UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MINGO LOGAN COAL CO., INC., **Plaintiff,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** **Defendant.**	)	Case No. 1:10-cv-00541-ABJ

REPLY OF CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.*
IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to the Federal Rules of Civil Procedure, *amici curiae* Chamber of Commerce of the United States, National Association of Manufacturers, American Road and Transportation Builders Association, Association of American Railroads, National Association of Home Builders, American Farm Bureau Federation, Fertilizer Institute, National Council of Coal Lessors, Industrial Minerals Association – North America, Utility Water Act Group, Foundation for Environmental and Economic Progress and Western Business Roundtable respectfully submit this brief in support of their motion for leave to file a brief in support of Plaintiff (Docket No. 27) in this action.

INTRODUCTION

According to Defendant U.S. Environmental Protection Agency ("EPA"), *amici* have nothing to offer this Court—neither a different "perspective" than Plaintiff, nor any "unique information," nor the sort of "special expertise" that would be of assistance in this case. In fact, *amici* wrote their brief from the perspective of the numerous industries—including manufacturing, housing and agriculture, to name a few—that would be harmed if EPA prevails here. The information contained in *amici*'s brief was also "unique" insofar as it described and

quantified the nationwide economic injuries that EPA's action threatens to inflict. Moreover, *amici* offer to the Court the expertise of a renown economist, who has prepared a study support for their position. All of this information provides a vital, broader context for the Court as it addresses EPA's interpretation of Section 404(c) of the Clean Water Act. Under the very standard that Defendant agrees should guide the Court's discretion, *amici*'s brief presents the ideal situation to allow *amcius* participation.

ARGUMENT

EPA does not dispute that this Court has discretion to grant or deny *amici*'s motion for leave to file a brief in support of Plaintiff. *See, e.g.*, *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003). Indeed, EPA and *amici* agree that leave to file a brief "should normally be allowed when," among other things, "the amicus has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide." *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)). The problem, explained in more detail below, is that EPA's austere application of this guidance essentially ignores the information and perspective offered by *amici*, and would exclude virtually any *amicus* brief imaginable.

To begin with, EPA claims that because "this is a challenge under the Administrative Procedure Act ('APA')," and the issues presented "are matters of statutory and regulatory construction," *amici* could not possibly offer any information to the Court beyond what the primary parties will provide. Opp. at 3, 4. Of course, *amici* can and regularly do participate in cases that involve statutory interpretation and APA claims. *See, e.g., National Ass'n of Mortgage Brokers v. Board of Governors of the Fed. Reserve System*, __ F. Supp. 2d __, 2011 WL 1158432 (D.D.C. Mar. 30, 2011) (granting *amicus* motion in an APA challenge to agency

action); *Smoking Everywhere, Inc. v. United States Food & Drug Admin.*, 680 F. Supp. 2d 62, 68, 78 (D.D.C. 2010) (same). EPA's suggestion to the contrary is simply erroneous.

Furthermore, it is well-established that the "the implications that flow" from the government's "theory of statutory liability . . . are ***extremely important*** in interpreting [a] statute." *United States v. Philip Morris, Inc.*, 160 F. Supp. 2d 1, 7 (D.D.C. 2001) (emphasis added). Indeed, the U.S. Supreme Court has held that "[t]he broad consequences that flow from the government's theory of liability" may "provide a final and dispositive factor against reading [the statute] in the manner suggested." *Dowling v. United States*, 437 U.S. 207, 226 (1985). In this case, by exploring the "broad consequences" that would flow from EPA's reading of Section 404(c), *amici* are providing crucial context for the Court's interpretive work. Plaintiff, who is understandably focused on the details of EPA's actions, is not in a good position to discuss this "extremely important" issue. Situations like these are exactly the times when information from *amici* can be of great benefit to the Court.

EPA also reasons that because some of the individual *amici* are members of *amicus* Chamber of Commerce of the United States, that somehow means that they do not have a perspective different from Plaintiff's. *See* Opp. at 3-4. What EPA is ultimately saying with this line of argument is that *amici* and Plaintiff have the same perspective because they want the same outcome. But that is not what "perspective" means. Regardless of the legal conclusion they advocate, *amici*'s motion for leave explains that they represent the perspective of a broad spectrum of industries. They are companies and businesses that must obtain Section 404 permits in a variety of circumstances that are nothing like those at issue in this case. This is exactly the kind of additional perspective that the cases encourage *amici* to provide.

EPA further argues that *amici* "do not possess any unique qualifications or expertise that may assist the Court." Opp. at 4. This contention is even more inexplicable. *Amici* supported their arguments regarding the impact of EPA's actions using a report prepared by Dr. David Sunding, an extensively published Professor in the College of Natural Resources at the University of California Berkeley. Notably, Dr. Sunding's work has been cited by the U.S. Supreme Court in the context of interpreting Section 404 of the Clean Water Act. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006). EPA, however, fails to as much as mention Dr. Sunding's contribution to *amici*'s submission, despite the fact that the case it cites as an acceptable *amicus* situation similarly involved contribution from a qualified academic. *See* Opp. at 4 (citing *United States v. Microsoft Corp.*, 1999 WL 1419040 (D.D.C. Dec. 20, 1999)). It is impossible to see how Dr. Sunding's work in support of *amici*'s brief would fail to qualify as "unique expertise," even under Defendant's overly-strict interpretation of that standard.

Finally, Defendant describes *amici*'s brief as "openly partisan," and claims that it should be barred on the grounds that it would effectively lengthen Plaintiff's summary judgment brief. (Notably, Defendant has not opposed the participation of multiple proposed intervenors whose papers presumably would have the same effect on Defendant's summary judgment brief.) And while it is true that courts will take into account the partiality of an *amicus* brief, it is commonplace for such briefs to explicitly support one side or the other. The D.C. Circuit's rules governing such briefs—rules to which this Court looks for guidance (*see Jin*, 557 F. Supp. 2d at 137)—specifically provide for submission of *amicus* briefs that explicitly support one side or the other, especially in cases like this one, where the court's interpretation of a statute will have far-reaching consequences. *See* Fed. R. App. P. 29(e) (stating that an *amicus* must file its brief "no later than 7 days after the principal brief of the party being supported"). *Amici*'s brief does not

repeat Plaintiff's argument or provide Plaintiff with additional pages. Rather, *amici* are bringing to the Court's attention the ways in which the outcome of this case affects them. To the extent such a brief could be described as "partisan," that description does not argue against its acceptance.

CONCLUSION

For all the reasons stated above and in their motion for leave to file, *amici* respectfully request that the Court accept their brief and consider it in the disposition of this case.

Dated: June 27, 2011

Respectfully submitted,

/s/ Jay C. Johnson
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2011, I filed a copy of the foregoing Reply in Support of Motion for Leave to File Brief of *Amici Curiae* with the Clerk for the United States District Court for the District of Columbia using the Court's CM/ECF system, which will automatically serve all counsel of record in this case.

__/s/ Jay C. Johnson_____
Jay C. Johnson