Reg. at 27,442. The petition for review filed by the Biogenic CO<sub>2</sub> Coalition (No. 15-1480) has been severed from this case and is being held in abeyance. ECF No. 1605581.

2016, to file petitions for review in this Court challenging the Reconsideration Denial. *See* 42 U.S.C. § 7607(b)(1).

4. Given the relationship between the New Source Rule and the Reconsideration Denial, consolidation of the petitions for review challenging the Reconsideration Denial with the petitions challenging the New Source Rule (the instant case) will serve the interest of judicial economy by allowing the parties to brief and argue at one time the merits of all issues raised by the New Source Rule and the Reconsideration Denial.

5. On March 24, 2016, the Court entered an order establishing a briefing format and schedule for the instant case. ECF No. 1605581. That order directs Petitioners to file opening briefs on July 15, 2016, *id.*, which is just 10 days after the statutory period for filing petitions for review of the Reconsideration Denial expires. Suspension of that deadline for opening briefs will allow time for: (i) petitions for review of the Reconsideration Denial to be filed; (ii) those petitions to be consolidated with the instant case; and (iii) issues statements, docketing statements, other initial submissions, and the certified index to the record to be filed in the dockets for the petitions for review of the Reconsideration Denial.

6. Petitioners propose to file a motion to consolidate the petitions for review of the Reconsideration Denial with this case by July 12, 2016—7 days after the deadline to file petitions for review of the Reconsideration Denial.

7. Petitioners propose to file a motion to amend the briefing order in this case by August 4, 2016—30 days after the deadline for filing petitions for review of the Reconsideration Denial. Petitioners anticipate that the motion will seek to amend the Court’s earlier briefing order in only two respects: (1) a uniform shifting of the deadlines by a fixed number of days; and (2) proposed appropriate additions to the word allocations for the briefs to accommodate the new issues arising from the Reconsideration Denial. Otherwise, Petitioners foresee no change to a format of three Petitioners’ briefs and a schedule that is consistent with the one entered for this case. In their motion to amend the briefing order that will be filed no later than August 4, 2016, Petitioners will propose the specific number of days by which the briefing schedule should be shifted. Waiting until then to propose the specific number of days will allow any new petitioners to the case to be known and to be consulted.

8. The Court has handled this type of situation in this way before in an effort to preserve party resources and to promote judicial economy. *See* Respondent’s Motion To Consolidate Case No. 10-1234 with Case No. 09-1322 and To Defer Deadline for Submission of Certified Index to the Administrative Record, *Coalition for Responsible Regulation, Inc., et al. v. EPA*, No. 10-1234 (and consolidated cases), ECF No. 1273770 (Oct. 26, 2010) (EPA motion to consolidate petitions for review challenging Endangerment Finding with petitions for review challenging denial of reconsideration petitions for the Endangerment Finding); Order, *Coalition for*

*Responsible Regulation, Inc., et al. v. EPA*, No. 09-1322 (and consolidated cases), ECF No. 1277479 (Nov. 15, 2010) (order granting motion to consolidate).

9. Temporarily suspending the briefing schedule in this case will not cause harm to EPA or to Respondent-Intervenors. The New Source Rule has been in effect since January 8, 2014, the date it was proposed. *See* 42 U.S.C. § 7411(a)(2), (b)(6); 79 Fed. Reg. 1430 (Jan. 8, 2014).

10. Petitioners and Petitioner-Intervenors consulted with Respondent EPA and with Respondent-Intervenors to determine their position on this motion and have been informed that they oppose it.

WHEREFORE, Petitioners and Petitioner-Intervenors request that the Court issue an order: (1) suspending the briefing schedule in this case; (2) directing Petitioners to file a motion to consolidate the petitions for review of the Reconsideration Denial with this case no later than July 12, 2016; and (3) directing Petitioners to file a motion to amend the briefing order in this case no later than August 4, 2016, to propose expeditious deadlines for the filing of briefs and the deferred appendix and to propose appropriate additions to the word allocations for the briefs to accommodate the new issues arising from the Reconsideration Denial.

Dated: May 24, 2016

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of May, 2016, the foregoing document was electronically filed with the Clerk of the Court using the Court's CM/ECF system. All registered CM/ECF counsel were electronically served by the Court's CM/ECF system.

/s/ Allison D. Wood  
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