



The undersigned Intervenor-Respondent States and Municipalities (State Intervenor) oppose petitioner North Dakota's untimely motion to sever and consolidate filed on April 11, 2017, ECF No. 1670187. The Court's February 24, 2017 Order in *North Dakota v EPA*, No. 17-1014, set March 31, 2017 as the procedural motion deadline. Contrary to North Dakota's contention, N.D. Mot. 8, n.4, its motion to consolidate is a procedural motion subject to such deadline. *See* D.C. Cir. Handbook of Practice and Internal Procedure 28 (Jan. 26, 2017 rev.) ("Procedural motions are those that may affect the progress of the case through the Court, *e.g.*, . . . motions to consolidate, . . ."). Thus, the Court should reject North Dakota's motion as untimely, as well as prejudicial in light of the Court's determination to expedite *West Virginia v. EPA*, No. 15-1363.

If entertained, the Court should deny North Dakota's motion and resolve the *North Dakota* reconsideration proceedings in the regular course for the reasons stated by State Intervenor in their oppositions (ECF Nos. 1665788 & 1670114) to nearly identical motions to sever and consolidate previously filed by a subset of petitioners in these cases. North Dakota's attempt to delay resolution of this case so that it may file supplemental briefing on issues that have either been fully briefed and argued in *West Virginia* or that can be fully considered and resolved by a three-judge panel in *North Dakota*, would be inefficient and inconsistent with

this Court's practice in similar cases, and would result in unnecessary and prejudicial delay in resolving the *West Virginia* case.

On the other hand, North Dakota and the other petitioners seeking consolidation cannot demonstrate any prejudice from denial of consolidation. The possibility that this Court's resolution of *West Virginia* could result in the stay of the Rule being lifted while the petitions in *North Dakota* are still pending is entirely speculative. In any event, the stay would only be lifted if the Rule were upheld by this Court and/or the Supreme Court. At that time, petitioners in *North Dakota* could seek a new stay of the Rule based on the arguments presented in that case that were not resolved in *West Virginia*. Petitioners would of course need to establish the prerequisites for such a stay, including a likelihood of success on the merits of those claims and irreparable harm.

### **CONCLUSION**

This Court should deny the motion.

Dated: April 17, 2017

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

The undersigned attorney, Morgan A. Costello, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 394 words.

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*/s/ Morgan A. Costello*

MORGAN A. COSTELLO

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Opposition to North Dakota's Motion to Sever and Consolidate was filed on April 17, 2017 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Morgan A. Costello  
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