C.A. No. 20-000123

IN THE 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.

On Appeal from the United States District Court for the District of New Union

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BRIEF FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant,

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia has original jurisdiction over this case per CAA § 304(a), which states district courts have jurisdiction "except that an action to compel agency action referred to in § 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title." 42 U.S.C. § 7604(a). According to CAA § 307(b)(1), "A petition for review of action of the Administrator in promulgating… national applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed *only* in the United States Court of Appeals for the District of Columbia." (italics added) 42 U.S.C. § 7607(b)(1).

QUESTIONS PRESENTED FOR REVIEW

I. Did the District Court have jurisdiction over CHAWN's unreasonable delay claim under CAA § 304(a) where the rule sought would be a rule of nationwide applicability subject to review exclusively in the DC Circuit under CAA § 307(b)?

II. Is the 2009 Endangerment Finding valid with respect to an endangerment of public welfare?

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

IV. Does EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA § 108(a) constitute an unreasonable delay?

V. Does the EPA have a non-discretionary duty to designate GHGs as a criteria pollutant under CAA § 108 based on the 2009 Endangerment Finding?

STATEMENT OF THE FACTS

In the 20th century there was increasing societal awareness of the dangers and widespread impacts of environmental pollution, especially air pollution, which decreased the quality of life for all citizens. The Clean Air Act (CAA) is a comprehensive environmental regulation that the United States implemented for the research, regulation, and enforcement of air emissions for a variety of sources on the state and federal level. The CAA gives the Environmental Protection Agency (EPA) the necessary power to fight environmental polluters but also to act as a gatekeeper by responding to petitions and citizen suits that private citizens submit to the courts when they believe the EPA has failed to perform an act or mandatory duty that is required by statute or to challenge actions taken by the EPA.

In 1999, several environmental groups petitioned the EPA to make a finding that GHG emissions from automobiles posed a danger to human health and the environment under section 202 of the CAA, 42 U.S.C. §7521. (R. at 6). If the 202 provision was triggered then the EPA would have to regulate GHG emissions from mobile sources but would not require the EPA to list GHG as criteria pollutants and subject it to regulation under NAAQS program of Title 1. *Id.* EPA denied their petition arguing that the classification of GHGs as "air pollutants" was a matter of statutory interpretation that should be left to the legislature, rather than a broad environmental regulation like the CAA. *Id.* The United States Supreme Court disagreed with the EPA's interpretation of "air pollutants" in *Massachusetts v. E.P.A.*, which held that GHGs fit squarely in the definition of "air pollutants" subject to potential regulation under the Clean Air Act. *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007) The court's ruling on the 202 petition instructed the EPA to make a finding of whether GHGs may present an endangerment to public health or welfare. *Id.*

In 2009, the policy regime began to shift as the Obama administration took a more aggressive stance on the issue of environmental pollution and restricting GHGs contamination by initiating regulatory schemes to limit and reduce GHGs. *Id.* The administration laid the groundwork for these restrictions by issuing their formal findings of endangerment under CAA § 202 which identified a group GHGs that present an endangerment to both public welfare and public health. The "Endangerment Findings" defined climate changes endangerment to public health as "an increase in ozone pollution due to hotter temperatures, an increase in heat related deaths, and the prevalence of insect borne diseases, as well as other impacts." *Id.* at 6-7. The Findings go on to define climate change endangerment to public welfare as "reducing agricultural productivity, reducing water supplies, and increasing property and economic damage due to storms and rising sea levels, as well as other impacts." *Id.* at 7. These definitions came before a series of regulations meant to regulate the emission and reduction of GHG but many were challenged and partially struck down by the courts.

In 2017, the country witnessed another shift in the EPA as the Trump administration placed an emphasis on regulatory rollbacks by relaxing GHG standards for mobile and stationary sources and challenging many of the GHG regulations that the previous administration had created. *Id.* The current EPA administration has left the Endangerment Finding intact and has chosen not to designate GHGs as criteria pollutants under CCA §108. The language of CCA §202, which the EPA has invoked, and CCA §108 are nearly identical for the listing of criteria pollutant. *Id.* at 8. CCA §108 directs that:

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

> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
> (C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 7408(a)(1). *Id.* at 7-8.

One of the defining components of CAA §108 is that it allows the EPA to establish National Ambient Air Quality Standards (NAAQS) to regulate emissions and protect the public health and public welfare. The CAA uses NAAQS to set concentration levels of pollutants in the ambient air and then further divides the standard into primary NAAQS and secondary NAAQS. *Id.* at 8. The primary NAAQS is set at the necessary levels to protect public health, while the secondary NAAQS are set at the necessary levels to protect public welfare. 42 U.S.C. § 7409. *Id.* Unlike §202, CAA §108 requires that the EPA propose the primary and secondary NAAQS within twelve months of the initial listing and the final NAAQS must be submitted within 90 days after the proposed primary and secondary NAAQS. CAA §§ 108(b), 109(a)(2), 42 U.S.C. §§ 7408(b), 7409(a)(2). *Id.*

STATEMENT OF THE CASE

On April 1, 2019, CHAWN properly served a Notice of Intent to sue EPA alleging that EPA failed to carry out its asserted mandatory duty to regulate GHGs criteria pollutants and for "unreasonable delay in carrying out its non-discretionary duty to designate GSG's as a critical pollutant as demanded in the December 15, 2009 petition for rulemaking." *Id.* at 4. After receiving this notice the EPA took no action in response to CHEWN' S notice of Notice of Intent to pursue litigation. *Id.* After waiting the requisite sixty days, CHAWN invoked the citizen suit provision of CAA 42 U.S.C 7604(b)(1)(A) and filed action to the United States District Court for the District of New Union on October 15, 2019, which sought a court order directing EPA to publish a new list of criteria pollutants that include GHGs as a criteria pollutant. *Id.* After CHAWN filed its action COGA moved to intervene as of right pursuant to Fed. R. Civ. P. 24(a), claiming that CHAWN's requested relief would result in regulatory limits that would detrimentally impact the market for its products. *Id.* After this court granted COGA's motion on November 30, 2019, COGA and EPA both answered CHAWN's complaint. After filing the initial complaint COGA asserted a cross claim against the EPA seeking a declaration that the 2009 Endangerment Finding is unsupported by the record and contrary to law. *Id.*

On August 15, 2020, the District Court first determined that the Endangerment Finding is valid with respect to an endangerment to public welfare. *Id.* at 14. Summary judgment was granted in CHAWN's favor against EPA and COGA. *Id.* at 13. Second, the EPA has unreasonably delayed action of responding to plaintiff's petition for designation of GHGs as a critical pollutant, and has unreasonably delayed designating GHGs as a critical pollutant. *Id.* Summary judgment was granted in CHAWN's favor against EPA and COGA. *Id.* Third, EPA has a duty that is not discretionary to designate GHGs as a critical pollutant. *Id.* Summary

judgment was granted in CHAWN's favor against EPA and COGA. *Id.* Lastly, the court granted COGA's motion summary judgment in part and declared that the portion of the Endangerment Findings that determined GHG is a danger to public health is contrary to law. *Id.* at 14. Summary judgment was granted in COGA's favor against EPA and CHAWN. *Id.*

The Environmental Protection Agency, Climate Health and Welfare Now, and the Coil, Oil and Gas Association have each filed a timely Notice of Appeal following the final order from the United States District Court for New Union. *Id.* at 1. CHAWN appeals to the District Courts' determination that the EPA's 2009 endangerment finding that GHGs in danger to public health is contrary to law. *Id*. COGA challenges the "District Court's determination that EPA's 2009 Endangerment Finding that GHGs endanger public welfare is valid and that the EPA had a non-discretionary duty to designate GHGs as a criteria pollutant under § 108(a) of the Clean Air Act." *Id.* COGA also challenges "the District Court's holding that EPA's ten-year delay in taking action listing GHGs as criteria pollutants constitutes an unreasonable delay." *Id.* The EPA agrees with COGA that it did not have a non-discretionary duty to list GHGs as criteria pollutants, and that it did not unreasonably delay in doing so and that the 2009 Endangerment Finding was not valid with respect to the endangerment of public health. *Id.* The EPA also agrees with CHAWN that the Endangerment Finding was valid with respect to the endangerment of public welfare. *Id.*

STANDARD OF REVIEW

The standard of review in this case is provided in CAA Section 307(d), 42 U.S.C. § 7607(d). Section 307(d)(9) provides that contested parts of the final rule may be reversed if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or in excess of EPA's "statutory jurisdiction, authority, or limitations."

Regarding questions of statutory interpretation of the CAA, the Court must first consider whether Congress has directly addressed the particular question at issue. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). However, if the statute is silent or ambiguous on the issue, the Court must accept the agency's interpretation if it is reasonable. *Id.* at 843.

SUMMARY OF THE ARGUMENT

The EPA requests that the United States Court of Appeals for the District of Columbia find that it has original jurisdiction in this action as the first question briefed, since the issue of unreasonable delay on a nationally-applicable final action has been raised. Therefore, this Court should vacate the District Court of New Union's decision and remand with directions to dismiss for lack of subject matter jurisdiction.

Second, the EPA requests that this Court find that the 2009 Endangerment Finding is valid with respect to the endangerment of public welfare since the EPA must be given deference for issues that involve complex scientific consideration and could be labeled as an absurd determination.

Third, the EPA requests that this Court find that the 2009 Endangerment Finding is not valid with respect to the endangerment of public health since the statutory text of CAA §108 since the harms are consequences of climate change and not an ambient concentration of GHGs that the EPA could regulate.

Fourth, the EPA requests that this Court find that the agency's action on listing greenhouse gases (GHGs) as criteria pollutants was not unreasonably delayed because all six of the TRAC factors weigh in the EPA's favor.

Fifth, the EPA requests that this Court find that the agency did not have a non-discretionary duty to designate GHGs as a criteria pollutant because Congress did not require that all specified action in CAA § 108(a) be taken by a date-certain deadline, nor could a deadline be inferred.

ARGUMENT

I. The District Court did not have jurisdiction over CHAWN's unreasonable delay claim under where the rule sought would be a rule of nationwide applicability subject to review exclusively in the DC Circuit under CAA § 307(b).

The district court did not have jurisdiction over the reasonable delay claim. District court jurisdiction is proper for citizen suits alleging a failure to perform a nondiscretionary duty. 42 U.S.C. § 7604(a)(2). However, CAA § 304(a) provides an exception when

> an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title.

42 U.S.C. § 7604(a). According to CAA § 307(b)(1),

> A petition for review of action of the Administrator in promulgating…any standard under section 7521…, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed *only* in the United States Court of Appeals for the District of Columbia…. [A]ny other final action…which is locally or regionally applicable may be filed *only* in the United States Court of Appeals for the appropriate circuit.

(italics added) 42 U.S.C. § 7607(b)(1). Section 7521 refers to CAA § 202: Emission Standards for New Motor Vehicles or New Motor Vehicle Engines. 42 U.S.C. § 7651. In *Texas Mun. Power Agency v. EPA*, this Court held that § 7607(b)(1) is "matter of venue, not jurisdiction; since EPA raised no objection" in a locally or regionally applicable action concerning the allocation of initial entitlements for stationary sources. 89 F.3d 858, 862 (D.C. Cir. 1996).

However, the matter of venue only applies to filing in federal courts of appeals. Judge Posner wrote, "It would be usurpative for a federal district court to assert jurisdiction over a case that should have been brought in a federal court of appeals[.]… So it must refuse to do so even if no party objects[.]" *State of New York v. EPA,* 133 F.3d 987, 990 (7th Cir. 1998). The 8th Circuit

Court of Appeals vacated the district court's decision and remanded with directions to dismiss for lack of jurisdiction when the plaintiff challenged the CAA's constitutionality, not specific final actions of the EPA. *State of Missouri v. U.S.,* 109 F.3d 440, 441 (8th Cir. 1997). "There is simply no reason the constitutional challenges of this lawsuit should be, or even can be, separated from a challenge to final EPA action under the CAA. *Id.* at 442.

Here, the EPA's Endangerment Finding is a final rule pertaining to CAA section 202(a). 42 U.S.C. § 7521. Initially, CHAWN's citizen's suit alleging the EPA Administrator's nondiscretionary duty, so the district court's jurisdiction was proper under 42 U.S.C. § 7604(a)(2). The district court determined that the allegations were "sufficiently broad to encompass relief for an unreasonable delay." (R. 12). At this point, only the United States Court of Appeals for the District of Columbia had jurisdiction because the suit involved an allegation of unreasonable delay pertaining to the Endangerment Finding, a final action under § 7521. This case is distinguished from *Mun. Power Agency* because it is only a matter of venue when the plaintiffs file in a different federal court of appeals. 89 F.3d at 862. CHAWN filed the claim in the District of New Union. Just as constitutional challenges could not be separated from the challenges to final EPA action in *State of Missouri,* the other claims arising out of CHAWN's lawsuit cannot be separated from the unreasonable delay claim when considering exclusive jurisdiction. 109 F.3d at 441. The EPA was not required to file a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) since the district court did not have jurisdiction "even if no party objects." *State of New York,* 133 F.3d at 990.

Therefore, the district of New Union did not have jurisdiction over the unreasonable delay claim, and this Court should vacate the district court's decision.

II. The court should find that the 2009 Endangerment Finding is valid with respect to the endangerment of public welfare since the EPA must be afforded deference when the issues are absurd or scientific determinations.

While the court is not bound to follow the decision reached in *Coalition for Responsible Regulation, Inc. v. EPA* the case is a foundational ruling that helps to inform the court on the issues in order to uphold regulatory policies established by the federal government. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). COGA asserts two major arguments, a failure of the court to consider absurdity and the uncertainty of the data from in the Endangerment Finding, which both fail due to the court's deference to the EPA on these matters.

In *Coalition for Responsible Regulation v. EPA* the court found that regardless of how absurd the consequences may seem it is irrelevant to the endangerment inquiry since the EPA has the authority to regulate GHGs under the CAA. *Coalition for Responsible Regulation, Inc.*, 684 F.3d. Further, the *Coalition for Responsible Regulation* the court asserted that the resolution of scientific issues is highly deferential and should rely on "whether EPA has made a rational determination based on the record before it." *Id.* In *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (D.C. Cir. 2014) the court reiterated this point by explaining that when the term "air pollutant" appears in the acts provisions the EPA usually determines its contextual meaning and is given deference as long as it "grounds it's reasons for action or inaction in the statute." With this consideration the court should grant deference to the EPA when determining that the 2009 Endangerment Finding is valid with respect to the public welfare since the EPA

The Supreme Court in *Massachusetts v. EPA* explains that policy concerns are not the responsibility of the EPA when establishing its endangerment findings which is an important point for the necessity of deference to the EPA on scientific matters. *Massachusetts,* 549 U.S. The CAA requires that the EPA maintain a precautionary approach to ensure that EPA can regulate potentially harmful pollutants that pose some level of danger to the public, like GHGs. *Ethyl Corp. v. EPA,* 541 F.2d 1, 28 (D.C. Cir. 1978). This means that the EPA is given deference in scientific matters, even if the issues are not completely settled. In this case the EPA should be granted deference since this is a scientific issue that the EPA has expertise in. These problems are not strictly policy related but have a high level of deference and dependency on the outcomes of scientific determinations. Since the regulation of GHG and secondary NAAQS regulations depend heavily on the administration of the EPA and their interpretation of the CAA, especially section §108. Therefore, the court should grant deference to the EPA concerning this complex scientific issue.

III. The court should find that the 2009 Endangerment Finding is not valid with respect to the endangerment of public health since the statutory text of CAA §108 allows for the broad and contextual protection of "any" air pollutant, not just the impact of GHGs on the public.

The issue of the endangerment of public health is one of degrees since the courts have given EPA some latitude in determining what can and cannot be regulated as an "air pollutant" under the CAA. The CAA defines "air pollutants" in sweeping terms of "any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S. Code § 7602(g). While some cases have given expensive meetings to this definition and others have restricted it, the modern approach must strike a balance that recognizes that the statutory definition of public health in CAA §108 in the Endangerment

Findings must be more inclusive than just the health impacts that result from breathing air with ambient concentrations of carbon dioxide or other GHGs. (R. at 10).

In *Massachusetts,* the court invalidated the EPA's interpretation that greenhouse gases were not "air pollutants" but rather that the CAA's definition of "air pollutants" embraces "all airborne compounds of whatever stripe and underscores that intent through the repeated use of the word "any." *Massachusetts,* 549 U.S. The court also found that Congress was intentional about conferring the flexibility necessary to avoid rendering the CAA as obsolete piece of legislation due to rapidly changing scientific findings and changing circumstances. *Id.* In the case before the court today the EPA argues that Endangerment Findings cannot rely entirely on consequential health harms that are a result of global climate change and are not are not directly related to a definable source of criteria pollutants. While it is necessary for the agency to regulate criteria pollutants that impact the public health and welfare of the nation the EPA cannot regulate a singular criteria pollutant that is impacting the entire globe.

In *Whitman v. American Trucking Association, Inc*. the court finds that once CAA §108 finds that a "air pollutant" qualifies as a primary ambient air quality standard section 109(b)(1) instructs the EPA to set primary ambient air quality standards which are "requisite to protect the public health with an adequate margin of safety." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 121 S. Ct. 903 (2001). When considering the definition of "public health" the court found that the words can have more than one meaning but the definition should be determined by the context surrounding the phrase and that "public health" means the "health of the community." *Id.* While GHGs have an impact on communities it is crucial to understand that an expensive issue like climate change, with indirect health impacts, has a limited ability to be regulated by the

EPA. Since this is the case the EPA has to operate within an adequate margin of safety which is not possible in relation to a global issue such as climate change.

In *Utility Air Regulatory Group,* the court found that when the term "air pollutant" appears in an act's "operative provisions, EPA has routinely given it a narrower, context appropriate meaning," opposed to *Massachusetts' more* expansive reading of the term. *Utility Air Regulatory Group,* 573 U.S. and *Massachusetts,* 549 U.S. *Massachusetts* held that the EPA "did not always have to regulate GHGs as an "air pollutant" everywhere that the term appears in the statute" but rather that the EPA only has to "ground it's reasons for action or inaction in the statute rather than on reasoning divorced from the statutory text." *Massachusetts,* 549 U.S. *Massachusetts* does not embrace the EPA's current "equally categorical position that greenhouse gases must be air pollutants for all purposes regardless of the statutory context." *Massachusetts,* 549 U.S. *Utility Air Regulatory Group* finds that when balancing *Massachusetts* with the appropriate use of the term "air pollutant" is not always the same and relies heavily on the context of the situation to encourage the courts and the EPA the words must be viewed in their place in the "overall statutory scheme." *Utility Air Regulatory Group,* 573 U.S. In this situation the EPA has chosen to regulate GHG in relation to public health in an expensive manner since there is not a singular point source or industry that can be blamed for the impacts of GHG on public health.

For the aforementioned reasons the court should find that the 2009 Endangerment Finding is not valid with respect to the endangerment of public health since the statutory text of CAA §108 allows for the broad and contextual protection from "any" air pollutant, not just the impact of GHGs on the public.

IV. EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA § 108(a) does not constitute an unreasonable delay.

CAA § 108(a) states

> Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants
>
> (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—
>
> (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
>
> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
>
> (C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 7408(a).

To determine whether an agency's action is unreasonably delayed, this Court has set forth six factors, known as the TRAC factors:

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

Telecomm. Research & Action Ctr. v. F.C.C. ("TRAC"), 750 F.2d 70, 80 (D.C. Cir. 1984), (quoting PCHRG v. FDA, 740 F.2d 21, 34 (D.C. Cir. 1984) (citations omitted).

This Court further clarified "unreasonable delay" by holding that, in the context of the statute authorizing the agency's action, the EPA's delay must be so egregious as to warrant mandamus. *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987). Plaintiffs must show either that the EPA violated a statutory "right to timely decisionmaking" implicit in the regulatory scheme, or another interest (including aesthetic, economic, or human health and welfare) "will be irreparably harmed through delay." *Id.* at 796-797.

In *Mexichem Specialty Resins, Inc. v. EPA*, this Court held that the petitioners failed to show that EPA had deprived them of a statutory right to timely decision making or that they would suffer irreparable harm due to EPA's four-year timeline for reconsideration of a rule for regulating polyvinyl chloride (PVC) under the CAA. 787 F.3d 544, 554-555 (D.C. Cir. 2015). "Irreparable harm must be both 'certain and great,' 'actual and not theoretical,' 'beyond remediation,' and 'of such *imminence* that there is a clear and present need for equitable relief[.]'" *Id.* at 555, (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

Here, an unreasonable delay is not evident when the TRAC factors are applied.

(1) The EPA has acted with reason as it has determined how to regulate the six greenhouse gases in stationary sources.

(2) After the initial deadline of 30 days after December 31, 1970, Congress has provided no expressed timetable beyond "from time to time and thereafter" in the statutory scheme. 42 U.S.C. § 7408(a)(1).

(3) Although EPA recognizes an endangerment of public welfare, "this factor alone can hardly be dispositive when… virtually the entire docket of the agency involves issues of this type." *Sierra Club*, 828 F.2d at 798.

(4) Although the EPA recognizes the serious nature of climate change, CHAWN has not shown that irreparable harm is *imminent* in comparison to the threat from other criteria pollutants and agency priorities. *Mexichem Specialty Resins, Inc.*, 787 F.3d at 555.

(5) CHAWN has not shown that their interests have been prejudiced by EPA's timeline to the extent so egregious as to warrant mandamus. *Sierra Club*, 828 F.2d at 797.

(6) The EPA has acted within its discretion and no evidence of impropriety is in the record.

Because all six TRAC factors weigh in favor of EPA, the agency's actions do not constitute an unreasonable delay.

IV. EPA does not have a non-discretionary duty to designate GHGs as a criteria pollutant under CAA § 108 based on the 2009 Endangerment Finding.

The Second Circuit Court first addressed the question of non-discretionary duty in *Natural Resources Defense Council, Inc. v. Train* by upholding the Southern District of New York's opinion that the EPA Administrator had a non-discretionary duty to place lead on the CAA § 108(a)(1) list of air pollutants. 545 F.2d 320 (2d Cir. 1976). The court considered the broader context of the CAA as a whole and the legislative history to determine that the action was non-discretionary. *Id.* at 327.

However, the courts have developed the date-certain deadline as the appropriate measure for non-discretionary duty. "In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must 'categorically mandate[e]' that *all* specified action be taken by a date-certain deadline." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (italics in original, quoting *Natural Resources Defense Council, Inc.*, 5010 F.2d at 712.) The court also held that an inferable deadline could also impose a mandatory duty of timeliness, but those occasions are "isolated" and "very rare." *Sierra Club*, 828 F.2d at 791. This concept of an inferable deadline is illustrated in *WildEarth Guardians v. Jackson*, 885 F.Supp.2d 1112 (D.N.M. 2012). The plaintiff argued that after a state-level permitting authority missed the 90-day deadline, date-certain deadlines for the EPA were inferable from the steps enumerated in the CAA Title V permitting process. The district court held that the EPA retained "a certain amount of discretion" as it followed the steps to deny or issue a permit. *Id.* at 1118.

Here, Congress expressed only one date-certain deadline within CAA § 108(a) that the EPA Administrator had a non-discretionary duty to follow when publishing the initial air pollutant list, which was "30 days after December 31, 1970." 42 U.S.C. § 7408(a). All other specified action indicates that the Administrator has broad discretion from the plain language of the statute: "from time to time thereafter revise," "in his judgment," "for which he plans to issue." *Id.* The plaintiffs cannot reasonably infer a deadline in the statutory language that could impose a mandatory duty of timeliness. *Sierra Club*, 828 F.2d at 791.

Therefore, it is clear that CAA § 108(a) does not impose a non-discretionary duty on the EPA.

C**ONCLUSION**

For the foregoing reasons, this Court should vacate the district court's opinion and remand with directions to dismiss for lack of jurisdiction and find for the EPA on issues 2-5.