2021 Jeffrey G. Miller National Environmental Law
Moot Court Competition

C.A. NO. 20-000123

In the
UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELLNESS 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 New Union

Brief of Intervenor COAL, OIL, AND GAS ASSOCIATION

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JURISDICTIONAL STATEMENT

The U.S. District Court for New Union had subject-matter jurisdiction over all claims pursuant to the Clean Air Act § 304(a), the citizen suit provision. 42 U.S.C. § 7604. This court, the U.S. Court of Appeals for the Twelfth Circuit, raises the issue of whether the District Court's jurisdiction was properly exercised. It was, and this is briefed in more detail below.

The U.S. Court of Appeals for the Twelfth Circuit has jurisdiction over all claims pursuant to the same citizen suit provision. 42 U.S.C. § 7604. This appeal is from a final decision and order that disposes of all parties' claims. *Climate Health & Welfare Now v. U.S. E.P.A*, No. 66-CV-2019 (D. N.U. 2019).

ISSUES PRESENTED

1. Did the District Court have jurisdiction over CHAWN's unreasonable delay claim under the Clean Air Act § 304(a) when CHAWN made incorrect but nonfrivolous allegations and where national applicability is an issue of venue rather than jurisdiction?

2. Is the 2009 Endangerment Finding valid with respect to an endangerment of public welfare if EPA failed to follow Clean Air Act procedure and relied on scientific literature contrary to the conclusions in the finding?

3. Is the 2009 Endangerment Finding valid with respect to an endangerment of public health if EPA failed to follow Clean Air Act procedure and relied on scientific literature contrary to the conclusions in the finding, and if such a finding leads to absurd results because states could not comply with the resulting regulations?

4. Does EPA's ten-year delay in taking action on listing GHGs as criteria pollutants under the Clean Air Act § 108(a) constitute an unreasonable delay where such delay is required to adequately understand the science behind climate change and GHGs?

5. Where the Clean Air Act § 108 gives EPA the authority to designate criteria pollutants according to its own "judgment," does this qualify as a non-discretionary duty to designate GHGs as criteria pollutants?

STATEMENT OF THE CASE

In reviewing the District Court's decision and order, this court should carefully amend the lower court's significant legal errors. Without correction, the District Court's misunderstandings of the plain meaning of the Clean Air Act will lead to rushed regulation of greenhouses gases—a global problem for which individual states should not be held liable. Through its careful review, this court can avoid hasty regulation that would lead to extreme outcomes, economic devastation, and harm to our national energy infrastructure. All issues are questions of law, for which the standard of review is *de novo. Highmark, Inc. v. Allcare Health Management System, Inc.*, 572 U.S. 559, 563 (2014).

I. Environmentalists' Petition to Regulate Greenhouse Gases

In 1999, the Environmental Protection Agency ("EPA") received a petition from several environmental groups asking EPA to issue a finding that Greenhouse Gas Emissions ("GHGs") "pose a danger to human health and the environment" under the Clean Air Act ("CAA"). R. at 6. Such an endangerment finding, known as a "202 Petition" under CAA § 202, also results in listing as a criteria pollutant under CAA § 108. *See* 42 U.S.C. § 7521. Following the petition's submission, EPA requested public comments on all issues raised in the petition, specifically including "any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPA's consideration of [the] petition." 66 Fed. Reg. 7,486, 7,487 (2001). Over five months, EPA received over 50,000 comments. *See* 68 Fed. Reg. 52,924 (2003).

In September of 2003, EPA denied the 202 Petition. R. at 6. EPA decided that GHGs did not qualify as air pollutants subject to CAA regulation because (1) the CAA does not authorize EPA to issue mandatory regulations to address global climate change, and (2) even if the EPA

had authority to set emission standards, it would be inappropriate to do so at that time because Congress was addressing climate change through other means. 68 Fed. Reg. 52,922; R. at 6.

Litigation ensued, culminating in *Massachusetts v. E.P.A*. 549 U.S. 497 (2007). In that case, the Supreme Court narrowly held that (1) EPA has authority to regulate new vehicle emissions because GHGs fit within the CAA's "capacious definition of 'air pollutant,'" and (2) EPA's decision that GHG regulation would be unwise at the moment was not a valid basis to deny the rulemaking petition. *Id.* at 500. The Court directed EPA to respond to the rulemaking petition by deciding whether GHGs endanger public health or welfare, as contemplated to trigger regulation under the CAA. *Id.* at 501.

II. EPA's 2009 GHG Endangerment Finding

The matter before the court today is based upon a formal GHG endangerment finding that EPA issued in December 2009 ("Endangerment Finding"). R. at 6. EPA issued this finding after a change in presidential administrations. R. at 6. It defined GHGs as a "single air pollutant" consisting of carbon dioxide, nitrous oxide, and methane. R. at 6. The finding stated that GHGs are emitted to the atmosphere by "numerous mobile sources," and that emissions "may present an endangerment to both public health and public welfare" through climate change. R. at 6–7.

Since issuing the 2009 Endangerment Finding, EPA has taken regulatory steps to limit GHG emissions. R. at 7. Some of these limits have been upheld in court, *see Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). But many of these regulations have been rolled back by court decisions, s*ee Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302 (2014), and by changes in EPA policy. The 2009 Endangerment Finding has remained intact thus far, but EPA has yet to invoke its authority to designate GHGs as criteria pollutants under CAA § 108. 42 U.S.C. § 7408; R. at 7.

When EPA lists a pollutant under Section 108, it has twelve months to propose primary and secondary national ambient air quality standards ("NAAQS"). 42 U.S.C. §§ 7408(b), 7409(a)(2). Primary NAAQS are designed to protect public health, and secondary NAAQS are designed to protect public welfare. 42 U.S.C. § 7409. Following EPA's establishment of primary NAAQS, the CAA triggers an obligation for each state to submit a State Implementation Plan ("SIP") to show how it plans to meet EPA's air quality standards for that pollutant within ten years. 42 U.S.C. § 7502(a)(2)(A). Thus far, EPA has established NAAQS, primary or secondary or both, for six pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. 40 C.F.R. 50. Tiny adjustments in these standards have enormous economic effects. *See* NATIONAL ASSOCIATION OF MANUFACTURERS, NEW NAM ANALYSIS CONFIRMS: FEDERAL OZONE REGULATION COULD BE COSTLIEST IN U.S. HISTORY (2015) (explaining that changing the NAAQS for ozone from 75 ppb to 65–70 ppb could reduce U.S. GDP by $140 billion per year).

SUMMARY OF THE ARGUMENT

This court has raised the issue of whether the District Court had jurisdiction over CHAWN's unreasonable delay claim under CAA § 304(a). It did, because CHAWN made nonfrivolous allegations of EPA's unreasonable delay. Further, the CAA's division of claims among the federal appellate courts is an issue of venue rather than procedure in this case, and EPA failed to object to CHAWN's imperfect venue.

This court should invalidate the 2009 Endangerment Finding because of its procedural and legal deficiencies. EPA unreasonably proceeded with the Endangerment Finding separate from standard rulemaking. Its scientific conclusions were inappropriately preordained by a presidential announcement, and the EPA Administrator failed to exercise her independent judgment. The Endangerment Finding also leads to absurd legal outcomes. Additionally, the

Endangerment finding is invalid because it constitutes an irrational reading of the scientific literature: EPA failed to follow the law with respect to data quality and came to unsubstantiated conclusions even while citing literature that stated the opposite.

Further, EPA did not violate a non-discretionary duty under CAA § 108 as it has a non-discretionary duty to create regulations once a criteria pollutant is listed, not to list that criteria pollutant after completing an endangerment finding. The delay in listing GHGs as criteria pollutants is not unreasonable because EPA properly used its discretion to prioritize other policy issues and a quicker listing would have violated the EPA's duty under the CAA and the Administrative Procedure Act.

ARGUMENT

I. The District Court had jurisdiction over CHAWN's unreasonable delay claim, where the rule sought would be a rule of national applicability subject to review exclusively in the D.C. Circuit.

The Clean Air Act creates a complex scheme of bifurcated jurisdiction. Depending on the challenge made, some cases can only be brought in federal district court, and some only in federal courts of appeals. Among the courts of appeals, the Clean Air Act further divides challenges based on venue.

In this case, the District Court had jurisdiction over CHAWN's unreasonable delay challenge because CHAWN made a nonfrivolous allegation that EPA violated a non-discretionary duty. By failing to object, EPA waived its argument against an improper venue, meaning this case is properly before the U.S. Court of Appeals for the Twelfth Circuit.

a. The District Court had jurisdiction over CHAWN's CAA § 304(a) claim when it made nonfrivolous allegations of EPA's unreasonable delay.

As a jurisdictional matter, CHAWN's unreasonable delay claim was properly brought in the United States District Court of New Union. As courts of limited jurisdiction, federal courts must

establish that they have subject matter jurisdiction over each individual claim that comes before them. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). This requires that the complaint claim a right to recover under the laws of the United States. *Bell v. Hood*, 327 U.S. 678, 681–83 (1946). The merits of a plaintiff's claims need not be addressed to properly vest subject matter jurisdiction in a district court. *Cronin v. Browner*, 898 F. Supp. 1052, 1057 (S.D.N.Y. 1995). With a statutory claim to jurisdiction, plaintiffs can establish a district court's subject matter jurisdiction if the claims alleged in the complaint are more than "wholly insubstantial and frivolous." *Bell*, 327 U.S. at 682–83.

The CAA allows citizen suits by authorizing any person to commence a civil action against the EPA Administrator when there is alleged a failure to perform any act or duty under the CAA which is not discretionary. 42 U.S.C. § 7604(a)(2).

Though ultimately incorrect, CHAWN made nonfrivolous allegations that EPA violated a non-discretionary duty and thus established the minimum required for subject matter jurisdiction in a federal district court. After EPA issued its 2009 Endangerment Finding that GHG emissions endanger public health and welfare, a coalition of environmental groups petitioned EPA to list GHGs as criteria pollutants under the CAA, subject to NAAQS. The environmental groups contended that EPA has this non-discretionary duty because of case law holding that EPA must list a pollutant with no minimum safe dosage as a criteria pollutant once it has made an endangerment finding. *Natural Resources Defense Council v. Train*, 411 F. Supp. 864 (S.D.N.Y. 1976). These allegations properly established subject matter jurisdiction pursuant to CAA § 304(a)(2).

b. Under CAA § 307(b), the national applicability of the rule that CHAWN sought from EPA is an issue of venue rather than jurisdiction, and EPA failed to preserve its objection to CHAWN's imperfect venue.

CHAWN filed its suit in an imperfect venue because of the challenged rule's national applicability, but EPA failed to object. As such, its claims are properly before the Twelfth Circuit Court of Appeals.

Under CAA § 304(a)(3), an action to compel agency action referred to in section 307(b) may only be filed in a U.S. District Court within the circuit in which such action would be reviewable under that section. 42 U.S.C. § 7604(a)(3). Section 307, in turn, confers jurisdiction on the federal courts of appeals to review certain EPA final actions, and organizes these challenges by venue. *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996) (per curiam) (citing *Harrison v. PPG Industries, Inc*., 446 U.S. 578 (1980)).

In the D.C. Circuit's words, "under section 307(b)(1), subject matter jurisdiction and venue are not coterminous." *Dalton Trucking, Inc. v. E.P.A*., 808 F.3d 875, 879 (D.C. Cir. 2015). For jurisdiction, the Supreme Court has established that by its terms, section 307(b)(1) confers jurisdiction on both "the United States Court of Appeals for the District of Columbia" and the regional "United States Courts of Appeals." *Harrison v. PPG Industries, Inc*., 446 U.S. 578 (1980).

For venue, Section 307 divides challenges between the D.C. Circuit and all other circuits. Venue lies in the D.C. Circuit only if (1) the final action taken by EPA is "nationally applicable," or if (2) EPA publishes a finding that an otherwise locally or regionally applicable action is "based on a determination of nationwide scope or effect." 42 U.S.C. § 7607(b)(1). To determine whether a final action is nationally applicable, courts "need look only to the face of the

rulemaking, rather than to its practical effects." *Am. Rd. & Transp. Builders Ass'n v. E.P.A.*, 705 F.3d 453, 456 (D.C. Cir. 2013).

Here, no party can object that if EPA were to list GHGs as a criteria pollutant, doing so would be a final action of national applicability. Greenhouse gases have global effects and are not local or regional (or as the Endangerment Finding concedes, even national). But as a venue provision, objection to an improper venue under CAA § 307(b) can be waived.

Parties can consent to be sued in a court that would otherwise be an improper venue by failing to object. A party waives a defense of improper venue by not raising the issue in its first defensive motion, or by failing to include it in a responsive pleading. FED. R. CIV. P. 12(h)(1); WRIGHT, FEDERAL COURTS 257 (1994) (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)). CAA § 307(b) is such a waivable venue provision, and EPA's failure to object waives its objection to venue. *Texas Mun. Power Agency v. E.P.A.*, 89 F.3d 858, 867 (D.C. Cir. 1996). Thus, the suitability among circuits of bringing a CAA challenge is a matter of venue rather than jurisdiction. Because EPA failed to preserve its objection to venue, the claims at issue are properly before this court.

II. This court should invalidate the Endangerment Finding because of its procedural and legal deficiencies.

The District Court was correct in holding that EPA's 2009 Endangerment Finding that GHGs endanger public health is invalid. However, the District Court erred in determining that the Endangerment Finding is valid regarding the alleged endangerment of public welfare. When reviewing an EPA endangerment finding, a court may reverse the finding for failure to observe procedure required by law if (1) such failure to observe procedure is arbitrary or capricious; and (2) the errors were so serious and related to matters of such central relevance to the rule that

there is a substantial likelihood that the rule would be been significantly changed if no such errors had been made. 42 U.S.C. § 7607(d)(9)(D).

As discussed below, EPA unreasonably proceeded with the Endangerment Finding separate from its standard CAA § 202(a) rulemaking. Additionally, the Endangerment Finding was preordained by the President's May 2009 announcement that EPA would regulate GHGs under the CAA. Finally, the EPA Administrator relied on conclusory statements made by other agencies, rather than her own interpretation of the data as is required by CAA § 202(a). The Endangerment Finding, therefore, suffers from procedural deficiencies such that the findings are arbitrary and capricious, which are so serious and related to matters of such central relevance to the finding that there is a substantial likelihood that the finding would have been significantly changed if such errors had not been made. 42 U.S.C. § 7607(d)(9)(D).

a. EPA unreasonably proceeded with the Endangerment Finding separate from CAA § 202(a) standard rulemaking.

EPA failed to promulgate GHG emission standards in conjunction with the Endangerment Finding. "Even under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation." *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014) (citations and internal quotation marks omitted). CAA § 202(a) provides no basis or authority for EPA to issue an endangerment finding independently of a rule to promulgate emissions standards, as EPA has done here. While EPA enjoys "significant latitude as to the manner, timing, content, and coordination of its regulation with those of other agencies," EPA may not create its own procedural rules out of whole cloth, divorced from the text of the CAA. 74 Fed. Reg. at 18,889 (quoting *Mass. v. E.P.A.*, 549 U.S. 497, 533 (2007)). Specifically, CAA § 202(a) does not express that EPA may issue an endangerment finding first and issue standards second. *See* 42 U.S.C. § 7521(a) ("The Administrator shall by regulation prescribe . . . *standards* applicable to

the emission of any air pollutant.") (emphasis added). The CAA states that EPA may issue standards conditioned upon the Administrator's endangerment determination. *See id.* By not proposing an endangerment finding in conjunction with standards, EPA denied the regulated community the opportunity to adequately assess or comment on the viability of such standards in the context of an endangerment finding. This is a serious procedural flaw. EPA's failure to concurrently issue standards was nothing short of arbitrary, and intrinsically impacted the findings themselves. Thus, this court should find the Endangerment Finding invalid under 42 U.S.C. § 7607(d)(9)(D).

c. The Administrator's final decision was preordained by the President's May 2009 vehicle announcement.

On May 19, 2009, less than one month after EPA published its initial proposal of the Endangerment Finding, the President announced a "new national policy" to decrease GHG emissions from all new vehicles in the United States. WHITE HOUSE PRESS RELEASE, *President Obama Announces National Fuel Efficiency Policy* (2009). The President required that EPA promulgate GHG emission standards under CAA § 202 as well as a "national policy on fuel economy standards and [GHG] emissions" through a collaboration between the Department of Transportation, EPA, and the states. *Id.* The President referred to "this rule"—"this new national standard"—as an accomplished fact. *Id.* The President further expressed that "the Department of Transportation and EPA *will* adopt the same rule." WHITE HOUSE PRESS RELEASE, *Remarks by the President on National Fuel Efficiency Standards*, *Rose Garden* (May 19, 2009) (emphasis added).

Without an affirmative endangerment finding, EPA may not regulate motor vehicles under CAA § 202. But with the President's expression of intent to use EPA and other agencies to regulate GHGs—before the Endangerment Finding was completed—the only real question left

for EPA was how, not whether, to control GHG emissions. *See generally* Joint Rulemaking Notice, 74 Fed. Reg. 24,007 (discussing details of how to structure § 202 standards in conjunction with fuel efficiency standards, over six months in advance of the Endangerment Finding). The President and EPA's preordainment of the Endangerment Finding seriously calls into question whether the Endangerment Finding was a rational interpretation of science, or an arbitrary finding to justify a *fait accompli* result. Indeed, as is discussed later, an objective view of the available science divorced from the President's preordained directive would likely have yielded a different result. Thus, this court should invalidate the Endangerment Finding pursuant to 42 U.S.C. § 7607(d)(9)(D).

d. The Administrator failed to exercise her independent judgment in promulgating the Endangerment Finding.

CAA § 202(a) requires the EPA Administrator to exercise her own judgment in deciding whether to make an Endangerment Finding. 42 U.S.C. § 7521(a). Despite this obligation, the Administrator did not base her Endangerment Finding on her own review of primary scientific literature and data. Indeed, the Administrator readily conceded that she relied almost exclusively on reports produced by others summarizing their views of climate science—reports she referred to as the "assessment literature." *See* Endangerment Finding, 74 Fed. Reg. 66,496, 66,504. "[T]he Administrator is relying on *the major assessments* of the USGCRP [U.S. Global Change Research Program], IPCC [Intergovernmental Panel on Climate Change], and NRC [National Research Council] as the primary scientific and technical basis of her endangerment decision." Endangerment Finding at 66,510 (emphasis added). The Administrator restates her primary reliance on such data summaries throughout the Endangerment Finding, Technical Support Document, and Response to Public Comments document. For example, the accompanying Technical Support Document states that it "relies most heavily" on "synthesis reports of climate

change science and potential impacts." U.S. EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act* 4 (2009) (hereinafter "Technical Support Documents" or "TSD").[1] "EPA did not develop new science as part of this action and instead summarized the existing peer-reviewed assessment literature." U.S. EPA, *EPA's Response to Public Comments* 7 (Volume 1 2009).[2] As discussed below, such reliance led to an arbitrary finding because the Administrator failed to interpret the data in a rational manner. The Endangerment Finding would have been different had the Administrator drawn her own independent conclusions from the data. Thus, this court should invalidate the Endangerment Finding under 42 U.S.C. § 7607(d)(9)(D).

e. With respect to the alleged endangerment of public health, the Endangerment Finding leads to absurd legal outcomes because primary NAAQS for GHGs would be impossible to meet, much less enforce.

Construing a statute to produce an absurd result violates long-standing rules of statutory construction. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("In deciding whether a result is absurd, we consider . . . [it] in the particular statutory context."). Further, a court may reverse an EPA finding if found to be (1) not in accordance with law or (2) in excess of statutory jurisdiction, authority, limitations, or short of statutory right. 42 U.S.C. § 7607(d)(9)(A), (C). Despite the Endangerment Finding, EPA has not yet invoked its authority to designate GHGs as criteria pollutants under CAA § 108. 72 U.S.C. § 7408(a)(1). CAA § 108 provides that the Administrator shall revise a list which includes each air pollutant's (1) emissions of which cause or contribute to air pollution which may be reasonably anticipated to endanger public health or welfare, and (2) the presence of which in the air results from numerous

[1] Available at Docket: EPA-HQ-OAR-2009-0171-11645, and at https://regulations.gov/document/EPA-HQ-OAR-2009-0171-11645.
[2] Available at Docket: EPA-HQ-OAR-2009-0171-11644, and at https://regulations.gov/document/EPA-HQ-OAR-2009-0171-11644.

or diverse mobile or stationary sources. 42 U.S.C. § 7408(a)(1). EPA *has* invoked CAA § 202, which uses identical language to Section 108 described above. Under Section 108, EPA is required to establish primary and secondary NAAQS for each listed pollutant. 42 U.S.C. §§ 7408(b), 7409(a)(2). EPA establishes primary NAAQS at a level necessary to protect public health and establishes secondary NAAQS at a level necessary to protect public welfare. 42 U.S.C. § 7409. EPA's promulgation of *primary* NAAQS for a pollutant triggers an obligation by each state to issue a State Implementation Plan ("SIP") demonstrating how it will achieve compliance with the primary NAAQS within ten years. 42 U.S.C. § 7502(a)(2)(A). If a state fails to submit a satisfactory plan, or fails to meet compliance deadlines, EPA will directly regulate emissions within the state, and the state will lose some federal highway funding. 42 U.S.C. §§ 7410(c)(1); 7509(a)–(b)(1).

Applying this legal framework to global climate change allegedly caused by GHGs leads to absurd results. First, never in its legal, policy, or scientific analysis does the Endangerment Finding establish a level of GHGs in the atmosphere within any measurable "margin of safety." *See generally* 42 U.S.C. § 7409(b). Second, EPA readily admits that GHG concentrations increase and decrease at the global level, rather than at the local level. Endangerment Finding at 66,499 ("[GHGs] are sufficiently long-lived to be well mixed globally in the atmosphere"). Third, because GHG concentrations change at the global, rather than regional level, it is not within the power of any individual state to meet established level of atmospheric GHGs within that state. *See generally* 42 U.S.C. § 7502(a)(2)(A).

China's rapid industrialization drives GHG emissions, producing more than double the GHG emissions per year than the entire United States.[3] Even if a state unilaterally cut GHG emissions

[3] China leads the world in CO_2 emissions at 10,877.218 Mt CO_2 per year, followed by the United States at 5,107.393, followed by the European Union at 3,548.345 collectively. European Commission's Sci. & Knowledge

to zero, it is unlikely that it would reach a safe level—undefined and undefinable as such a level may be—of ambient air quality within ten years. Additionally, the CAA does not grant authority to EPA to establish legally binding obligations based on environmental conditions attributable to activities of foreign nations. Thus, a finding that GHGs endanger public health under CAA § 172 leads to absurd legal outcomes. This result is absurd "when considered in the particular statutory context," and thus this statute "should not be construed" to allow such a result. *Shalala*, 140 F.3d at 1068.

III. The Endangerment Finding is invalid with respect to public welfare.

When reviewing an EPA endangerment finding, a court may reverse the finding[4] if found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or (2) beyond statutory jurisdiction, authority, or limitations, or short of EPA's statutory right. 42 U.S.C. § 7607(d)(9)(A), (C). When EPA's evaluation of evidence is challenged, courts inquire whether EPA's conclusion is supported by substantial evidence when considered on the record as a whole; specifically, whether EPA took the scientific record into account "in a rational manner." *Coal. for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 122 (D.C. Cir. 2012), *aff'd in part*, *rev'd in part sub nom*, *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302 (2014), *amended sub nom*, *Coal. for Responsible Regulation, Inc. v. E.P.A.*, 606 F. App'x 6 (D.C. Cir. 2015) (quoting *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981)). For example, when asked to reverse an Administrator's promulgation of air quality standards, "the Administrator's conclusions must be supported by the record, and [she] may not engage in sheer guesswork." *Costle*, 665 F.2d at 1186–87. Additionally, when a party challenges EPA's scientific

Serv., *Fossil CO2 Emissions of All World Countries - 2018 Report* (2018 ed. EU Sci. Hub 2018), https://ec.europa.eu/jrc/en/publication/fossil-co2-emissions-all-world-countries-2018-report.

[4] Among other reasons not applicable here. *See* 42 U.S.C. § 7607(d)(9).

findings, "reviewing courts are not to substitute their judgment for an agency's," but rather "establish parameters of rationality within which the agency must operate." *S. Terminal Corp. v. E.P.A.*, 504 F.2d 646, 665 (1st Cir. 1974).

For example, when EPA applies new source performance standards in a way that is inconsistent with previous positions, "[s]uch inconsistency must be viewed as arbitrary and capricious" as described in the CAA, and may therefore be set aside by a reviewing court. *PPG Indus., Inc. v. Harrison*, 660 F.2d 628, 634 (5th Cir. 1981). *See also Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 317 (2014) ("It takes some cheek for EPA to insist that it cannot possibly give 'air pollutant' a reasonable, context-appropriate meaning . . . when it has been doing precisely that for decades."). Additionally, when EPA was alleged to have (1) overestimated the photochemical oxidant problem in a certain region, (2) used unreliable carbon monoxide data, and (3) deviated from EPA's own suggested method for data collection, another court was unable to "uphold EPA's conclusions as to photochemical oxidant and carbon monoxide levels and reductions," even though the court did "not say that [EPA's conclusions] were necessarily incorrect." *S. Terminal Corp.*, 504 F.2d at 665.

As discussed below, the Endangerment Finding contained conclusions that were unsupported by EPA's scientific record at the time of their publication. EPA further took conclusory positions within the Endangerment Finding that were internally inconsistent with the TSD. The Endangerment Finding relied on data patently contrary to the Data Quality Standards Act and EPA's own data quality standards concerning peer review, transparency, and use of best available science.

a. The Endangerment Finding and TSD fail to comply with the Data Quality Act.

EPA's Endangerment Finding violates the Data Quality Act ("DQA"), EPA's DQA guidelines, and guidelines promulgated by the Office of Management and Budget ("OMB"). The DQA and OMB guidelines at the time of the 2009 Endangerment Finding required federal agencies to issue guidelines ensuring the quality, objectivity, utility, and integrity of all information disseminated by the agency and to allow affected parties to request and obtain correction of any disseminated information that does not comply with those guidelines. *See* Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2001); 67 Fed. Reg. 8,452 (2002). EPA's guidelines at the time of the 2009 Endangerment Finding closely tracked the language in OMB guidelines. *See* U.S. EPA Office of Environmental Information, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008 (2002) (hereinafter "EPA Guidelines"). OMB and EPA Guidelines apply to the distribution of information to the public that is initiated or sponsored by the agency, including distribution of information prepared by a party outside the agency in a manner suggesting that the agency endorses the information. 67 Fed. Reg. 8,452, 8,460–63; EPA Guidelines at 15–16. Information that will be "influential" on public policies is to be disseminated with a higher-than-usual degree of transparency concerning (1) the source of the data used, (2) the various assumptions employed, (3) the analytic methods applied, and (4) the statistical procedures employed, to "facilitate the reproducibility of such information by qualified third parties, to an acceptable degree of imprecision." EPA Guidelines at 19–21. Overall, EPA failed to comply with the requirements that it (1) undertake an independent and external peer review of the TSD, (2) provide reproducible information, and (3) use only the best available science.

i. EPA failed to comply with the Data Quality Act requirement that it undertake an independent and external peer review of the TSD.

At the time of the Endangerment Finding, EPA policy required independent external peer review of influential information. U.S. EPA Science Policy Council, *U.S. Environmental Protection Agency Peer Review Handbook* (3d ed.), EPA/100/B-06/002 (2006) (hereinafter "Handbook"); EPA Guidelines at 11. Peer reviewers are "independent of those who performed the work," and do not "have a material stake in the outcome of the peer review." Handbook at 12, 13. However, all twelve reviewers for the 2009 Endangerment Finding's TSD were scientists employed by the federal government; all were closely affiliated with the Climate Change Science Program (hereinafter "CCSP") and had openly and publicly articulated their beliefs that GHGs create dangers for public health and welfare. Norman Fichthorn et al., *Comments of the Utility Air Regulatory Group on the Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gasses Under Section 202(a) of the Clean Air Act* 100 (2009).[5] Seven of the twelve reviewers authored studies cited in the TSD; several of those were cited extensively and relied on by the TSD. *Id.* Thus, the reviewers chosen by EPA could not provide a critical, independent, and objective peer review of the TSD. Failure to follow applicable law with respect to independent peer review is a substantial procedural flaw that impacted the outcome of the Endangerment Finding, leading to an arbitrary and capricious result.

ii. EPA failed to comply with the Data Quality Act requirement that it provide reproducible information.

EPA Guidelines establish rigid requirements for transparency when EPA disseminates influential information such as the Endangerment Finding. *See* U.S. EPA Office of Environmental Information, *Guidelines for Ensuring and Maximizing the Quality, Objectivity,*

[5] Available at Docket: EPA-HQ-OAR-2009-0171-3524, also at https://regulations.gov/document/EPA-HQ-OAR-2009-0171-3524.

Utility, and Integrity of Information Disseminated by the Environmental Protection Agency, EPA-260R-02-008 (2002). Further, OMB guidelines require agencies to provide "sufficient transparency about data and methods that an independent reanalysis could be undertaken by a qualified member of the public," whether the agency analysis is of data from a single study or combines information from multiple studies. 67 Fed. Reg. at 8,460, 8,456. The Endangerment Finding failed to comply with this requirement because EPA provided no access or reference to any raw data or data sources and did not describe its methods or assumptions. This may be due in part to EPA's substantial reliance on CCSP and IPCC reports. EPA's decision to heavily rely on others' conclusions in the Endangerment Finding limited transparency and reproducibility. Failure to follow applicable law with respect to transparency is a substantial procedural flaw that impacted the outcome of the Endangerment Finding, establishing an arbitrary and capricious result.

iii. EPA failed to comply with the Data Quality Act requirement that it use only the best available science.

Finally, EPA guidelines require information used in human health, safety, and risk assessments to be "accurate, reliable and unbiased," use the "best available science," and use "data collected by accepted methods or best available methods." EPA Guidelines at 21–22. Additionally, the presentation of such information must include (1) each population affected by each risk assessed; (2) the expected risk for each affected population; (3) each appropriate upper- or lower-bound estimate of risk; (4) each significant uncertainty identified by the risk assessments; and (5) peer-reviewed studies that "support, are directly relevant to, or fail to support" any methodologies used to reconcile inconsistencies in the data. *Id.* at 22–23. As explained in more detail below, the Endangerment Finding relied on science that failed to meet these requirements. Failure to follow applicable law with respect to using the best available

science is a substantial procedural flaw that impacted the outcome of the Endangerment Finding, leading to an arbitrary and capricious result.

f. The Endangerment Finding relied on scientific literature that cannot be rationally interpreted to support a finding of endangerment to public welfare.

In addition to failing to adhere to data quality standards, EPA relied on scientific literature which, if read "in a rational manner" pursuant to *Coal. for Responsible Regulation*, would have resulted in sharply different findings. The Endangerment Finding discusses several areas of public welfare allegedly endangered by GHG emissions: food production, forestry, water resources, sea-level rise, and energy. Endangerment Finding at 66,498. Further, as discussed below, EPA relies on scientific literature that does not support the conclusory statements made in the Endangerment Finding. Indeed, the Endangerment Finding makes conclusory statements about specific impacts of GHG emissions, then cites data that either does not support these conclusions or even indicates the opposite.

Concerning food production, the Endangerment Finding references a USGCRP report that indicated *benefits* to grain and oilseed crop yield, citing "modest temperature increases and a longer growing season." Endangerment Finding at 66,531. In EPA's initial proposal for the Endangerment Finding, the agency cited the conclusions of IPCC and Climate Change Science Program (CCSP) studies that predicted net short-term *benefits* to crop production in several agricultural areas. *See* 74 Fed. Reg. at 18,902. Acknowledging projected *benefits* to food

production, the final Endangerment Finding merely speculates about impacts on weeds,[6] horticultural crops,[7] and livestock.[8] A *benefit* is not an endangerment.

With respect to forestry, EPA notes that "[o]verall forest growth in North America will likely increase modestly (10 to 20%) as a result of extended growing seasons and elevated CO_2 over the next century but with important spatial and temporal variation." TSD at 104. Additional benefits of GHGs include accelerating forest growth in areas where growth was previously limited by low temperatures and short growing seasons. TSD at 105. "For the United States as a whole, forest growth and productivity have been observed to increase since the middle of the 20th century, in part due to observed climate change." TSD at 105. EPA further suggests that "fires and extreme events are not represented in models," and that "it is difficult to separate the role of climate from other potentially influencing factors, particularly because these interactions vary by location." TSD at 104, 107. With contradicting effects—including crucial benefits—and uncertain conclusions, the Endangerment Finding's forestry discussion fails to support a finding of endangerment.

Likewise, the Endangerment Finding's conclusions regarding water quality and water resources are replete with uncertainty, cherry-pick information, and do not support an endangerment finding. Earlier drafts of technical support documents cite a CCSP report to conclude that "most water quality changes observed so far in the U.S. are likely attributable to causes other than climate change." U.S. EPA, *Draft Technical Support Document* -

[6] "Research on the combined effects of elevated carbon dioxide and climate change on pests, weeds, and disease is still limited." Endangerment Finding at 66,531.
[7] "There is relatively little information on their response to carbon dioxide, and few crop simulation models, but according to the literature, they are very likely to be more sensitive to the various effects of climate change than grain and oilseed crops." Endangerment Finding at 66,531.
[8] "With respect to livestock, higher temperatures will very likely reduce livestock production during the summer season in some areas, but these losses will very likely be partially offset by warmer temperatures during the winter season." Endangerment Finding at 66,531.

Endangerment Analysis for Greenhouse Gas Emissions under the Clean Air Act 89 (2008), Dkt. No. EPA-HQ-OAR-2008-0318-0082. In later drafts, EPA cited the same report to say that "water quality is sensitive to both increased water temperatures and changes in precipitation." *Compare id. with* TSD at 113. Like in *Harrison*, EPA has inexplicably changed positions in its Endangerment Finding, demonstrating an arbitrary outcome.

Concerning sea level rise and coastal areas, EPA recognizes that "erosion and ecosystem loss is affecting many parts of the U.S. coastline, but it remains unclear to what extent these losses result from climate change instead of land loss associated with relative sea-level rise due to subsidence and other human drivers." TSD at 118. In considering the alleged risk of sea-level rise, EPA included the alleged risk of extreme weather events. TSD at 120–21. As discussed above, such data are too contradictory to support an endangerment finding. In its original proposed finding, EPA specifically noted that "[t]he power and frequency of Atlantic hurricanes have increased substantially in recent decades, though North American mainland land-falling hurricanes do not appear to have increased over the past century." 74 Fed. Reg. 18,886, 18,899. Based as it is on inputs unrelated to climate change, and high degrees of uncertainty, the finding as it relates to sea levels does not appear to be supported by data.

Concerning energy and infrastructure, the Endangerment Finding notes that "temperature increases will *change* heating and cooling demand . . . however, under current conditions *it is unclear whether or not net demand will increase or decrease*." Endangerment Finding at 66,533 (emphasis added). While the Endangerment Finding expresses vague concern for energy and infrastructural vulnerabilities, it cites no studies that definitively indicate an increase in energy usage.

IV. The Endangerment Finding is invalid with respect to public health.

The Endangerment Finding discusses five areas of public health allegedly impacted by GHGs: temperature changes, air quality effects of ozone levels, extreme weather events, disease, and airborne allergens. None of these are a direct result of exposure to GHSs. EPA's conclusory statements in the Endangerment Finding are often either unsupported by—or directly contrary to—the scientific literature cited in the TSD. In short, EPA fails to interpret the scientific literature in a *rational* manner with respect to endangerment of public health. Like in *Harrison*, "[s]uch inconsistency must be viewed as arbitrary and capricious," and this court should invalidate the finding under 42 U.S.C. § 7607(d)(9)(A). 660 F.2d at 634.

With respect to direct temperature effects, the Endangerment Finding is inconsistent in concluding whether GHGs would lead to more or fewer deaths. In an earlier draft of the TSD, EPA specifically indicated that most studies show a greater decrease in cold-related deaths than an increase in heat-related deaths. *See* U.S. EPA, *Draft Technical Support Document - Endangerment Analysis for Greenhouse Gas Emissions under the Clean Air Act* 66 (2008), Dkt. No. EPA-HQ-OAR-2008-0318-0082. The IPCC cited several studies that indicate decreases in winter mortality may be great than increases in summer mortality, but it cites one study that estimates the reverse. *Id.* This inconsistency was removed from subsequent technical support drafts without explanation, instead writing that "[i]t is not clear whether reduced mortality from cold will be greater or less than increased heat-related mortality in the United States due to climate change." TSD at 4. Neither of these internally inconsistent statements support a finding that public health is reasonably likely to be endangered.

With respect to air quality effects, the Endangerment Finding's conclusions amount to little more than sheer guesswork. The finding predicts increases in regional ozone pollution, relative to

ozone levels without climate change due to higher temperatures and weaker circulation in the United States relative to air quality levels without climate change. Endangerment Finding at 66,525. However, the TSD concedes that then-current models and studies do not reliably predict future ozone effects. "[T]here are major discrepancies with observed long-term trends in ozone concentrations over the 20th century . . . resolving these discrepancies is needed to establish confidence in the models." TSD at 93. This uncertainty does not support a finding that ozone pollution is reasonably likely to endanger public health. Even within this framework of unreliable modeling, predictions are indirect and uncertain at best. *See e.g.*, TSD at 93 ("[T]he effects of air pollution on plant function *may indirectly* affect carbon storage.") (emphasis added). As in *Costle*, the findings here constitute little more than "sheer guesswork," and make bold predictions far into the future based on uncertain and unreliable methods.

With respect to effects on extreme weather events, the Endangerment Finding and TSD report contradicting conclusions. "[T]he Administrator *considers the potential* for increased deaths, injuries, infectious diseases, and stress-related disorders and other adverse effects *associated with* social disruption and migration from more frequent extreme weather." Endangerment Finding at 66,525 (emphasis added). The Endangerment Finding concerning projected extreme weather events is tentative and indirect on its face. Indeed, EPA concedes that "projections in frequency changes in tropical cyclones are currently too uncertain for confident projections. Some modeling studies have projected a *decrease* in the number of tropical cyclones globally." TSD at 75. EPA further projects "fewer mid-latitude storms." TSD at 74. EPA concurrently claims that "adverse effects on crop yields due to droughts and other extreme events may offset the beneficial *direct* effects of elevated CO_2, moderate temperature increases over the

near term, and longer growing seasons." TSD at 101. Like in *Harrison*, these internally contradictory conclusions are arbitrary and capricious.

With respect to effects on climate-sensitive diseases and airborne allergens, EPA notes four important conclusions, none of which support a finding of endangerment. First, the "risk of infectious diseases following flooding in high-income countries is generally low." TSD at 86. Second, "the impact of climate on foodborne and waterborne pathogens will seldom be the only factor determining the burden of human injuries, illness, and death." *Id.* at 87. Third, "it is not anticipated that climate change will lead to loss of life or years of life due to chronic illness or injury from waterborne or foodborne illnesses." *Id.* Fourth, "locally acquired cases [of malaria] have been virtually eliminated." *Id.* Here, EPA cited sources that suggested that diseases and airborne allergens will be mitigated to conclude the reverse in their findings.

It appears that EPA gathered evidence to support a finding that climate change does not endanger public health, and then switched the conclusion for the Endangerment Finding. Conclusory statements in the Endangerment Finding are unsupported by—or directly contrary to—the scientific literature cited in the TSD. Citing science that says one thing to support a conclusion that states the opposite does not constitute reading in a *rational* manner. *Coal. for Responsible Regulation*, 684 F.3d at 122. Like in *Harrison*, this blatant inconsistency is arbitrary and capricious, and this court should invalidate the Endangerment Finding.

V. EPA did not violate the CAA by delaying action on the 2009 Endangerment Finding because it does not have a non-discretionary duty to act based on the Endangerment Finding.

For a court to determine that EPA violated the CAA by failing to list the GHGs as criteria pollutants the court must find that (1) EPA had a non-discretionary duty to list GHGs, and (2) such action was unreasonably delayed.

a. EPA should receive Chevron deference for its listing decisions.

When a court reviews an agency interpretation of a statute that the agency administers, the court must determine what deference is owed to the agency's interpretation, if any. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In determining if *Chevron* deference applies, a court conducts a "step zero" analysis which asks (1) if the agency action carries the force of law, and (2) if such action was "promulgated in the exercise of that authority." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *U. S. v. Mead Corp.*, 533 U.S. 218, 227 (2001). Once the court passes "step zero," it turns to the *Chevron* test which asks "whether Congress has directly spoken on the precise question at issue." *Chevron*, 467 U.S. at 842–43. If Congress has spoken to the precise question, the inquiry ends, and the "unambiguously expressed intent of Congress" must be given effect. *Id.* But if Congress has not directly addressed the question at issue, the court cannot substitute its own construction of the statute but must ask if the agency's interpretation "is based on a permissible construction of the statute." *Id.* at 843. When interpreting ambiguities in the CAA, courts defer to EPA as the statute's administering agency unless EPA's reasoning is arbitrary and capricious. *Center for Biological Diversity v. EPA*, 749 F.3d 1079, 1087 (D.C. Cir. 2014).

g. EPA does not have a non-discretionary duty to list GHGs as criteria pollutants under § 108 of the CAA and the District Court's ruling should be reversed.

EPA has a non-discretionary duty to act under the CAA when the duty is "'clear-cut' and requires the Administrator to act by a 'date-certain deadline.'" *Sierra Club v. Wheeler*, 956 F.3d 612, 616 (D.C. Cir. 2020) (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987)). The CAA states that the Administrator must revise the list of air quality criteria for air pollutants meeting three elements. 42 U.S.C. § 7408(a)(1). The first element covers emissions that, in the Administrator's judgment, cause or contribute to air pollution and "may reasonably be

anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). The second element speaks to pollutants in the air as a result of "diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1)(B). The third element covers pollutants for which air quality criteria were not issued before December 31, 1970, but that the Administrator "plans to issue air quality criteria." 42 U.S.C. § 7408(a)(1)(C). This third element applies to pollutants contained in this initial list, and all subsequent additions to the list must meet the criteria in Section 108(a)(1)(A) and (B). *Train*, 545 F.2d at 325.

Other courts have tangentially touched on the issue of EPA's duty to designate criteria pollutants. For example, in *Center for Biological Diversity v. EPA*, the court discussed EPA's obligation to create standards, stating that if EPA found it did not have adequate available information to "permit a reasoned judgment" about whether a proposed standard would be sufficient "to protect public welfare," subsequent promulgation would be arbitrary and capricious. 749 F.3d at 1087. The court went on to state that it would be "ridiculous" for the CAA to require EPA to take actions that would violate the CAA itself. *Id.*

It is clear from existing case law that EPA has a non-discretionary duty to issue air quality criteria for pollutants which are listed under Section 108(a)(1). *Zook v. McCarthy*, 52 F.Supp.3d 69, 71–72 (D.D.C. 2014). But that is a separate issue from the issue in this case, which concerns EPA's duty to list a pollutant in the first place. CHAWN argues that EPA has a non-discretionary duty to regulate listed pollutants, and COGA does not challenge that argument. But even if EPA has a non-discretionary duty to regulate listed pollutants, the choice to list the pollutant in the first place is still discretionary and based on the judgment of the Administrator and the information available at that time. 42 U.S.C. § 7408(a)(1)(A).

Based on its policy priorities, EPA has exercised its judgment and delayed the listing of GHGs. Courts have established that EPA is entitled to *Chevron* deference in its interpretation of ambiguous provisions of the CAA because EPA administers the CAA. *Center for Biological Diversity*, 749 F.3d at 1087. The plain language of the CAA has ambiguity in the amount of discretion granted to the Administrator in listing a criteria pollutant. 42 U.S.C. § 7408(a)(1)(A). As such, EPA has interpreted that pollutant listing must be discretionary and based on the "judgment" of the Administrator because any other answer would contradict the terms of the CAA itself. As discussed at length in *Center for Biological Diversity v. EPA*, forcing EPA to list a pollutant without adequate information would lead to an arbitrary and capricious result and violate the Administrative Procedure Act ("APA") and the CAA. 749 F.3d at 1087. Any other interpretation would leave EPA with a Hobson's choice, forcing it to violate the CAA and APA in the process of carrying out obligations under the CAA. EPA should be afforded *Chevron* deference in the interpretation of this provision, but even if a court finds that it does not have such deference, it would be "ridiculous" to presume that Congress intended EPA to violate the statute it was meant to administer and other federal law in order to administer the Act itself. *Center for Biological Diversity*, 749 F.3d at 1087.

For the above-stated reasons, this Court should find that EPA does not have a non-discretionary duty to list GHGs as criteria pollutants under CAA § 108 and that EPA has properly followed its Congressional mandate and its own reasonable interpretation of the CAA. As such, this court should reverse the lower court's finding.

h. EPA did not unreasonably delay listing GHGs as criteria pollutants and the District Court's decision should be reversed.

The Air Pollutant List for NAAQS includes air pollutants that, in EPA's judgment, "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or

welfare." 42 U.S.C. § 7408(a)(1)(A). The CAA requires that EPA issue air quality criteria for an air pollutant within 12 months after such pollutant has been added to the Air Pollutant List for NAAQS. 42 U.S.C. § 7408 (a)(2).

District courts have jurisdiction to compel agency action that is "unreasonably delayed." 42 U.S.C. § 7604(a). The term "unreasonably delayed" is not defined by the CAA, and there is no strict definition provided in the accompanying regulations.. Indeed, "[t]here is no per se rule as to how long is too long to wait for an agency action." *In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004).

The EPA Administrator must concurrently issue the listing of an air pollutant and the NAAQS for that pollutant. 42 U.S.C. § 7409(a)(2). These national standards are based on the "judgment of the Administrator." 42 U.S.C. § 7409(b)(1). Criteria pollutants and their accompanying NAAQS must be reviewed by the Administrator in five-year intervals (or more frequently) to "make such revisions . . . as may be appropriate." 42 U.S.C. § 7409(d)(1). The Administrator must appoint a scientific committee that also completes a review of this list and "recommend[s] to the Administrator" new standards or revisions. 42 U.S.C. § 7409(d)(2)(A), (B). Listing decisions are thus made at the discretion of the Administrator and he or she is not obligated to list a pollutant even after a scientific committee's findings.

Courts apply six factors to determine whether an agency has unduly delayed action. *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) (hereinafter "*TRAC*"). These factors are not "ironclad" but intended to be guidance "in assessing claims of agency delay." *In re Core Communications, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *TRAC*, 750 F.2d at 80); *see also Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (discussing the TRAC factors, specifically a "rule of reason" in the context of the Sierra

Club's claim that strip mines should be listed under the CAA for fugitive emissions). The six factors cover (1) the rule of reason; (2) whether there is a statutory timetable that impacts the rule of reason; (3) whether a delay may be unreasonable because of its proximity to human health and welfare; (4) the effect on delay of higher priority agency projects; (5) interests that could be prejudiced by a delay; and (6) impropriety. *Id.*

At issue in this matter, as described by the lower court, are the first factor (rule of reason) and third factor (whether unreasonable delay impacts human health and welfare). R at 12–11. The first factor states that the "time agencies take to make decisions must be governed by a 'rule of reason.'" *TRAC*, 750 F.2d at 80 (quoting *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1034 (D.C. Cir. 1983) (hereinafter "*PEPCO*")). The "rule of reason" is the most important factor of the *TRAC* factors. *In re Community Voice*, 878 F.3d 779, 786 (9th Cir. 2017). For example, in *PEPCO* the court stated that the agency had unduly delayed action because the agency "understood its statutory responsibilities . . . [and] promised to expedite [the] matter, but without delivering." 702 F.2d at 1035 (discussing the ICC's delayed decision of a complaint filed by PEPCO for railway freight charges that were levied against Consolidated Rail Corporation). The purpose behind the rule of reason is that "excessive delay saps the public confidence in an agency's ability to discharge its responsibilities." *PEPCO*, 702 F.2d at 1034. The rule of reason traditionally requires a "reasonable" timeframe. *MCI Telecommunications Corp. v. F.C.C.*, 627 F.2d 322, 340 (D.C. Cir. 1980). For example, in *MCI Telecommunications*, the court stated that "several years or a decade" were unreasonable for the FCC in ratemaking. 627 F.2d at 340. In *In re Core Communications*, the court found similarities between the *PEPCO* matter and *Radio-Television News Directors Ass'n v. F.C.C.*, 229 F.3d 269 (D.C. Cir. 2000) because just as in those cases, the FCC in *In re Communications* violated its own stated timeline, when it said the

interim rules "would only last three years" yet were still in place seven years later. 531 F.3d at 587. In contrast, EPA's decision to delay listing is reasonable because it does not unreasonably violate an EPA-imposed deadline.

i. EPA should be afforded Chevron deference for its listing timing decisions.

Chevron step zero is satisfied in this case because the agency action at issue is intended to carry the force of law and does so within the confines of EPA's authority. By choosing to postpone listing, EPA has decided to postpone statutory regulation of specific air pollutants. Because EPA administers the CAA, it has the authority to exercise listing powers.

EPA should be afforded deference for the timeline of its listing decisions because Congress has not directly spoken on the timing of the listing of potential criteria pollutants. The CAA does not establish any temporal restriction on when EPA must list criteria pollutants. Section 109 of the CAA shows that Congress expressly established timelines for certain aspects of the listing process, but not for the initial listing decision. For example, it established a strict 30-day deadline for publication of proposed regulations for air quality criteria (draft NAAQS) that were issued prior to December 31, 1970. *See* 42 U.S.C. § 7409(a)(1)(A). All subsequently listed pollutants must be listed concurrently with proposed NAAQS. 42 U.S.C. § 7409(a)(2). This language illustrates that Congress considered the timing of pollutant listing and decided not to create a statutory deadline for such listings. This is further emphasized by the fact that Congress built in a timeline for when the criteria pollutant list must be reviewed and by whom. 42 U.S.C. § 7409(d). Congress explicitly stated that the list must be reviewed at least every five years after December 31, 1980, and revised as necessary. *Id.* However, Congress did not state any such requirements for what substantive revisions must take place. Congress implied that any such "revisions" were a discretionary matter for the agency to consider. *Id.*

This court cannot substitute its judgment for that of the agency, and it should defer to EPA's timeline for its GHG listing decision. EPA made a discretionary choice to withhold the listing of GHGs as such a listing would have to be accompanied by immediately proposed standards. This action with allegedly impactful substances, such as GHGs, requires careful attention to detail and carefully measured policy decisions due to the widespread and significant impact of that potential regulation. R. at 12. Additionally, EPA must undertake extensive scientific study and research to ensure that any resulting regulation is effective in carrying out the listing's goal while also abiding by the intent and mandate imposed by the CAA.

ii. EPA's actions do not constitute undue delay because its timeline is reasonable and does not violate a previously established timeline.

The CAA does not provide a statutorily mandated timeline for which potential pollutants must be added to the Air Pollutant List for NAAQS. Congress explicitly provided EPA with discretion as to whether to add a pollutant to this list. 42 U.S.C. § 7408(a). Congress did not say that if the pollutant appears to endanger public health or welfare EPA must within a certain period list the pollutant, but rather, if the Administrator "in his judgment" finds the pollutant to "cause, or contribute" to endangerment, then EPA has the discretion to list the pollutant. *Id.* This language should be given the weight it deserves. The CAA does not explicitly provide a definition for "unreasonable delay," but given the statutory context, the EPA Administrator during the time of the Endangerment Finding had the discretion to use their sound judgment in creating sound regulations and policy. Indeed, the only reference to timelines and delay in the accompanying regulations for Section 304 is related to the SIPs to prevent transportation activities from allowing attainment of NAAQS. *See* 23 C.F.R. 450.104.

The CAA's requirement that EPA concurrently lists a criteria pollutant and first iteration of the proposed NAAQS supports EPA's decision. The demands of such a requirement would set

EPA up for failure if EPA were required to rush its process of scientific inquiry and attempt to resolve other intertwined policies too quickly. GHGs emissions from oil, coal, gas, and other such fossil fuels comprise the large majority of the power that runs our nation's economy.[9] Any regulations that attempt to limit the use of these products would have significant economic ramifications.[10] It is for situations such as this that Congress entrusted EPA with the discretion to use sound judgment in listing potential criteria pollutants. Mandating that EPA speed up its consideration of these crucial factors would be careless and myopic. EPA chose to spend the last ten years adequately researching the ramifications of certain regulations, resolving other policy concerns, and investing in science for the long-term benefit of the United States economy, public health, and welfare. EPA's reasonable decision to delay violated no CAA provision.

iii. EPA satisfies the TRAC factors, but even if it does not, those factors are not obligatory nor exactly on-point with EPA's obligations.

EPA is reasonable in delaying the listing of GHGs, and such delay does not jeopardize human health or welfare. EPA's ten-year delay is reasonable because unlike decisions like FCC ratemaking, regulation of any potential pollutant requires an intimate and well-supported understanding of not only the science of the chemicals at issue but also the subsequent complex impacts on humans and the environment. While CHAWN can argue that the 2009 Endangerment Finding embraces this understanding, it would be wrong, as the finding does not adequately assess effective GHG concentrations (which create an impact on the climate level) and acceptable dosages. While the 2009 Endangerment Finding may say that GHGs are harmful in certain quantities, there are many more moving parts to determine how to create effective

[9] *Fossil fuels account for the largest share of U.S. energy production and consumption*, U.S. ENERGY INFORMATION ADMINISTRATION (Nov. 18, 2020, 4:50PM), https://www.eia.gov/todayinenergy/detail.php?id=45096#.
[10] *Oil and Natural Gas Contribution to U.S. Economy Fact Sheet*, AMERICAN PETROLEUM INSTITUTE (Nov. 18, 2020, 5:04PM), https://www.api.org/news-policy-and-issues/taxes/oil-and-natural-gas-contribution-to-us-economy-fact-sheet#:~:text=America's%20oil%20and%20natural%20gas,here%20at%20home%20every%20year.

regulations that address potential harms. Creating such regulations involves extensive scientific study and an understanding of emissions that EPA cannot calculate in a short timeframe. Additionally, EPA must act reasonably, and consider that the United States does not exist in a vacuum. International emissions must be integrated somehow into the regulation—not for regulation, but to ensure that such NAAQS are not unattainable because of emissions from countries beyond the reach of EPA regulations.

The lower court cited several cases that employ the *TRAC* factors; however, most of these cases along with the factors themselves concern FCC ratemaking, a beast of a very different kind. *See e.g.*, *In re Core Communications*, 531 F.3d. at 855. Applying the standards and practice of FCC ratemaking to the timing of listing and regulation of complex chemicals with countless known and unknown rippling effects is the very definition of unreasonable. Improperly considered GHG regulations could impact human health and welfare far more than any current harm. Emergency services such as transportation and manufacturing rely heavily on GHGs to power necessary functions. EPA's sound judgment in delaying listing has been to the benefit of the United States because, without such a delay, the U.S. would be caught between a rock and a hard place. Without adequate alternative energy sources to make up the difference, country-wide black and brown-outs would result, putting untold millions at risk. Considering the current COVID-19 pandemic, such circumstances would be detrimental to the responsiveness of essential emergency services, leaving the residents of the United States in a precarious position.

Moreover, unlike other tests created by courts, the *TRAC* factors are not obligatory. The court in *In re Core Communications* explicitly stated that such factors are not "ironclad" obligations, and as such, should not be applied as such here. 531 F.3d. at 855. Even if GHG's proximity to human health and welfare qualifies as the basis for unreasonable delay under the *TRAC* factors, a

court is not required to act on these factors. Indeed, the lower court's reference to *In re Pesticide Action Network N. Am., Inc.*, 798 F.3d 809 (9th Cir. 2015) is not illustrative of this matter as *In re Pesticide* involved the administration of a different statute and the response to an administrative petition. In this case, CHAWN is attempting to force EPA's discretion. Additionally, unlike *In re Community Health*, the case here does not concern lead, a substance that is widely accepted to be incredibly dangerous to human health and welfare in any quantity. Regulations of GHGs require a sensitive balancing act that is simply not possible to achieve in a short timeframe. As such, EPA's delay is not unreasonable. The court should find that EPA should be afforded deference in its choice of listing GHGs and that such delayed listing does not constitute an unreasonable delay under the CAA. As such, this court should reverse the lower court's finding.

CONCLUSION

In conclusion, this Court should carefully correct the District Court's misapplication of the Clean Air Act. The lower court had jurisdiction to hear this case, and this court has jurisdiction to correct the lower court's rulings. COGA requests that the court reverse the District Court on its rulings regarding undue delay, nondiscretionary duties, and public welfare, and affirm the lower court's ruling on public health.