C.A. No. 20-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CLIMATE HEALTH AND WELFARE NOW,

Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellant,

-and-

COAL, OIL, AND GAS ASSOCIATION,

Intervenor-Defendant-Appellant-Cross Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR THE APPELLEE-CROSS APPELLANT

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QUESTIONS PRESENTED

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?

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JURISDICTION

The judgment of the United States District Court for the District of New Union was entered on August 15, 2020. On September 1, 2020, this Court granted the appeal. The jurisdiction of this Court rests on 42 U.S.C.A. § 7604(a)(2).

STANDARD OF REVIEW

A district court order granting summary judgment is reviewed de novo. *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002). Thus, summary judgment is proper when the record, viewed in the light most favorable to the non-moving party, discloses there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed R. Civ. P. 56(a); *see also Universal Health Serv., v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004).

STATEMENT OF THE CASE

I. Factual Background

This is a case about the Environmental Protection Agency's (EPA) inaction over 11 years to respond to the plaintiff CHAWN's petition to compel the Administrator of the EPA to list GHGs as criteria pollutants under the Clean Air Act (CAA) § 108(a), 42 U.S.C. § 7408. R. at 4. In 2009 the EPA issued an endangerment finding that found greenhouse gases (GHG) a threat to public health and welfare, and several environmental groups filed a petition demanding the EPA designate GHGs as criteria pollutants under CAA § 108. R. at 5. The 2009 Endangerment Finding comes after a series of petitions and actions filed by various environmental groups asking the EPA to find GHG emissions from automobiles a danger to human health and the environment under CAA § 202. R. at 6. The petition was denied in 2003 because GHG were not pollutants as considered by the statute. *Id*. However, the 2007 Supreme Court case *Massachusetts v. EPA* held

that GHG are air pollutants and directed the EPA to respond to the petition by making a finding as to whether GHG present a danger to public health or welfare. 549 U.S. 497 (2007).

In 2009, the EPA issued a finding that GHG's were a danger to both public health and welfare because they create and affect climate change. R. at 6-7. The EPA found that climate change poses a risk to public health because warmer temperatures lead to an increase in ozone pollution, increased temperature-related deaths, and insect-borne diseases. R. at 7. Climate change was found to endanger public welfare by reducing agricultural productivity, reducing water supplies, and increasing property damage due to severe weather. *Id*. After the endangerment finding was made, the plaintiff, along with other environmental organizations, filed a petition on December 5, 2009, to demand the EPA list GHGs as criteria pollutants under CAA §108. R. at 5. However, EPA has not taken action to designate GHGs as criteria pollutants, nor has the EPA disturbed the 2009 Endangerment Finding. *Id*.

II. Procedural History

On April 1, 2019, plaintiff CHAWN served the EPA with its notice of intention to sue the EPA for both its failure to perform its mandatory duty to list GHGs as criteria pollutants and that it had unreasonably delayed in carrying out this non-discretionary duty. *Id*. The EPA did not take action in response and CHAWN instituted this action on October 15, 2019, invoking the citizen suit provisions of CAA § 304(a)(2). *Id.* CHAWN seeks to direct the EPA to publish a new list of criteria pollutants including GHGs. *Id*. During the course of the action, the Coal Oil and Gas Association (COGA) successfully intervened under F. R. Civ. P. 24(a). The United States District Court for the District of New Union granted the plaintiff's motion for summary judgment in part and granted the intervenor's motion in part on August 15, 2020. R. at 4.

SUMMARY OF THE ARGUMENT

The United States District Court for the District of New Union correctly exercised jurisdiction over CHAWN's unreasonable delay claim because the agency action was not final. The CAA provides the district courts with jurisdiction to hear citizen suits to compel agency action that is unreasonably delayed, and provides jurisdiction and venue to the D.C. Circuit Court of Appeals if the action has nationwide scope or effect. However, if an agency action is not final, review is not appropriate in the D.C. Circuit Court of Appeals. Here, the D.C. Circuit is not the appropriate court to review the EPA's inaction because the EPA has not reached the consummation of its decision-making process in designating GHGs as criteria pollutants under §108.

Furthermore, the EPA's Endangerment Finding regarding public welfare is valid because the EPA had a rational, scientific basis for its conclusions. The EPA viewed the "full weight" of the evidence and made a purely scientific conclusion all while staying within the bounds of the CAA's effects on public welfare. Not only did the EPA consider its own scientific analysis, but also referred to scientific literature from experts within the field. The data was well within the EPA's expertise, and it should be granted the deference it deserves.

Additionally, the EPA's Endangerment Finding is valid concerning effects on public health because the agency retains *Chevron* deference and it made rational conclusions concerning the effects of GHGs on public health. The EPA's Endangerment Finding retains *Chevron* deference because the interpretation of the statute is within their responsibility to administer their congressionally delegated power to regulate. The CAA's use of the terms of public health and welfare is ambiguous because it does not provide the administrator with a clear understanding of how to regulate using the term "public health." The EPA's interpretation of "public health"—

concluding that effects on public health can flow from effects on public welfare—is reasonable as it allows the Administrator to consider real effects on individuals' health that are caused by GHGs. Using this conclusion, the Endangerment Finding concerning public health is valid because the EPA had a rational, scientific basis for its determination.

The EPA's ten-year delay in designating GHGs as criteria pollutants under CAA § 108 constitutes an unreasonable delay. This results from the EPA's failure to respond within a reasonable time to a petition compelling action on a non-discretionary duty, especially when public health and welfare are at stake. Congress specifically intended the EPA to respond to citizen petitions within a reasonable timeframe. Here, the 10-year delay cannot be considered reasonable.

Lastly, the EPA has a non-discretionary duty to designate GHG's as a criteria pollutant under CAA § 108. Congress specifically chose the word "shall" in the statute, which has consistently established a mandatory duty on the agency. Both statutory conditions were met when the EPA determined GHG's have an adverse effect on public health and welfare. Because of these reasons, the EPA has a non-discretionary duty to designate GHG's as a criteria pollutant under CAA § 108.

ARGUMENT

I. The United States District Court for the District of New Union correctly exercised jurisdiction over CHAWN's unreasonable delay claims because the agency action was not final.

An action brought to compel performance of non-discretionary duties may be brought in the district court where the venue is otherwise proper under the general venue statute 28 U.S.C. §1391, and suits for an unreasonable delay must be brought in the United States District Court for the District of Columbia if the delayed action would have nationwide scope or effect. *Am. Lung*

Ass'n v. Reilly, 962 F.2d 258, 263 (2d. Cir. 1992). Under the citizen suit provision of the CAA, district courts have jurisdiction to review EPA actions and inactions. *Nat. Res. Def. Council, Inc. v. Thomas*, 689 F. Supp. 246, 252 (S.D.N.Y. 1988), aff'd, 885 F.2d 1067 (2d Cir. 1989). The CAA provides district courts jurisdiction to compel agency actions that are unreasonably delayed. 42 U.S.C. § 7604(a)(2). Further, it provides that unreasonable delay suits to compel agency actions can be filed in the United States District Court. It provides a venue provision in the District Courts if the action is regionally or locally applicable, or if it has nationwide scope or effect then it provides a venue requirement for review of the action in the D.C. Circuit Court of Appeals. *Sierra Club v. EPA*, 955 F.3d 56, 61 (D.C. Cir. 2020) (finding that section 7607(b)(1) is both a jurisdiction and venue requirement). An unreasonable delay suit must be brought in the U.S. District Court for the District of Columbia if the challenged action has nationwide scope or effect. *New Jersey v. Wheeler*, LEXIS 133161, (N.Y.S.D.C. 2020) (*see eg. Am. Lung. Assn. v. Reilley*, 962 F.2d. 258, 263 (2nd Cir. 1992). However, if an agency action is not final, then jurisdiction lies where it would otherwise be proper. A suit to compel performance of a non-discretionary duty may be brought in the district court where the venue is otherwise proper under the general venue statute. *New Jersey*, 22 citing 28 U.S.C. § 1391.

A. If an agency action is not final, review is not appropriate in the D.C. Circuit Court of Appeals.

Even though the language of section 307(b)(1) provides a jurisdictional element and a venue element, the jurisdictional provisions and venue provisions are not coterminous. *Dalton Trucking v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015) (finding it error to conclude that section 307(b)(1) gives the D.C. Circuit exclusive jurisdiction over final EPA actions). However, a party that fails to object to the venue may have waived the issue. *Tex. Mun. Power Agency v. EPA*, 89 F.3d at 867 (D.C. Cir. 1996). The court in *Wheeler* concluded that section 7606(b) of the CAA

citizen suit provision conferred jurisdiction on the Courts of Appeals to review certain EPA actions. *Wheeler* 22-23. However, it found the statute imposed a venue provision that vested review of EPA actions of nationwide scope or effect in the D.C. Circuit Court of Appeals. *Id*. Further, it imposed venue provisions for the appropriate circuit when EPA actions are locally or regionally applicable. *Id*.

However, while an agency action may have nationwide scope or effect that does not mean the action is final to where it can be reviewed immediately by the D.C. Circuit Court of Appeals. *Sierra Club v. EPA*, 61. Under *Bennett v. Spear*, for an agency action to be final, (1) the action must mark the consummation of the agency's decision-making process, and (2) the action must determine legal rights and obligations from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). Each prong must be satisfied independently for an agency action to be final. *Soundboard Ass'n b. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018). The first prong inquires whether the action constitutes the consummation of an agency's decision-making process in that it cannot be tentative or interlocutory. *Bennett*, 520 U.S. at 177-178. The second prong asks whether the agency action has direct and appreciable legal consequences and the court must engage in a pragmatic inquiry to do so. *Sierra Club v. EPA*, 955 F.3d 56, at 62-63. Further, the court must determine prong two based on the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it. *Id*. *See also United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016) (finding the agency's determination had direct and appreciable consequences for the petitioners because if they did not heed the determination, they risked criminal and civil penalties under the statutory regime).

Further, there were no direct and appreciable legal consequences, and the document did not impose any obligations, prohibitions, restrictions, or compel action by the recipient or agency.

Id, 64. The court concluded that just because an agency action has national applicability does not mean it is final to the point where it can be reviewed by the D.C. Circuit. *Id*. at 61. The D.C Circuit dismissed the Sierra Club's petition for review because it found that the EPA's Significant Impact Levels guidance did not expose any regulated entity to the possibility of legal consequences, and therefore it was not a final action reviewable by the D.C. Circuit. *Id*. at 65. Similarly, here the EPA's failure to take any action to promulgate GHGs as criteria pollutants under CAA §108 means that the action is not final.

Thus, if the agency action is final and has nationwide scope or effect it gets reviewed in the D.C. Circuit, if not then it can be reviewed where venue and jurisdiction would otherwise be proper. In *Sierra Club*, the court denied petitioner Sierra Club's judicial review of the EPA's ozone finding because the agency action was not final. *Sierra Club*, 955 F.3d at 63-64. It reasoned that the document did not impose any obligations, prohibitions, or restrictions on regulated entities, did not subject them to enforcement risks, was not sufficient to support a permitting decision without a robust record, and was not necessary for permitting decisions because the permitting authorities were free to ignore it. *Id*.

B. Neither jurisdiction nor venue is proper in the D.C. Circuit Court of Appeals because the EPA has not reached the consummation of its decision making process.

Here, review in the D.C. Circuit is not proper because the EPA did not reach the consummation of its decision-making process in designating GHGs as criteria pollutants under CAA §108. The EPA has not taken any action to invoke its authority to designate GHGs as criteria pollutants under CAA §108. R. at 8. Under §108, the EPA must first list the pollutant as a criteria pollutant and then within 12 months, propose primary and secondary NAAQS levels for the criteria pollutant, and finalize it within 90 days. R. at 8. After the EPA has promulgated the appropriate

level of pollutants to protect public welfare, only then does the state have a requirement to submit a State Implementation Plan (SIP) to achieve compliance within ten years. States who fail to meet these guidelines are subject to direct EPA regulation of emissions in their state as well as a loss of federal highway funding.

Additionally, the EPA's promulgation of GHGs as criteria pollutants is not final, as under *Bennet*, because the agency has not taken any action in designating the appropriate levels of the pollutant under the NAAQS. Similar to *Sierra Club*, where the court found that the guidance was not a final action because regulated entities were essentially free to ignore it, here, because the EPA has not taken any steps to designate GHGs as criteria pollutants, it has not reached the consummation of the decision-making process. Further, a state that could potentially be regulated under section 108 is essentially free to ignore the regulation of GHGs under section 108 because they cannot suffer any legal consequences for failing to comply with a regulation that does not yet exist. Despite the fact the rule is applicable nationwide, the rule is not final. As a result, the District Court for the District of New Union can exercise jurisdiction over the unreasonable delay claim.

II. The Endangerment Finding concerning public welfare is valid because the EPA had a rational, scientific basis for its conclusions.

The effects on public welfare impact a wide variety of climate-sensitive sectors ranging from all-things nature, wildlife, and atmospheric conditions, to the impact of transportation and our economic well-being.[1] CAA § 302, 42 U.S.C. § 7602(h) (2008). When questioning the findings of such effects, courts require scientific judgments and disregard mere policy arguments.

[1] CAA § 302, 42 U.S.C. § 7602(h) (2008). "All language referring to effects on welfare includes, but is not limited to, 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 economics values and on personal comfort and well-being, whether caused by transformation, conversion, or combination, with other air pollutants."

Massachusetts v. E.P.A., 549 U.S. 497, 534 (2007). Congress left the responsibility to the agency itself to determine which pollutants endanger public welfare. *Friends of the Earth v. U.S. E.P.A.*, 934 F. Supp. 2d 40, 48 (D.C. Cir. 2013). The court's role is not to re-weigh the scientific evidence and reach their own conclusion. *Coalition for Responsible Regulation, Inc., v. E.P.A.*, 684 F.3d 102, 122 (D.C. Cir. 2012). So long as there is a rational basis for the agency's conclusion, courts presume the findings are valid and provide the agency an "extreme degree" of deference when evaluating the scientific data within its expertise. *Id*. at 120.

Here, the EPA found "compelling support" to conclude that GHGs endanger public welfare. Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the CAA, 74 Fed. Reg. 66,496, 66,535 (Dec. 15, 2009). In doing so, it identified six impacted sectors providing such evidence, including (1) food production and agriculture, (2) forestry, (3) water resources, (4) sea-level rise and coastal areas, (5) energy, infrastructure and settlements, and (6) ecosystems and wildlife. *Id.* at 66,531-66,534. Ultimately the EPA viewed the "full weight" of the evidence and concluded GHGs endanger the public welfare of our generation *and* future generations *Id.* at 66,531, 66,535. It is only expected to increase over time. *Id.*

For example, the EPA detailed how water resources are at serious risk from climate change, and projected temperature increases and precipitation variability could impact water supply and quality. *Id.* at 66,534. These impacts are correlated with the increase in temperature and GHGs. *Id*. The EPA also found "clear support" from the evidence that coastal areas are at higher risk of storm surge and flooding as a result of GHG air pollution. *Id*. In fact, the EPA utilized scientific literature determining that hurricanes may perhaps grow in intensity due to climate change, and found the threat sufficient to support a finding that coastal communities are impacted by GHG air pollution. *Id*.

Furthermore, the EPA also found an endangerment finding with regards to energy, infrastructure, ecosystems, and wildlife. *Id.* It found that electricity production may meet "peak demand," because of climate change. *Id.* at 66,535. It noted that extreme weather events threaten energy, transportation, and water resource infrastructure and that climate change will cause species to move to higher elevations, completely changing our ecosystems as we know them. *Id.*

Lastly, the EPA revealed uncertainty regarding the net benefits in the near future for certain crops but ultimately found severe risks on a large segment of the crop market as a whole. *Id.* On the one hand, the EPA found comparable the potential benefit for certain crops to the potential for adverse effects in parts of the agricultural sector in the near term. *Id.* On the other hand, over time there is a risk for significant crop failure. *Id.* Additionally, while carbon dioxide and temperature increases may result in forest growth and productivity, it also leads to wildfires and an increase in pests and disease. *Id.*

The 2009 Endangerment finding is valid with respect to an endangerment of public welfare because the EPA articulated a rational, scientific basis for its conclusion. The agency sought out the relevant factors by primarily focusing on the impacts of climate change, GHGs, and carbon dioxide on public welfare. The agency referred to data-based trends in determining that climate change is likely to impact water resources and electricity production. It found "clear support" when finding the disproportionate impact GHGs have on temperature change; threatening coastal areas with increased hurricanes. Lastly, the agency utilized scientific literature in concluding carbon dioxide's potential to increase wildfires and pests.

In justifying its findings, the EPA does not need to provide a "step-by-step proof of cause and effect," because it is not the court's role to reconsider the scientific analysis. *Coalition for Responsible Regulation, Inc.*, 684 F.3d at 121-122. Therefore, this Court should focus on the data

the EPA provides, and accept the scientific expertise that went into the findings. The agency's findings above were based on pure scientific judgments, and not only took into consideration their own scientific analysis but relied on scientific literature from experts in the field. This data was well within the EPA's expertise, and it should be granted the "extreme degree of deference" it deserves.

The District Court was correct in agreeing with the agency's finding. By focusing on purely scientific conclusions, and viewing the "full weight" of the evidence before it, the EPA had a sound, rational basis for its endangerment finding to public welfare. It stuck to science and stayed within the bounds of the CAA's effects on welfare. As a result, this Court should uphold the lower court's conclusion and determine the EPA's endangerment finding with respect to the endangerment of public welfare is valid.

III. The EPA's Endangerment Finding is valid with respect to the endangerment to public health.

The term "public health" remains undefined in the CAA. In the EPA's Endangerment Finding the Administrator 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." Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the CAA, 74 Fed. Reg. 66,496, 66,524 (Dec. 15, 2009). All of these effects flow from general public welfare effects to then have an adverse consequence upon the health of the public.

COGA and the EPA contend that these effects do not form a connection between public health and the GHGs that are in question. They contend these consequences should be considered for their "effects on public welfare." CAA § 302(h), 42 U.S.C.A. § 7602(h). This argument stems

from Congress's decision to define "effects on welfare" and their omission in defining effects on public health. Here, the EPA is allowed *Chevron* deference in this instance and is correct in putting forth their reasonable interpretation of the effects on public health to apply this interpretation to the scope of the effects of GHGs. As the EPA has changed their position on the validity of the public health scope of the endangerment finding within this litigation, they assert that its new interpretation of endangerment to public health is applicable. Because they have not engaged in any sort of force of law procedures, they cannot be granted deference in their newfound position.

A. The EPA's Endangerment Finding retains *Chevron* deference because the interpretation of the statute is within their responsibility to administer their congressionally delegated power to regulate under the CAA.

An agency is allowed *Chevron* deference when it interprets a statute that the agency administers while using force of law procedures so long as Congress intended to delegate that interpretive power. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The EPA was tasked by Congress with interpreting the CAA to regulate the environmental hazards brought on by pollutants in the atmosphere. In this case, the EPA has issued an Endangerment Finding that classified "public health" as being endangered by health hazards and contaminants caused by GHGs. The term "public health" is not defined within the CAA. Therefore, the agency acted within their deference in interpreting the term public health.

1. The CAA is ambiguous with respect to the term public health because it does not provide the administrator with a clear understanding how to regulate using the term.

Congress's omission in defining public health provided the EPA with the authority to interpret this statute as the term is otherwise too ambiguous to render applicable in the

administration of the CAA. Congress had the power to define what should be considered "effects on health" for the purposes of administering this statute. Instead, Congress chose to only define the phrase "effects on welfare" to include the effects of GHGs on soils, crops, vegetation, weather, and climate. CAA § 302(h), 42 U.S.C.A. § 7602(h). With this omission, Congress provided the EPA with the power to interpret this term because of its ambiguity. The Endangerment Finding states that the "effects on welfare" definition does not provide the EPA with a clear way to categorize health effects that flow from "effects on welfare," resulting in the regulation of much fewer health effects in general. Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the CAA, 74 Fed. Reg. 66,496, 66,527 (Dec. 15, 2009). Therefore, this ambiguity renders the distinction between "public health" and "public welfare" unworkable in the administration of the CAA.

2. The EPA's interpretation of "public health" is reasonable as it allows the administration to consider real effects on individuals' health that are caused by GHGs.

The EPA, relying on the important distinction that Congress made, reasonably determined that the term, "effects on public welfare," means anything other than the effects on "public health." Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the CAA, 74 Fed. Reg. 66,496, 66,527 (Dec. 15, 2009). The EPA argued in their Endangerment Finding that failing to determine public health effects often flow from effects on welfare would render almost all possible impacts upon public health not to be considered, therefore neglecting to address the very dangerous results of green-house gas pollution in a meaningful way. *Id*. This highlights the need for the EPA to define and regulate these dangerous effects on public health, otherwise, they would be left unconsidered in their quest to regulate GHG emissions that harm the public.

The EPA has been required to consider the effects on public health that flow from effects on welfare in the past. In *Am. Trucking Associations, Inc. v. U.S.E.P.A.*, the EPA refused to consider the indirect benefit that tropospheric ozone had in screening the harmful UVB rays that can cause cataracts and both melanoma and nonmelanoma skin cancers. *Am. Trucking Associations, Inc. v. U.S.E.P.A.*, 175 F.3d 1027, 40 (D.C. Cir. 1999). These public health effects flow from the effects of these pollutants on public welfare. The EPA argued that they were not meant to consider the benefits to public health that these pollutants provide, only the adverse effects. *Id*. They maintained this position without stating that they should never consider the indirect effects pollutants have on public health. The D.C. Circuit Court found that the EPA was required to consider all possible effects upon public health. *Id* at 41. The court's reasoning was based upon the language in 42 U.S.C.A. § 7408(2), stating that "all identifiable effects on public health or welfare" should be considered and further reasoned that the addition of the word "adverse" in § 7408(2)(b)-(c) only emphasized the need to consider all beneficial and adverse effects. *Am. Trucking Associations, Inc.,* 175 F.3d 1027 at 41. In doing so, the court implicitly held that the EPA must consider all effects on public health that flow from effects on public welfare because of these reasons.

The EPA was reasonable in their interpretation of the term public health because any other interpretation of the term would have been unworkable. The Endangerment Finding that the EPA put forth interprets what should be considered effects on public health out of necessity to find an applicable method of administration for this portion of the CAA. In doing so, they also fell in line with their past endangerment findings with respect to how they have been required to consider the public health effects that flow from effects on welfare. Their reasonableness in interpreting this

statute allows for them to receive the deference to apply this interpretation to the public health effects that flow from effects on welfare that are caused by GHGs.

B. The Endangerment Finding with respect to public health is valid because the EPA had a rational, scientific basis for its conclusions.

As stated above, courts require scientific judgments to be made in support of findings of endangerment as this allows the court to evaluate only whether the basis in the finding is rational. *Massachusetts,* 549 U.S. 497 at 534; *Coalition for Responsible Regulation, Inc.,* 684 F.3d 102 at 122. The agency's "extreme degree" of deference involved in this justification rests in the expertise that they have to offer. *Id*.

Effects on public health that result from GHGs' impact upon weather and climate include rising temperatures that result in heat waves, effects on air quality that cause an increase in ozone pollution, a rise in the frequency and danger in extreme weather events, and a likely increase in the spread of food and water-borne pathogens. Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the CAA, 74 Fed. Reg. 66,496, 66,524 (Dec. 15, 2009). The EPA found that these effects can be "reasonably anticipated" to endanger both current and future generations. *Id*.

With respect to the effects stemming from rising global temperatures, the EPA cites that heat is the leading weather-related cause of death in the United States. In finding several groups of people that would be highly susceptible to the rise in frequency in heatwaves, the EPA lists city-dwellers, those working and playing outside, young children, and the elderly, the EPA rationally makes this connection to the health of these individuals. *Id* at 66,525. The EPA also cites that heatwaves between 1989 and 2000 caused a 5.7 increase in death rates. *Id*.

In addition to these mortality rates, the effects of rising temperatures also include the increase in frequency and danger of extreme weather events. While events like hurricanes and floods are considered "low probability, high impact" events, the consistent increase in these events has the likelihood to overwhelm the heath of those individuals impacted. *Id*. Flooding and more intense coastal storms can cause physical injuries as well as the increased spread of water-borne diseases. *Id*.

Diseases from increasing temperatures themselves will also become more common and cause an increase in food and water-borne pathogens generally. *Id*. These GHGs would also have an adverse effect on the quality of air inhaled by the public, thus causing health issues. Increased ozone pollution makes the public more likely to contract and be harmed by respiratory illness and often leads to premature deaths due to asthma and other chronic respiratory illnesses. *Id*.

As the scientific evidence offered to support these conclusions made by the EPA allows the court to solely consider the rationality of these findings. The agency's conclusion in finding adverse public health effects is rational because its analysis relies upon causal links between the public health effects that flow from effects on welfare and shows the increased likelihood of death and disease resulting from GHGs.

The EPA's original Endangerment Finding has retained *Chevron* deference because the agency has acted within the power delegated to it by Congress to interpret the term "public health." For the purposes of ensuring its workability in the application, the agency determined that public health effects include those effects that flow from effects on public welfare. With this definition of public welfare in mind, the agency then put forth a rational basis for finding that GHG emissions have an adverse effect on public health.

IV. The EPA's ten-year delay in designating GHGs as criteria pollutants under CAA § 108 constitutes an unreasonable delay because it did not respond within a reasonable time to a petition compelling action on a non-discretionary duty.

If an agency fails to perform a non-discretionary duty, then it unreasonably delayed that duty. *New Jersey v. Wheeler*, No. 20-cv-1425 (JGK), 2020 U.S. Dist. LEXIS 133161 at *22-23 (S.D.N.Y. July 28, 2020) (finding the EPA had unreasonably delayed its non-discretionary duty to promulgate a Federal Implementation Plan to discharge Good Neighbor obligations); s*ee also WildEarth Guardians v. McCarthy*, 772 F.3d 1179, (9th Cir. 2014) (dismissing the plaintiff's action to compel the EPA to revise regulations, reasoning that it could not find a non-discretionary duty to promulgate regulations for ozone under CAA §108). Likewise, the EPA's failure to respond at all to the 2009 petition was unreasonably delayed because the EPA has a non-discretionary duty to list GHGs as criteria pollutants under CAA, which required the administrator to list and revise air pollutants that endanger public health or welfare for the purposes of establishing NAAQS standards. 42 U.S.C. §7408(a). In addition, as part of the 1990 Amendments to the CAA, Congress intended for the EPA to respond in a reasonable time to citizen petitions. Here, the ten-year delay was not within the reasonable timeframe congress had envisioned.

The EPA is required to list a pollutant after it finds the pollutant has an adverse effect on health or welfare. *Natural Resources Defense Council v. Train*, 545 F.2d 320, 325, 328 (2nd Cir. 1976) (finding the EPA had a non-discretionary duty to designate a criteria pollutant when it meets the conditions in CAA §108(a)(1)(A) and (B)). Additionally, in determining whether an agency action was unreasonably delayed, courts are guided by a six-part test as described in *Telecomm. Research & Action Ctr. v. F.C.C.* . ("TRAC"). 750 F.2d 70 (D.C. Cir. 1984). The six factors are (1) the timeliness of agency decisions must be governed by a "rule of reason", (2) if Congress has provided a timetable for when the action was to be completed, the statute may inform the rule of

reason, (3) delays that may be considered reasonable in the economic sphere are less tolerable when human health and welfare are at stake, (4) the court must consider the effect of expediting delayed action when other activities may be of a higher priority, (5) the courts should consider the nature and extent of the interests prejudiced by the delay, and (6) the court does not need to find any impropriety lurking behind agency lassitude to find the action unreasonably delayed. *Id*, at 80.

Here, the EPA's failure to respond to the plaintiff's petition constituted an unreasonable delay under factors (1), (2), and (3). The EPA's failure to respond at all to the 2009 petition falls under factors (1) and (2) of the TRAC test. Under the 1990 amendments to the CAA, the absence of a specific timetable to respond to citizen petitioners does not excuse the EPA's failure to respond in a reasonable time. 136 Cong. Rec. E3670-01, 1990 WL 206958 (stating the courts have jurisdiction to compel the agency to respond to a citizen's petition if no response has been made within a reasonable time). Although the CAA §108 does not provide a specific date, Congress intended for the agency to take at least initial action in response to a citizen's petition. Thus, Congress has provided a rule of reason in that the EPA must respond in some fashion to citizen complaints, and by failing to do so here, the EPA has unreasonably delayed designating GHGs as criteria pollutants. As such, the EPA's failure to respond at all cannot fall within the reasonable timeframe Congress envisioned.

Further, the present case mirrors *Wheeler*, where the court found the EPA unreasonably delayed in failing to perform a statutory duty, here the EPA has unreasonably delayed listing GHGs as criteria pollutants because it failed to perform its non-discretionary duty to designate GHGs as criteria pollutants under the 2009 Endangerment Finding. Thus, under factor (3) of the TRAC factors, the EPA had a duty to respond to the petition based on the hazards GHGs pose to human health and welfare. The EPA, in creating the 2009 endangerment finding, triggered its non-

discretionary duty to list GHGs as criteria pollutants under CAA §108 because it concluded that GHGs elevate the risk of flooding in coastal areas and cause extreme weather that threatens utility infrastructure. 74 Fed. Reg. 66,534 (Dec. 15, 2009). Therefore, the EPA's scientific findings implicate the necessity for EPA to respond under factor (3) because the delay in responding to the plaintiff's petition could cause harm to public welfare in the form of environmental and structural devastation.

The EPA had a non-discretionary duty to list the GHGs after it found they posed a threat to public health and welfare. Further, its failure to take any action at all in response to the plaintiff's 2009 petition does not comply with the statutory intent of the 1990 amendments Congress made to the CAA. Consequently, the EPA's failure to respond to the plaintiff's petition and designate GHGs as criteria pollutants was unreasonably delayed because the EPA did not respond within a reasonable time to comply with its nondiscretionary duty.

V. The EPA has a non-discretionary duty to designate GHG's as criteria pollutants under CAA § 108 because the word "shall" establishes a mandatory duty and both statutory conditions have been met.

By using the word "shall," the statute is claiming the EPA "is required to." *Shall*, Black's Law Dictionary (11th ed. 2019). When both conditions set forth in § 108(a)(1)(A) and (B) are met, Courts agree the EPA Administrator has a non-discretionary duty to designate the pollutant. *Train*, 545 F.2d at 325, 328 (2nd Cir. 1976).

Here, the EPA Administrator has a non-discretionary duty to designate GHG's as a criteria pollutant under CAA § 108. The statute contains the word "shall," and it is generally accepted that it places a duty on those compelled to act. Furthermore, the EPA's Endangerment Finding satisfied both requirements of § 108(a)(1)(A) and (B), placing a nondiscretionary duty on the Administrator

to list these pollutants. Because of these reasons, the EPA has a nondiscretionary duty to designate GHG's as a criteria pollutants.

A. By using the word "shall" in § 108, there is a mandatory duty to list GHG's as criteria pollutants.

The plain meaning of the word "shall" is "has a duty to." *Shall*, Black's Law Dictionary (11th ed. 2019). Courts have commonly interpreted the word "shall" in a statute as establishing a mandatory duty. *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 54 (D.C. Cir. 2013) (citing *Bennett v. Spear*, 520 U.S. 154, 175 (1997); *see also Shenango Inc., v. Apfel,* 307 F. 3d. 174, 193 (3rd Cir. 2002) (admitting "shall" is generally considered mandatory language when used in a statute).

Here, the EPA has a non-discretionary duty to designate GHG's as criteria pollutants because § 108(a)(1) contains mandatory language. § 108(a)(1) states that "the Administrator *shall* . . . publish . . . a list . . . ." (Emphasis added). GHGs meet the listing requirements under § 108(a)(1) and therefore the EPA is obligated to designate them as criteria air pollutants.

Any claim that the mandatory language only applies to §108(a)(1)(C), which states "for which [the Administrator] plans to issue air quality criteria . . ." is inapposite. In the present case, the Court of Appeals correctly ignored EPA's attempt to gain total discretion. Finding the EPA to have a discretionary duty contradicts both the structure and purpose of the CAA. By rejecting the EPA's argument, the lower court remained consistent with precedent. *See Train*, 545 F.2d at 325 (rejecting the same argument because the mandatory language would otherwise become "mere surplusage").

Because the statute explicitly uses the word "shall," this Court should remain consistent with common statutory interpretation principles and determine the EPA has a mandatory duty to list GHG's as criteria pollutants.

B. Because the EPA determined GHG's have an adverse effect on public health and welfare, it now has a non-discretionary duty to list them.

The EPA Administrator must publish a list including each air pollutant (A) emissions which in his judgment may endanger public health or welfare, (B) resulting from a plethora of mobile or stationary sources, and (C) for which he plans to issue air quality criteria. 42 U.S.C.A. § 7408(a)(1). If the first two requisites (A) and (B) are met, the EPA Administrator is required to list the pollutants. *Train*, 545 F. 2d at 325. However, that nondiscretionary duty does not exist "unless and until the EPA first makes policy determinations about the pollutant." *Zook v. McCarthy*, 52 F. Supp. 3d 69, 74 (D.D.C. 2014).

For example, when both provisions (A) and (B) are met in § 108(a)(1), Courts have held that the Administrator has a non-discretionary duty to designate the pollutant. *Train*, 545 F. 2d at 325, 328. In *Train*, the plaintiffs requested the EPA to regulate lead and place it on a list of air pollutants under § 108(a)(1) of the CAA. *Id.* at 322. The Court found the EPA met the conditions of § 108(a)(1)(A) and (B), and therefore it had a non-discretionary duty to designate lead to the list. *Id.* at 328. Ultimately the Court affirmed the ruling of the District Court that explicitly stated:

> While the Administrator is provided with much discretion to make the threshold determination of whether a pollutant has 'an adverse effect on health,' after that decision is made, and after it is determined that a pollutant comes from the necessary sources, there is no discretion provided by the statute not to list the pollutant.

411 F.Supp. 864, 868 (S.D.N.Y. 1976).

On the other hand, the EPA must first make policy determinations about the pollutant before the non-discretionary duty begins. *Zook*, 52 F. Supp. 3d at 74. In *Zook,* the plaintiffs brought legal action to compel the EPA to regulate emissions caused by animal feeding operations. *Id.* at 73. The plaintiffs claimed the EPA had a non-discretionary duty to list animal feeding operations and their pollutants. *Id.* However, the EPA had not yet determined the specific pollutants satisfied

the criteria outlined in § 108(a)(1)(A) and (B). *Id.* at 74. The Court relied on *Train* and reasoned § 108(a)(1) clearly states the E.P.A's listing duty is non-discretionary when the EPA determined the pollutant meets the proper criteria in § 108(a)(1)(A) and (B). *Id.* Until the criteria are met, however, the nondiscretionary duty does not exist. *Id.* Because the EPA had not determined that animal feeding operation pollutants met the proper criteria, the Court ruled the EPA was not obligated to list the pollutants. *Id.* at 75.

Here, the facts in the present case are strikingly similar to the facts in *Train*. Like *Train*, where the plaintiffs sought to force the EPA to place the metal lead on a list of air pollutants, here, the Appellees demand the EPA list GHGs as criteria pollutants. In both cases the conditions of § 108(a)(1)(A) and (B) are met, mandating the EPA to list the pollutant and move forth with the additional requirements. The statute explicitly leaves the endangerment finding of § 108(a)(1)(A) up to the EPA administrator's sole judgment. While it is true the nondiscretionary duty does not exist unless and until the EPA first makes a policy determination about the pollutant, the EPA met that requirement when it found GHGs to endanger the public health and welfare in the Endangerment Finding.

Because the conditions of § 108(a)(1)(A) and (B) are met, this Court should affirm the lower court's ruling determining the EPA has a non-discretionary duty to list GHGs as criteria pollutants.

CONCLUSION

This Court should affirm the ruling of the District Court concerning its exercise of jurisdiction, the Endangerment Finding, the finding of unreasonable delay, and the finding of a

non-discretionary duty to designate GHGs as criteria pollutants. Furthermore, this Court should reverse the District Court regarding its finding that the 2009 Endangerment Finding as to public health is contrary to law.

November 21, 2020

CERTIFICATE OF SERVICE

This document certifies electronic delivery of one copy of this brief to the NELMCC Office, nelmcc@law.pace.edu, on the twenty-first of November, 2020.

/s/ #35