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

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| CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT,<br><br>Petitioner,<br><br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,<br><br>Respondent. | ) | No. 03-1222 |

**MOTION TO DISMISS**

Respondent United States Environmental Protection Agency ("EPA") hereby moves to dismiss the present petition because the Center for Energy and Economic Development ("CEED") has not met its burden of establishing the elements of constitutional standing.[1] For the reasons set forth below, CEED's petition should be dismissed.

**Background**

In this petition, CEED challenges EPA's final rulemaking, entitled "Revisions to Regional Haze Rule To Incorporate Sulfur Dioxide Milestones And

[1] EPA has filed an accompanying motion seeking leave to file this dispositive motion out of time.

Backstop Emissions Trading Program for Nine Western States and Eligible Indian Tribes Within That Geographic Area; Final Rule." 68 Fed. Reg. 33,764 (June 5, 2003) ("the Annex Rule"). In the Annex Rule, EPA approved a plan -- known as the Annex -- developed by a group of nine western States to meet the requirements of 40 C.F.R. § 51.309(f). Among other things, the Annex establishes a voluntary program, and a "backstop" cap-and-trade program, to reduce emissions from stationary sources in those western States as part of a comprehensive plan to meet the visibility improvement requirements of the Clean Air Act. See 42 U.S.C. §§ 7491-92.

CEED is a Section 501(c)(6) company that "acts as a trade association" for coal-producing companies, coal-transporting railroads, coal-fueled electric utilities, and related entities "organized to educate the public about low-cost, environmentally-compatible coal-fueled electric generation." Pet. Br. Rule 26.1 Disclosure. On February 2, 2004, CEED filed its opening brief, which raises several objections to the Annex Rule. CEED's objections focus largely on EPA regulations that allow States to adopt alternatives to the Best Available Retrofit Technology ("BART") requirements otherwise applicable to certain stationary sources of visibility-impairing air pollutants. See 40 C.F.R. §§ 51.308(e), 51.309(f).

## Argument

### I. CEED HAS NOT MET ITS BURDEN OF DEMONSTRATING ARTICLE III STANDING

"The party invoking federal jurisdiction bears the burden of establishing" the elements of Article III standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). An association such as CEED has standing to sue on behalf of its members only if at least one member has standing to sue in its own right. Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002). To meet Article III standing requirements, therefore, CEED must demonstrate that at least one of its members: (1) has suffered an injury-in-fact; (2) the injury is "fairly traceable to the challenged action of the defendant," and not "the result of the independent action of some third party not before the court"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Defenders of Wildlife, 504 U.S. at 560-61 (internal quotations and modifications omitted).

A petitioner such as CEED has the evidentiary burden of showing a "substantial probability that it has been injured, that the defendant caused its injury, and that the court could redress that injury." Sierra Club, 292 F.3d at 899-900 (internal quotation omitted). Where, as here, petitioner's standing is not self-evident, the petitioner must make that showing in its opening brief "by citing record evidence relevant to its claim of standing and, if necessary, appending to its

filing additional affidavits or other evidence sufficient to support its claim." Id. at 900-01. The opening brief should also provide, in the jurisdictional statement, "a concise recitation of the basis upon which [the petitioner] claims standing." Id. at 901.

Here, CEED has not met its burden of establishing Article III standing. In spite of the clear requirements set forth in Sierra Club, CEED's opening brief did not contain any explanation of CEED's standing or any evidence to support such a claim. CEED's petition must, therefore, be dismissed.

## II. CEED'S STANDING IS NOT SELF-EVIDENT

Although a petitioner may be excused from meeting the Sierra Club requirements where its standing is "self evident," 292 F.3d at 900-01, there is nothing self-evident about CEED's standing in this case. Indeed, CEED's brief itself calls into question CEED's standing -- presenting the very type of problem that Sierra Club intended to address.

In Sierra Club, this Court explained that "[r]equiring the petitioner to establish its standing at the outset of its case is the most fair and orderly process" to determine whether the Court has jurisdiction. Id. at 901. The facts to substantiate a petitioner's standing are "peculiar to [the petitioner] and are ordinarily within its possession," often to the exclusion of the respondent and the court. Id. If the

petitioner does not present such facts, the respondent is at a distinct disadvantage, and is "left to flail at the unknown in an attempt to prove the negative." Id.

Here, CEED's brief calls into question whether CEED has suffered an injury-in-fact and -- depending on the nature of that injury -- also raises questions about the causation and redressability of that injury. With respect to its injury-in-fact, it is completely unclear from CEED's brief whether CEED thinks it was injured by the Annex Rule because the Annex is too stringent or because the Annex is not stringent enough. On the one hand, CEED challenges EPA regulations allowing States to use alternatives to BART -- such as the Annex -- but requiring States to apply a "collective" BART approach to demonstrate the alternative will achieve greater reasonable progress than would have been achieved through the imposition of BART controls. Pet. Br. at 24-41. CEED has not explained how these regulations have injured its members. Presumably, however, CEED believes that the regulations will result in emissions limitations that are more stringent than the emissions limitations that would have applied if EPA had not required States to use a collective BART approach when adopting a BART alternative. Similarly, given that CEED is challenging an alternative to BART (i.e., the Annex), CEED must believe that it will sustain some burden under the Annex that will be greater than the burden it would have sustained had its members

been required to adopt BART controls. In other words, if CEED has any cognizable injury to support its claims, that injury would be the result of regulations that CEED believes to be too stringent.

At the same time, however, CEED contends that EPA should not have approved the Annex because it does not ensure sufficient progress towards achieving the national visibility goal. Pet. Br. at 41-45. Again, CEED has not explained how EPA's approval injured its members, but it is noteworthy that CEED supports one of its arguments by citing a comment on the Annex Rule raised by an environmental group. Pet. Br. at 45 (citing 68 Fed. Reg. at 37,770). It appears, therefore, that CEED believes it has been injured because the Annex is not stringent enough.

Because CEED seems to argue that the Annex is both too stringent and not stringent enough, CEED's Article III injury is not self-evident. Furthermore, because CEED has not explained the nature of its injury, it is impossible to determine whether CEED's injury was caused by EPA's rule, would be redressed by a favorable decision, or might be subject to prudential standing restrictions. See, e.g., Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855 (D.C. Cir. 2001); Duquesne Light Co. v. EPA, 166 F.3d 609 (3d Cir. 1999). Given that CEED's standing is not self-evident, CEED was required to meet the standards in Sierra

Club, which it failed to do. Consequently, EPA is in the same quandary that Sierra Club sought to avoid -- the Agency is "left to flail at the unknown in an attempt to prove the negative," and cannot provide the Court with adequate briefing to address the issue of CEED's standing. CEED's petition must, therefore, be dismissed.

## Conclusion

For these reasons, EPA respectfully requests that the Court dismiss CEED's petition for lack of standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, _____, certify that on this ____ day of February, 2003, true and correct copies of the attached MOTION TO DISMISS was served by first class mail, postage prepaid, on each of the following:

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