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)**

REPLY BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF MOTION TO INTERVENE

The Center for Biological Diversity is seeking two separate bites at its cherished apple of seeing the Clean Air Act's Prevention of Significant Deterioration ("PSD") program applied for the first time to greenhouse gases "GHGs"). Step One of CBD's plan calls for it to sit on the sidelines and root for EPA to defend successfully a judicial challenge to the Agency's decision to trigger the application of PSD to GHGs as of January 2, 2011. Step Two calls for CBD to reactivate as necessary its own suits seeking to impose an *immediate* duty on EPA to regulate GHGs under the Act, depending on the outcome at Step One.

Disappointed in the opposition this strategy has drawn from business trade

associations and public interest groups whose views on law and environmental policy differ from CBD's views, CBD vociferously contests the intervention of any of these groups into its case. But for reasons explained below, if CBD were to succeed in getting two separate opportunities to seek PSD-based regulation of GHGs in court, groups such as the Chamber of Commerce of the United States of America ("Chamber") should be permitted to participate as intervenors in both proceedings. Permitting intervention in the above–captioned case — CBD's second-bite-at-the-apple lawsuit — is the only way to ensure that the interests and perspectives of the Chamber's members continue to be heard alongside and in contrast to CBD's perspectives in all potentially relevant proceedings.

ARGUMENT

As an initial matter, CBD does not dispute the Chamber's characterizations of CBD's legal positions and objectives. Specifically, CBD does not deny that it intends to argue that "EPA did not go far enough or fast enough in regulating greenhouse gas emissions from stationary sources." Chamber Mot. to Intervene at 2-3. Instead, CBD concedes the point. *See* CBD Opp. to Intervention at 2. Likewise, CBD does not deny that it maintains the extreme position that the ill-suited national ambient air quality standards ("NAAQS") program must be applied to GHG emissions. *Id.* at 3-4. Nor, beyond conceding the obvious by stating that it wishes to move forward EPA's current January 2, 2011, date for applying PSD

to GHG emissions, does CBD do anything to clarify the precise contours of the arguments it will advance against the PSD Triggering Rule and how those arguments differ from Sierra Club's challenges to EPA's prior Johnson Rule in Case Number 09-1018. *See id.* at 7.

1. Instead of disputing the Chamber's characterizations of the CBD litigating positions, CBD argues that the business community's interests are adequately represented by EPA. CBD contends in this regard that EPA can represent the Chamber's interest in CBD's challenge because the Chamber has the same interest as EPA in defending EPA's currently scheduled January 2, 2011 onset for PSD-based regulation of GHG emissions and because a vast array of business interests have challenged EPA's PSD Triggering Rule (and related EPA GHG rules). CBD Opp. to Intervention at 5-6. This position overlooks the following:

First, notwithstanding that EPA and business trade groups generally agree that the PSD program should not be applied to GHG emissions occurring before January 2, 2011, CBD concludes much too hastily that, therefore, EPA's position and the position of the Chamber and other business groups are "identical." CBD Opp. to Intervention at 5, 10. With all respect to CBD, this assertion mistakenly projects onto the business community CBD's own assumption that the thing that matters as to EPA's PSD Triggering Rule is *the timing of when* and not

the question of whether the PSD program will become applicable to regulated parties. The "identity" of interests CBD claims is the product of CBD's own wishful but misguided thinking.

Second, the mere fact that an array of individual businesses and business trade associations have challenged this particular GHG-related rulemaking, or other GHG-related rulemakings, is not evidence that EPA and business groups have congruent legal positions. Quite the opposite, the fact these groups all are petitioning to review EPA's PSD Triggering Rule, instead of intervening in support of the Rule, show how truly novel, economically significant, and intensely controversial EPA's GHG-related rulemakings are in the eyes of the business community.

Third, contrary to CBD's arguments, an EPA filing in an older, related case makes clear that EPA's litigation strategy is far more closely aligned with that of CBD than with that of the Chamber. Indeed, the business community's suspicions about a possible EPA-CBD alignment are further confirmed by the large number of motions for intervention into this case submitted by business groups like the Chamber.

In particular, on June 9, 2010, EPA filed an "unopposed" motion in Case No. 09-1018 reflecting a carefully honed agreement between EPA and CBD, without even consulting with business community litigants. *See* Unopposed

Motion to Govern Further Proceedings, in *Sierra Club v. EPA*, No. 09-1018 (and consolidated cases), at 8 (June 9, 2010) ("EPA June 9 Motion"). This intricate EPA-CBD agreement is comprised of multiple procedural steps: (i) severance of CBD's challenge to the PSD Triggering Rule; (ii) consolidation of CBD's severed challenge to the PSD Triggering Rule with the older case captioned *Sierra Club v. EPA*, No. 09-1018; and (iii) placement of that new and peculiar amalgam of cases into temporary abeyance, subject to revival based on what is, in turn, a detailed set of activation conditions that are not even fully described. *See id*. It strains credulity for CBD to argue, in view of this carefully honed EPA-CBD agreement that will be vigorously opposed by business groups, that "EPA's and movant-intervenors' interests are *perfectly aligned*, and intervention should not be granted." CBD Opp. to Intervention at 5 (emphasis added).

2. CBD also argues that "the motion by the U.S. Chamber of Commerce . . . to intervene on neither party's side [is] unsupported by case law, contrary to this Court's case management procedures and wholly unnecessary." CBD's Opp. to Intervention at 2; *see also id.* at 8-10. But crucially, CBD cites no case law precluding intervention in support of neither side, and the Chamber is aware of none. Certainly, Federal Rule of Appellate Procedure 15(d) does not preclude such a procedural posture:

> Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave

> to intervene with the circuit clerk and serve a copy on all parties. The motion — or other notice of intervention authorized by statute — must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

Indeed, Rule 15(d) does not even reference "sides" to a dispute, and it provides only that motions for intervention "must contain a concise statement of the interest of the moving party and the grounds for intervention." The plain terms of this Rule clearly envision protected "interests" that are more diverse than the binary pair of competing "sides" — one presumably affirmative and the other negative — that CBD is envisioning.

Likewise, CBD also finds no support in this Court's Circuit Rules or its case management procedures. Circuit Rule 15(b) does not preclude the granting of a petition to intervene in support of neither side. Nor do the Court's case management procedures concerning intervention limit the contemplated interests in a dispute to a binary pair of "sides" in the way CBD's opposition suggests.

3. Relatedly, CBD contends that, contrary to good case-management practices, briefing will somehow be multiplied if the business groups' intervention requests are granted. But this contention ignores the root problem, which is solely of CBD's making: If the CBD case remains part of the consolidated cases challenging the PSD Triggering Rule, then there will likely be no need for separate intervenor briefs directed at CBD's individual case and a proliferation of briefing

will easily be avoided. In that event, the consolidated cases challenging the PSD Triggering Rule will have a familiar and straightforward, if admittedly complex, structure: (i) briefing from the business community and allied public interest groups challenging the PSD Triggering Rule as going too far in regulating GHG emissions; (ii) briefing from CBD challenging the PSD Triggering Rule as not going far enough in regulating GHG emissions; and (iii) briefing from EPA defending its Rule against the challenges from both directions, plus the usual panoply of intervenor and *amicus* briefing supporting or assailing EPA, as appropriate.

4. Getting way ahead of itself, CBD argues that if the proposed interventions are granted, then all of the business and public interest intervenors opposed to it should be limited to a single brief. *See* CBD's Opp. to Intervention at 6-7. To be sure, determining the structure and lengths for briefing of this case will be critical (given that this rulemaking is part of one of the most significant set of cases ever to come before this Court), but those decisions are for a later day. Tellingly, the EPA-CBD deal (if approved) calls for a briefing format to be established months down the road and only once the proposed abeyance is lifted. *See* EPA June 9 Motion at 7. The sole issues for today are whether the Chamber's intervention into CBD's case will be granted and whether the Chamber's voice will

be heard in the event CBD pulls off its carefully negotiated breakout from the main PSD Triggering Rule proceeding.

5. As a parting shot, CBD ironically accuses the Chamber of trying to have "four bites" at the apple in attacking the PSD Triggering Rule. CBD Opp. to Intervention at 10. But under the Chamber's view that all cases challenging the PSD Triggering Rule should remain consolidated, both the Chamber and CBD would be dealt with fairly and even-handedly, and each would have the same opportunity to prepare appropriate briefing explaining their respective grounds for challenging EPA's rulemaking.

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For the reasons stated above, CBD's effort to achieve breakout from this Court's main PSD Triggering Rule review proceeding and then exclude the Chamber from participating in its "second bite" follow-on proceeding should be denied. In the alternative, the Chamber previously indicated that if it is not granted intervention into CBD's case in support of neither side (the posture the Chamber thinks most appropriate), then it should be granted permission to intervene in support of EPA. See Chamber Intervention Motion at 8. Although CBD declines to respond to this proposed alternative relief, the proposal remains a sound one, and it should be granted in the event the Chamber's primary position is not adopted.

CONCLUSION

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 July 16, 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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