

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

SIERRA CLUB, et al.,)	
)	
Petitioners,)	
)	
v.)	Case No. 09-1018
)	and consolidated cases
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent)	
_____)	

UNOPPOSED MOTION TO GOVERN FURTHER PROCEEDINGS

Respondent United States Environmental Protection Agency (“EPA”) hereby submits its proposal to govern proceedings in the above-captioned case. In this Motion, EPA requests that the Court hold this case in abeyance, pending further motion of the parties. Each of the Petitioners consents to this Motion.

FACTUAL BACKGROUND

On December 18, 2008, then-Administrator of EPA Stephen L. Johnson issued a memorandum (the “PSD Interpretive Memo”) concerning EPA’s interpretation of 40 C.F.R. § 52.21(b)(50), a regulation defining pollutants that are covered by the Prevention of Significant Deterioration (“PSD”) permitting program under the Clean Air Act. Notice of the issuance of the PSD Interpretive Memo was

subsequently published in the Federal Register. *See* 73 Fed. Reg. 80,300 (Dec. 31, 2008).

On December 31, 2008, Petitioners in this case and other environmental organizations submitted petitions to EPA pursuant to Clean Air Act Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), asking EPA to reconsider the issuance of the December 18, 2008 memorandum on substantive and procedural grounds (the “Petition for Reconsideration”). Under Section 553(e) of the Administrative Procedure Act, EPA granted the January 6, 2009 request for reconsideration on February 17, 2009.

Various petitioners also filed petitions for review of the PSD Interpretive Memo in this Court. Those cases were consolidated into Case No. 09-1018, in which several environmental organizations also moved to intervene on behalf of petitioners. While EPA’s reconsideration process was pending, this Court held those consolidated cases in abeyance.

On April 2, 2010, EPA completed its reconsideration process, publishing a final decision. *See* “Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs,” 75 Fed. Reg. 17,004 (April 2, 2010) (the “PSD Reconsideration Action”). In that notice, EPA stated that it would continue applying its existing interpretation of 40 C.F.R.

§ 52.21(b)(50), with one refinement. Specifically, EPA said that it would continue to interpret the phrase “subject to regulation” under the Clean Air Act to include those pollutants for which the Act itself or a regulation adopted under the Act requires “actual control of emissions.” *See* 75 Fed. Reg. at 17,004. EPA refined its interpretation to establish that the permitting requirements of the PSD program would not apply to a newly regulated pollutant until a control requirement for that pollutant “takes effect.” *Id.* EPA also explained that greenhouse gases will be covered by the PSD permitting program when a control requirement on these pollutants – specifically, the greenhouse gas emission control requirements applicable to model year 2012 light-duty motor vehicles, *see* 75 Fed. Reg. 25,324 (May 7, 2010) – takes effect on January 2, 2011.¹

REQUEST FOR ABEYANCE

Petitioners' opposition to EPA's interpretation in the PSD Interpretive Memo and the PSD Reconsideration Action is based upon their desire that the regulatory

^{1/} EPA's PSD Reconsideration Action has been challenged by a number of parties that are expected to oppose application of the PSD permitting program to greenhouse gases, and by the Center for Biological Diversity in No. 10-1115, which is expected to seek wider application of the PSD permitting program to greenhouse gases. *See Coalition for Responsible Regulation v. EPA*, No. 10-1073; *Southeastern Legal Foundation v. EPA*, No. 10-1083 and consolidated cases; *Clean Air Implementation Project v. EPA*, No. 10-1099; *American Iron & Steel Institute v. EPA*, No. 10-1109 and consolidated cases.

provisions of the PSD programs include the regulation of greenhouse gases. At the time that EPA expressed its “actual control” interpretation in the PSD Interpretive Memo, members of the public expressed uncertainty as to when EPA would promulgate a control requirement for greenhouse gases and treat those substances as pollutants covered by the PSD permit process.

EPA clarified this issue in the PSD Reconsideration Action and related actions, stating that if EPA finalized its proposed greenhouse gas emission standards for motor vehicles, then those standards would constitute “actual control” for purposes of its PSD regulations and take effect on January 2, 2011. *See* 75 Fed. Reg. at 17,019. EPA has published those motor vehicle standards, *see* 75 Fed. Reg. 25,324 (May 7, 2010), although they have been challenged in petitions for review in this Court, *see, e.g., Coalition for Responsible Regulation v. EPA*, No. 10-1092. EPA also published a finding that emissions of greenhouse gases from new motor vehicles and new motor vehicle engines cause or contribute to air pollution which may reasonably be expected to endanger public health and welfare. *See* 74 Fed. Reg. 66,496 (December 15, 2009). This predicate action for the motor vehicle standard has also been challenged in petitions before this Court. *See, e.g., Coalition for Responsible Regulation v. EPA*, No. 09-1322.

If these two EPA actions ultimately are upheld by this Court, it will affect the parties' interests in this case. The fact that EPA's "actual control" interpretation will result in the application of PSD program requirements to greenhouse gases as of January 2, 2011 may, as a practical matter, cause Petitioners' arguments to become moot before this case is decided, or may change Petitioners' view of the urgency of presenting their arguments to the Court. However, Petitioners have an interest in preserving their arguments concerning EPA's "actual control" interpretation pending the resolution of the litigation over EPA's related actions, or in the event that EPA changes its interpretation of its PSD regulations.

In light of these circumstances, the most efficient use of the parties' and the Court's resources will be for these consolidated cases to be held in abeyance indefinitely, without any waiver of claims or defenses, to be reopened upon the motion of one of the parties for good cause. Good cause shall include, but is 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. In the event that a party moves the Court to lift the abeyance period and reopen the case, the parties would propose a briefing schedule.

EPA has contacted counsel for each of the Petitioners in this case and they represent that they consent to the relief requested in this Motion. The Court may note that the Center for Biological Diversity (“CBD”) has filed a petition for review of the PSD Reconsideration Action in *Center for Biological Diversity v. EPA*, No. 10-1115, which has been consolidated into *American Iron & Steel Institute v. EPA*, No. 10-1109. Pending discussions with the other petitioners in No. 10-1109, 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. Counsel for CBD has authorized EPA to represent 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.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court hold this case in abeyance pending further motion of the parties.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

/s/ David Gunter
DAVID GUNTER
D.C. Circuit Bar # 50311

United States Department of Justice
Environment and Natural Resources Div.
P.O. Box 23986
L'Enfant Plaza Station
Washington, DC 20026
Phone: (202) 514-3785
Fax: (202) 514-8865
David.Gunter2@usdoj.gov

Dated: June 9, 2010

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Govern Further Proceedings was filed with the Court's electronic filing system on June 9, 2010, which will effect service upon the following counsel registered with that system:

Mr. David T. Buente, Jr.
Mr. Norman William Fichthorn
Mr. Jeffrey R. Holmstead
Ms. Lisa Marie Jaeger
Mr. Steffen Nathanael Johnson
Ms. Vickie Lynn Patton
Mr. James W. Rubin
Mr. John DuVal Walke
Ms. Ann Brewster Weeks
Ms. Allison D. Wood

For the following counsel, I caused a copy of the foregoing Motion to be served by first-class mail, postage pre-paid, sent on June 9, 2010.

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

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

Mr. William H. Lewis, Jr.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541

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

/s/ David Gunter
DAVID GUNTER