

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,)	
)	
)	
)	
Petitioner,)	
)	Docket No. 10-1205
)	(consolidated with No.
v.)	10-1200 as lead case)
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**MOTION FOR LEAVE TO INTERVENE ON
BEHALF OF RESPONDENT**

Pursuant to Federal Rules of Appellate Procedure Rule 15(d) and 27 and Circuit Rules Rule 15(b) and 27, the National Association of Manufacturers, American Frozen Food Institute, American Petroleum Institute, Brick Industry Association, Corn Refiners Association, Glass Association of North America, Independent Petroleum Association of America, Indiana Cast Metals Association, Michigan Manufacturers Association, National Association of Home Builders, National Oilseed Processors Association, National Petrochemical and Refiners Association, Tennessee Chamber of Commerce and Industry, Western States Petroleum Association, West Virginia Manufacturers Association, and Wisconsin

Manufacturers & Commerce (collectively “Movants”) respectfully request leave to intervene on behalf of Respondent in this case.¹

Petitioner Center for Biological Diversity filed the petition for review in this case to challenge a Final Action of Respondent, the U.S. Environmental Protection Agency (“EPA”) entitled “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule.” 75 Fed. Reg. 31,514 (June 3, 2010) (hereinafter, “Final Action”). The petition for review was filed under Section 307(b)(1) of the Clean Air Act (“CAA”), 42 U.S.C. § 7607(b)(1), on August 2, 2010.

I. Introduction and Interests of Intervenor

Movants are business organizations and trade associations whose members include many companies engaged in key business sectors in the United States, including manufacturing, construction, retail, and production and refining of petroleum. Members of the movant associations own and operate facilities that emit greenhouse gases (“GHGs”), including carbon dioxide (“CO₂”). Because CO₂ and other greenhouse gases have never before been subject to the Clean Air Act’s

¹ Movants have also joined in a petition for review of the rule at issue in this lawsuit. By intervening on behalf of Respondent and against the Center for Biological Diversity in this case, Movants do not concede that EPA’s decision to regulate GHG under CAA permitting programs is legally permissible or that EPA has established the proper criteria for determining permitting applicability.

(“CAA”) permitting programs (42 U.S.C. §§7571, 7661, *et seq.*), the GHG emissions of Movants’ members are not regulated under such programs.

The Final Action under review establishes EPA’s position regarding under what circumstances sources with GHG emissions will be subject to CAA permitting requirements. EPA has “tailor[ed] the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements....” 75 Fed. Reg. at 31,514. In challenging the Final Action in this Court, Petitioner is likely to argue that EPA has unlawfully tailored the permitting applicability criteria in violation of the CAA.

If this Court were to agree with Petitioner’s position, EPA and States could be required to apply much more stringent applicability criteria to permitting programs than specified in the Final Action. Such a result not only would compel many of Movants’ members to undergo costly permitting processes never before required, but would also impose on members potentially enormous costs of prohibiting GHG emissions and/or installing emission-control technology. As such, Movants have a substantial interest in the outcome of this case.²

² A corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 and a certificate of parties pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A) are attached as an addendum to this Motion.

II. Reasons For Granting Intervention

Movants should be permitted to intervene in this case because they have a significant, direct interest in the outcome of this case that will be harmed if the Final Action is reversed in whole or in part, and that interest will not be adequately represented in the absence of intervention. In addition, the motion to intervene is timely, and granting intervention will not adversely affect any party or the timely resolution of the case.

A. **Movants have a direct and substantial interest in the outcome of this case.**

Movants have a substantial interest in the subject matter of this case because its members are subject to the regulations at issue.³ Movants anticipate that Petitioner will argue that the CAA prohibits EPA's decision to tailor its permitting criteria.

A ruling in Petitioner's favor could force EPA and States to apply permitting to many of Movant members' facilities that currently are not subject to such

³ Movants meet Article III standing requirements because its members are the subject of the provisions in question in this case, and the individual participation of the members in the case is not required. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (finding trade association had standing in challenge of EPA regulation where some of its members were subject to challenged regulation). Nonetheless, this Court has indicated that Article III standing should not be required of any party seeking to intervene as a defendant. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 915 (2004) ("Requiring standing of someone who seeks to intervene as a defendant ... runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction") (citations omitted).

permitting. For example, the Final Action tailors the Title V program such that only facilities that emit at least 100,000 tons per year of CO₂ would need a permit. Petitioner argued in its comments on the proposed rule that EPA had not justified the source thresholds it proposed or the timing for phasing of the applicability criteria.⁴ EPA rejected Petitioner's comments and raised the proposed thresholds in the Final Action. Given this, Petitioner is likely to argue in this case for a reduction in the final thresholds and for accelerating the phase-in of requirements for facilities owned and operated by Movants' member companies. If Petitioner is successful in having CAA permitting programs apply using the thresholds of 100 and 250 tons per year, the drastic difference in applicability criteria would require millions of additional permits. As a result, thousands of members' facilities around the nation that do not currently fall within any CAA permit program could be forced to undergo the permitting process.

Because Petitioner's challenge has the potential to bring Movants' members under new and burdensome governmental regulation, Movants clearly have interests sufficient to merit intervention.

⁴ *Comments of Ctr. for Biological Diversity*, EPA-HQ-OAR-2009-0517-5139.1.

B. The interests of Movants are not adequately represented by any of the existing parties.

Intervention is appropriate and necessary to adequately protect Movants' interests. The burden of showing inadequate representation "is not onerous," and an "applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Because Petitioner opposes the Final Action that Movants would defend, Petitioner cannot, of course, adequately represent Movants' interests.

Nor can EPA adequately represent Movants' interests. As a governmental entity, EPA must avoid advancing the "narrower interest" of certain businesses "at the expense of its representation of the general public interest." *Dimond*, 792 F.2d at 192-93. Although EPA must take into account the cost-effectiveness of regulations, EPA must also pursue its general public mandate to improve the nation's air quality. In contrast, Movants admittedly have a "narrower interest," namely, helping ensure that their members are not thrust into a new and potentially unwarranted permitting process, with dire economic consequences, in the absence of a thorough administrative analysis of the impacts of that regulation. Particularly at a time when American industry is reeling from the effects of a deep recession,

Movants cannot rely solely on a mission-oriented public agency to safeguard their concerns.

Even if Movants' and EPA's interests were more closely aligned, "that [would] not necessarily mean that adequacy of representation is ensured." *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). Precisely because Movants' interests are "more narrow and focused than EPA's," Movants' participation is "likely to serve as a vigorous and helpful supplement to EPA's defense." *Id.* at 912-13.

C. The requested intervention would be timely and consistent with the orderly resolution of the case.

Under Federal Rule of Appellate Procedure 15(d), a motion for leave to intervene "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." The current motion is being filed within 30 days after the filing of the petition for review by Petitioner Center for Biological Diversity in this case and, therefore, is timely.

Moreover, this case is in its early stages, and no schedule for the filing of briefs has been issued to date. Granting the instant motion to intervene in this action, therefore, will not delay the proceedings in this Court and will not cause undue prejudice to any party. On the other hand, if intervention is not granted,

Movants' ability to defend the interests of its members in this proceeding will be severely prejudiced. Movants agree to follow any schedule issued by this Court.

Conclusion

For the reasons stated above, Movants respectfully request that the Court enter an order granting leave to intervene in support of Respondents.

Respectfully submitted,

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