C.A. No. 20-000123 Team Number: 34

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 FLORIDA NEW UNION

BRIEF OF APPELLANT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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STATEMENT OF JURISDICTION

The United States Environmental Protection Agency (EPA) responds to an appeal from an Opinion and Order entered August 15, 2020, by the honorable Judge Romulus N. Remus in the United States District Court of New Union, No. 66-CV-2019. Following the issuance of this Opinion, the Climate Health and Welfare Now (CHAWN) and the Coal, Oil, and Gas Association (COGA) filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4 (2020). This Court has jurisdiction under 28 U.S.C. § 1291 (2020).

STATEMENT OF THE ISSUES

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

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

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

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. 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)?

STATEMENT OF THE CASE

I. Factual Background

In 1999, the EPA was petitioned to determine whether Greenhouse Gas (GHG) emissions from automobiles posed a danger to human health and the environment. R. at 6. This finding would trigger regulation of GHGs from mobile sources. R. at 6. If the EPA had designated GHGs as a criteria pollutant, it would be directed to follow a comprehensive scheme of regulation establishing public health and welfare-based concentration limits known, respectively, as primary and secondary National Ambient Air Quality Standards (NAAQS). R. at 6. States

would be charged with regulating GHGs through State Implementation Plans (SIPs). R. at 6. On September 8, 2003, the EPA denied the petition, explaining that GHGs did not fit under the statutory definition of "air pollutants" triggering Clean Air Act (CAA) regulation. R. at 6. Instead, the EPA determined that such regulation should be authorized by specific legislation. R. at 6. However, the United States Supreme Court held that GHGs are air pollutants subject to potential regulation. R. at 6. Thereafter, the EPA was directed to determine whether GHGs from mobile sources presented an endangerment to public health and welfare. R. at 6.

On December 15, 2009, the EPA responded with a formal endangerment finding (the "Endangerment Finding") which defined a group of six greenhouse gases as a single air pollutant. R. at 6. Moreover, the EPA found that these GHGs were emitted by numerous mobile sources and may endanger human health and welfare. R. at 7. In the following years, the EPA began regulating GHGs through emission limitations for vehicles and new sources. R. at 7. As the administration changed, the EPA began reevaluating GHG emissions through regulatory revisions of emission standards for new motor vehicles and new and existing power plants. R. at 7. Despite these policy changes, the Endangerment Finding has not yet been subject to reevaluation. R. at 7. Hence, the EPA has not invoked its power to designate GHGs as a criteria pollutant under the CAA. R. at 7. While the listing process has similarities to Section 202, it triggers regulatory actions involving the resolution of issues of science and policy. R. at 8.

Shortly after the EPA issued the Endangerment Finding, a group of environmental organizations demanded that the EPA list GHGs as a criteria pollutant under the CAA. R. at 5. The petition asserted that the EPA had a non-discretionary duty to list GHGs as criteria pollutants and had erred in deferring to act in the ten years since the initial findings. R. at 5. CHAWN identified individuals harmed by the effects of climate change, including owners of

real property who have vacated coastal land and young adults whose future is allegedly endangered. R. at 5. Accordingly, CHAWN was given standing to commence this suit. R. at 6.

II. Procedural History

On April 1, 2019 Plaintiff CHAWN served a Notice of Intent to sue EPA alleging unreasonable delay and failure to carry out its asserted duty to regulate GHGs as criteria pollutant. R. at 5. The EPA did not respond. R. at 5. On October 15, 2019, CHAWN commenced this lawsuit under the citizen suit provisions of CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2). R. at 5. CHAWN seeks to compel the EPA to include GHGs as a criteria pollutant. R. at 5. COGA moved to intervene as of right pursuant to Fed. R. Civ. P. 24(a) asserting that CHAWN's remedy would destroy the market for its products. R. at 5. The lower court granted COGA's motion on November 30, 2019. R. at 5. COGA and EPA both answered the complaint, while COGA asserted a cross claim against EPA seeking to invalidate the Endangerment Finding. R. at 5.

On September 1, 2020, Judge Remus issued an Opinion and Order granting CHAWN's motion for summary judgement, holding that the Endangerment Finding is valid with respect to the public welfare and that EPA had unreasonably delayed and had a non-discretionary duty in designating GHGs as a criteria pollutant. R. at 13, 14. The District Court also granted COGA's cross-motion for summary judgement in part, declaring that the Endangerment Finding is vacated to the extent that it declares GHGs to endanger public health. R. at 14. Appellants filed a timely Notice of Appeal, granted by this Court. R. at 1. The Court raises *sua sponte* the issue of whether the District Court had jurisdiction to hear an unreasonable delay claim. R. at 1.

STANDARD OF REVIEW

The CAA empowers the Court to reverse agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Med. Waste Inst. & Energy*

Recovery Council v. EPA, 645 F.3d 420, 424 (D.C. Cir. 2011) (quoting 42 U.S.C. § 7607(d)(9)(A)). The EPA's interpretation of statute requires the courts to defer to a permissible construction of statute absent the clear and unambiguously expressed intent of Congress. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). Otherwise, any newfound interpretation is "entitled to respect" to the extent it has the "power to persuade." *Gonzales v. Oregon*, 546 U.S. 243, 244 (2006) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140). Whether the elements of an unreasonable delay and jurisdiction are satisfied is a question of law reviewed de novo. *Oregon Natural Resources Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565 (10th Cir. 1995).

SUMMARY OF ARGUMENT

The Endangerment Finding is valid in regard to the public welfare as the court defers to the EPA's scientific expertise as well as reasonable statutory and judicial interpretations of public welfare. Given the agency's expertise and experience in resolving the complex scientific issues relating to the protections of human welfare, the EPA's scientific analysis of the public welfare effects of GHG emissions are entitled to substantial deference. The substantial effects of GHGs and climate change to the public welfare merit the validity of the Endangerment Finding. Moreover, The Endangerment Finding is invalid with respect to public health as the noted impacts merely indirectly effect the public health. This newfound position is entitled to deference even though it is a departure from previous interpretation that was raised during litigation. Thus, the Endangerment Finding is invalid with respect to the effects on public health because the term public health does not include indirect health impacts flowing solely from climate change.

The plain language of §108 of the CAA emphasizes the EPA's discretionary authority to list GHGs as a criteria pollutant based on the absence of a statutory deadline and the common

sense underpinnings of the statute. The plain meaning grants considerable discretion to the EPA in determining when to list a potential criteria pollutant. Further, the statute's absence of an ascertainable deadline bars any inference that listing criteria is a non-discretionary duty. Additionally, the political underpinnings of the statute grant the EPA considerable discretion in listing GHGs as a criteria pollutant. Under the "TRAC" factors, the EPA's deferral was reasonable in light of the complexity of the issue, congressional and judicial expectations, minimal impact on health and welfare, and lack of prejudice and good faith in listing GHGs.

The lower court has no jurisdiction over the unreasonable delay claim under section 304(a) of the CAA because the claim under review involves a non-discretionary duty of the EPA and a rule of nationwide applicability. Section 307(b) of the CAA requires an unreasonable delay claim to be heard exclusively in the United State Court of Appeals for the District of Columbia. Moreover, section 304(a) of the CAA is an exception to the broader scheme of judicial review under the CAA that grants jurisdiction only to specific matters not at issue in this case. Further, the unreasonable delay claim is based on a determination of the EPA for a nationwide rule.

ARGUMENT

I. THE ENDANGERMENT FINDING IS VALID IN REGARD TO THE PUBLIC WELFARE AS THE COURT DEFERS TO THE EPA'S SCIENTIFIC EXPERTISE AS WELL AS REASONABLE STATUTORY AND JUDICIAL INTERPRETATIONS OF PUBLIC WELFARE.

A. The EPA's Scientific Analysis of the Public Welfare Effects of GHG Emissions are Entitled to Substantial Deference Given the Agency's Expertise and Experience in Resolving Complex Scientific Issues Relating to the Protection of Human Welfare.

The Endangerment Finding was the culmination and consideration of a considerable body of scientific evidence defining six well-mixed GHGs as an air pollutant that together causes or

contributes to climate change. *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114–15 (D.C. Cir. 2012). Traditionally, such a finding may be set aside if it is found to be arbitrary and capricious. *Med. Waste Inst*, 645 F.3d at 424. This is a narrow scope of review so that a court may not substitute their judgements for an agency's expertise. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). An action is arbitrary and capricious if the agency has failed to explain a reason for its action. *Id.* at 43. Accordingly, the Endangerment Finding is presumed valid in relation to public welfare so long as the EPA presents a rational basis for its decision. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519–20 (D.C. Cir. 2009).

Additionally, an agency is given an "extreme degree of deference . . . when it is evaluating scientific data within its technical expertise." *Id.* at 520 (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 248 (D.C. Cir. 2003)); *see also Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983) ("[When the agency] is making predictions, within its area of special expertise, at the frontiers of science . . . a reviewing court must generally be at its most deferential."). The EPA's decision making is guided by collaboration with twenty-two advisory committees that "conduct cutting-edge scientific and technical research" on the agency's core mission of environmental protection. *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 638–39 (D.C. Cir. 2020); *In re Nat. Res. Def. Council*, 956 F.3d 1134, 1136 (9th Cir. 2020). Since the EPA carefully considered scientific evidence and public comment in promulgating the Endangerment Finding, it is entitled to extreme deference in these decisions. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act. 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009); *Am. Farm Bureau*, 559 F.3d at 520.

Finally, the EPA has expertise in regulating GHGs through various regulatory initiatives. R. at 7. Since 1999, the EPA has been on the forefront of regulating GHGs. R. at 6. Moreover,

the EPA has evolved its understanding of GHGs, having refined their approach to regulation as circumstances change. *Mass. v. EPA*, 549 U.S. 497, 499 (2007). In fact, the EPA is well-aware of when and how to reevaluate GHG regulations, having recently revised a GHG vehicle emission standard. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 43,245 (Aug. 24, 2018). Thus, the EPA's experience calls for deference in their evaluations of the effects of GHGs on human welfare.

B. The Substantial Effects of GHGs and Climate Change to the Public Welfare Identified by the EPA Merit the Validity of the Endangerment Finding.

The Endangerment Finding is rationally consistent with the published findings of international and national scientific consensus. R. at 9. Reevaluating the specifics of the Endangerment Finding requires a scientific judgement, not policy consideration. *Coal. for Responsible Regulation,* 684 F.3d at 117–18. The scientific considerations of the Endangerment Finding are inherently welfare based. *Id.* Welfare is broadly defined to include "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being . . ." 42 U.S.C. § 7602 (2020). Even when a substance is innocuous to the public health, the broad definition of public welfare does not foreclose the interpretation that the same substance substantially impacts public welfare. *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433 n.48 (D.C. Cir. 1980) ("Thus, we could not say that the […] determination is arbitrary, even if the dust were shown innocuous to public health.").

The EPA has identified six impacts on public welfare generated from GHG emission, including impacts to agriculture, forestry, water resources, sea level rise, energy infrastructure, and the ecosystem. Endangerment Finding, 74 Fed. Reg. at 66,531–34. Addressing each in turn,

increased temperatures resulting from GHG emissions may cause staple crops to fail and enhance pest growth, reducing agricultural productivity. *Id.* at 66,531. Similarly, emissions will affect forestry by increasing wildfire, drought, and major losses from insects and disease. *Id.* at 66,532. Further, unchecked emissions will likely affect available water resources through amplified droughts and decreased precipitation. *Id.* 66,532–33. Moreover, rising sea levels will increase shoreline erosion, storm-surge flooding, and wetland loss. *Id.* at 66,533. Additionally, temperature increases will impact the energy sector by increasing demands throughout the country, while infrastructure may be vulnerable to extreme weather events. *Id.* at 66,533–34. Finally, emissions are exerting major influence on biodiversity and the natural environment. *Id.* at 66,534. Summarily, the EPA has provided compelling evidence and analysis that GHG pollution endangers the public welfare of current and future generations. *Id.* at 66,535.

The EPA has relied on a compelling body of science to reach these conclusions. 74 Fed. Reg at 66,496. Since environmental regulation is precautionary, the agency's decision does not require a perfect study noting a pure cause and effect. *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976). Instead, the EPA may justify its conclusions based on a compelling body of scientific knowledge. *Id.* These decisions are consistent with the near entirety of scientific literature. R. at 9. Thus, the EPA may apply their expertise in drawing a rational conclusion of GHGs substantial effect on welfare. *Ethyl Corp*, 541 F.2d at 28.

C. Statutory Interpretation and Judicial Decisions Relating to the Clean Air Act Reveal the EPA's Rational Decision in Determining Adverse Public Welfare Effects.

While the EPA previously noted it was unclear whether Congress intended to separate public health and welfare, a plain reading of the CAA and the judicial decisions interpreting it reveal a clear distinction. Endangerment Finding, 74 Fed. Reg. at 66,528. Foremost, the CAA

distinguishes public health and welfare by virtue of prescribing primary and secondary NAAQS setting different concentration standards. 42 U.S.C. § 7409(b). In fact, the EPA cannot create identical primary and secondary NAAQS without substantial evidence meriting the similarity. *Am. Farm Bureau*, 559 F.3d at 531 ("The EPA's decision to set secondary fine PM NAAQS identical to the primary NAAQS was unreasonable . . . ."). Establishing identical standards is conceivable only if no known effect to welfare exists besides the effect to health. *S. Terminal Corp. v. EPA*, 504 F.2d 646, 668 (1st Cir. 1974). While health is conflated in prior findings, the EPA may evaluate welfare independently of health. *See S. Terminal*, 504 F.2d at 668.

For example, particulate matter can damage vegetation, disrupt ecosystems, and erode infrastructure. *Am. Farm Bureau Fed'n*, 559 F.3d at 515–16. Moreover, lead's accumulation in the environment is like GHGs' ruinous effect. National Ambient Air Quality Standards for Lead, 73 Fed. Reg. 66,964, 67,011 (Nov. 12, 2008). Similarly, ozone's effect on crop productivity is analogous to GHG's impact on the agricultural industry. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,485 (Mar. 27, 2008). Since welfare is broadly defined and the impacts of GHGs are analogous to pollutants with undisputed risks to the public welfare, the Endangerment Finding is valid as to public welfare. *Mass.*, 549 U.S. at 506.

II. THE ENDANGERMENT FINDING IS INVALID IN REGARD TO PUBLIC HEALTH AS THE NEWFOUND POSITION THAT NOTED IMPACTS MERELY INDIRECTLY EFFECT THE PUBLIC STILL REQUIRES A LEVEL OF DEFERENCE.

A. The Newfound Position that the Endangerment Finding is Not Valid with Respect to Public Health is Entitled to Deference Even Though it is a Departure from Previous Interpretation That Was Raised Only During Litigation.

The seminal *Chevron* case laid the groundwork for what kind of deference an agency should be given in its interpretation of a statute. *See generally Chevron*, 467 U.S. 837 (1984).

Apart from the well-established high degree of deference given to agencies in *Chevron*, there are other points to be taken from that case that are of great importance here. *Id.* at 843–44. In its review of the EPA's interpretation of the word "source," the court noted that the EPA inconsistently gave meaning to the word, altering its interpretation based on the context. *Id.* at 863. It explicitly stated that "[a]n initial agency interpretation is not instantly carved in stone" and that a changing interpretation still merits deference. *Id.* Accordingly, the EPA's newfound position with respect to public health should be given some level of deference even though it is a departure from previous interpretation of the CAA.

The court below gave no deference to this new position because it was not subject to notice and comment rulemaking, but this is without justification. R. at 10. In *U.S. v. Mead Corp*, the court made clear that "as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference. . ." even without administrative formalities. 533 U.S. 218, 230–231 (2001). Although the court in that case denied *Chevron* deference on other grounds, it was not the absence of notice and comment alone that prevented them from granting it. *Id.*

Naturally, a question arises about what level of deference should be given to the EPA's newfound position. In reference to both *Chevron* and *Skidmore v. Swift*, the court in *U.S. v. Mead Corp.* stated "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency…" 121 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139). Even if complete deference is not granted to the newfound position, it should not have been dismissed entirely just because of its lack of notice and comment rulemaking and because it was only espoused during litigation. R. at 10.

B. The Endangerment Finding is Not Valid with Respect to an Endangerment of Public Health Because the Term Public Health Does Not Include Indirect Health Impacts Flowing Solely from Climate Change.

This court should find that the Endangerment Finding is not valid with respect to an endangerment of public health. In its Endangerment Finding, the EPA found that GHGs posed a threat to public health. Endangerment Finding, 74 Fed. Reg. at 66,524. To reach this conclusion, the EPA "considered direct temperature effects, air quality effects, the potential for changes in vector-borne diseases, and the potential for changes in the severity and frequency of extreme weather events." *Id.* The effect of increased temperatures on public health will lead to an increase in heat-related mortality. *Id.* Air quality effects resulting from an increase in ozone pollution will create a greater risk for respiratory illnesses and premature deaths. *Id.* When examining the effects of extreme weather on public health, the EPA "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." *Id.* Finally, in its consideration of GHGs' impact on public health, the EPA determined that GHGs might lead to an increase in pathogens, as well as an increase in aeroallergens which create more serious allergy symptoms. *Id.* Ultimately, these findings only demonstrate an indirect health impact as a result of climate change, not direct hazard to human health. Therefore, the Endangerment Finding is not valid with respect to public health.

Commenters on the Endangerment Finding suggested that the term public health, as contemplated by Congress, was meant only to include direct and not indirect exposure to GHG pollution. *Id.* at 66,526. It was anticipated that challenges would be brought arguing that only direct public health effects from GHGS, such as skin contact or inhalation, constituted an endangerment to public health. Patricia Ross McCubbin, 41 NO. 5 ABA TRENDS 6, 7 (2010). The

EPA rejected that public health effects must result directly, rather than indirectly from GHGs. *Id.* At the same time, the EPA noted that GHGs would not likely rise to a level that would directly affect public health. *Id.* While the Endangerment Finding would be valid with respect to endangerment of public welfare, until GHGs concentrations directly impact public health, these indirect effects should only be valid with respect to public welfare.

The issue of what constituted a threat to public health was contemplated and decided with regard to lead from automobile admissions by the D.C. Circuit. *Ethyl Corp,* 541 F.2d at 47. The court stated that "[f]rom a vast mass of evidence the [EPA] has concluded that the emission products of lead additives will endanger the public health." *Id.* The EPA's decision was based on the fact that "absorption of lead automobile emissions…raises the body lead burden to a level that will endanger health." *Id.* at 31. The exposure to lead in the automobile admissions was what posed the threat to public health. *Id.* at 32. It was not the case that the lead caused an impact or change on the climate that in turn created an endangerment to public health. There was a clear, direct threat to human health from the lead in the automobile admissions. *Id.* Thus, the term public health should only be valid with respect to direct impacts.

This issue is made more complex by the fact that Congress did not provide a definition for either public health or public welfare. *Id.* at 66,527. The Endangerment Finding itself states that "there is no obvious indication whether Congress intended there to be a clear boundary between the two terms or whether there might be some overlap where some impacts could be considered both a public health and a public welfare impact." *Id.* Logically, the two phrases must have different meanings and encompass different threats or else it would be unnecessary for both terms to be used in the statute. The Endangerment Finding suggests that "[if] the effect on people

is to their health then we have considered it a public health issue. If the effect on people is to their interest in matters other than health, then we have treated it as a public welfare issue." *Id.*

The reasoning of the Endangerment Finding is inconsistent with this conclusion. For example, GHG pollution may lead to increases in ambient ozone, as well as increases in water and surface temperatures that could potentially lead to an increase in mortality. *Id.* The finding describes these as *effects on the climate,* with which effects on human health are associated. *Id.* In essence, this is not an effect on human health; it is an effect on the climate. It more logically falls into an "interest in matters other than health" that should be considered effects on welfare. *Id.* The Endangerment Finding adds further support to this conclusion by stating that "this effect flows from the change in climate and effects on climate are included in the definition of effects on welfare." *Id.* Plainly, effects on climate are impacts on public welfare, not public health.

Further, the Endangerment Finding states "[i]t is clear that effects on climate are an effect on welfare, but the definition does not address whether health impacts that are caused by these changes in climate are also effects on welfare." *Id.* Two examples of prior EPA action provide clarity. The EPA listed both UVB-induced human diseases resulting from ozone, as well as human health risks created by algal blooms in welfare, not health categories. *Id.* at 66,528. Thus, based on past EPA action, the plain meaning of public welfare, and the decision in *Ethyl Corp*, effects on the climate that do not directly impact human health should be considered threats to public welfare, not public health.

The language from the CAA giving the EPA authority to designate primary and secondary ambient air quality standards is also important in the consideration of this issue. 42 U.S.C. § 7409 (2020). The CAA clearly distinguishes between primary and secondary NAAQS specifying different attainment levels requisite to protect the public health and the public welfare.

42 U.S.C. § 7409(b) (2020). The rule against surplusage, though not a binding interpretive canon, warrants a reading that gives meaning to all parts of a statute. *See* Nina A. Mendelsen, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Co*, 117 MICH. L. REV. 71, 91 (2018). While it is conceivable that primary and secondary standards may overlap where there is little difference between the effects on public health and welfare, this will only be the case when there are no effects on public health except for public welfare ones. *S. Terminal Corp*, 504 F.2d at 668. In fact, many times primary and secondary standards will differ. *Id.*

Though the Endangerment Finding was challenged in *Coalition for Responsible Regulation v. EPA*, the court did not address the issue of whether it was valid with respect to public health. 684 F.3d at 113. The petitioners in that case argued that several rules promulgated by the EPA, including the Endangerment Finding, were arbitrary and capricious, or otherwise improperly construed the provisions of the CAA. *Id.* The court held the Endangerment Finding was neither arbitrary nor capricious but did not specifically address the issue of the validity of the Endangerment Finding with respect to public health. *Id.* In *Util. Air Regulatory Group v. EPA.*, Justice Scalia delivered an opinion addressing whether the EPA impermissibly required permits for stationary sources emitting GHGs based on its motor vehicle GHG regulations. 573 U.S. 302 (2014). While this opinion involved a discussion of the Endangerment Finding, it did not draw any conclusions about its validity with respect to either public health or public welfare. *Id.* at 311, 313, 334, 343. Ultimately, this issue has never been addressed by the courts.

However, this Court should still find the Endangerment Finding invalid with respect to public health. Based on the language of the Endangerment Finding, the absence of specific definitions for the terms public health and public welfare, prior actions of the EPA in

promulgating terms, and the distinction between primary and secondary NAAQS, the Endangerment Finding is valid with respect to public welfare, but is invalid with respect to public health.

III. THE PLAIN LANGUAGE OF § 108 OF THE CLEAN AIR ACT CLEARLY SHOWS THAT THE EPA HAD DISCRETIONARY AUTHORITY TO LIST GHGS AS A CRITERIA POLLUTANT BASED ON THE ABSENCE OF A STATUTORY DEADLINE AND THE COMMON SENSE UNDERPINNINGS OF THE STATUTE.

Before a court can determine a claim of unreasonable delay, a court must analyze whether the agency is required to act. *In re a Cmty. Voice*, 878 F.3d 779, 784 (9th Cir. 2017). Ultimately, the plain language of the CAA, absence of a deadline, and common sense and political underpinnings indicate that the EPA has no mandatory duty to list GHGs

A. The Plain Meaning of § 108 Grants Considerable Discretion to the EPA in Determining when to List a Potential Criteria Pollutant.

Foremost, the plain language of the statute clearly grants the EPA discretion in listing criteria pollutants. Section 108(a)(1) provides that the EPA "shall from time to time" list a pollutant that meets certain criteria. 42 U.S.C. § 7408(a)(1) (2020). Importantly, the language is conjunctive rather than disjunctive, meaning listing is mandatory only for pollutants which the EPA "plans to issue air quality criteria." 42 U.S.C. § 7408(a)(1)(C) (2020). Moreover, the use of "shall" should not be taken to automatically create an obligation. *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 760–61 (2005). Doing so would relieve the EPA of a long-held practical discretionary authority in policing air pollution. *See id.* at 762. Indeed, courts have previously held that even when a mandatory duty to list hazardous pollutants was clear on the face of the statute, the EPA still had discretion to determine which substances were in fact hazardous. *Nat. Res. Def. Council v. Thomas*, 689 F. Supp. 246, 254 (S.D.N.Y. 1988). A parallel may be drawn

between determining hazardous pollutants and determining criteria pollutants. *Id.* Accordingly, the language of the statute gives the EPA discretion on listing criteria pollutant.

The lower court relies heavily on a nearly fifty-year-old decision for the proposition that listing criteria pollutants is a mandatory duty. *Nat. Res. Def. Council v. Train*, 545 F.2d 320, 328 (2d Cir. 1976). Unfortunately, this case provides weak support for finding a mandatory duty to list GHGs, as it draws an improper comparison and violates the plain language of the CAA. For one, the lower court improperly claims that *Train*'s holding is that EPA has a non-discretionary duty to list GHGs, when in fact the case only discusses lead. R. at 13; *Train*, 545 F.2d. Notably, the impacts of lead as discussed are far more detrimental and undisputed to public health then GHGs. *NRDC*, 689 F. Supp. at 254; *see* NAAQS for Lead, 73 Fed. Reg. at 66,976 (noting "sensory, motor, cognitive and behavioral impacts" of lead neurotoxicity in children). More importantly, the court gave considerable weight to the ostentatious language that "Congress expects criteria to be issued for nitrogen oxides, fluorides, lead, polynuclear organic matter, and odors." *Train*, 545 F.2d at 326. Besides nitrogen oxides and lead, none of these pollutants have been listed, meaning that this sentence may be more aspirational than directive.

Additionally, *Train* pre-dates the popularization of *Chevron* analysis. Thus, a pre-*Chevron* interpretation of statute is only controlling if the court determines the statute speaks squarely to the issue. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005). If the previous judicial interpretation involves gap-filling or interpreting ambiguous constructions, the court will defer to the agency's new interpretation. *Id.* Therefore, the Second Circuit's interpretation of ambiguous terms of the statute is not controlling in future agency decisions. In fact, the court stated that the "literal language" of the statute "is somewhat ambiguous" and the court was forced to analyze a combination of legislative history and judicial

interpretations. *Train*, 545 F.2d at 327. Regardless of the court's bold pronunciation that the CAA leaves no room for interpretation, such language itself is based on resolving ambiguous wording considering "the judicial gloss." *Id.* at 328; *see also Util. Air*, 573 U.S. at 321. The court's findings in *Train* are unconvincing and outdated in light of *Chevron*. Accordingly, *Train* is weak support to find a mandatory duty to list GHGs.

B. The Statute's Absence of an Ascertainable Deadline Bars Any Inference That Listing Criteria Pollutants is a Non-Discretionary Duty.

Notwithstanding the statute's plain meaning, the EPA agrees with the lower court's assertion that a date-certain deadline is an essential element of a non-discretionary duty. R. at 11. To impose a non-discretionary duty, the statute must categorically mandate that the specified action be taken by a specific deadline. *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987); *Sierra Club v. Wheeler*, 956 F.3d 612, 616 (D.C. Cir. 2020). Notably, requiring an agency to act "promptly" without a statutory deadline may not trigger a non-discretionary duty. *Defs. of Wildlife v. Browner*, 888 F. Supp. 1005, 1008 (D. Ariz. 1995). Ultimately, a date-certain deadline simplifies the court's analysis to determine only if an agency failed to comply with a mandatory deadline. *WildEarth Guardians v. Jackson*, 885 F. Supp. 2d 1112, 1116 (D.N.M. 2012).

Applying this definition, the D.C. Circuit confirmed that the lack of a deadline gave the EPA discretion in determining whether strip mines were a "major emitting facility" under the CAA. *Thomas*, 828 F.2d at 792. While the jurisdictional holding of *Thomas* has been abrogated, the analytical framework for determining non-discretionary duties remains intact. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544 n.6 (D.C. Cir. 2015). Applying *Thomas*, Section 108 must clearly define a deadline to impose a non-discretionary duty. *Thomas*, 828 F.2d at 791. Nowhere in the relevant statute does a specific deadline appear. 42 U.S.C. § 7408(a)(1). Thus, in

the absence of a readily ascertainable deadline, it will be almost impossible to conclude that Congress sought to deprive the EPA of discretion in listing GHGs. *Id.*

Moreover, a non-discretionary deadline cannot be inferred from the statute. While *Thomas* is cited for the proposition that an "inferable deadline is likely to impose such a discretionary duty" the D.C. Circuit concluded that such inferences would be "very rare." *Id.* Moreover, "it is highly improbable that a deadline will ever be non-discretionary if it exists only by reason of an inference drawn from the overall statutory framework." *Id.* Recently, the D.C. Circuit affirmed the denial of an inferred deadline in relation to the CAA's regulation of solid waste incinerators. *Wheeler*, 330 F. Supp. 3d at 417. In *Sierra Club v. Wheeler*, the relevant statute required the EPA to develop federal regulations for solid waste generators "located in any State which has not submitted an approvable plan . . . within 2 years after the date on which the Administrator promulgated the relevant guidelines." *Id.* The D.C. Court of Appeals rejected an argument that an inferential deadline furthered the general purpose of the CAA and made sense considering other statutory requirements. *Id.* at 418–19. Thus, even when a deadline seems evident on the face of the statute, inferred deadlines are incredibly rare. *Thomas*, 828 F.2d at 791. Since the statute at issue does not specify time limitations, inferring a deadline would be inappropriate.

C. The Political and Common Sense Underpinnings of the Statute Grant the EPA Considerable Discretion in Listing GHGs as a Criteria Pollutant.

Even if EPA has a duty to list criteria pollutants, this duty is discretionary given the feasibility of the current statutory framework. Listing a pollutant under section 108 triggers a host of regulatory actions. *Id.* Upon listing, the EPA is required to create a NAAQS with states designating areas as either in attainment or nonattainment for GHGs. 42 U.S.C. §§ 7409–7410

(2020). Ultimately, "major emitting facilities" within nonattainment areas would be subject to strict permitting requirements based on statutorily defined emission standards. 42 U.S.C. §§ 7470–7492 (2020). While this seems feasible, this regulatory scheme is exactly what was struck down as "an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Util. Air*, 573 U.S. at 324. Under current law, sources with a potential to emit more than 100 tons per year are "major emitters." 42 U.S.C. § 7479(1) (2020). This would demand an agency to require permits for millions of small sources. *Id.* Moreover, it would grant a single agency unrestricted power over the national economy to confront a single issue. *Id.* Accordingly, "it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant." *Id.*

Thus, the EPA's deferral of listing GHGs is within the agency's discretion based on policy judgements made on the unreasonableness of the current structure of the statute. *Util. Air*, 573 U.S. at 320. A non-discretionary duty to list GHGs does not exist unless and until the EPA first makes important policy determinations. *Zook v. McCarthy*, 52 F. Supp. 3d 69, 74 (D.D.C. 2014). Additionally, the EPA's broad discretion in carrying out its mission is at its height when the agency decides not to bring action. *Mass*, 549 U.S. at 527. The EPA may make a policy judgement based on the vast overregulation implicit in the current statutory structure. *FDA. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000). Moreover, the court must be guided by a degree of common sense in evaluating whether the EPA may regulate GHGs when previous attempts were declared "unworkable." *Id.* at 133; *Util. Air*, 573 U.S. at 320. Ultimately, the non-discretionary duty does not exist if the EPA does not "plan" to issue such a criterion based on political and common sense judgements. 42 U.S.C. § 7408(a)(1) (2020).

IV. UNDER THE "TRAC" FACTORS, THE EPA'S DEFERRAL WAS REASONABLE IN LIGHT OF THE COMPLEXITY, CONGRESSIONAL AND JUDICIAL EXPECTATIONS, ECONOMIC IMPLICATIONS, MINIMAL IMPACT OF HUMAN HEALTH, AND CLEAR LACK OF ANY PREJUDICE OR BAD FAITH IN DECIDING WHEN TO LIST GHGS.

Even if the EPA had a non-discretionary duty to list GHGs, the 10-year deferral is not automatically an unreasonable delay. A District Court may "compel agency action which is unreasonably delayed." 42 U.S.C. § 7604(a) (2020); *In re Pesticide Action Network,* 798 F.3d 809, 813 (9th Cir. 2015). However, compelling agency action is an extraordinary remedy only granted in exceptional circumstances. *Id.* Thus, the EPA's temporary and reasonable delay should not be punished by the courts, as the delay in implementing this complex scheme is nowhere near the level of necessary egregiousness. *Id.*

Ultimately, an unreasonable delay claim is better framed as a determination of the appropriateness of the extraordinary writ of mandamus compelling an agency to take the delayed action. *Ctr. For Food Safety v. S.M.R. Jewell,* 83 F. Supp. 3d 126, 144 (D.D.C. 2015). In evaluating delay, courts have relied on the holding in *Telecommunications Research & Action Ctr. v. FCC* to apply a multifactor analysis. 750 F.2d 70, 80 (D.C. Cir. 1984). As outlined by the D.C. Circuit, the "TRAC" factors include:

> (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
> (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'

Id. at 80, (quoting *PCHRG v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984) (citations omitted). Considering these factors, it is clear that the EPA has not unreasonably delayed in listing GHGs.

A. The EPA's Deferral was a Reasonable Attempt at Implementing a Complex Regulatory Scheme Given that Neither Congress or the Courts Had Indicated a Speed or Deadline by Which the Agency was to Act.

The most important TRAC factors look to if the agency was reasonable in taking the necessary time to act. *TRAC*, 750 F.2d at 80. Yet there is no per se rule as to how long is too long to wait for an agency to act. *In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). The actual length of time that has passed is important to consider, but these considerations are not determinative of unreasonableness. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). In fact, it would be incorrect to decide reasonability merely by referencing a presumed number of years. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). The context of the delay means everything. *Oceana v. Bureau of Ocean Energy Mgmt*., 37 F. Supp. 3d 147, 184–85 (D.D.C. 2014). The determination depends "upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *See id.* (remanding a delay to consider the agencies competing interest and limited resources).

Since evaluating delays requires an inquiry into the context and complexity of the alleged action, it is improper to rely on precedent to try and establish a per se rule. *Id.* at 184. Courts have regularly upheld delays greater than 10-years as reasonable given the circumstances. *Debba v. Heinauer*, 366 Fed. Appx. 696 (8th Cir. 2010) (holding a 10-year delay reasonable given the complex investigation of a controversial political asylee); *see also In re Sierra Club, Inc.*, 12-1860, 2013 WL 1955877 (1st Cir. 2013) (holding a 17-year delay in reviewing NDPES permits was reasonable given the complexity and proposed timetable). On the other hand, short delays of

mere months have been held as unreasonable. *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 338 (E.D. La. 2011) (holding a delay of four months in revieing an oil drilling permit was "unreasonable, unacceptable, and unjustified" based on the statute's policy of expeditious development). The Court may not merely rely on a length of time alone. R. at 12. Ultimately, evaluating the rule requires a look into the reasonableness of agency action, not just the timeline.

Accordingly, the ten-year delay in acting on criteria pollutants is inherently reasonable given the required resolution of complex scientific and policy issues. *Mashpee*, 336 F.3d at 1102. In addition to listing, the EPA must determine the correct NAAQS for GHGs and the appropriate enforcement mechanisms. R. at 12. Generally, the determination of NAAQS and SIPS inherent in listing GHGs requires tremendous scientific and public review. *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1184 (D.C. Cir. 1980). For example, creating a regulatory scheme for lead was the "culmination of a process of rigorous scientific and public review which permitted a thorough ventilation of the complex scientific and technical issues." *Id.* at 1184. Even though 88 percent of lead emissions derived from a single source, the EPA was required to act carefully and constructively in considering solid waste incineration and industrial facilities. *Id.* at 1136. In contrast, GHGs are emitted from millions of sources nationwide, including retail stores, offices, apartment buildings, shopping centers, schools, and churches. *Util. Air*, 573 U.S. at 324, 328. The complexity of this issue requires significant time and analysis. *See In re Sierra Club*, 2013 WL 1955877. Furthermore, courts will "defer to the judgment of agencies when assessing timelines that involve complex scientific and technical questions." *Ctr. for Sci. in the Pub. Interest v. FDA*, 74 F. Supp. 3d 295, 301 (D.D.C. 2014). The present "complex scientific" regulatory scheme is exactly the type for which courts should defer to the agency's timeline and expertise. *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 555 (D.C. Cir. 1999)

Thus, the court should not second-guess the EPA's policy judgement to pursue listing in line with its other statutory obligations related to air quality. *In re Core Commc'ns*, 531 F.3d at 859.

In addition, the court must examine the resources available to the agency. *Mashpee*, 336 F.3d at 1102. Since the Clinton administration, the EPA has been shrinking in budget and staff, with more severe cuts in last few years impeding the agency's ability to provide science for effective GHG regulation. *See* Jonathan R. Nash et. al., *The Production Function of the Regulatory State: How Much Do Agency Budgets Matter?*, 102 MINN. L. REV. 695 (2017). Since budgeting is merely a step towards agency action, the court is not permitted to review such policy choices in the abstract. *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18, 20 (D.C. Cir. 2006). However, the shortage of agency resources and funds are key in evaluating a delay. *Mashpee*, 336 F.3d at 1102. The EPA must address the "extremely complex and labor-intensive task" of creating NAAQS and appropriate enforcement measures for GHGs with limited resources. *Id.*; R. at 12. Thus, granting relief will not remedy the agency's financial limitations and is inappropriate given the context. *In re Pub. Employees for Envô. tResponsibility*, 957 F.3d 267, 274 (D.C. Cir. 2020) ("Mandamus relief can't make money grow on trees").

Moreover, the reasonability is not changed by considering the Congressional or judicial expectations of expediency. *TRAC*, 750 F.2d at 80. The relevant statute has no ascertainable or inferable deadline which would imply expediency. *See supra* III.B. In addition, the EPA has offered no "concrete timetable," has not been previously remanded to work more expeditiously and has not failed to meet court deadlines. *Cf Pesticide Action Network*, 798 F.3d (agency had a history of missing deadlines); *cf In re Core Commc'ns*, 531 F.3d (agency continuingly failed to respond to court's specific requests on remand); *cf In re A Cmty. Voice*, 878 F.3d (agency was under a duty and had offered only speculative dates). Considering the first two TRAC factors,

the EPA's decision on acting was reasonable given the scientific and political complexity in successful administration of the CAA. *TRAC*, 750 F.2d at 80.

B. The EPA's Decision to Act Was Reasonable Given the Minimal Impacts to Public Welfare and the Negligible Interest Prejudiced by the Temporary Postponement.

Under the TRAC factors, delays are less tolerable "when human health and welfare are at stake; [and] ... the court should also take into account the nature and extent of the interests prejudiced by delay." *Indep. Min. Co., Inc. v. Babbitt*, 105 F.3d 502, 509 (9th Cir. 1997) (quoting *TRAC*, 750 F.2d at 80.). There exists significant controversy as to GHGs effect on public health. *Supra* II. Comparatively, the EPA has been compelled to act when the relief involves an outright ban of a substance whose risk was so significant as to warrant a nationwide prohibition. *Pesticide Action Network*, 798 F.3d at 814; *see also In re NRDC*, 956 F.3d (agency unreasonably delayed in banning pesticides previously used as nerve warfare agents). At issue here is the listing of GHGs, which would merely trigger the process of regulation. *See Lead Indus. Ass'n*, 647 F.2d at 1136. There is no comparative absolute ban on GHGs, meaning that there is almost no direct impact on public health.

Moreover, while the EPA concedes GHGs impacts to public welfare, the impacts are decidedly minimal regarding the postponement of listing. 42 U.S.C. § 7408(a)(1) (2020). Compelling this action merely places GHGs on a list when other agency action would create immediate or impactful regulation. *See, e.g.*, *Mass*, 549 U.S. (approving EPA's regulation of GHG for motor vehicles under Section 202). Regardless, while the potential impacts to public welfare may be serious, they not so direct and immediate as to warrant compelling agency action. *Indep. Min. Co.*, 105 F.3d at 509–10. Notably, this factor should not weigh heavily as the EPA regulates almost the entire realm of human health and welfare. *In re Pesticide Action*

Network, 532 Fed. Appx. 649, 651 (9th Cir. 2013); *Cent. Sierra Envô. Res. Ctr. v. Stanislaus Nat'l Forest*, 304 F. Supp. 3d 916, 952 (E.D. Cal. 2018). Since accelerating an action with *de minimus* impact comes at the expense of EPA action elsewhere, mandating action based on this factor alone is inappropriate. *PAN*, 532 Fed. Appx. at 651. Ultimately, this factor is not dispositive when analyzing reasonability. *Cent. Sierra Envô. Res. Ctr.*, 304 F. Supp. 3d at 952. ("These factors do not weigh in favor of a finding of unreasonable delay.")

Finally, the nature of potential prejudice is minimal in relation to the postponement. Comparatively, the Ninth Circuit has held that the inherent threat of lead poisoning requires immediate action. *In re A Cmty. Voice*, 878 F.3d at 787. Severe prejudice was evident as lead was the "number one environmental health threat in the U.S." *Id.* While the threat may be sufficient for standing purposes, threats from climate change are not directly attributed to the delay in *listing* GHGs. *Juliana v. U.S.*, 947 F.3d 1159 (9th Cir. 2020). Ultimately, the court should give little weight to these factors given the minimal impacts and prejudice. Inaction in this case does not immediately "risk[] life and limb" but may create minimal public welfare risks. *Pub. Employees*, 957 F.3d at 274. At the very least, the considerations are neutral in reference to the EPA position. *Id.*

C. EPA's Good Faith Decision to Defer Listing GHGs was Reasonable Given the Competing Agency Priorities of Reducing Regulatory Burdens.

Requiring the EPA to act now would interfere with the agency's higher priorities. Accordingly, "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80. While each TRAC factor merits discussion, the court may not disregard the "obvious significance of competing priorities" within the agency. *Mashpee*, 336 F.3d at 1102. Even if all other factors weighed against the

EPA, courts have previously denied relief where compelling action would merely reorganize agency priority and produce no net gain. *Id.* (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991). By virtue of the EPA's mission, the agency's regulatory actions affect the entirety of human health. *PAN*, 532 Fed. Appx. at 651; *Cent. Sierra Envtl. Res. Ctr.*, 304 F. Supp. 3d at 952. Thus, prioritizing one action inevitably delays another affecting health and welfare. *Id.* Therefore, the Court may look neutrally and critically at the importance placed on the EPA's other priorities instead of just health and welfare. *Id.*

Of critical importance is the EPA's priority in reducing the regulatory burdens on the economy as directed by executive order. Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9,339 (Feb. 3, 2017); Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 28, 2017) (It is in the national interest to promote clean and safe development . . . while at the same time avoiding regulatory burdens that unnecessarily . . . constrain economic growth, and prevent job creation . . ."). In its current iteration, the EPA scheme for regulating GHGs is an overregulation that cuts against executive policy. *Util. Air*, 573 U.S. at 320. Currently, listing GHGs will inevitably overburden millions of sources nationwide. *Id.* at 328. Thus, implementing without a thorough and timely reworking will directly conflict with competing priorities.

Disregarding its impractical form, listing GHGs is not plainly possible without considering new executive policy. Under the new "two for one" requirement, "'whenever an . . . agency . . . promulgates a new regulation', the agency must 'identify at least two existing regulations to be repealed.'" *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 13 (D.D.C. 2018) (quoting Reducing Regulation, 82 Fed. Reg. at 9,339). This contemplates an "offset" requirement, which requires agencies to offset "any new incremental cost associated with new

regulations" by eliminating "existing costs associated with at least two prior regulations." *Id.* Thus, to comply with executive orders and implement the GHG regulatory scheme in its current form, the EPA would have to eliminate enough regulatory programs to offset the incredible expense. *Cf id.* at 28 ("No one has said [the rule] is a bad idea or that it is too costly."). The EPA must promulgate an expensive regulatory program while cutting enough environmental regulation to offset its costs. Accordingly, experience and common sense suggest that complying with this mandate will in fact cause delay. *Id.* In evaluating reasonability, the court cannot doubt the significance of the EPA's competing priorities in regulating the entirety of human health while reducing the costs of regulation. *See Mashpee,* 336 F.3d at 1102.

Finally, the EPA's delay was not the result of impropriety or bad faith. *TRAC,* 750 F.2d at 80. An agency manifesting obvious bad faith by singling someone out or asserting utter indifference to a congressional deadline will automatically denote unreasonableness. *Indep. Min. Co.*, 105 F.3d at 510. Bad faith is not mere bureaucratic inefficiency leading to postponement. *Pub. Citizen Health Research Group v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987). Accordingly, the absence of bad faith is an important consideration *favoring* the reasonableness of an agency's postponement. *In re Barr Labs*, 930 F.2d at 76. While the issue of impropriety intersects with the sensitivity to the agency's legitimate priorities, both factors favor the EPA's position. *Id.* Thus, the court may not compel agency action given the good faith evaluation of competing interests.

V. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION DOES NOT HAVE JURISDICTION OVER CHAWN'S UNREASONABLE DELAY CLAIM UNDER SECTION 304(A) OF THE CLEAN AIR ACT BECAUSE THE CLAIM UNDER REVIEW INVOLVES A NON-DISCRETIONARY DUTY OF THE EPA ADMINISTRATOR THAT INVOLVES A RULE OF NATIONWIDE APPLICABILITY.

A. Section 307(b) of the Clean Air Act Requires CHAWN's Unreasonable Delay Claim to be Heard Exclusively in the United States Court of Appeals for The District of Columbia.

Under the Administrative Proceedings and Judicial Review Section of the CAA, it is unequivocally stated that "[a] petition for review of action of the [EPA] in promulgating . . . any other nationally applicable regulations promulgated . . . may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1). Though ambiguity remains as to whether this provision should be considered a requirement of venue or jurisdiction, the D.C. Circuit Court held that section 307(b)(1) is a conferral of jurisdiction. *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015). In *Dalton Trucking*, the substantive issue involved a California waiver of request of federal preemption of the CAA for standards relating to emissions of nonroad diesel engines. *Id.* at 877. However, a procedural issue decided in that case was based on the requirements of 307(b)(1). *Id.* at 879.

In its reference to *Harrison v. PPG Industries*, the court noted that "[o]nce Section 307(b) is understood as a jurisdictional provision, it is apparent from its terms that the jurisdiction conferred extends both to 'the United States Court of Appeals for the District of Columbia' and to the regional 'United States Court of Appeals.'" *Id.* (citing *Harrison v. PPG Industries*, 446 U.S. 578, 100 (1980)). By referring to the "undeniable vesting of subject matter jurisdiction in both the 'United States Court of Appeals for the District of Columbia,' and regional 'United States Court of Appeals,'" the court in *Dalton Trucking* reiterated what it determined to be clear

from *Harrison*; that 307(b)(1) is a conferral of jurisdiction. *Id.* (citing *Harrison v. PPG Industries*, 446 U.S. at 100).

In *Dalton Trucking*, the court stressed that section 307(b)(1), in addition to being a jurisdictional provision, is also a venue provision. 808 F.3d at 879. It is true that courts have held this section to be a venue provision. *Texas Mun. Power Agency v. EPA* 89 F.3d 858, 867 (D.C. Cir. 1996). In *Texas Mun. Power*, the court grappled with the emissions trading scheme of the 1990 amendments to the CAA. *Id.* at 861. Before getting to the merits of the argument, the court first decided the issue of whether section 307(b)(1) is a requirement of jurisdiction or venue. *Id.* The court concluded that this section is merely a venue requirement which can be waived if not objected to by the parties. *Id.* at 867. The language of this case suggests that this is only one way section 307(b)(1) can be read. For example, the court in *Texas Mun. Power* stated that "[s]ection 307(b)(1) *can* be read as prescribing the choice among circuits and not the power of a particular federal circuit court to hear a claim." *Id.* (emphasis added). The court conceded that there is in fact some jurisdictional language located in the section 307(b)(1). *Id.*

The Seventh Circuit once again considered the implications of section 307(b)(1) of the CAA as either a venue or jurisdiction provision. *State of New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998). In *State of New York*, the court contemplated that the holding from *Texas Mun. Power*, which designated section 307(b)(1) as a merely a venue provision, may be true, but conceded that it might be wrong. *Id.* Section 307(b)(1) is in effect a "jurisdictional bar to a regional circuit's entertaining a petition to review an order of the EPA that has national applicability . . . ." *Id.* Furthermore, the Seventh Circuit noted the difference between venue and jurisdiction. *Id.* Venue provisions specify where a suit should be filed, while jurisdictional provisions specify what kind of court it should be filed in. *Id.* The court did not have to reach a

decision about whether this section is a venue or jurisdictional provision because the substantive issue was not one of national applicability. *Id.* The facts of *State of New York* involved state exemptions from nitrogen oxide emissions limitations imposed by the CAA and concerned only states in proximity to Lake Michigan. *Id.* at 989. Comparatively, listing of GHGs will has nationwide legal implications for states and private actors alike. *See infra* V.C.

What must be said from the consideration of all these cases is that 307(b)(1) can read as a provision of jurisdiction for cases that involve issues of national applicability. This Court should read it as so thereby requiring the unreasonable delay claim to be heard only in the Court of Appeals for the District of Columbia because, as further discussed below, the rule involved is one of nationwide applicability. *Id.*

B. Section 304(a) of the Clean Air Act is an Exception to a Broader Scheme of Judicial Review that Grants Jurisdiction Only to Specific Matters Which are not at Issue Here.

As previously noted, Section 307(b) of the CAA designates review of petitions involving nationally applicable regulations to the Court of Appeals for the District of Columbia. *NRDC*, 689 F. Supp. at 252. As referred to in *NRDC*, this is a designation of "exclusive jurisdiction", once again reiterating the idea that this is a grant of jurisdiction, not merely a provision of venue. *Id.* On the other hand, section 304(a)(2) gives district courts jurisdiction over only acts of the EPA that are non-discretionary. *Id.* As noted by the court in *NRDC*, "[s]ection 304(a)(2)'s grant of jurisdiction to the district courts is an exception to the larger plan for judicial review of Agency action under the CAA laid out by Congress in § 307(b) of the Act." *Id.* In other words, Congress purposefully made the breadth of jurisdiction in district courts quite limited. *Id.*

There are several reasons for this limit of jurisdiction. As stated in *NRDC*, Congress restrained the jurisdiction of district courts "to the review of non-discretionary acts or duties in

order to 'limit the number of citizen suits which could be brought against the [EPA] and to lessen the disruption of the Act's complex administrative process.'" *Id.* (quoting *Kennecott Copper Corp v. Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978)). Another reason Congress gave limited jurisdiction to the district courts is because of the nature of these claims, which involve making factual determinations that district courts can do more appropriately than courts of appeal. *Thomas*, 828 F.2d at 781. Additionally, the court in *Thomas* held section 304(a) as only granting jurisdiction to the district courts for review of an alleged failure of the EPA to perform a non-discretionary duty. *Id.* at 787.

Thus, as an exception to the larger jurisdictional scheme of the CAA, section 304(a) grants limited jurisdiction to the district courts. The only way this claim could be heard in the District Court of New Union is if it is one that involved a non-discretionary duty of the EPA Administrator. As has already been established, the plain language of section 108, the absence of an ascertainable deadline, and the common sense underpinnings of the statute create a discretionary duty for the EPA Administrator in its determination to list a potential criteria pollutant. *See supra* Section III. Since the unreasonable delay claim does not involve a non-discretionary duty, it cannot be heard in the District Court for the District of New Union. Only claims involving a non-discretionary duty of the EPA Administrator may be heard in the district courts as required by section 304(a) of the CAA.

C. CHAWN's Unreasonable Delay Claim is Based on a Determination of the EPA of Nationwide Scope.

Because CHAWN's unreasonable delay claim is based on a determination of the EPA that would be a rule of nationwide applicability, CHAWN's unreasonable delay claim can only be heard in the Court of Appeals for the District of Columbia. In determining whether a rule is one of nationwide applicability, the Tenth Circuit held that "[t]he language of the Clean Air Act

provision makes clear this Court must analyze whether the regulation itself is nationally applicable, not whether the effects complained of or the petitioner's challenge to that regulation is nationally applicable." *ATK Launch Systems v. EPA* 651 F.3d 1194, 1197 (10th Cir. 2011). The court was considering the breadth of the EPA's responsibility of establishing NAAQS. *Id.* at 1195. The EPA establishes the maximum amount for allowable pollutants through creation of NAAQS. *Id.* The EPA reviews state designations of attainment and nonattainment areas pursuant to the NAAQS, and then promulgates its final decision which directs each state in creating their SIP to comply with the designated air emission standards. *Id.* Accordingly, the creation of NAAQS affects almost every state instead of just a few. *Id.*

The court in *ATK Launch Systems* considered the fact that the regulation at issue involved a process that was consistent throughout the country as evidence that this the regulation was one of nationwide scope. *Id.* It denied that just because the EPA undertook a case-by-case examination of different areas the regulation was changed from a national to a local one. *Id.* at 1198. Similarly, the D.C. Circuit Court held that the nationwide scope element of 307(b) should not depend on the impact or effect of the regulation, but rather the regulation itself. *Nat. Res. Def. Council v. Thomas* 838 F.2d 1224, 1249 (D.C. Cir. 1988). This case also involved the EPA's promulgation of NAAQS. *Id.* The issue was whether a state could disperse rather than reduce pollutants as part of their SIP. *Id.* at 1230. In acknowledging that impact of the regulation at issue in that case appeared to be limited to certain geographic areas, the court found that nevertheless the regulation was one of nationwide scope. *Id.* at 1249.

In 2015, the D.C. Circuit held that determining national applicability of a final action requires the court to look only at the face of the rulemaking, not the practical effects. *Dalton Trucking*, 808 F.3d at 881. The EPA's regulation requirements at issue in *Dalton Trucking* only

involved matters taking place inside of the state of California. *Id.* Thus, the court had no problem holding that the issue was not one of nationwide applicability. *Id.* On the other hand, the Seventh Circuit found that the EPA's regulations which involved 24 different states were of nationwide applicability. *Southern Illinois Power Cooperative v. EPA.* 863 F.3d 666, 669 (7th Cir. 2017). In another case reviewing an issue related to NAAQS and the designation of nonattainment areas, the court in *Southern Illinois Power Cooperative* found that the supplementary designations by the EPA were nationally applicable since they dealt with sixty-one various geographic areas. *Id.* at 671.

CHAWN brought its unreasonable delay claim because the EPA has not yet decided to list GHGs under section 108(a) of the CAA based on the EPA's Endangerment Finding. The scope of the Endangerment Finding and the implications of listing a criteria pollutant under section 108(a) signifies whether the unreasonable delay claim is one of local or national applicability. Endangerment Finding, 74 Fed. Reg at 66,496. This is what determines whether it must be brought in the District Court of New Union, or if it must be brought in the D.C. Circuit Court.

Clearly, the rule sought by CHAWN that would be established by the EPA's listing of GHGs as a criteria pollutant under section 108(a) would be one of nationwide applicability. According to section 109 of the CAA, once a criteria pollutant has been listed under 108, the EPA is responsible for creating a "*national* ambient air quality standard." 42 U.S.C. § 7409 (emphasis added). The language of the statute itself describes the standards to be prescribed by the EPA are in fact national ones. *Id.* Moreover, listing GHGs will bring millions of small sources nationwide into the regulatory authority of the EPA. *Util. Air*, 573 U.S. at 324. Using the

rule given in *Dalton Trucking*, the face of the rulemaking mechanism here explicitly and implicitly states that the standards will be national. 808 F.3d at 881.

Similarly, the court in *ATK Launch Systems* found the regulation at issue to be one of nationwide scope since it involved a process consistent throughout the country. 651 F.3d at 1197. The creation of the NAAQS involves a national process uniform for the entire country. *Id.* Based on the language of the CAA and the process of creating NAAQS, CHAWN's unreasonable delay claim would be a rule of nationwide applicability subject to jurisdiction only in the United States Court of Appeal for the District of Columbia under section 307(b) of the CAA. 42 U.S.C. § 7607(b)(1) (2020).

In sum, section 307(b) of the CAA should be read as a jurisdictional provision requiring CHAWN's unreasonable delay claim to be heard in the D.C. Circuit Court as the rule involved is of nationwide applicability. Section 304(a) is an exception to the broader jurisdictional scheme of the CAA, only designating jurisdiction to the district courts for claims involving review of non-discretionary duties of the EPA. Thus, the District Court for the District of New Union was without jurisdiction under section 304(a) of the CAA. Accordingly, CHAWN has improperly and inappropriately brought this claim before the Court.

CONCLUSION

For the reasons stated above, EPA respectfully requests that this Court: (1) affirm the District Court's order granting CHAWN's motion for summary judgment declaring the Endangerment Finding valid with respect to the public welfare; (2) affirm the District Court's order granting COGA's motion for summary judgment vacating the Endangerment Finding to the extent that it declares GHGs endanger public health; (3) reverse the District Court's order granting CHAWN's motion for summary judgment declaring that the EPA had a non-

discretionary duty to list GHGs as a criteria pollutant; (4) reverse the District Court's order granting CHAWN's motion for summary judgment declaring that the EPA has unreasonably delayed in designating GHGs as a criteria pollutant; and (5) grant the Court's *sua sponte* motion and hold that the District Court did not have jurisdiction to hear the unreasonable delay claim.