Team #15

CA. 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

BRIEF FOR THE APPELLEE

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STATEMENT OF JURISDICTION

This case was filed in the United States District Court for the District of New Union pursuant to the citizen suit provision of § 304 of the Clean Air Act. 42 U.S.C. § 7604. On August 15, 2020, a final order was entered granting Climate Health and Welfare Now's (CHAWN) motion for summary judgement in part and granting the Coal, Oil, and Gas Association's (COGA) cross motion for summary judgement in part. CHAWN, COGA and the Environmental Protection Agency (EPA) each filed a timely Notice of Appeal. 28 U.S.C. § 1291 provides that the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. Thus, this Court has jurisdiction of this appeal.

STATEMENT OF THE ISSUES

I. Does this Court have jurisdiction to review CHAWN'S unreasonable delay claim under the CAA § 304(a) and § 307(b)?

II. Assuming sufficient jurisdiction over the unreasonable delay claim, is the EPA's 2009 Endangerment Finding valid with respect to the endangerment of public welfare?

III. Is the EPA's 2009 Endangerment Finding valid with respect to the endangerment of public health?

IV. Was the EPA's ten-year delay in taking any action to list greenhouse gas emissions as criteria pollutants pursuant to § 108(a) of the Clean Air Act an unreasonable delay?

V. Does the EPA have a non-discretionary duty under § 108 of the Clean Air Act to designate greenhouse gas emissions as a criteria pollutant based on the 2009 Endangerment Finding?

STATEMENT OF THE CASE

I. FACTS

The relevant background facts of this case take us back to 1999. In that year, several environmental groups petitioned the EPA to make a finding that the emission of Greenhouse Gases (GHGs)—consisting of gases such as carbon dioxide, nitrous oxide, and methane—from automobiles presented a danger to human health and the environment under § 202 of the Clean Air Act (CAA).

The EPA denied this petition in less than five years, explaining that, in its view, the emission of GHGs did not fit within the concept of "air pollutants" which were subject to CAA regulation. Additionally, the EPA felt that the regulations addressing global climate change would best be served through more specifically authorized legislation and international agreements. Litigation ensued from this denial, and the issue came before the Supreme Court in 2007. The Court in *Massachusetts v. EPA* held that GHGs fit within the definition of "air pollutants" subject to regulation under the CAA, and ordered the EPA to respond to the petition by determining whether GHGs present a threat to public health or welfare. 549 U.S. 497 (2007). A finding of such would trigger regulation under the CAA.

Following the change in Presidential administrations, the EPA in 2009 issued a finding that the emissions of GHGs endanger public health and welfare (the "Endangerment Finding"). The finding defined GHGs as a single air pollutant, and found that GHGs were emitted by numerous mobile sources. Notably, the Endangerment Finding found that the emission of GHGs present a threat to public health and welfare as the GHG emissions contribute to increasing global temperatures, change storm frequency and change precipitation patterns. The Endangerment Finding determined that these changing conditions could endanger public health by causing an increase in ozone pollution due to hotter temperatures, an increase in heat related deaths,

prevalence of insect borne diseases, and other impacts. The Endangerment Finding additionally determined that climate change threatens public welfare by reducing agricultural productivity, reducing water supplies, increasing property and economic damages following frequent storms and rising sea levels, and other impacts. The determinations made by the Endangerment Finding continue to remain intact.

Following the issuance of the Endangerment Finding, a coalition of environmental organizations—including CHAWN—filed a petition with the EPA asking that the EPA list GHGs as criteria pollutants under CAA § 108, 42 U.S.C. § 7408, as the Endangerment Finding created a non-discretionary duty to list GHGs. Section 108 provides that:

> For the purpose of establishing a 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 judgement, 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.

CAA § 108(a)(1), 42 U.S.C. § 7408(a)(1).

Ten years passed since the petition was made, yet the EPA took no action on the petition—neither to grant nor deny it.

In 2019, CHAWN properly served the EPA with notice of intention to sue for failure to carry out its asserted mandatory duty to regulate GHGs as criteria pollutants and for unreasonable delay in carrying outs its non-discretionary duty to designate GHGs as a criteria pollutants as requested in the 2009 petition. The EPA again took no action, and CHAWN commenced this

lawsuit under the citizen suit provision of CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2) to seek an order directing the EPA to publish a new list of criteria pollutants that includes GHGs.

II. PROCEDURAL HISTORY

On September 1, 2020, the District Court for the District of New Union addressed cross motions for summary judgement from plaintiffs (CHAWN) and defendants (COGA and the EPA). CHAWN petitioned that once the EPA made the Endangerment Finding, it had a non-discretionary duty to list GHGs as criteria pollutants, and that the EPA's delay in doing so was unreasonable. In response, the EPA argued that it is not subject to such a non-discretionary list and that the complexities that would arise from the listing justified the delay. COGA, meanwhile, asserted that the Endangerment Finding is unsupported by law and does not support a finding of endangerment to public health. In response, the EPA defended the Endangerment Finding regarding public welfare, but did not defend the public health component of the Endangerment Finding. Accordingly, the EPA sided with COGA in arguing that a portion of the Endangerment Finding is not valid.

The District Order granted CHAWN's motion for summary judgement in part, issuing a judgement declaring that: (1) the Endangerment Finding is valid with respect to the threats climate change poses to public welfare; (2) the EPA unreasonably delayed responding to CHAWN's position and unreasonably delayed designating GHGs as pollutants; and (3) the EPA has a non-discretionary duty to designate GHGs as criteria pollutants. As a result, the EPA was ordered to publish notice of a proposed rule designating GHGs as criteria pollutants within 90 days, and a final rule within 180 days of the proposal.

The District Court additionally granted—in part—COGA's cross motion for summary judgement, finding that the Endangerment Finding determining GHGs to threaten public health was contrary to law.

Following the District Court's issuance of the Order, CHAWN, COGA and the EPA each filed a timely Notice of Appeal to the Court of Appeals for the Twelfth Circuit.

SUMMARY OF THE ARGUMENT

This matter arises out of the EPA's 2009 Endangerment Finding in which the agency held that GHG emissions may endanger public health and public welfare. After this finding, CHAWN filed a petition to list GHG emissions as criteria pollutants because they are an endangerment to both public health and public welfare. For ten years following the filing of the petition, the EPA remained silent on their decision. As a result of this deafening silence, CHAWN filed a petition that the EPA's ten-year delay in acting to list GHG emissions as criteria pollutants pursuant to CAA § 108(a) constituted an unreasonable delay. The District Court properly determined that the EPA's ten-year delay in action was unreasonable, and this Court should find so as well. In analyzing the EPA's delay under a widely-accepted factors analysis, this Court will find that the EPA has no justification for its ten-year delay.

This Court should additionally find that the EPA has a non-discretionary duty under CAA § 108 to designate GHG emissions as a criteria pollutant due to the use of the word "shall" in the statute. Courts around the country—including the Supreme Court—have consistently held that when "shall" is used in a statutory provision and is accompanied by an action, the statute connotes a mandatory duty to act.

Next, CHAWN moves for summary judgement arguing that the Endangerment Finding is valid with regards to both public health and public welfare. This Court should rule that the Endangerment Finding is valid with regards to public welfare because the EPA has a statutory obligation to prevent danger to the public welfare and this decision was based on a reasonable scientific judgement. This Court should find that the Endangerment Finding is valid with regard to public health because CAA § 202(a) is silent on public health. Thus this court must defer to the EPA's reasonable deference. Further, despite the EPA's change of position, the EPA's prior

interpretation should be given controlling deference under *Chevron* because this is its first time in litigation and it has never been subject to notice and comment rulemaking.

This Court has also raised a jurisdictional issue, *sua sponte*, that CHAWN's unreasonable delay claim should be exclusively reviewed in the Court of Appeals District of Columbia (D.C.) Circuit under CAA § 307(b). CAA § 307(b) states that a claim is subject to exclusive review in the D.C. Circuit Court of Appeals if it is enumerated within the statute or if the claim has nationwide applicability. This Court should rule that CHAWN's unreasonable delay claim should not be subject to the exclusivity rule under CAA §307(b) because these claims are not enumerated within the statute nor does this unreasonable delay claim have nationwide applicability.

ARGUMENT

I. STANDARD OF REVIEW

This is an appeal from a ruling on cross-motions for summary judgement. Accordingly, the standard of review to be applied by this Court is *de novo*. *Bienkowski v. Northeastern University*, 285 F.3d 138, 140 (1st Cir. 2002); *see e.g. County of Vernon v. United States*, 933 F.2d 532 (7th Cir. 1991).

II. WHEN APPLYING THE RULES OF STATUTORY INTERPRETATION TO CAA § 304(A) AND § 307(B), THIS COURT SHOULD FIND SUFFICIENT JURISDICTION TO REVIEW CHAWN'S UNREASONABLE DELAY CLAIM.

Here, the Court has taken this jurisdictional issue, *sua sponte*, which means the Court brought up this motion on its own accord without CHAWN or COGA's prompting. To overcome this burden, CHAWN must show that this Court has sufficient jurisdiction over the unreasonable delay claim. Under CAA § 304(a), CHAWN must show that the unreasonable delay claim is not enumerated under the statute nor will it have nationwide applicability. When applying the rules of statutory interpretation that require following the plain meaning of statutes—avoiding absurd results and following the legislature's intent to CAA § 304(a) and CAA § 307(b)—this Court should find sufficient jurisdiction to review CHAWN's claim.

A. The plain meaning rule requires this court to follow CHAWN's interpretation of CAA § 304(a) because the plain meaning of the statute permits a civil action when there is alleged failure of the Administrator to perform a duty.

The first issue presented is whether this Court has sufficient jurisdiction under CAA §304(a) to hear CHAWN's unreasonable delay claim. When interpreting a statutory term, the court's job is to interpret the words consistent with their ordinary meaning at the time Congress enacted the statute. *Wisconsin Central Ltd. v. U.S.,* 138 S.Ct. 2067, 2070 (2018). In this case, the plain language of CAA § 304(a) states that **"**any person may commence a civil action on his own behalf against the [EPA] Administrator where there is an alleged failure of the Administrator to

act." CAA § 304(a), 42 U.S.C. § 7604(a). Here, the inaction to respond to CHAWN's unreasonable delay claim is a clear failure of the Administrator to fulfill his duty and respond to the petition. Thus, when applying the plain meaning rule to CAA § 304(a), this Court should find sufficient jurisdiction to hear this case under CAA § 304(a).

B. The plain meaning rule requires this court to follow CHAWN's interpretation of § 307(b) because the plain meaning of the statute does not include unreasonable delay claims within the statute nor is there an unreasonable delay claim subject to nationwide applicability.

Next, this Court must apply the plain meaning rule to CAA § 307(b) to determine if CHAWN's unreasonable delay claim is subject to exclusive review in the D.C. Circuit. The plain language of CAA § 307(b) enumerates specific claims that may only be filed in the United States Court of Appeals for the D.C. Circuit. In the current case, a claim of unreasonable delay is not enumerated within the statute and thus does not automatically trigger an exclusive review in the D.C. Court of Appeals.

However, the list of enumerated claims is not the only way in which exclusive review is granted to the D.C. Circuit. Congress has granted the D.C. Circuit exclusive jurisdiction to review any "nationally applicable regulation, promulgated or final action taken by the Administrator under the CAA." CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1); *see Sierra Club v. Jackson*, 813 F.Supp.2d 149, 156 (D.C. Cir. 2011). Therefore, the D.C. Circuit's exclusive review requires that the claim be a nationally applicable regulation, promulgation, or final action and such action is based on a determination of nationwide scope or effect. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

Here, CHAWN's claim is that the EPA failed to respond to CHAWN's petition within a sensible amount of time and that the delay was unreasonable. CHAWN's unreasonable delay claim refers to the EPA's failure to respond to CHAWN's petition to list GHG emissions as a criteria pollutant. While CHAWN's claim of listing GHG emissions as a criteria pollutant likely has

nationwide applicability, the issue presented is strictly about the EPA's failure to respond to CHAWN's claim within a reasonable time. The jurisdictional issue is not about the nationwide applicability of GHG being listed as criteria pollutants, rather it is only about the nationwide applicability of EPA's failure to respond to CHAWN's claim. This unreasonable delay claim does not have nationwide applicability because CHAWN's claim is unique only to CHAWN. This Court's ruling on the CHAWN's unreasonable delay claim will only affect CHAWN. The argument can be made that the decision to list GHG emissions as criteria pollutants does have nationwide applicability but that is not the issue here. Therefore, this Court should dismiss the lack of jurisdiction claim because an unreasonable delay claim is not enumerated within CAA § 307(b) nor does it have nationwide applicability.

C. The absurd results rule requires this court to follow CHAWN's interpretation of CAA § 307(b) because forcing all review of the EPA Administrator to be filed only in the D.C. Circuit would be an absurd result.

Next, this Court must address whether a broad interpretation of the D.C. Circuit's exclusivity rule would produce an absurd result. The absurd result rule is a long-standing rule that a statute should not be construed to produce an absurd result. *Center for Biological Diversity v. EPA*, 722 F.3d 401, 411 (9th Cir. 2017). Congress granted exclusive jurisdictional review to the D.C. Circuit under CAA § 307(b) to review any "nationally applicable regulation, promulgated or final action taken by the Administrator." *Sierra Club v. Jackson*, 813 F.Supp.2d 149, 156 (D.C. Cir. 2011). As a result of this exclusive review, the D.C. Circuit Court of Appeals proportionally hears more administrative law proceedings than any other circuit in the country. Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, Vol 23 Cornell J.L. & Pub. Pol'y 131 (2013). Thus, it can be reasonably inferred that the D.C. Circuit possesses an expertise in the field of administrative law. In the present case, the issue presented is about an unreasonable delay claim. An unreasonable delay claim is not a specialized part of administration law. These claims can be sufficiently

reviewed by any of the Circuits across the country. Thus, an unreasonable delay claim does not require a specialized review by the D.C. Circuit. Therefore, it would create an unnecessary and absurd result if this Court were to grant exclusive review to the D.C. Circuit.

III. THIS COURT SHOULD FIND THAT THE 2009 ENDANGERMENT FINDING IS VALID WITH RESPECT TO PUBLIC WELFARE BECAUSE THE EPA HAS A STATUTORY OBLIGATION TO PREVENT DANGER TO THE PUBLIC WELFARE AND THIS DECISION WAS BASED ON REASONABLE SCIENTIFIC JUDGEMENT.

In *Massachusetts v. EPA*, the Court concluded that the EPA can avoid taking further action only if it determines that GHGs do not contribute to climate change or if it provides some reasonable suspicion as to why it cannot or will not exercise its discretion to determine whether they do. 549 U.S. 497, 533 (2007). The Court directed the EPA to determine whether sufficient information exists to make an endangerment finding for greenhouse gases. *Id*. at 534. As a result of the Supreme Court's conclusions in *Massachusetts*, the EPA handed down the Endangerment Finding of 2009. *Coalition of Responsible Regulators v. EPA, 684* F.3d 102, 114 (D.C. Cir. 2012). In this 2009 Finding, the EPA concluded that motor-vehicle emissions contribute to the total GHG air pollution and thus to the climate change problem which may reasonably be anticipated both to endanger public health and public welfare. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66499 (Dec. 15, 2009). The finding of endangerment with regards to public welfare is now being challenged by COGA. This Court should find that the 2009 Endangerment Find is valid with respect to an endangerment of public welfare because EPA has a statutory obligation to prevent danger to the public welfare and their decision was based upon a reasonable scientific judgement. Finally, despite the EPA's change of position, the EPA's prior interpretation should be given controlling deference under *Chevron* because this is its first time in litigation and it has never been subject to notice and comment rulemaking.

A. The EPA has a statutory obligation under CAA § 202(a) to regulate the harmful GHG emissions that endanger public welfare.

This Court must make a determination on whether the EPA should include GHG emissions as a potential danger to public welfare. The EPA has a statutory obligation to regulate the harmful greenhouse gases when they threaten to endanger public welfare. *Massachusetts,* 548 U.S. at 534, *see also Ethyl Corp v. EPA,* 541 F.2d 1, 7. (D.C. Cir. 1976) (holding that CAA § 211(c)(1)(A) authorizes the Administrator of the EPA to regulate gasoline additives whose emission products will endanger the public health or welfare). The CAA defines all language referring to effects on "welfare" to include, but not be limited to, "effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants." CAA § 302(h), 42 U.S.C. § 7602(h). Therefore, the EPA has a duty to make an endangerment finding when there is danger to any of the factors included under public welfare. In the 2009 Endangerment Finding, the EPA found that emissions from GHGs may present an endangerment to public welfare in the form of increasing global temperatures, changing storm frequency and precipitation patterns. 74 Fed. Reg. 66499 (Dec. 15, 2009). The EPA determined the effects of climate change would endanger public welfare by reducing agricultural productivity, water supplies and increasing property and economic damage due to storms and rising sea levels. *Id*. Since the EPA has made a scientific based determination that GHG emissions contribute to climate change and climate change negatively affects public welfare, the EPA has the authority to regulate GHG emissions.

B. When making an Endangerment Finding policy discussions must not be included, instead the finding must be based on reasoned scientific judgement.

The next issue presented is whether this Court should permit policy discussion to be considered when making an Endangerment Finding. The Supreme Court held in *Massachusetts* that when making an Endangerment Finding, scientific judgment about the potential risks that GHG emissions pose to public health and welfare—not policy discussions—must be applied. 549 U.S. at 533. In that case, the EPA attempted to inject considerations of policy including a "laundry list of reasons not to regulate GHGs." *Id*. The Court decided that policy judgements have nothing to do with GHG emissions' contribution to climate change and still less do they amount to a reasoned justification for declining to form a scientific judgement. *Id.* at 533-34, *see also Coalition of Responsible Regulators v. EPA, 684* F.3d at 322 (dismissing State and Industry Petitioners' argument because it put forth only a policy argument of what might happen if the EPA were to make an endangerment finding). Furthermore, the EPA expressly indicated their intent to prevent policy discussion when making scientific judgement in their 2009 Endangerment Finding. 74 Fed. Reg. at 66515 (Dec. 15, 2009). The EPA stated that policy arguments muddle the rather straightforward scientific judgement about whether there may be endangerment by throwing the potential impact of responding to the danger into the initial question. *Id*.

In the present case, COGA introduces an absurd results argument that it is beyond the power of any one State or even the United States, acting alone, to bring down global GHG concentrations to a non-threatening level. This argument is undoubtedly a policy discussion about the potential impact of responding to climate change. As the Supreme Court has previously held *in Massachusetts* and *Responsible Coalition of Regulators*, policy judgments may not be applied when making an Endangerment Finding. In the present case, the EPA has used several published findings of several international and national scientific review bodies and the vast majority of peer reviewed scientific literature to form a rational basis for their endangerment finding. 74 Fed. Reg.

at 66515 (Dec. 15, 2009). Therefore, this Court should dismiss COGA's argument as a policy discussion and affirm the EPA's Endangerment Finding because the EPA used reasoned scientific judgment to make their conclusion.

C. The EPA may make an endangerment finding despite lingering scientific uncertainty because an endangerment finding is precautionary in nature.

Next, this Court must analyze whether an endangerment finding is appropriate even when there is lingering scientific uncertainty. If a statute is precautionary in nature and designed to protect the public health, and the relevant evidence is difficult to come by, uncertain or conflicting because it is on the frontiers of scientific knowledge, EPA need not provide rigorous step-by-step proof of cause and effect to support an endangerment finding. *Ethyl Corp v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976). Furthermore, the D.C. Circuit in *Coalition of Responsible Regulators v. EPA* held that requiring the EPA to find certain endangerment of public health or welfare before regulating GHGs would prevent the EPA from doing the job Congress gave in Section 202(a)—utilizing emission standards to prevent reasonably anticipated endangerment from maturing into concrete harm. 684 F.3d at 326. Here, the EPA has used publishing findings of several international and national scientific review bodies and the vast majority of peer reviewed scientific literature to form a rational basis for their endangerment finding. 74 Fed. Reg. at 66515 (Dec. 15, 2009). Despite some lingering uncertainty about the full effects of climate change, the EPA compiled the best available scientific data to make the Endangerment Finding. Therefore, this Court should find that the EPA's Endangerment Finding is appropriate despite lingering scientific uncertainty because endangerment findings are precautionary in nature and designed to protect public welfare.

IV. THIS COURT SHOULD FIND THE 2009 ENDANGERMENT FINDING VALID WITH RESPECT TO PUBLIC HEALTH BECAUSE CAA §202(A) IS SILENT ON PUBLIC HEALTH THUS THIS COURT MUST DEFER TO THE EPA'S REASONABLE DEFERENCE WHICH INCLUDES BOTH DIRECT AND INDIRECT HEALTH IMPACTS FROM GHG EMISSIONS.

This Court should find that the Endangerment Finding is valid with respect to an endangerment of public health for four reasons. First, CAA § 202(a) is silent with regards to the definition of public health, thus this Court must yield to the EPA's deference. Second, the exclusion of indirect impacts stemming from GHGs as established in the EPA's Endangerment Finding would produce an absurd result because the EPA has authority under CAA § 202(a) to protect any endangerment to public health from air pollution. Third, it was Congress's intent under CAA § 202(a) for the EPA to have the authority to protect the public health of all its citizens. Finally, despite the EPA's change of position, the EPA's prior interpretation should be given controlling deference under *Chevron* because this is its first time in litigation and it has never been subject to notice and comment rulemaking.

A. When a statute is silent regarding an issue, the Court must consider whether the agency's action was based on a permissible construction of the statute.

When a court reviews an agency's construction of a statute it faces two questions. The first question is whether Congress directly addressed the question at issue. *Chevron v. Natural Defense Council*, 467 U.S. 837, 842 (1984). If Congress leaves an explicit statutory gap, then there is an express delegation of authority to the agency to fill that gap by promulgating regulations. *Id.* If the court finds that the statute is silent regarding that specific issue, the court must next make a decision on whether the agency's action was based on a permissible construction of the statute. *Id.* In the present case, while Congress remains silent as to the definition of public health, Congress did provide a definition for public welfare. This inaction by Congress appears to be intentional in nature because public health and public welfare are paired together throughout the entire CAA. This indicates Congress's intent to leave an explicit gap in the definition of public health and therefore expressly delegated the EPA with authority to fill that gap by creating regulations.

Now, the Court must consider whether the EPA's action was based on permissible construction of the statute. In making this determination, the court need not conclude that the agency's construction was the only one it permissibly could have adopted to uphold the construction or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S 27, 39 (1981). Further, if Congress has explicitly left a gap for the agency to fill, expressive delegation of authority is given to the agency unless they are arbitrary, capricious or manifestly contrary to the statute. *Chevron*, 467 U.S. at 844. Here, the Court must make a determination that is based on the permissible construction of CAA § 202(a). This provision of the CAA expressly permits the EPA to regulate "air pollution that may reasonably be anticipated to endanger public health." CAA § 202(a), 42 U.S.C. § 7521(a). Since Congress did not expressly define public health in CAA §202(a), this Court should yield to the EPA's deference on the definition of public health. The EPA's Endangerment Finding including both indirect and direct health impacts is reasonable because it was Congress's intent to give the EPA the measures necessary to protect the public health of its citizens. Therefore, this Court should yield to the EPA's deference in finding that public health can include both indirect and direct health impacts.

B. This Court should find that the endangerment of public health includes direct and indirect health effects because it would be an absurd result if the EPA could not regulate all health impacts resulting from air pollution.

Next, this Court must address whether excluding indirect health effects of air pollution from the EPA's Endangerment Finding would produce an absurd result. The absurd result rule is a long-standing rule that a statute should not be construed to produce an absurd result. *Center for Biological Diversity*, 722 F.3d at 411. In the current case, COGA argues that 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. COGA

argues that the EPA's Endangerment Finding consists only of the indirect health hazards caused by climate change and thus does not follow Congress's intent when drafting CAA § 202(a). However, if this court were to adopt COGA's interpretation of public health, it would produce an absurd result.

CAA § 202(a) is silent as to the definition of public health and thus the EPA has not been provided with explicit guidance from Congress on whether to include all forms of public health impacts. However, CAA §202(a) does expressly give the EPA the authority to regulate air pollution that may reasonably be anticipated to endanger public health. CAA § 202(a), 42 U.S.C. § 7521(a). Further, the Supreme Court has held that the EPA has a statutory obligation to regulate the harmful GHGs when they threaten to endanger public health or welfare. *Massachusetts,* 549 U.S. at 534. If the EPA is restricted to making their Endangerment Findings based strictly on direct health impacts, it would produce an absurd result because the EPA could acknowledge the dangers of indirect and direct health impacts but not be able to make an endangerment finding to protect public health**.** Therefore, this Court should dismiss COGA's interpretation of public health because it would produce an absurd result.

C. This Court should find that the endangerment of public health includes both direct and indirect health effects because it was Congress's intent to protect the health of its citizens.

Next, this Court must determine whether the statutory term of "public health" should be read to include the indirect and direct health impacts from air pollution. Unlike public welfare, Congress did not include a definition for "public health" within CAA § 202(a). CAA § 202(a), 42 U.S.C. § 7521(a). The EPA does not have express instructions whether to include indirect or direct health impacts in its endangerment finding. However, when drafting the CAA, the legislature was clear in stating that the EPA has the authority to regulate "air pollution that may reasonably be anticipated to endanger public health." *Id*. Although Congress may not have expressly defined the

term public health, it can be reasonably inferred that Congress intended to include indirect and direct health impacts because Congress has granted the EPA the express authority to protect the health of its citizens.

D. Despite the EPA's change of position, the EPA's prior interpretation should be given controlling deference under *Chevron* because this is its first time in litigation and it has never been subject to notice and comment rulemaking.

The next issue presented is whether the EPA's prior interpretation of the 2009 Endangerment Finding regarding public health should be given controlling deference because the EPA's new position has never been subject to notice and comment rulemaking. Under the Administrative Procedure Act (APA), proposed agency rulemaking is subject to notice and comment requirements unless the rulemaking is an interpretative rule, general statements of policy, or rules of agency organization, procedure or practice or when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary or contrary to public interest. 5 U.S.C. § 553(b) (2018). However, an agency rule can be exempt from the notice and comment requirement if it is merely an interpretative rule. *American Min. Congress* v. *Mine Safety & Health Admin*., 995 F.2d 1106, 1112 (1993). When determining whether a rule is legislative or interpretative, the court considers the following: (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or their action to confer benefit or ensure the performance of duties; (2) whether the agency has published the rule in the Code of Federal Regulations; (3) whether the agency has explicitly invoked its general legislative authority; or (4) whether the rule effectively amends a prior legislative rule. *Id*. If the answer to any of these questions is affirmative, then it is a legislative rule and thus subject to notice and comment requirements. *Id.*

In the present case, the EPA's 2009 Endangerment Finding was published in the Code of Federal Regulations. 74 Fed. Reg. at 66496 (Dec. 15, 2009). Therefore, the EPA's new

interpretation is a legislative rule and must be subject to notice and comment rulemaking. This court should give the EPA's initial Endangerment Finding controlling deference and dismiss the EPA's new Endangerment Finding because it has not been subject to notice and comment rulemaking.

V. THE EPA'S TEN-YEAR DELAY IN TAKING ACTION ON LISTING GHGS AS CRITERIA POLLUTANTS UNDER § 108(A) OF THE CAA VIOLATES ITS NON-DISCRETIONARY DUTY TO DO SO AND IS AN UNREASONABLE DELAY.

2010 to 2019 produced the warmest decade since record keeping began 140 years ago, with scientists from the National Oceanic and Atmospheric Administration (NOAA) and National Aeronautics and Space Administration (NASA) pointing to continued GHG emissions as the primary reason behind the rising global temperatures. Katherine Brown, *NASA, NOAA Analyses Reveal 2019 Second Warmest Year on Record*, NASA (Jan. 15, 2020), https://www.nasa.gov/press-release/nasa-noaa-analyses-reveal-2019-second-warmest-year-on-record. With 2019 producing the second warmest year on record, *id.*, the global temperatures threaten to continue rising over the next few years. Yet despite the known causes of the continually rising global temperatures, the threats the increase pose (heat waves, wildfires, rising sea levels, etc.), and in light of the 2009 Endangerment Finding, the EPA failed to take action—for ten years—on the petition to list GHGs as pollutants.

Under § 108(a)(1) of the CAA, the EPA "shall from time to time . . . revise, a list which includes each air pollutant . . . ." To hold the EPA accountable on this statutory duty, § 304 of the CAA authorizes citizens to bring suit against the EPA to compel the Administrator of the EPA to perform non-discretionary duties. CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2). The reviewing court has jurisdiction to compel agency action that is unreasonably delayed. CAA § 304(a)(3), 42 U.S.C. § 7604(a)(3).

In this case, the District Court failed to recognize the differing opinions amongst courts regarding when the EPA has a duty to list criteria pollutants and improperly concluded that the EPA had discretion on when to do so. However, despite this, the District Court properly held that the ten-year delay in response following the petition to list GHGs was unreasonable.

A. The District Court improperly determined that the EPA has a discretionary duty on when to act to list pollutants.

The EPA must list a pollutant as a criteria pollutant under § 108 of the CAA once the endangerment finding has been made. The EPA does not have discretion on the timing of this action, and the District Court improperly relied on the "date certain doctrine" in determining that the EPA has discretion on when to list. The date certain doctrine suggests that a non-discretionary duty of timeliness may arise when a fixed deadline is provided in the relevant statute or if a deadline is readily ascertainable by reference to another fixed date or event. *Sierra Club v. Thomas*, 828 F.2d 783, 790 (D.C. Cir. 1987). However, neither deadline necessarily imposes a non-discretionary duty of timeliness. *Id.* at 790-91. In order to impose a clear-cut non-discretionary duty, a duty of timeliness must "'categorically mandate' that all specified action be taken by a date-certain deadline." *Id.* at 791. Relying on the use of the date certain doctrine in cases such as *Sierra Club*, the District Court determined that a date-certain deadline is an essential element of a non-discretionary duty. However, in doing so, the District Court improperly disregarded the fact that the date certain doctrine has been criticized and some courts have chosen not to follow it.

It is noteworthy that the D.C. Circuit—the court that decided *Sierra Club*—and the U.S. District Court for the District of Columbia have expressed reservations over the date certain doctrine. *See e.g., National Wildfire Federation v. Browner*, 127 F.3d 1126, 1129 n.6 (D.C. Cir. 1997) (declining to decide the EPA's contention that a "readily ascertainable deadline" for agency action is a necessary jurisdictional base for a citizen suit under the CAA); *Kingman Park Civic*

Association v. EPA, 84 F. Supp. 2d 1, 5 (D.D.C. 1999) (declining to accept the EPA's argument that the lack of a date-certain deadline means the EPA has a discretionary duty, as the application of *Sierra Club* to the case would "assume distorted dimensions").

Other district courts have similarly been reluctant to follow the date certain doctrine. The Northern District of Illinois found that despite no statutory date-certain deadline, § 505(c) of the CAA imposed a non-discretionary duty on the EPA to make a decision on whether to issue a permit to a polluting facility. *Sierra Club v. Johnson*, 500 F. Supp. 2d 936, 940-41 (N.D. Ill. 2007). In *Johnson*, the EPA contended that § 505(c) provided the EPA with a discretionary duty on when to issue the permit because a specific date or time frame by which to complete the permit process was not provided. *Id.* at 940. The court was not persuaded by this contention and implied that the EPA's interpretation would go against the purpose of the CAA. *Id.* at 941. The court viewed the EPA's interpretation as "unnecessarily complicating an already complex statute, making a long process longer, and undermin[es] attaining the goal of cleaner air." *Id.*

Another district court applied a similar analysis of the applicability of the date certain doctrine to the Clean Water Act. In *Raymond Proffitt Foundation v. EPA*, the Eastern District of Pennsylvania held that § 303(c)(3) imposed a non-discretionary duty on the EPA to promulgate water quality standards for states that failed to properly make their own. 930 F. Supp. 1088, 1097 (E.D. Pa. 1996). While the statute does not provide a date by which the EPA "shall promulgate" the standards, the court rejected the need for a date certain doctrine to create a non-discretionary duty. *Id.* at 1099-101. The court reasoned, in part, that the application of the date certain doctrine would conflict with the goals and purpose of the Clean Water Act, as well as the express procedures for promulgation of water quality standards under § 303(c)(3) of the Act. *Id.* at 1099-100.

It is evident that the date certain doctrine does not have the weight and significance that the District Court believed it to have. Even when statutory provisions do not have a date-certain deadline, courts have continued to find that the EPA has a non-discretionary duty to act when a delay would go against the purpose of the statutes the EPA enforces—whether it be the Clean Water Act or the CAA. In this case, the purpose of the CAA is to protect and enhance the quality of the Nation's air in order to promote public health and welfare. CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1). The EPA's continued delay in listing GHGs as pollutants severely threatens public health and welfare. Therefore, a determination that the EPA has a non-discretionary duty to list GHGs once the endangerment finding is made—despite the lack of a date-certain deadline—is consistent with the rationale of other courts.

B. Even if the EPA's duty regarding when to list pollutants is discretionary, the ten-year delay is unreasonable.

Regardless of whether the EPA has discretion on when it must act on its statutory duty, the EPA's ten-year delay in taking any action to list GHGs as pollutants is unreasonable. Under the APA, all agencies must conclude matters presented to them within a "reasonable time," 5 U.S.C. § 555(b), and courts reviewing agency action must compel agency action that is "unreasonably delayed." *Id.* § 706(1). The CAA further promulgated these APA rules by establishing that district courts shall have jurisdiction to compel agency action that is unreasonably delayed. CAA § 304(a)(3), 42 U.S.C. § 7604(a)(3).

The meaning of the terms "reasonable time" and "unreasonably delayed" have not been interpreted by the Supreme Court, nor have they been defined by the CAA or the APA. Additionally, the Supreme Court has never addressed how a reviewing court should analyze an agency's delay. Lower federal courts, however, have nonetheless commonly employed a multi-factor analysis in reviewing agency delays. This six-factor analysis—known as the "TRAC

analysis" and established by the D.C. Circuit—verifies the District Court's determination that the EPA's delay in action was unreasonable. The precedent stemming from the cases utilizing the TRAC analysis additionally support the District Court's determination that a ten-year delay is not reasonable. Accordingly, this Court will find that the EPA unreasonably delayed in acting to list GHGs as a pollutant.

1. Application of the TRAC analysis establishes that the EPA's delay was unreasonable.

An analysis of agency delay using the factors laid out by the D.C. Circuit in *Telecomm. Research & Action Ctr. v. F.C.C.* ("TRAC") establishes that the EPA unreasonably delayed in listing GHGs as criteria pollutants. Under this analysis, the D.C. Circuit instructs courts to consider:

> (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 70, 80, (D.C. Cir. 1984) (*quoting PCHRG v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984)) (citations omitted). While the D.C. Circuit has never attempted to elaborate on the relationships between the factors, their relative importance as compared to one another, or if any factors are independently sufficient or absolutely necessary for a finding of unreasonable delay, Michael Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and*

Executive Branch Review of Agency Foot-Dragging, 79 Geo. Wash. L. Rev. 1381, 1412 (2011), it is evident that these factors weigh in favor of an unreasonable delay determination in this case.

Despite the EPA's contention to the District Court, the ten-year delay in action does not satisfy the "rule or reason" factor and therefore is not justified. In support, the D.C. Circuit has stated that the "rule of reason" assumes that agency action will be made within a decade. *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980). Additionally, while the EPA may contend that the ten-year delay is reasonable under the "rule of reason" because it would allow the agency to resolve policy and scientific issues such as the correct NAAQS for GHGs, this argument holds little weight in the context of certain CAA provisions. CHAWN acknowledges the importance of scientific diligence in setting NAAQS, but a ten-year time frame to do so is outlandish, particularly as the CAA provides the EPA with 12 additional months following the listing to propose NAAQs for the pollutant. CAA § 108(b), 42 U.S.C § 7408(b). Additionally, the EPA has authority to review, modify and reissue the criteria it sets for the pollutant. CAA § 108(c), 42 U.S.C. § 7408(c). In light of the additional 12 months the EPA has to propose NAAQs for GHGS and the EPA's authority to revise the NAAQs, the EPA cannot justify the ten-year delay under the "rule of reason." Accordingly, the delay is unreasonable under the first factor.

A consideration of the third factor additionally establishes that the EPA's delay was unreasonable. As discussed above, the continued and largely unregulated emission of GHGs pose significant risk to human health and welfare. The EPA's Endangerment Finding found that GHG emissions elevate the atmospheric concentrations of GHGs, which endangers the public health and welfare by fostering global climate change and the negative impacts a changing climate brings. 74 Fed. Reg. 66523, 66537 (Dec. 15, 2009). The rationalization of the EPA's Endangerment Finding

was upheld by the D.C. Circuit upheld in *Coalition for Responsible Regulation,* 684 F.3d at 122. Therefore, the third factor additionally weighs in favor of an unreasonably delay.

In its argument to the District Court, the EPA unsuccessfully petitioned that the fourth factor fell in its favor due to the issuance of an Executive Order. This Executive Order established that the EPA's highest priority would be the reduction of regulatory burdens on business and economic activity. However, the purpose of the CAA is to protect and enhance the quality of the Nation's air in order to promote public health and welfare. CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1). The longstanding purpose of the Congressionally approved act would seem to serve as higher priority as opposed to an Executive Order that is subject to revision and revocation every four years. In essence, the legislative branch provided the rules for the executive branch to enforce. The executive branch, through the EPA, cannot and should not throw these rules and policies to the wayside in favor of its own, conflicting rules. Accordingly, when faced with the decision to enforce the purpose of the CAA or a conflicting policy established through Executive Order, enforcing the purpose of the CAA should be the EPA's higher priority. The EPA's belief that this Executive Order is a higher priority than the listing and regulation of a pollutant under the CAA is unreasonable.

The fifth factor additionally supports the determination that the EPA's delay in action was unreasonable. Continued delay in regulating and listing GHGs unfairly prejudices the interests of the Nation in having clean air and a stable climate. Given the rate global temperatures have risen over the past decade, the delay additionally threatens to prejudice the interests and well-being of future generations. The Supreme Court in *Massachusetts v. EPA* recognized that Congress has long been privy to the potential future impact of climate change. *See Massachusetts*, 549 U.S. at 507. Following the enactment of the National Climate Program Act in 1978, the National Research

Council investigated the impact of carbon dioxide on climate change. *Id.* The Council found that, "If carbon dioxide continues to increase, the study group finds no reason to doubt that climate change will result and no reason to believe that these changes will be negligible. . . . A wait-and-see policy may mean waiting until it is too late." *Id.* at 508 (*quoting* Climate Research Board, Carbon Dioxide and Climate: A Scientific Assessment, p viii (1979)). Due to the unforgiving nature of climate change and the established impact GHG emissions have on public health and welfare, the EPA's delay has prejudiced current and future generations.

In reviewing the applicable factors, the EPA fails to establish that the delay was within the "rule of reason" and cannot claim that the delay was justified due to a higher priority. Additionally, the EPA's flawed determination of a higher priority and continued delay endangers the health and welfare for current and future generations—directly contradicting the EPA's purpose. Therefore, it is evident that the balance of the TRAC factors substantially weighs in favor of an unreasonable delay determination.

2. Courts have established that agency delays of less than ten years are unreasonable.

Based on precedent established by courts applying the TRAC analysis, the EPA's delay of ten years is unreasonable. While delays of mere months are not found to be unreasonable under the TRAC factors, delays of years are unreasonable. *In Re California Power Exchange Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001). The D.C. Circuit has found agency delays as short as four years to be unreasonable. *See MCI Telecomms. Corp.* 627 F.2d 322; *see also In Re Core Commc'ns, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (determining that the FCC's seven-year delay in justifying interim rules was unreasonable). The 9th Circuit has additionally found delays of eight years to be unreasonable. *See, e.g.*, *NRDC v. EPA*, 798 F.3d 809 (9th Cir. 2015) (finding that the EPA unreasonably delayed for eight years to issue a final ruling regarding pesticides); *In re Cmty. Voice*

v. EPA, 878 F.3d 779 (9th Cir. 2017) (determining that the EPA unreasonably delayed for eight years to set a "concrete timetable" for final action). In this instance, the EPA's delay of ten years is vastly longer compared to the time frames courts have found to be unreasonable. Accordingly, this Court should affirm the District Court's determination and find that the EPA's ten-year delay in listing GHGs as criteria pollutants is unreasonable.

VI. DUE TO THE USE OF THE WORD "SHALL," THE DISTRICT COURT PROPERLY HELD THAT THE EPA HAS A NON-DISCRETIONARY DUTY UNDER CAA § 108 TO DESIGNATE GHGS AS A CRITERIA POLLUTANT BASED ON THE 2009 ENDANGERMENT FINDING.

The use of the word "shall" in § 108 of the CAA precludes any notion that the EPA has a discretionary duty to designate GHGs as a criteria pollutant following the Endangerment Finding. The CAA provides that the Administrator of the EPA *shall* from time to time revise a list which includes each air pollutant:

> (A) emissions of which, in his judgement, 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.

CAA § 108(a)(1), 42 U.S.C. § 7408(a)(1). The Supreme Court has determined that the plain meaning of "shall" signifies a mandatory requirement. *See Bennet v. Spear,* 520 U.S. 154, 175 (1997) (stating that an agency's duty was not discretionary when "shall" was used in the statute); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (establishing that through the use of the phrase "shall order" in the relevant statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied."); *Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988) (noting that the use of "shall" in a statute was mandatory language).

This interpretation of "shall" applies to environmental statutes. In *Children's Earth Foundation v. EPA*, the 9th Circuit analyzed the use of "shall" within the Clean Water Act and affirmed that when Congress specifies an obligation and uses the term "shall," it typically connotes a mandatory command. 527 F.3d 842, 847 (9th Cir. 2008). The 5th Circuit in *Sierra Club v. Train* additionally noted that the use of the word "shall" generally indicates a mandatory intent, unless a "convincing argument to the contrary is made." 557 F.2d 485, 489 (5th Cir. 1977) (citing C. Sands, Sutherland's Statutory Construction § 25.04 (4th ed. 1973)). Such an argument can be made when extrinsic aids (such as the purpose of the statute, the statute as a whole, or the legislative history) indicate an intention that the statute be given a discretionary effect. *Id.*

However, in analyzing the structure and goals of the CAA, courts have determined that the EPA's designation of criteria pollutants is not a discretionary duty. Analogous to the issue presented in this case, the 2nd Circuit in *Natural Resources Defense Council, Inc. v. Train* was confronted with the question of EPA's discretion to list a pollutant under § 108 of the CAA. 545 F.2d 320, 324 (2nd Cir. 1976). The EPA contended that the phrase "plans to issue air quality criteria" within § 108(a)(1)(C) of the CAA provided the EPA with a discretionary duty to list lead as a pollutant. *Id.* This argument did not prevail, as the court determined that the EPA's interpretation was contrary to the structure of the CAA and inconsistent with the CAA's legislative history. *Id.*

The court first noted that § 108(a)(1) contains mandatory language in the use of the word "shall." *Id.* at 324-25. Therefore, if the listing of pollutants were only mandatory for substances for which the EPA plans to issue air quality criteria, the court reasoned that the mandatory language of § 108(a)(1) would become "mere surplusage." *Id.* at 325. The court further stated that under the EPA's interpretation, the specific timetables established by the CAA for the attainment of air

quality standards would become futile if the EPA could simply avoid listing pollutants by choosing not to issue air quality criteria. *Id.* at 327.

NRDC v. Train continues to be upheld in recent court decisions, *see Zook v. McCarthy*, 52 F. Supp. 3d 69, 74 (D.D.C. 2014), and the applicability extends to this case. The use of "shall" in § 108(a)(1) creates a non-discretionary duty for the EPA to revise a list of each air pollutant which may be anticipated to endanger public health or welfare, comes from numerous sources, and for which the EPA plans to issue air quality criteria. Having established through the Endangerment Finding that GHGs may be anticipated to endanger public health or welfare and come from numerous sources, the EPA in this instance relied on the "plans to issue" provision to make the only argument it viewed as remotely plausible to establish a discretionary duty to designate GHGs as criteria pollutants. However, under the precedent established by *NRDC v. Train* and in accordance with the legislative history of the CAA, the "plans to issue air quality criteria" provision is not a caveat that allows the EPA to bypass listing a pollutant. Therefore, the District Court correctly determined that the EPA has a non-discretionary duty under § 108 of the CAA to list GHGs as criteria pollutants based on the 2009 Endangerment Finding.

CONCLUSION

In conclusion, the District Court properly determined that the EPA's ten-year delay in action was unreasonable, and this Court should find so as well. In analyzing the EPA's delay under a widely-accepted factors analysis, this Court will find that the EPA has no justification for its ten-year delay. Further, this court should grant CHAWN's motion for summary judgement that the EPA's Endangerment Finding should be held valid with regards to public health and public welfare. The Endangerment Finding with regards to public welfare is valid because the EPA has a statutory obligation to prevent danger to public welfare and this decision was based on reasonable

scientific judgement. The Endangerment Finding is valid with regards to public health because CAA §202(a) is silent on public health thus this Court must defer to the EPA's reasonable deference which includes both direct and indirect health impacts from GHG emission. Further, despite the EPA's change of position, the EPA's prior interpretation should be given controlling deference under *Chevron* because it has never been subject to notice and comment rulemaking.

Next, this Court should find that the EPA has a non-discretionary duty under CAA § 108 to designate GHG emissions as a criteria pollutant due to the use of the word "shall" in the statute. Mandatory and persuasive authority from around the country—including the Supreme Court—have consistently held that when "shall" is used in a statutory provision and is accompanied by an action, the statute connotes a mandatory duty to act. Finally, unreasonable delay claims are not enumerated within the CAA §307(b) nor does an unreasonable delay claim have nationwide applicability. Thus, this Court should rule that the CHAWN's unreasonable delay claim should not be subject to the exclusivity rule under CAA §307(b). Accordingly, this Court should affirm the District Court's order that EPA publish notice of a proposed rule designating GHGs as a criteria pollutant within 90 days and issue of final rule within 180 days of the notice.