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

CENTER FOR BIOLOGICAL DIVERSITY **Petitioner,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY** **Respondent.**	**No. 10-1115 (and consolidated cases)**

MOTION TO INTERVENE IN SUPPORT OF NEITHER SIDE

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Rule 15(b) of this Court, the Chamber of Commerce of the United States of America respectfully moves to intervene in the above-captioned proceeding.

I. Background and Interests of Proposed Intervenor

On April 2, 2010, the United States Environmental Protection Agency ("EPA") published the final action that is the subject of this proceeding. *See Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs; Final Rule*, 75 Fed. Reg. 17,004 (Apr. 2, 2010) [hereinafter "PSD Triggering Rule"]. Among other things, EPA

determined in the PSD Triggering Rule when the Prevention of Significant Deterioration ("PSD") program — a stationary source regulatory program established under Title I of the Clean Air Act — would become applicable for the first time to emissions of greenhouse gases.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. In consolidated case Number 10-1123, the Chamber has filed its own challenge to the PSD Triggering Rule, which it believes is unlawful for a variety of reasons, including that it is part of a series of artificially compartmentalized rulemakings that truly comprise an overarching EPA policy initiative set in motion in 2009 to regulate greenhouse gas emissions from stationary sources, using Clean Air Act mechanisms EPA freely admits, in a related rulemaking, are "absurd." *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule*, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010).

Based on prior positions the Center for Biological Diversity ("CBD") has taken, the Chamber reasonably believes that CBD has filed the case into which the Chamber now seeks intervention to assert that in some fashion EPA did not go ***far***

enough or fast enough in regulating greenhouse gas emissions from stationary sources. Among other sources,[1] this is clear from the fact that CBD has prominently filed a rulemaking petition with EPA requesting that the Agency take the extraordinary and unprecedented step of applying the National Ambient Air Quality Standards ("NAAQS") program in Title I of the Clean Air Act to greenhouse gas emissions. *See* Center for Biological Diversity & 350.org, Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act, *available at* http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf (last visited June 28, 2010).

Applying the NAAQS program to greenhouse gas emissions would be "absurd" for reasons similar to why application of the closely related Title I PSD program, with its localized PSD "increments," would be absurd. *See Environmental Defense v. EPA*, 489 F.3d 1320, 1331 (D.C. Cir. 2007) (describing how the NAAQS and PSD increment programs fit together). The NAAQS program operates on the basis of requiring reductions in the levels of pollutants

[1] *See also* Comments to EPA from Kevin Bundy, Senior Attorney for the Center for Biological Diversity, on Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program, Proposed Rule (Dec. 3, 2009) (Docket ID EPA-HQ-OAR-2009- 0597-0101) (arguing that greenhouse gas emissions have been subject to PSD regulation since Congress first required electric utilities to monitor and report such emissions in 1990).

that are largely locally released and concentrate in the ambient air of a region to create localized air quality problems. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1037 (D.C. Cir. 2001) (noting that "[m]uch air pollution is a local or regional problem," and that the Clean Air Act utilizes specialized mechanisms to deal with contributions to NAAQS non-compliance by air pollution transported across regions). By contrast, greenhouse gas levels are evenly mixed in the global atmosphere. Hence, with respect to greenhouse gas emissions, the NAAQS program could never function as Congress intended — to discipline and incentivize States with air quality deficiencies differently from States having NAAQS-compliant air quality. Instead, were a greenhouse gas NAAQS to be established, every State would be classified simultaneously and identically as falling inside or outside of compliance. CBD's approach to the Clean Air Act is extreme and insupportable.

The Chamber thus has important interests in intervening into CBD's case challenging the PSD Triggering Rule because CBD's positions, if they were to prevail, would result in onerous regulation and potentially in fines and penalties for Chamber members. Moreover, CBD and EPA have signaled that an attempt might be made to sever this case from the other consolidated cases involving the PSD Triggering Rule. *See* Unopposed Motion to Govern Further Proceedings, in *Sierra Club v. EPA*, No. 09-1018 (and consolidated cases), at 8 (June 9, 2010) ("EPA and

CBD have agreed to file a joint motion to have CBD's claims severed from that case and consolidated with this case in the near future.") (also noting that the *Sierra Club* case, and possibly this CBD case, if severed and consolidated with *Sierra Club*, should be placed into abeyance).[2]

Severance of CBD's case from the other PSD Triggering Rule cases, including the Chamber's, would raise the prospect that challenges to ***the same EPA final action*** would be resolved — merely from competing standpoints — in a piecemeal fashion. This would not only be burdensome to the Court, but it would threaten to give proponents of greenhouse gas regulation "two bites at the regulatory apple" — one to help defend EPA's PSD Triggering Rule from review by the business and public interest communities, and another to either try to undo any decision in which the opponents of such regulation prevailed or to force EPA to impose additional greenhouse gas regulations on stationary sources, should its

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[2] This motion was "unopposed" only insofar as it was filed before the business community intervenors were granted intervention, though it was clearly the product of EPA discussions with CBD, which is a non-party to that case. After intervention status was granted, the motion was indeed opposed by a group of intervenors, including the Chamber. Resolution of EPA's motion to govern the *Sierra Club* proceedings remains pending. *See also* Motion to Govern Further Proceedings, in *Coalition for Responsible Regulation, et al. v. EPA*, No. 10-1073, 10-1083 (and consolidated cases), and 10-1109 (and consolidated cases), at 4 (June 24, 2010) (EPA noting that CBD's petition is that "its arguments in No. 10-1115 are sufficiently different from the other Petitioners' arguments that severance is warranted under this Court's rules," without indicating that EPA continues to join in that position).

current approach survive judicial review. There is no warrant for such an inefficient and strategic approach, and an opposition to a motion EPA filed in *Sierra Club* that the Chamber joined explains in greater detail why that is so. *See* Joint Response of Intervenor-Respondents to Respondent's Motion to Govern Further Proceedings, in *Sierra Club v. EPA*, No. 09-1018 (June 22, 2010). The important point for this Motion to Intervene is that especially if the CBD case is severed, it will be especially important for the Chamber's to be allowed to participate in that case.

Many other Petitioners from the business or public interest community opposing EPA's regulatory initiatives in this area have filed motions to intervene in support of EPA in the CBD's case. The Chamber instead takes the approach of filing a Motion to Intervene in Support of Neither Side in CBD's suit. The Chamber's position is that EPA's PSD Triggering Rule is unlawful (as noted above) ***and*** that CBD's position that more stringent or more rapid regulation of greenhouse gas emissions is called for is also unlawful. It therefore is properly aligned with neither side in CBD's petition for review. Such an approach is fully consistent with the "traditionally flexible approach to appellate procedure" that this Court has applied. *Synovus Fin. Corp. v. Board of Governors of the Federal Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1992); *see also Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 740 F.2d 203, 206 (2d Cir. 1984);

cf. Supreme Court Rule 33.1(g)(xi) & 37.3(a) (noting that *amicus* briefs can be filed in support of neither side). Granting intervention to the Chamber in this alignment is especially fitting given that the precise parameters of CBD's challenge are unknown at this time, and even a non-binding summary of that position in CBD's Statement of Issues is not due before the deadline for seeking intervention in this case expires.[3]

II. Grounds for Intervention

The Chamber seeks to intervene in these consolidated cases because it has a direct and substantial interest in these proceedings that cannot be adequately represented by any other party. *See Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (intervention should be granted if "representation" by other parties "'may be' inadequate"). "Persons whose legal interests are at stake are appropriate intervenors . . . ." *Sierra Club v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004).

The Chamber represents numerous stationary source businesses that will be "directly affected by [the] application" of the PSD program to greenhouse gas

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[3] The Chamber is an intervenor aligned with EPA in the *Sierra Club* case. But that case is distinguishable in that it involves defense of an EPA decision that the regulation of stationary source greenhouse gas emissions had ***not been triggered***. Now that EPA's position has changed to advocating the view that the PSD program has been triggered, the Chamber does not believe it can appropriately be fully aligned with EPA, even in a case where CBD is the Petitioner.

emissions. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744 (D.C. Cir. 1986). *Accord Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (where entity had "a substantial interest in the outcome of the petition, the Court granted its petition to intervene pursuant to Fed. R. App. P. 15(d).").

The Chamber's principal position in this and all related litigation will be that the regulation under the Clean Air Act of stationary source greenhouse gas emissions, as EPA has structured such regulation, is unlawful. In the alternative, however, the Chamber does expect to argue that EPA regulation should not be made more stringent or accelerated. This Court has long granted intervention motions by businesses seeking to defend agency rulemaking outcomes to one degree or another. *See, e.g., Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962) (referencing one category of refiners intervening in favor of an agency to defend a rule challenged by another category of refiners). Granting intervention where the members of a trade association benefit from or are protected by provisions in final rules challenged by other parties is entirely appropriate. *See, e.g., Consumer Union of U.S., Inc. v. FTC*, 801 F.2d 417 (D.C. Cir. 1986).

In this instance, it goes without saying that EPA is not situated adequately to represent the Chamber's interests. "Given the minimal burden on the movants . . . we conclude that the government's representation of the intervenors' interest is inadequate." *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (citing

Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972) (burden on a prospective intervenor to show that its interests are not adequately represented by an existing party "should be treated as minimal")).

This intervention Motion is timely, having been filed within the time period specified in Fed. R. App. P. 15(d) and Fed. R. App. P. 26(a)(1)(C). The Court has not yet set a briefing schedule and none of the parties have tendered their initial submissions. Also, as noted above, CBD (or CBD and EPA jointly) may be moving to sever CBD's case from the other PSD Triggering Rule cases, and hold it in abeyance. Hence, no party to this case will suffer prejudice from the Chamber's intervention.

Finally, it is no barrier to intervention by the Chamber into CBD's petition for review challenging the PSD Triggering Rule that the Chamber has itself challenged that final agency action, even if the cases remain consolidated. *See, e.g., Dynegy Midwest Generation, Inc. v. FERC*, No. 09-1306 (Feb. 25, 2010) (granting intervenor status to petitioning parties in related, consolidated cases); *National Pork Producers Council v. EPA*, No. 09-1104 (April 29, 2009) (same); *Mississippi v. EPA*, No. 08-1200 (June 30, 2008) (same); *New York v. EPA*, No. 06-1416 (March 22, 2007) (same). Indeed, over EPA's objection, one trade association petitioner challenging the related rulemaking known as the Endangerment Rule, *see Endangerment and Cause or Contribute Findings for*

Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009), was granted intervention status as well. *See* Order in *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (June 10, 2010) (granting intervention in the consolidated cases on condition the trade association petitioner was not seeking to intervene into its own case). The Chamber seeks intervention rights here in CBD's case and consolidated cases, but does not seek to intervene in its own case.

III. Conclusion

For the reasons stated above, the Chamber's motion to intervene in these cases should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, I electronically filed the foregoing with the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. As to non-CM/ECF users, I have caused a copy of the foregoing document to be sent to the following non-CM/ECF users via First-Class Mail, postage-prepaid:

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