THIRTY-THIRD ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

2021 Competition Problem*

C.A. No. 20-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELFARE NOW,
Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

-and-

COAL, OIL, AND GAS ASSOCIATION,
Intervenor-Defendant-Appellant-Cross Appellee.

Appeal from the United States District Court for the District of New Union in
No. 66-CV-2019, Judge Romulus N. Remus.

ORDER

Following the issuance of an Order of the United States District Court for the District of New Union dated August 15, 2020 in 66-CV-2019, Climate Health and Welfare Now (CHAWN), Coal, Oil and Gas Association (COGA) and the United States Environmental Protection Agency (EPA) each filed a timely Notice of Appeal.

CHAWN takes issue with the District Court's determination that EPA's 2009 Endangerment Finding that Greenhouse Gases (GHGs) endanger public health is contrary to law.

COGA takes issue with the District Court's determination that EPA's 2009 Endangerment Finding that GHGs endanger public welfare is valid and that the EPA had a non-discretionary duty to designate GHGs as a criteria pollutant under § 108(a) of the Clean Air Act. COGA also takes issue with the District Court's holding that EPA's ten-year delay in taking action listing GHGs as criteria pollutants constitutes an unreasonable delay.

EPA agrees with COGA that it did not have a non-discretionary duty to list GHGs as criteria pollutants, and that it did not unreasonably delay in doing so. EPA also agrees with COGA that the 2009 Endangerment Finding was not valid with respect to endangerment of public health, but agrees with CHAWN that the Endangerment Finding was valid with respect to endangerment of public welfare.

Finally, the Court of Appeals raises *sua sponte* the issue of whether the District Court had jurisdiction to hear CHAWN's unreasonable delay claim brought under CAA § 304(a), even when the rule sought would be a rule of nationwide applicability subject to review exclusively in the DC Circuit under CAA § 307(b). CHAWN and COGA assert that the District Court did have jurisdiction, while EPA asserts that it did not.

Therefore, it is hereby ordered that the parties brief all of the following issues:

1. Did the District Court have jurisdiction over CHAWN's unreasonable delay claim under CAA § 304(a) where the rule sought would be a rule of nationwide applicability subject to review exclusively in the DC Circuit under CAA § 307(b)? (Raised *sua sponte* by Court; CHAWN argues it did have jurisdiction; EPA argues it did not; COGA argues it did.)

2. Is the 2009 Endangerment Finding valid with respect to an endangerment of public welfare? (CHAWN argues it is; EPA argues it is; COGA argues it is not.)

3. Is the 2009 Endangerment Finding valid with respect to an endangerment of public health? (CHAWN argues it is; EPA argues it is not; COGA argues it is not.)

4. Does EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA § 108(a) constitute an unreasonable delay? (CHAWN argues that it does; EPA argues that it does not; COGA argues that it does not.)

5. Does the EPA have a non-discretionary duty to designate GHGs as a criteria pollutant under CAA § 108 based on the 2009 Endangerment Finding? (CHAWN argues it does; EPA argues it does not; COGA argues it does not.)

SO ORDERED

Entered 1st day of September 2020
[NOTE: No decisions decided or documents dated after September 1, 2020 may be cited in the briefs or in oral argument.]

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW UNION

CLIMATE HEALTH AND WELFARE NOW,
Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant,

-and-

COAL, OIL, AND GAS ASSOCIATION,
Intervenor-Defendant,

No. 66-CV-2019, Judge Romulus N. Remus.

DECISION AND ORDER

Plaintiff Climate Health and Welfare Now (CHAWN) brings this action, styled as a citizen suit under Clean Air Act section 304, 42 U.S.C. § 7604, to compel the administrator of the United States Environmental Protection Agency (EPA) to list greenhouse gases (GHGs) under CAA § 108(a), 42 U.S.C. § 7408, as criteria pollutants subject to the National Ambient Air Quality Standards (NAAQS) program. EPA answered and asserted various defenses, discussed below. This Court previously granted the Coal, Oil, and Gas Association's (COGA's) motion to intervene as a defendant on the side of EPA. The parties agree on the basic underlying administrative record, and have cross moved for summary judgment. For the reasons stated

below, this Court grants plaintiff's motion for summary judgment in part, and grants intervenor's motion in part.

INTRODUCTION

A coalition of environmental organizations, including the plaintiff in this action,[i] filed a petition with the EPA shortly after EPA's issuance of a 2009 finding that the emissions of greenhouse gases (GHGs) endanger public health and welfare (the "Endangerment Finding"). This petition demanded that EPA list GHGs as criteria pollutants under Clean Air Act (CAA) § 108, 42 U.S.C. § 7408. The petition asserted that, having made the relevant finding, EPA had a non-discretionary duty to list GHGs as criteria pollutants. Despite the passage of ten years since the issuance of the Endangerment Finding and filing of the listing petition, EPA has taken no action on the petition, either to grant it or to deny it. On April 1, 2019, CHAWN properly served notice of its intention to sue EPA for failure to carry it out its asserted mandatory duty to regulate GHGs as criteria pollutants and for "unreasonable delay in carrying out its non-discretionary duty to designate GHGs as a criteria pollutant as demanded in the December 15, 2009 petition for rulemaking." EPA took no action in response to CHAWN's notice. On October 15, 2019, CHAWN commenced this lawsuit, invoking the citizen suit provisions of CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2). CHAWN seeks an order directing EPA to publish a new list of criteria pollutants that includes GHGs as a criteria pollutant.

Coal Oil and Gas Association (COGA) is a trade association representing the economic interests of fossil fuel companies engaged in the extraction, processing, and marketing of coal, oil, and natural gas. COGA moved to intervene as of right pursuant to FED. R. CIV. P. 24(a), asserting that the grant of CHAWN's requested relief would result in regulatory limits that would severely limit, or completely destroy, the market for its products. This court granted COGA's motion on November 30, 2019. COGA and EPA both answered the complaint, and COGA also asserted a cross-claim against EPA seeking a declaration that the 2009 Endangerment Finding is unsupported by the record and contrary to law.

The Court now addresses cross motions for summary judgment. CHAWN asserts that once EPA made the Endangerment Finding, it became subject to a non-discretionary duty to list GHGs as criteria pollutants, and that EPA's ten-year delay is per se unreasonable. EPA, for its part, denies that it is subject to such a non-discretionary duty, and asserts that the regulatory complexities that would result from such a listing more than justify its delayed response. COGA, as intervenor, asserts as an additional ground for denying relief that the 2009 Endangerment Finding is itself unsupported by law and the administrative record, and does not, in any event support a finding of endangerment to public health sufficient to support a primary NAAQS. EPA, in turn, defends the 2009 Endangerment Finding with respect to public welfare, but has declined to defend that portion of the 2009 Endangerment Finding that determined GHG emissions may reasonably be expected to endanger public health. Therefore, EPA sides with COGA in arguing that that portion of the Endangerment Finding is not legally valid.

This court has jurisdiction under the Citizen Suit provision of the Clean Air Act, 42 U.S.C. § 7604(a), as well as federal question jurisdiction under 28 U.S.C. § 1331. Although there is a question whether venue is proper in this district under 42 U.S.C. § 7604(a), no defendant has raised an objection to venue.

Plaintiff CHAWN has submitted affidavits identifying specific members who have been harmed by the effects of sea level rise and global warming, including owners of real property who have been required to vacate land in coastal areas subject to storm surge flooding, and young adults whose future lives are endangered by the prospect of climate change. This Court is satisfied that CHAWN has sufficiently established injury in fact, causation, and redressability for

Article III standing to commence this suit. *See Massachusetts v. EPA*, 549 U.S. 497 (2007); *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). CHAWN has also satisfied the notice requirements of 42 U.S.C. 7604(b).

Title I of the Clean Air Act provides for a comprehensive scheme of regulation of those pollutants deemed to endanger the public health or welfare. Pollutants subject to regulation are known as "criteria pollutants," and the United States Environmental Protection Agency (EPA) is directed to establish public health and welfare-based concentration limits for the pollutants. These limits are known, respectively, as the primary and secondary National Ambient Air Quality Standards (NAAQS). CAA § 109, 42 U.S.C. § 7409. States are charged with regulating emissions emanating from sources within their borders in order to meet these standards, subject to approval by EPA and federal intervention in the case of insufficient State Implementation Plans (SIPs).

I. FACTUAL BACKGROUND

A brief overview of EPA's regulatory actions affecting GHGs under the Clean Air Act provides necessary context for the instant controversy.

In 1999, several environmental groups petitioned EPA to make a finding that GHG emissions from automobiles posed a danger to human health and the environment under section 202 of the CAA, 42 U.S.C. §7521 (the 202 Petition). Such a finding under section 202 would trigger EPA regulation of GHG emissions from mobile sources, primarily automobiles. Although the finding of endangerment under section 202 is the same as for listing criteria pollutants under section 108, the 202 Petition did not seek regulation under the NAAQS program of Title I.

EPA denied the petition on September 8, 2003, explaining that, in its view, as a matter of statutory interpretation, the ubiquitous emissions of GHGs did not fit the concept of "air pollutants" subject to CAA regulation. It explained that in any event, as a policy matter, regulation addressing global climate change should be conducted pursuant to more specific authorizing legislation and international agreements yet to be adopted, rather than the catch-all air pollution provisions of the 1970 CAA. 68 Fed. Reg. 52,922 (Sept. 8, 2003). Litigation ensued, culminating in the United States Supreme Court's decision in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), which held that GHGs fit squarely in the definition of "air pollutants" subject to potential regulation under the Clean Air Act. EPA was thus directed to respond to the 202 Petition by making a finding whether GHGs may present an endangerment to public health or welfare, as contemplated to trigger regulation under the statute.

Action by EPA followed the change of Presidential administrations, in the form of a formal finding of endangerment under CAA § 202, issued on December 15, 2009 (the "Endangerment Finding"). Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496–546 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. I). The Endangerment Finding defined a group of GHGs, including carbon dioxide, nitrous oxide, and methane as a single air pollutant.[1] EPA further found that GHGs were emitted by numerous mobile sources, and the emissions of GHGs may

[1] The Endangerment Finding included six greenhouse gases as a single "air pollutant"; they are carbon dioxide, methane, nitrous oxide, hydroflourocarbons, perflourocarbons, and sulfur hexafluoride. Endangerment Finding at 66,536-37.

present an endangerment to both public health and public welfare, by increasing global temperatures and changing storm frequency and precipitation patterns. These climate change impacts were determined to endanger public health by causing an increase in ozone pollution due to hotter temperatures, an increase in heat related deaths, and the prevalence of insect borne diseases, as well as other impacts. Climate change was determined to endanger public welfare by reducing agricultural productivity, reducing water supplies, and increasing property and economic damage due to storms and rising sea levels, as well as other impacts.

In the years following the Endangerment Finding, EPA embarked on a series of regulatory actions limiting GHG emissions. First, EPA established GHG emissions limits for new passenger vehicles and light trucks. These limits, and the underlying Endangerment Finding, were upheld in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), rev'd in part on other grounds sub nom in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). EPA also adopted New Source Performance Standards and Best Available Control Technology guidance under Title I of CAA, which would apply to major new sources of GHG pollutants, primarily consisting of power plants. EPA also adopted the so-called Tailoring Rule, which limited the scope of permitting and review requirements that would apply to GHG sources. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,550 (June 3, 2010); Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015). In 2015, EPA issued the so-called Clean Power Plan regulations, Carbon Pollution Emission Guidelines for Existing Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015), which directed states to modify their CAA implementation plans in order to achieve GHG emissions reductions consistent with EPA guidance on the Best System of Emissions Reductions under CAA § 111(d), 42 U.S.C. § 7411(d).

None of these regulatory initiatives were to survive completely intact. The Tailoring Rule and the scope of application of new source GHG limits were partially struck down by the United States Supreme Court in *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302 (2014). The new EPA administration installed in 2017 embarked on a series of regulatory rollback actions, including a relaxing of the GHG emissions standards for new motor vehicles, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020), as well as the emissions standards for new and existing power plants. Repeal of the Clean Power Plan; Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019). However, the 2009 Endangerment Finding has, so far, been left intact.

EPA has not to date invoked its authority to designate GHGs as criteria pollutants under CAA § 108. Section 108 directs that:

> For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall, within 30 days of December 31, 1970, and shall from time to time thereafter revise, a list which includes each air pollutant –
>
> > (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
> >
> > (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 7408(a)(1).

Section 108 uses identical language to describe the endangerment trigger for regulation under that section as used in section 202 of the Clean Air Act, which EPA has invoked. Listing a pollutant as a criteria pollutant under CAA § 108 has several important regulatory consequences. First, EPA is then required, within twelve months of listing, to propose both primary and secondary NAAQS for the pollutant. CAA §§ 108(b), 109(a)(2), 42 U.S.C. §§ 7408(b), 7409(a)(2). Final NAAQS must follow within 90 days. *Id.* NAAQS are designated concentrations of a pollutant in the ambient air. Primary NAAQS are established at a level requisite to protect public health, while secondary NAAQS are set at the level necessary to protect public welfare. 42 U.S.C. § 7409. EPA promulgation of primary NAAQS for a given pollutant triggers an obligation on the part of each state to submit a State Implementation Plan showing how the state will achieve compliance with the primary NAAQS concentrations within no more than ten years. CAA § 172(a)(2)(A), 42 U.S.C. § 7502(a)(2)(A). States that fail to submit a satisfactory plan, or that fail to meet compliance deadlines are subject to direct EPA regulation of emissions within the state, *see* CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1), as well as loss of federal highway funding. CAA § 179(a), (b)(1), 42 U.S.C. §7509(a), (b)(1).

II. RESOLUTION OF CLAIMS ASSERTED

Any duty of the EPA administrator to act under CAA § 108(a) turns on the existence of a prior valid determination of endangerment. *See Zook v. McCarthy,* 52 F.Supp.3d 69 (D.D.C. 2014). Accordingly, this Court will first address the challenges to the validity and scope of the 2009 Endangerment Finding, and then turn to the question of what duty, if any, the Endangerment Finding imposes with respect to listing of criteria pollutants under CAA § 108.

A. Challenge to the 2009 Endangerment Finding

The Endangerment Finding was the subject of a lengthy administrative record compiled during 2009. EPA determined that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." Endangerment Finding, 74 Fed. Reg. at 66,497 (Dec. 15, 2009). As noted, a challenge to the Endangerment Finding was rejected by the D.C. Circuit in 2010, in the *Coalition for Responsible Regulation* case. Despite the change of administrations and the EPA rollbacks of regulatory programs based on it, EPA has not sought by rulemaking to rescind the Endangerment Finding.
Intervenor COGA faces a heavy burden to unravel this seemingly settled issue of climate policy. COGA argues that its challenge is timely, since the existence of a mandatory duty to list GHGs as a criteria pollutant under CAA § 108, as asserted by plaintiff in this case, constitutes "grounds arising after such sixtieth day [from promulgation]." CAA § 307(b), 42 U.S.C. § 7607(b). COGA first challenges the EPA's understanding and application of the term "reasonably anticipated to endanger" as embodied in CAA §§ 108 and 202. Second, COGA challenges the interpretation of the statutory term "endangerment to public health" to include health impacts that flow not

directly from the adverse impacts of breathing air contaminated by the pollutant in question (or its chemical byproducts), but from the second order climate change impacts of modified atmospheric conditions.

1. Challenge to the Administrative Record Supporting the Endangerment Finding

As noted, the D.C. Circuit has previously considered and rejected industry challenges to the Endangerment Finding. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). COGA re-asserts two of the challenges that were rejected in that case. First, COGA asserts that the Endangerment Finding failed to consider the absurd regulatory policy impacts that would follow from the endangerment finding. Second, COGA asserts that the science relied on by EPA concerning the role of anthropogenic GHG emissions in currently observed global temperature increases and the magnitude of future temperature increases is too uncertain to support a current finding of endangerment.

The *Coalition for Responsible Regulation* decision is not binding on this Court as a matter of *stare decisis*, as it is not a decision of the Twelfth Circuit. However, this Court is very mindful of the role Congress assigned to the D.C. Circuit in resolving challenges to regulations of national import, *see* 42 U.S.C. § 7607(b), and will not lightly disturb a precedent upholding the Endangerment Finding as a matter of nationally established regulatory policy. COGA argues that the relief sought by plaintiff constitutes an additional level of regulatory absurdity not considered by the D.C. Circuit: if plaintiff is correct (which COGA does not concede), then EPA would be required to establish a safe level of GHG concentrations in the atmosphere, and States would be required to meet this level in each state within ten years, or face the mandatory loss of federal highway funding. *See* CAA § 179(a), (b)(1), 42 U.S.C. §7509(a), (b)(1). This sets States up with an impossibility, since (as CHAWN and EPA concede) GHG concentrations are relatively constant around the globe — it is beyond the power of any one State, or even the United States as a nation, acting alone, to bring global GHG concentrations down to a level that does not threaten climate change. The D.C. Circuit in *Coalition for Responsible Regulation* rejected this sort of "absurd results" argument, relying on the Supreme Court's holding in *Massachusetts v. EPA* that "policy judgments . . . have nothing to do with whether greenhouse gas emissions contribute to climate change." 684 F.3d at 119 (quoting *Massachusetts v. EPA*, 549 U.S. at 501). This Court agrees that these policy and absurdity arguments are not relevant factors that EPA must consider in making the purely scientific determination whether air pollutant "in [its] judgment cause, or contribute to, air pollution that may reasonably be anticipated to endanger public health or welfare." CAA § 202(a), 42 U.S.C. § 7521(a).

COGA's challenge to the scientific evidence supporting EPA's Endangerment Finding fares no better. Review of EPA's resolution of scientific issues is highly deferential: the question is not whether this Court would make the same finding as EPA made, but whether EPA has made a rational determination based on the record before it. *Coalition for Responsible Regulation*, 684 F.3d at 120; *Am. Farm Bureau Fed'n v. EPA,* 559 F.3d 512 (D.C. Cir. 2009). Certainly, EPA has a rational basis to make a finding of endangerment that is consistent with the published findings of several international and national scientific review bodies and the vast majority of peer reviewed scientific literature. Nor do possible uncertainties about the magnitude of the public health and welfare harms prevent EPA from regulating GHGs — the CAA embodies the precautionary principle, allowing EPA to regulate to prevent potentially grave harms even in the

face of uncertainty about the scope and causation of those harms. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1978).

2. Challenge to the Scope of the Endangerment Finding as Including an Endangerment to "Public Health" as that term is used in the Clean Air Act

COGA's challenge the Endangerment Finding as applied to public health stands on a different footing, however, as it presents a pure question of legal interpretation. COGA argues, in essence, that an endangerment to public health as contemplated by Congress consisted solely of the direct health hazards of air contaminants due to respiration or other personal exposure to the contaminants in the air. EPA's public health endangerment finding relies entirely on the consequential health harms resulting from changing climate, and does not rely on any health impact resulting from breathing air with ambient concentrations of carbon dioxide or other GHGs. According to COGA, although this chain of causation might support a finding of endangerment to public welfare, it cannot support a finding of endangerment to public health. In a reversal of position from its endangerment finding, EPA now agrees with COGA, and argues that "public health" as that term is used cannot be read to include indirect health impacts flowing solely from climate change.

This argument was not considered by the D.C. Circuit in *Coalition for Responsible Regulation*, and the distinction between public health and public welfare has no consequence to regulation under CAA § 202 – either sort of endangerment suffices to trigger regulation. The distinction between public health and public welfare is of great consequence to this case, however, as it spells the difference between primary NAAQS, with their strict compliance deadlines and draconian sanctions, and secondary NAAQS, without statutory compliance deadlines. *See* 42 U.S.C. § 7502(a)(2)(A), (B) (ten-year deadline for achieving attainment applies to primary NAAQS but not secondary NAAQS).

EPA's newfound position is not entitled to deference, as it was espoused for the first time in this litigation and never subjected to notice and comment rulemaking. *See U.S. v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Plaintiff urges that EPA's prior interpretation, reflected in the Endangerment Finding, should be given controlling deference under *Chevron*, despite EPA's change of position. However, where Congress has expressed a specific intention regarding the resolution of a question of statutory interpretation, the Court must always give effect to that specific intention of Congress. In the case of climate, Congress specifically included impacts on "climate" in the definition of "welfare." CAA § 302(h), 42 U.S.C. § 7602(h). The Court is satisfied that Congress saw climate impacts of air pollution solely as a matter of public welfare. Accordingly, this Court rejects the application of EPA's finding of endangerment to public health, at least for the purposes of this litigation.

B. EPA's Duty to List GHGs as Criteria Pollutants Following its Endangerment Finding

Having upheld EPA's Endangerment Finding, at least as it relates to an endangerment to public welfare, this Court can now turn to Plaintiff's claim that the existence of the Endangerment Finding triggers a non-discretionary duty on the part of EPA to list GHGs as a criteria pollutant subject to the NAAQS program. Resolution of this issue requires this Court to

disentangle the questions of whether EPA must list a pollutant as a criteria pollutant once it has made the requisite finding from the question of when that listing is required; i.e., whether the passage of ten years since EPA's issuance of the Endangerment Finding (and plaintiff's petition) constitutes an "unreasonable delay."

1. Lack of a Deadline for Action

Plaintiff relies heavily on the 1976 decision of the Second Circuit in *Natural Resources Defense Council v. Train*, 545 F.2d 320 (2d Cir. 1976), to argue that EPA must list a pollutant as a criteria pollutant under CAA § 108 once it has made the endangerment finding to support regulation of that pollutant under the mobile source provisions of Clean Air Act Title II. In *Train*, the Second Circuit affirmed a District Court decision ordering EPA to list lead as a criteria pollutant based on EPA's prior determination to regulate lead pollution from automobile fuels under CAA § 211 because airborne lead pollution constituted an endangerment to public health. *Natural Resources Defense Council v. Train*, 411 F. Supp. 864 (S.D.N.Y. 1976).

Plaintiff relies on the striking parallels between that case and this one both substantively and procedurally. Like the plaintiff in *Train*, plaintiff bases its cause of action on the provision of CAA § 304(a)(2) that authorizes a citizen suit to compel the Administrator of EPA to perform a duty that is "not discretionary with the Administrator." In *Train*, the District Court found jurisdiction under this section and granted relief, and that relief was affirmed by the Second Circuit Court of Appeals.

EPA asserts that the procedural aspect of *Train* is no longer good law. According to EPA, in order for a statutory duty to be "not discretionary," there must be a statutory deadline for the performance of the duty. In the absence of such a statutory deadline, the EPA Administrator has discretion about the timing of an action that is otherwise mandatory, and a non-discretionary duty claim does not lie. This so-called "date certain doctrine' has generally been applied by federal courts in determining the scope of jurisdiction over mandatory duty cases brought under CAA § 304(a)(2). *See, e.g., Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987); *WildEarth Guardians v. Jackson*, 885 F.Supp. 2d 1112, 1116 (D.N.M. 2012); *Natural Resources Defense Council v. Thomas*, 689 F.Supp. 246, 252 (S.D.N.Y. 1988).

This Court is convinced that a date-certain deadline is indeed an essential element of a pure non-discretionary duty action under CAA § 304(a)(2), the District Court grant of relief in *NRDC v. Train* notwithstanding.[2] We note that the *Train* case was decided a decade before *Sierra Club v. Thomas*, and that the Second Circuit in *Train* did not discuss the jurisdictional question in its opinion.

2. Unreasonable Delay in Performing GHG Listing Duty

The lack of a "date-certain" for EPA action designating new criteria pollutants under CAA § 108(a) does not end this Court's jurisdictional inquiry, for Congress amended § 304 in

[2] The Court notes that this determination that EPA's discretion concerning *when* to list GHGs as criteria pollutants in the absence of a date-certain deadline is a different inquiry from the inquiry into whether EPA had a non-discretionary duty to list GHGs as criteria pollutants. In short, the Court determines that EPA enjoyed discretion about *when* to list GHGs, obviating a citizen suit purely under section 304(a)(2), but the Court does not determine that EPA enjoyed discretion *whether* to list GHGs as criteria pollutants. The Court addresses this latter issue in section 3 below.

1990 to authorize the District Courts to "compel agency action which is unreasonably delayed." 42 U.S.C. § 7604(a), added by Clean Air Act Amendments of 1990 § 707(f), Pub.L. No. 101-549, 104 Stat. 2574, 26883. Although the plaintiff styled its action as one to enforce a non-discretionary duty, this Court finds the allegations of the complaint sufficiently broad to encompass relief for an unreasonable delay. Both the notice letter, and the complaint, include claims that EPA's failure to designate GHGs as criteria pollutants constituted an unreasonable delay, and the parties have fully briefed the issue of unreasonable delay in their motions for summary judgment.

Section 304's provision for relief from "unreasonable delay" raises another potential jurisdictional issue. Section 304 also provides that "an action to compel agency action referred to in section 7607(d) of this title which is unreasonably delayed may only be filed in a United States District Court within the Circuit in which such action would be reviewable under section 7607(b) of this title." Section 7607(b), in turn, provides that regulations of nationwide application (a category which would certainly include the designation of a criteria pollutant) must be reviewed in the Court of Appeals for the District of Columbia Circuit. CAA § 307(b), 42 U.S.C. § 7607(b). However, courts have held that this is a venue requirement, and is not jurisdictional, and is thus waived if not asserted by the defendant. *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858 (D.C. Cir. 1996); *State of N.Y. v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998). As no party has objected to venue in this Court, any objection to venue in this Court has been waived.

This Court must accordingly determine whether EPA has unreasonably delayed action on plaintiff's decade-old demand that it take action to designate GHGs as a criteria pollutant. Unreasonable delay claims are assessed by applying the six factors announced by the District of Columbia Circuit in *Telecomm. Research & Action Ctr. v. F.C.C. ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984). As described by the D.C. Circuit, the TRAC factors are:

> Although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay: (1) the time agencies take to make decisions must be governed by a "rule of reason," . . . ; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason, . . . ; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; . . . ; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, . . . ; (5) the court should also take into account the nature and extent of the interests prejudiced by delay, . . . ; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.' "

750 F.2d at 80, (quoting PCHRG v. FDA, 740 F.2d 21, 34 (D.C. Cir. 1984) (citations omitted).

EPA argues that the ten-year delay in acting on the criteria pollutant determination satisfies the "rule of reason," in that regulation of GHGs as criteria pollutants would require resolution of thorny policy and scientific issues — such as the correct NAAQS for GHGs and the appropriate response to States unable to meet NAAQS in their implementation plans. EPA also urges that a requirement to act now on the GHG criteria pollutant question would interfere with agency activities of a higher priority than regulation of GHGs under the fourth *TRAC* factor. EPA cites an Executive Order establishing its highest priority as the reduction of regulatory burdens on business and economic activity. Reducing Regulation and Controlling Regulatory

Costs, Exec. Order 13771, 82 Fed. Reg. 9,339 (Feb. 3, 2017). This Court is not persuaded. Delays of over eight to ten years have uniformly been held to be unreasonable by courts applying the *TRAC* factors, *See, e.g., In Re Core Commc'ns, Inc.,* 531 F.3d 849 (D.C. Cir. 2008) (seven-year delay unreasonable); *In re Pesticide Action Network N. Am., Inc.,* 798 F.3d 809 (9th Cir. 2015); *In re A Cmty. Voice v. U.S. E.P.A.,* 878 F.3d 779 (9th Cir. 2017) (eight year delay unreasonable). This Court also finds that the third factor (regarding human health and welfare being at stake) applies here, given that EPA itself has found that unregulated GHG emissions pose an endangerment to public welfare.

Accordingly, EPA has unreasonably delayed action on listing GHGs as criteria pollutants under CAA § 108(a).

3. Existence of Non-Discretionary Duty to List

Having determined that the Endangerment Finding is valid with respect to the endangerment to public welfare, and that EPA has unreasonably delayed action on listing GHGs as criteria pollutants, it remains to be determined whether EPA has a non-discretionary duty to list GHGs as a criteria pollutant based on the Endangerment Finding. Legislative history of the 1990 amendments to the Clean Air Act make clear that this Court must determine not just whether EPA has unreasonably delayed action, but also whether EPA is subject to the underlying non-discretionary duty. *See* S. REP. NO. 101-228, at *3758 (1990) (". . . the court in those cases where plaintiff prevails should also go on to define the scope of EPA's duty and specify the particular actions EPA must take to fulfill that duty within the court-imposed deadline.")

Plaintiff relies heavily on the use of the word "shall" in section 108(a) to argue that EPA must list a pollutant once it has made findings that the pollutant constitutes an endangerment and is emitted from numerous or diverse stationary or mobile sources. EPA relies heavily on the third condition for criterial pollutant designation, which limits designation to pollutants for which EPA "plans to issue air quality criteria under this section." 42 U.S.C. § 7408(a)(1)(C). These are the exact same arguments considered by the Second Circuit in *NRDC v. Train,* which rejected EPA's claim of total discretion to decline to designate criteria pollutants as inconsistent with the overall structure and remedial goals of the Clean Air Act. Although the Court might hesitate to rely on precedent from nearly one-half century ago, *Train* continues to be cited and is assumed to be good law in recent decisions. *See Ctr. for Biological Diversity v. EPA,* 749 F.3d 1079, 1083 (D.C. Cir. 2014); *Zook, supra,* 52 F.Supp.3d at 74. Accordingly, this Court will follow *Train*'s holding that EPA has a non-discretionary duty to list GHGs as a criteria pollutant under CAA § 108(a)(1).

III. CONCLUSION AND ORDER

Based on the foregoing, Plaintiff's motion for summary judgment is granted in part. This Court shall issue judgment declaring that: 1) the Endangerment Finding is valid with respect to an endangerment to public welfare, 2) EPA has unreasonably delayed action on responding to Plaintiff's petition for designation of GHGs as a criteria pollutant, and has unreasonably delayed designating GHGs as a criteria pollutant, and 3) EPA has a duty that is not discretionary to designate GHGs as a criteria pollutant. EPA is ordered to publish notice of a proposed rule designating GHGs as a criteria pollutant within 90 days of entry of this order, and to publish a

final rule designating GHGs as a criteria pollutant within 180 days following publication of the notice of proposed rulemaking.

Intervenor COGA's cross motion for summary judgment is also granted in part. This Court shall issue judgment declaring that that portion of the Endangerment Finding determining GHGs to endanger public health is contrary to law. The Endangerment Finding is vacated to the extent that it declares GHGs to endanger public health (and only to that extent).

IT IS SO ORDERED.

Dated this 15th Day of August, 2020.
Romulus N. Remus
United States District Judge

[i] For the purpose of this competition, competitors are to assume that the petition for EPA Rulemaking filed on December 2, 2009 by Center for Biological Diversity and 350.org included Climate Health and Welfare Now as a co-petitioner. The petition is published at https://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf