ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,	)	
Petitioners,	)	
v.	)	**No. 09-1018 and consolidated case No. 09-1088**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
Respondents.	)	

JOINT RESPONSE OF INTERVENOR-RESPONDENTS TO RESPONDENT'S MOTION TO GOVERN FURTHER PROCEEDINGS

The undersigned Intervenor-Respondents (hereinafter, collectively, "Intervenor-Respondents")[1] respectfully submit this joint response in opposition to Respondent Environmental Protection Agency's ("EPA" or "Agency")

[1] The Intervenor-Respondents that join in this response are: (a) the Chamber of Commerce of the United States of America, the American Chemistry Council, the American Coke and Coal Chemicals Institute, the American Forest and Paper Association, the American Iron and Steel Institute, the American Petroleum Institute, the National Association of Manufacturers, the National Oilseed Processors Association, and the National Petrochemical and Refiners Association; (b) the Utility Air Regulatory Group; (c) Deseret Power Electric Cooperative; (d) the Electric Reliability Coordinating Council and the Council of Industrial Boiler Owners; and (e) the Clean Air Implementation Project.

"unopposed" motion to govern further proceedings in this case.[2] Specifically, if the petitions for review in this case will not be voluntarily dismissed, Intervenor-Respondents ask that the Court deny EPA's request to hold the petitions for review in abeyance. Intervenor-Respondents similarly ask that the Court deny any request (*see* EPA Mot. at 6) to sever *Center for Biological Diversity v. EPA*, No. 10-1115, from *American Iron & Steel Institute v. EPA*, No. 10-1109 (and consolidated cases), and to consolidate, and to hold in abeyance, No. 10-1115 with the present case.

In short, holding this case in abeyance is inappropriate because the issues presented directly relate to a subsequent EPA final action that—if EPA's motion is granted—will be litigated separately from the present case, and very possibly before a different panel. Continuing to hold this case in abeyance would thus be contrary to EPA's rationale for asking to hold it in abeyance last year, *i.e.*, to serve the interests of judicial economy and to allow challenges related to the same issue

[2] EPA designated its motion as "unopposed" on the grounds that the Petitioners—*i.e.*, three environmental organizations (Sierra Club, Natural Resources Defense Council, and Environmental Defense Fund, petitioners in No. 09-1018 ("Environmental Group Petitioners")) and one state (California, petitioner in No. 09-1088)—consented to the motion. At the time EPA filed its motion on June 9, 2010, all motions for leave to intervene in this case remained pending, and, apparently on that basis, counsel for EPA did not contact counsel for Intervenor-Respondents to obtain their position on EPA's motion. EPA did, however, contact a non-party, Center for Biological Diversity, to secure its agreement to EPA's motion. On June 11, 2010, the Court granted the motions to intervene, and Intervenor-Respondents now timely oppose EPA's motion.

to be heard and decided in one proceeding. Furthermore, EPA's proposal to sever one petition to review the subsequent rulemaking and to consolidate it (and hold it in abeyance) with this case is even more problematic, as it would permit the single petitioner the opportunity to re-litigate the subsequent rulemaking after another panel of this Court will have already considered it.

BACKGROUND

On January 15, 2009, Environmental Group Petitioners filed a petition for review of an interpretive memorandum (the "PSD Interpretive Memo") issued by EPA under the Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*[3] California filed a petition for review of the same document on March 2, 2009, and the Court subsequently consolidated the two petitions for review. The PSD Interpretive Memo provides EPA's interpretation of 40 C.F.R. § 52.21(b)(50), which defines which pollutants are subject to requirements of the CAA's Prevention of Significant Deterioration ("PSD") preconstruction permitting program, 42 U.S.C. §§ 7470-7479. Petitioners contend the PSD Interpretive Memo is final agency action subject to judicial review under the CAA and that emissions of carbon dioxide and other greenhouse gases ("GHGs") are *currently* subject to the PSD program's requirements, contrary to the PSD Interpretive Memo's position.

[3] The PSD Interpretive Memo was submitted to this Court by Environmental Group Petitioners along with their petition for review on January 15, 2009.

Intervenor-Respondents include business organizations and trade associations whose members include companies engaged in virtually all business sectors in the United States, including manufacturing, construction, retail, electric generation, and production and refining of petroleum. Members of Intervenor-Respondent associations own and operate facilities that emit carbon dioxide and other GHGs and, thus, have a substantial interest in opposing Petitioners' position, which would trigger costly and burdensome new permitting processes and potentially impose enormously expensive GHG emission limitation requirements on a wide range of industrial, utility, commercial, and other enterprises. Petitioners would likely argue that these new requirements should apply to existing projects and facilities, not just future activities, thus magnifying these costs and other burdens. For these reasons, Intervenor-Respondents timely filed motions for leave to intervene in support of EPA in February 2009.

On February 17, 2009, EPA granted a request by Petitioner Sierra Club and others for administrative reconsideration of the PSD Interpretive Memo and simultaneously moved the Court to hold this case in abeyance while EPA conducted reconsideration proceedings. In support of its motion for abeyance, EPA stated that

> it would serve the interests of judicial economy and the parties to allow EPA to complete its reconsideration of the [PSD Interpretive] Memo, take a final action with respect to reconsideration, and

> consolidate any potential new challenges to EPA's final action in one proceeding before the Court.

Unopposed Motion To Hold Case in Abeyance Pending Completion of Administrative Reconsideration at ¶ 5 (Feb. 17, 2009) ("EPA February 2009 Mot."). The Court granted EPA's motion on February 19, 2009.

On April 2, 2010, after completion of public notice-and-comment reconsideration proceedings, EPA published a final decision that affirms the basic position of the PSD Interpretive Memo, but which also sets forth EPA's position on other issues not covered by the Memo. *See* Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,006-07, 17,015-23 (Apr. 2, 2010) ("Reconsideration Rule") (final EPA action after soliciting "public comment on the issues raised in the [PSD Interpretive] Memo" and additional issues, *id.* at 17,005).

For example, the Reconsideration Rule addresses additional issues concerning (a) the specific timing of applicability of PSD requirements to GHGs (making those requirements applicable to GHGs beginning on January 2, 2011); (b) transition for pending PSD permit applications; (c) PSD program implementation by EPA and states; and (d) the applicability to GHGs of requirements of the CAA's Title V operating permit program. *Id.* at 17,004, 17,019-23. In a subsequent but related rulemaking, EPA promulgated amendments to the Code of Federal Regulations that codify elements of the Reconsideration

Rule. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) ("Tailoring Rule") (amending C.F.R. provisions implementing PSD and Title V programs).[4]

Numerous parties, including several of the Intervenor-Respondents here, filed timely petitions for review in this Court challenging certain aspects of the Reconsideration Rule. *See, e.g., Clean Air Implementation Project v. EPA*, No. 10-1099; *American Iron & Steel Institute v. EPA*, No. 10-1109 and consolidated cases (including *Utility Air Regulatory Group v. EPA*, No. 10-1122; *Chamber of Commerce v. EPA*, No. 10-1123; *National Association of Manufacturers, et al. v. EPA*, No. 10-1127); *see also* EPA Mot. at 3 n.1 (noting that the Reconsideration Rule "has been challenged by a number of parties that are expected to oppose application of the PSD permitting program to greenhouse gases"). One environmental organization, the Center for Biological Diversity ("CBD"), filed a petition for review of the Reconsideration Rule (No. 10-1115). *See* EPA Mot. at 3 n.1 (noting that the purpose of CBD's petition is "to seek wider application of the PSD permitting program to greenhouse gases"). None of the four Petitioners in the present case, however, filed a petition for review of the Reconsideration Rule.

[4] Thus far, two petitions for review of the Tailoring Rule have been filed in this Court: *Southeastern Legal Foundation, et al. v. EPA*, No. 10-1131, and *Coalition for Responsible Regulation, Inc. v. EPA*, No. 10-1132. Under CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1), the deadline for filing petitions for review of that rule is August 2, 2010.

On June 9, 2010, EPA filed its motion to govern further proceedings in the present case. EPA's motion asks the Court to continue holding these cases in abeyance "indefinitely," EPA Mot. at 5, while litigation on petitions for review of the Reconsideration Rule and related EPA actions, such as the Tailoring Rule, proceeds. The requested abeyance, however, could be lifted "upon the motion of one of the parties for good cause"—with "good cause" defined as including, but not limited to, "any change in EPA's interpretation of its PSD regulations, or other events that cause a delay in commencing PSD permitting for greenhouse gases under the Clean Air Act as of January 2, 2011." *Id.*

Further, EPA states that it is contemplating filing a joint motion with CBD—which is not a party in this case—to have CBD's petition for review of the Reconsideration Rule "severed from that case and consolidated with this case." *Id.* at 6. EPA adds that, "based on the assumption that CBD's claims will be made a part of this case, CBD also agrees to the relief requested in this Motion." *Id.*

ARGUMENT

The instant motion to hold this case in indefinite abeyance contradicts the express basis of EPA's representations to this Court when it sought temporary abeyance in February 2009. At that time, EPA represented that to avoid "unnecessary expenditure of judicial resources," it made sense to temporarily hold this litigation in abeyance so that future "challenges to EPA's final action" after

reconsideration rulemaking could be consolidated into "one proceeding before the Court." EPA February 2009 Mot. at ¶ 5. In reliance on these representations, this Court granted a temporary abeyance. Consistent with EPA's prediction, eighteen petitions for review were filed challenging EPA's Reconsideration Rule. However, EPA proposes to selectively consolidate one of these eighteen challenges with the present case and to indefinitely hold in abeyance adjudication of the resulting subset of petitions for review—while litigation proceeds on the remaining seventeen.

EPA's selective consolidation proposal seeks to preserve for California and four environmental groups two possible bites at the litigation apple. In the Reconsideration Rule cases brought by petitioners other than CBD, EPA would presumably defend those aspects of its new regulatory program that extend GHG regulation throughout the national economy. But if that program is found to be unlawful or is altered, EPA's supporters could then resurrect the present case and argue that the PSD program must nonetheless be applied to GHG emissions now.

Multiple Rounds of Litigation on the Same or Closely Related Issues Would Be Inefficient. If the petitions for review here are not dismissed, litigation of the issues raised by those petitions should not be held in abeyance while litigation on manifestly interrelated issues proceeds separately in this Court on petitions for review of the Reconsideration Rule and the Tailoring Rule. Doing so

would create the prospect of two or more rounds of litigation on questions concerning the application of PSD requirements to GHGs—hardly "the most efficient use of the parties' and the Court's resources." EPA Mot. at 5.

In the first round,[5] petitioners (other than CBD) that challenge aspects of the Reconsideration Rule and the Tailoring Rule—including many of the Intervenor-Respondents here—would prepare and present briefs and oral argument on claims that it was improper for EPA to subject GHG emissions to PSD requirements, or to subject those emissions to those requirements on the schedule determined by EPA. *See* EPA Mot. at 3 n.1 (noting that most of the petitioners challenging the Reconsideration Rule "are expected to oppose application of the PSD permitting program to greenhouse gases"). If the Court in the Reconsideration Rule litigation were to accept those petitioners' arguments and grant them relief that takes the form of "any change in EPA's interpretation of its PSD regulations" or any "delay in commencing PSD permitting for greenhouse gases," *id.* at 5, any such relief could be illusory, or at best uncertain, if EPA's present motion is granted. That is because, under the approach EPA's motion seeks, any of the four Petitioners here—none of which petitioned for review of the Reconsideration Rule—would *then* claim to have "good cause" to commence a second round of active litigation,

[5] The first round may actually be two rounds, depending on whether challenges to the Reconsideration Rule and challenges to the Tailoring Rule are consolidated with each other or, conversely, are briefed and heard separately.

perhaps before a different panel, pressing the argument that carbon dioxide and other GHGs must be deemed *already* subject to PSD requirements, *i.e.*, even before January 2, 2011. *See*, *e.g.*, Petitioners' Statement of Issues To Be Raised and Statement Regarding Appendix, No. 09-1018 (Feb. 17, 2009).

Petitioners Should Not Be Permitted to Hold Arguments in Reserve for a Subsequent Round of Litigation. Petitioners should not be allowed to reserve the opportunity to pursue what would amount to a subsequent collateral attack on EPA's PSD rule for GHGs through belated litigation of the petitions for review in the present case. In its motion, EPA states that "Petitioners' opposition to EPA's interpretation in the PSD Interpretive Memo *and the [Reconsideration Rule]* is based upon their desire that the regulatory provisions of the PSD programs include the regulation of greenhouse gases." EPA Mot. at 3-4 (emphasis added). Having chosen not to challenge the Reconsideration Rule, which incorporates the PSD Interpretive Memo, Petitioners here should be prepared to litigate the issues that form the basis for their "opposition to EPA's interpretation" in conjunction with the litigation of the petitions for review of the Reconsideration Rule, or else dismiss their petitions for review. Thus, if the petitions for review in the present case are not voluntarily dismissed (or dismissed for mootness on the grounds that the Reconsideration Rule and Tailoring Rule have, for purposes of judicial review, subsumed the PSD Interpretive Memo), then it would be most appropriate to

consolidate those petitions with the petitions for review of the Reconsideration Rule.[6] Or, at a minimum, the Court should coordinate in some other appropriate way the briefing, oral argument, and decision on the petitions for review in this case with that of the petitions for review of the Reconsideration Rule.

EPA's Proposal to Sever and Consolidate Here the CBD Petition to Review the Reconsideration Rule Could Lead to Inconsistent Panel Decisions. EPA's stated intent to seek to consolidate the CBD petition for review of the Reconsideration Rule with the present case, and to hold that petition in abeyance together with the present case, is particularly objectionable.[7] As noted above, the Reconsideration Rule not only incorporates the PSD Interpretive Memo but also addresses (and resolves) several issues beyond those addressed in the PSD Interpretive Memo, and the Tailoring Rule codifies several elements of the Reconsideration Rule. Thus, if EPA's motion were granted, a real possibility exists that CBD (unlike the existing Petitioners here, which plainly cannot challenge any aspect of the Reconsideration Rule that extends beyond the scope of

[6] EPA made the case for precisely that consolidation in 2009, arguing that "it would serve the interests of judicial economy and the parties to . . . consolidate any potential new challenges to EPA's final action" on reconsideration with the petitions for review in the present case, "in one proceeding before the Court." EPA February 2009 Motion at ¶ 5.

[7] Only after EPA filed the instant motion did it consult with the Reconsideration Rule petitioners (other than CBD) regarding the proposed severance of the CBD petition.

the PSD Interpretive Memo[8]) might later seek to litigate *as part of the present case* aspects of the Reconsideration Rule that are beyond the scope of the PSD Interpretive Memo. This would create the wholly untenable and unworkable prospect of two competing litigations, perhaps before two separate panels at two different times, on a single Agency rule (*i.e.*, the Reconsideration Rule).

There Is No Basis for Placing CBD's Challenge to the Reconsideration Rule in Abeyance. The judicial efficiency rationale espoused by EPA to justify its indefinite abeyance request and expected motion to consolidate the CBD challenge to the Reconsideration Rule with the present case is undermined by CBD's own decision to challenge the legality of PSD permits issued by EPA in 2010 on the grounds that, according to CBD's argument, GHGs are *currently* subject to regulation under the PSD program, notwithstanding the Reconsideration Rule and the Tailoring Rule. *See In re Shell Gulf of Mexico, Inc.*, OCS Appeal Nos. 10-01 to 10-04 & 10-12 (EPA Environmental Appeals Board). CBD's permit challenges demonstrate unmistakably that its petition for review of the Reconsideration Rule raises issues of immediate import that should be timely adjudicated, and not held in indefinite abeyance. It strains credulity to contend that judicial economy results

[8] Thus, if the petitions for review in the present case are litigated in a consolidated (or other coordinated) fashion together with the petitions for review of the Reconsideration Rule, the Petitioners in the present case would, notwithstanding the consolidation, be limited in their briefs and oral argument to only those issues that can be raised in a challenge to the PSD Interpretive Memo.

from allowing CBD to preserve its legal arguments on and objections to the Reconsideration Rule for later adjudication in this Court, yet simultaneously allowing CBD to proceed in a different forum with collateral attacks on that same rule.

Instead of fostering judicial economy, granting EPA's request would, to borrow EPA's own words, give rise to "additional burdens" on the litigants; the possibility of "inconsistent rulings"; "confusion" and "uncertainty"; and "the unnecessary expenditure of judicial resources." EPA February 2009 Mot. at ¶ 5. These are precisely the results that the February 2009 request to hold this case in abeyance until completion of EPA's reconsideration proceedings was intended to avoid. Now that those reconsideration proceedings have been completed, the express intent of the original abeyance request should not be defeated by allowing Petitioners here to defer their claims and then brief them after this Court has completed adjudication of the Reconsideration Rule.

CONCLUSION

For the foregoing reasons, the Court should deny EPA's motion. If the petitions for review in the present case are not dismissed, the Court should not allow them to be held in abeyance, with a right to subsequent reopening by the Petitioners, while litigation proceeds on the petitions to review the newer

Reconsideration Rule; nor should the Court sever the CBD petition to review the Reconsideration Rule and consolidate it with the present case.

Dated: June 22, 2010

Respectfully submitted,

/s/ Timothy K. Webster
David T. Buente
Timothy K. Webster
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
dbuente@sidley.com
twebster@sidley.com

Counsel for Chamber of Commerce of the United States of America, American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest and Paper Association, American Iron and Steel Institute, American Petroleum Institute, National Association of Manufacturers, National Oilseed Processors Association, and National Petrochemical and Refiners Association

And

Norman W. Fichthorn
Allison D. Wood
James W. Rubin
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

Counsel for the Utility Air Regulatory Group

And

Steffen Nathanael Johnson
WINSTON & STRAWN LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

Counsel for Deseret Power Electric Cooperative

And

Jeffrey R. Holmstead
Lisa Marie Jaeger
BRACEWELL & GUILIANI LLP
2000 K St., NW Suite 500
Washington, DC 20006
(202) 828-5000

Counsel for Electric Reliability Coordinating Council and Council of Industrial Boiler Owners

And

William H. Lewis, Jr.
Ronald J. Tenpas
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202)739-5145

Counsel for the Clean Air Implementation Project

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Court's electronic filing system on June 22, 2010, which will effect service upon the following counsel registered with that system:

Mr. Norman William Fichthorn
Mr. John David Gunter II
Mr. Jeffrey R. Holmstead
Ms. Lisa Marie Jaeger
Mr. Steffen Nathanael Johnson
Mr. William H. Lewis Jr.
Ms. Vickie Lynn Patton
Mr. James W. Rubin
Ms. Joanne Marie Spalding
Mr. John DuVal Walke
Ms. Ann Brewster Weeks
Ms. Allison D. Wood

For the following counsel, I caused a copy of the foregoing to be served by first-class mail, postage pre-paid, sent on June 22, 2010.

Mr. David G. Bookbinder
Sierra Club
408 C Street, NE
Washington, DC 20002-0000

Mr. Sanjay Narayan
Sierra Club
85 Second Street
Second Floor
San Francisco, CA 94105-3441

Ms. Raissa S. Lerner
Office of the Attorney General
State of California
1515 Clay Street, 20th Floor
PO Box 70550
Oakland, CA 94612-0550

Respectfully submitted,

/s/ Timothy K. Webster
Timothy K. Webster