THIRTY-THIRD ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Measuring Brief

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 in No. 66-CV-2019, Judge Romulus N. Remus

Brief of Defendant-Appellant, U.S. ENVIRONMENTAL PROTECTION AGENCY

[redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3
STATEMENT OF THE ISSUES 4
STATEMENT OF THE CASE 5
FACTUAL BACKGROUND 5
PROCEDURAL HISTORY 6
SUMMARY OF THE ARGUMENT 7
STANDARD OF REVIEW 8
ARGUMENT 9
CONCLUSION 34
CERTIFICATION 34

TABLE OF AUTHORITIES

Statutes

Federal Water Pollution Control Act § 306 10
Title 33 U.S.C § 1316 10
Title 42 U.S.C. § 7401 24
Title 42 U.S.C. § 7408 ..... 10, 11, 19, 30
Title 42 U.S.C. § 7409 ..... 13, 17, 20
Title 42 U.S.C. § 7521 14
Title 42 U.S.C. § 7602 20
Title 42 U.S.C. § 7604 ..... 9, 12, 13, 27
Title 42 U.S.C. § 7607 11

United States Supreme Court Cases

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 18, 19, 22, 23
Heckler v. Day, 467 U.S. 104 (1984) 30
Massachusetts v. EPA, 549 U.S. 497 (2007) 14, 17, 24
U.S. v. Mead Corp., 533 U.S. 218 (2001) 18, 19
Util. Air Regulatory Group v. EPA, 573 U.S. 302 (2014) 22, 25, 30

Federal Court of Appeals Cases

Bayshore Res. Co v. U.S., 2 Cl. Ct. 625 (1983). 33
Beyond Pesticides/Nat'l Coal. Against the Misuse of Pesticides v. Johnson, 407 F. Supp. 2d 38 (D.D.C. 2005) 30
Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, (D.C. Cir. 2012) 13, 14
Ctr. For Biological Diversity v. EPA, 749 F.3d 1079 (D.C. Cir. 2014) 22
Cutler v. Hayes, 818 F.2d 879 (U.S. App. D.C. 1987) 28
Debba v. Heinauer, 366 F. App'x 696 (8th Cir. 2010) 27
Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) 16
In re A Cmty. Voice v. U.S. E.P.A., 878 F.3d 779 (9th Cir. 2017) 27
I*n re Core Commc'ns, Inc.,* 531 F.3d 849 (D.C. Cir. 2008) 27
In re Idaho Conserv. League, 811 F.3d 502 (D.C. Cir. 2016) 32
Kokajko v. Fed. Energy Regul. Com., 837 F.2d 524 (1st Cir. 1988) 28
Lead Industries Ass'n, Inc. v. EPA, 647 F.2d 1130 (1980) 11, 25
Nat'l Cong. of Hispanic Am. Citizens (el Congreso) v. Marshall, 626 F.2d 882 (D.C. Cir. 1979) 24
Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554 (D.C. Cir. 2002) 22
Natural Resources Defense Council, Inc. (*NRDC*)*, v. Train,* 510 F.2d 692 (D.C. Cir 1974) 9, 22, 23
New York v. EPA, 413 F.3d 3 (D.C. Cir 2005) 17
Petroleum Inst. V. Costle, 665 F.2d 1176 (D.C. Cir 1981) 17
Sierra Club v. Thomas, 828 F.2d 783 (1987) ..... passim
State of N.Y. v. EPA, 133 F.3d 987 (7th Cir. 1998) 9
Tex. Mun. Power Agency v. EPA, 89 F.3d 858, (D.C. Cir. 1996) 9
Troy Corp. V. Browner, 120 F.3d 277 (D.C. Cir. 1997) 22

Washington Market Co. v. Hoffman, 101 U.S. 112 (1879) 11

State Cases

State v. Schultz, 939 N.W.2d 519, 536 (Wis. 2020) 33

JURISDICTIONAL STATEMENT

The United States District Court for the Territory of New Union Island exercised citizen suit jurisdiction over the Plaintiff's claims under Clean Air Act (CAA) section 304, 42 U.S.C. §7604, and federal jurisdiction under 28 U.S.C. § 1331. Although there is a question of whether venue was proper in this district under 42 U.S.C. § 7604(a), venue was not objected by any party and the venue requirement was waived. The District Court entered its judgment on August 15, 2020, granting plaintiff's motion for summary judgment in part and intervenor's motion in part. Each of the three parties to this suit filed a timely notice of appeal. This court has jurisdiction over the order of the District Court pursuant to 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

1. 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)?
2. Is the 2009 Endangerment Finding valid with respect to an endangerment of public welfare?
3. Is the 2009 Endangerment Finding valid with respect to an endangerment of public health?
4. Does EPA's ten-year delay in taking any action on listing GHGs as criteria pollutants under CAA § 108(a) constitute an unreasonable delay?
5. Does the EPA have a non-discretionary duty to designate GRGs as a criteria pollutant under CAA § 108 based on the 2009 Endangerment Finding?

STATEMENT OF THE CASE

This case is about agency administrative power and regulation of harmful air pollutants, specifically greenhouse gases (GHG), under the Clean Air Act. Plaintiff Climate Health and Welfare Now (CHAWN) sought to compel the Environmental Protection Agency (EPA) to list GHG as a Level I and II criteria pollutant under CAA § 108 and subsequently trigger a series of broad regulatory actions per CAA §§ 109 and 110 that would require state implementation plans and agency oversight. Record at 5. CHAWN asserts that Congress, through a nondiscretionary duty per CAA § 108, demands the EPA to list GHG as a criteria pollutant pursuant to the EPA's finding that GHG endanger public health and welfare, and that the EPA has unreasonably delayed action. *Id*. The EPA asserts that Congress was silent to the matter of discretion and therefore delegated to the EPA the authority to decide which sources to regulate as criteria pollutants. *Id.* Coal Oil and Gas Association (COGA) intervened pursuant to Fed. R. Civ. P. 24(a) and asserts that the underlying Endangerment Finding is unsupported by the record and contrary to law. *Id.* The EPA asserts that the Endangerment Finding is valid only as to public welfare. *Id.* The District Court correctly held that the Endangerment Finding is valid only as to public welfare, but incorrectly held that the EPA a) unreasonably delayed action, and b) has a nondiscretionary duty to issue criteria for harmful pollutants.

I. FACTUAL BACKGROUND

In 2007, the Supreme Court of the United States ruled that the Environmental Protection Agency (EPA) must respond to a 1999 rulemaking petition that compelled the EPA to make a finding about whether greenhouse gases (GHG) present an endangerment to public health or welfare and are thus subject to EPA regulation under section 202of the Clean Air Act (CAA). Record at 8. The resulting Endangerment Finding (Finding) under CAA 202 was released in

December 2009 and held that GHG present an endangerment to both public health and public welfare, "by increasing global temperatures and changing storm frequency and precipitation patterns." R. at 9. In response, the EPA issued regulations "limiting GHG's from new passenger vehicles and light trucks." R. at 7. The EPA has decided not to list GHG's as criteria pollutants do to the unworkability of enforcing CAA 108.

II. PROCEDURAL HISTORY

In October 2019, CHAWN filed a complaint against the EPA in the U.S. District Court for the District of New Union, seeking an order to direct the EPA to publish a new list of criteria pollutants that includes GHGs as a criteria pollutant. Record at 5. The oil and gas trade association, COGA, moved to intervene citing that relief to CHAWN would "severely limit, or completely destroy, the market for its products." *Id.* The district court granted COGA's motion and both the EPA and COGA responded to CHAWN's claim, denying unreasonable delay and non-discretionary duty. *Id.* COGA also asserted a cross-claim against the EPA, seeking a declaration that the 2009 Endangerment Finding (the Finding) is unsupported by the record and contrary to law. *Id.* CHAWN responded that the Finding is valid as to public health and welfare, while the EPA responded that the Finding is valid only as to public welfare. *Id.*

The District Court correctly held that the Finding is valid only as to public welfare. R. at 10. The District Court erred when it held that the EPA unreasonably delayed action to list GHG as a criteria pollutant. R. at 13. The District Court also incorrectly held that the EPA has a non-discretionary duty to list GHG, or any harmful air pollutant, as a criteria pollutant under CAA § 108. *Id.* The EPA, CHAWN, and COGA each filed a timely Notice of Appeal, granted by this Court. *Id.* at 2.

SUMMARY OF THE ARGUMENT

First, Clean Air Act Section 108 gives the EPA a discretionary duty to list criteria pollutants and promulgate primary and secondary National Ambient Air Quality Standards (NAAQS). The Clean Air Act does not allow a District Court to review claims that allege the EPA has unreasonably delayed an action. Instead, review of NAAQS standards is limited to the United States Court of Appeals for the District of Columbia. Additionally, Clean Air Act Section 108 does not contain a date by which the Administrator shall review the list of criteria pollutants and promulgate primary and secondary NAAQS. Rather, the Administrator is tasked with a review "from time to time". Following review, if the Administrator does not plan to issue air quality criteria for a pollutant under section 108, the Administrator is not required to list that pollutant as a criteria pollutant.

Second, the EPA's 2009 Greenhouse Gas (GHG) Endangerment Finding is valid with respect to public welfare. The Endangerment Finding is strictly a question of science that is based on a substantial scientific record. The substantial scientific record that supports the 2009 Endangerment Finding does not trigger absurd regulatory results and any changes to the supporting scientific evidence will not undermine the rationally based Endangerment Finding.

Third, the EPA's 2009 GHG Endangerment Finding is not valid with respect to public health. The EPA is bound by the Clean Air Act to judge endangerment to public welfare, not public health. Congress's intent that the EPA judge endangerment based on effects to public welfare is expressly stated in the provisions of Section 108 of the Act.

Fourth, the EPA is entitled to discretion to list a pollutant under Clean Air Act Section 108. Despite the lower court's holding, there is no indication that Congress intended to burden the EPA with a non-discretionary duty to list GHGs as a criteria pollutant.

Fifth, the EPA is entitled to "Chevron Deference" with respect to interpreting the provisions of the Clean Air Act. Congress remains silent regarding whether the EPA has a non-discretionary duty to list criteria pollutants under the Clean Air Act. As such, the EPA has the latitude to interpret the timetable by which it must act pursuant to the provisions in Section 108. The EPA's interpretation of ambiguous provisions is entitled to significant deference provided the interpretation is not arbitrary, capricious, or manifestly contrary to the statute.

Sixth, although ten years have passed since the EPA issued the Endangerment Finding, the EPA has not unreasonably delayed action to list GHGs as criteria pollutants under Section 108. The EPA is entitled to significant deference with respect to effectively regulating GHGs. The Clean Air Act, unlike the Administrative Procedures Act, does not contain a mechanism by which courts may compel Agency action. Therefore, the TRAC factors used to evaluate claims of unreasonable delay do not apply here. Even if the TRAC factors were applied as a balancing test in this case, the EPA has not unreasonably delayed action due to the complexities of GHG regulation and competing provisions of the Clean Air Act.

STANDARD OF REVIEW

This Court reviews District Court jurisdiction over CHAWN's CAA § 304 unreasonable delay claim de novo. The court may reverse any agency action under the Clean Air Act which may be found to be arbitrary, capricious, an abuse of discretion, or contrary to the law. 42 U.S.C. 7607(9)(A). Accordingly, the validity of the Endangerment Finding is reviewed as to the approach by which the EPA determined the Finding, including a review of the comprehensiveness of the underlying facts upon which it based its conclusion. Unreasonable delay and non-discretionary duty are reviewed as to whether the EPA's decision not to act, and interpretation of the Act, are arbitrary, capricious, or resulting from an abuse of discretion.

This Court reviews District Court jurisdiction de novo. This Court may reverse an EPA action, or inaction, found to be arbitrary, capricious, an abuse of discretion, or contrary to law. Title 42 U.S.C. 7607(9).

ARGUMENT

I. The EPA Has a Discretionary Duty Under Clean Air Act Section 108, Therefore the U.S. District Court for New Union Did Not Have Jurisdiction to Hear a Claim of Unreasonable Delay Because the District Court's Jurisdiction is Limited to Review of Non-Discretionary Duty.

CHAWN filed suit under the Clean Air Act's (CAA) § 304(a) Citizen Suit provision in the District Court for New Union asserting the December 2009 Endangerment Finding triggers a nondiscretionary duty, seeking to compel the listing of GHG's as a criteria pollutant under CAA § 108, which ultimately results in promulgation of national ambient air quality standards (NAAQS). The District Court held the EPA has a duty to list that is not discretionary, and that duty has been unreasonably delayed. This Court raises *sua sponte* the issue of district court jurisdiction, citing *Tex. Mun. Power Agency v. EPA,* 89 F.3d 858, 866 (D.C. Cir. 1996) and *State of N.Y. v. EPA,* 133 F.3d 987 (7th Cir. 1998).

The CAA § 304 provides citizens the "[a]uthority to bring civil action . . . where there is an alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary . . .." 42 United States Code § 7604(a)(2).

A. The absence of a 'date certain' in Clean Air Act Section 108 gives the EPA a discretionary duty to list air pollutants.

Nondiscretionary duty is statutory and date certain. *See Natural Resources Defense Council, Inc.* (*NRDC*)*, v. Train,* 510 F.2d 692, 704 (D.C. Cir 1974). "Date-certain" is an explicit date, as opposed to and "inferable date." *Id.* Jurisdiction over failing to perform nondiscretionary duty is committed to district court because they are best suited to determine fact. *Id.; see* Title 42 U.S.C. § 7604(a)(2).

1. The Clean Air Act Section 108 provision that Administrator reviews "shall be from time to time" is not a date certain.

Arguendo if CAA § 108 confers a duty that is not discretionary to list GHG's, and the EPA asserts it does not, *see* discussion *infra pp. ,* the duty is a discretionary duty of general timeliness because it lacks date certainty. In *Train,* the Federal Water Pollution Control Act (FWPCA) § 306(b)(1)(A) directed the EPA Administrator "to publish within one year of October 18, 1972, regulations providing guidelines for" a specific list of "effluent limitations . . .," *Train,* 510 F2.d 692, 704. The EPA conceded that the statute was date certain and the duty was not discretionary. *Id.* The D.C. Circuit held the district court below had jurisdiction to compel such duty. *Id.* Here, the CAA § 108 directed the EPA "to publish, . . . a list which includes each air pollutant" by January 30, 1971. Title 42 U.S.C. § 7408(a)(1). The EPA recognizes that portion of the statute as date certain and the duty as not discretionary.

However, FWPCA § 306(b)(1)(a) permitted "revision from time to time" of the original date certain list. *Id.* at 705. The EPA interpreted the revision language of the statute as providing discretion. *Id.* at 705; Title 33 U.S.C § 1316. The D.C. Circuit noted deference was due to EPA's interpretation, as well as the legislative history noting the "Committee" did not limit the EPA to the original "sources enumerated," to conclude the EPA had a "general duty" to list and entitled to some discretion as to the publication date, considering such factors as the quality of guidelines and the resulting obligations placed on the EPA. *Id.* at 706 (*citing* H.R.Rep.No. 911, supra note 34, at 107, Legislative History, supra note 34 at 794); *Id.* 710-711. Here, CAA § 108 provides the EPA with the authority to "revise from time to time" the original date certain list, as well as "plan[] to issue air quality criteria," the quality of which needs consideration, as well as the obligations that will be placed on the EPA as a result of developing

such criteria. The EPA interprets CAA § 108 in the same manner as FWPCA § 306, and asserts it provides discretion.

2. The Clean Air Act Section 108(a) only applies to air quality criteria for which the Administrator "plans to issue" and is not date certain.

Air quality criteria is a term of art describing an actual "criteria document." *See Lead Industries Ass'n, Inc. v. EPA,* 647 F.2d 1130, 1136 (1980). A "criteria document" is the work product of scientific process subject to extensive peer and public review. *Id.* at 1137. The process can include Congressional Subcommittee hearings, public comment process, and extensive drafting and review. *Id.* at 1137-1138; Title 42 U.S.C. § 7607 (d). The process of planning and producing a criteria document is a significant undertaking that requires a significant amount of resources and must be complete within twelve months of listing a pollutant under CAA § 108(a). *Id.*; Title 42 U.S.C. 7408(a)(2). Within six months of a published criteria document the EPA must promulgate final NAAQS. *Lead Industries, supra* at 1137; Title 42 U.S.C. 7607(d)(10).

The plain meaning of CAA § 108(a)(1)(C) indicates the EPA shall list a pollutant after "plans to issue air quality criteria" have been developed. Title 42 U.S.C. 7408(a)(1)(C). Relying on CAA § 108(a)(1)(A) and (B) without giving consideration to (C) would violate the rule against Surplusage because it would negate any present meaning to an entire element of a three conjunctive elements necessary to list a pollutant under CAA § 108(a). "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Washington Market Co. v. Hoffman,* 101 U.S. 112, 115 (1879).

Subsequently, if *arguendo* there is any duty to list under CAA § 108, the EPA asserts Congress explicitly delegated discretion, and acknowledges a discretionary general duty of timeliness. CAA § 304 does not provide authority to pursue a claim against the EPA for failing

to perform discretionary acts or duty; however, CAA § 304(e) explicitly preserves jurisdiction under any statute, and that includes federal question jurisdiction under 28 U.S.C. § 1331, and the Administrative Procedures Act (APA). Title 42 U.S.C. § 7604(e).

B. Review of discretionary duty with respect to promulgation of National Ambient Air Quality Standards is limited to review by the United States Court of Appeals for the District of Columbia.

Discretionary duty is reviewable by courts of appeals because they are best suited to determine questions of law. *Sierra Club v. Thomas,* 828 F.2d 783 (1987) (superseded in part by Title 42 U.S.C. 7604(a)(2). CAA § 307 displaces review of the promulgation of NAAQS from the reach of APA, including its standards of review, and prevents review in any other forum, including federal question jurisdiction under 28 U.S.C. § 1331, and limits review to the specific standards in CAA § 307(d)(9) which do not incorporate the APA unreasonable delay standard. *See* Title 42 U.S.C. 7607(b)(2)(d)(1)(A); *see also Sierra, supra* at 796 (*dicta* positing a plausible argument the APA unreasonable delay standard cannot be considered under CAA § 307 standards of review because it is not designated by the Act).

The discretionary acts CHAWN seeks to compel involved promulgating NAAQS; thus, they are reviewable pursuant to CAA § 307 (b)(d)(1)(A). *See* Title 42 U.S.C. 7607(b)(d)(1)(A); *Sierra Club, supra*. They are committed to Court of Appeal review by CAA § 307(d)(1)(A); thus, they are limited to specific standards of review by CAA § 307(d)(9), and subsequently prevented from review in any other forum by CAA § 307 (b)(2). *See* Title 42 U.S.C. 7607(b)(2)(d)(1)(A); *Sierra, supra*

In conclusion, the District Court for New Union did not have jurisdiction under CAA § 304(a) because discretionary acts involving the promulgation of a NAAQS are committed to court of appeal review, barred from review in any other forum, and not subject to unreasonable

delay review. *See* Title 42 U.S.C. § 7604(a)(2), 7607(b)(2)(d)(1)(A); *Sierra, supra* at 796 (*dicta* positing an argument the APA unreasonable delay standard cannot be considered under CAA § 307(d)(9) standards of review is a plausible argument). Notwithstanding, unreasonable delay is discussed *infra.*

II. The 2009 Endangerment Finding is Valid with Respect to Public Welfare Because the Endangerment Finding is Rationally Based on a Substantial Scientific Record.

COGA asserts the 2009 Endangerment Finding (Finding) for greenhouse gases (GHG's) is invalid because 1) the Finding failed to consider the absurd regulatory results that would follow, 2) the Finding relied on science that is too uncertain to reasonably anticipate endangerment, and 3) the science is not current[1].

A. The EPA's 2009 Endangerment Finding does not trigger an absurd regulatory result.

COGA posits the Finding triggers CAA § 108(a)(1) NAAQS rule promulgation and, 1) triggers PSD and Title V permit requirements of select stationary sources that Congress did not intend to regulate, and 2) CAA § 179 nonattainment sanctions against the states.

First, the Finding does not trigger NAAQS promulgation. *See* Title 42 U.S.C. § 7409(a)(2). NAAQS promulgation is triggered solely by issuance of an air quality criteria document. *Id.* Second, NAAQS promulgation is subject to "public comment . . . with such modification as the [EPA] deems appropriate." *Id.* at (a)(1)(B). Thus, it is not plausible to allege the Finding results in absurd PSD permit requirements, Title V permit requirements, or CAA § 179 sanctions because of the attenuated connection between the Finding and NAAQS

[1] COGO claim 1 and 2 are reasserted from *Coalition for Responsible Regulation, Inc. v. EPA,* 684 F.3d 102, (D.C. Cir. 2012). Both claims previously failed in *Coalition. Id.* COGA adds an additional level of absurdity through CAA § 179 not argued in *Coalition* and that the 2009 science to support the Finding is now uncertain based on today's science.

promulgation by the criteria document. *See id.* at § 7409(a). Finally, *arguendo,* the EPA has the discretion in the operative application of the Act. *See discussion infra.*

B. The EPA's 2009 Endangerment Finding is strictly a question of science.

The Court held it is unmistakably clear Congress relies on the EPA to judge whether an "air pollutant . . . cause[s], or contribute[s] to, air pollution [that is] anticipated to endanger public health or welfare," and that is strictly a science based issue. *Coalition for Responsible Regulation, Inc. v. EPA,* 684 F.3d 102, 117-118 (D.C. Cir. 2012) (*citing Massachusetts v. EPA,* 549 U.S. 497 (2007)); *see* Title 42 U.S.C. § 7521(a)(1).

C. The EPA's 2009 Endangerment Finding is based on a substantial scientific record.

COGA asserts that the science relied on by EPA concerning the role of anthropogenic GHG emissions in currently observed global temperature increases and the magnitude of future temperature increases is too uncertain to support a current finding of endangerment.

The Court held "scientific uncertainty" does not affect the moment." *See Massachusetts v. EPA,* 549 U.S. 497, 534 (2007). The question is whether there was substantial evidence to anticipate endangerment to public health or welfare at the time of the Finding. *See id.* (*holding* the question of whether uncertain science precludes regulation is not a consideration of whether endangerment exists); *but see id.* at 554 (Justice Scalia dissented arguing the statute is silent about any premise in which the EPA may "defer making a judgement," thus, it had discretion to defer making such judgement).

The scientific basis for the Finding is contained in the "Technical Support Document" (TSD). Federal Register Vol. 74, No. 239, 66510. "[T]he primary scientific and technical basis" for the Finding are "the major assessments of the United States Climate Change Science Program (CCSP), the Intergovernmental Panel on Climate Change (IPCC), and the National Research

Council (NRC)." *Id.* The assessments provide evidence of the resulting "atmospher[ic]" accumulation of GHG's as emitted by "human activities," the resulting "changes to the Earth's energy balance," historical climate change in general, the extent historical climate change can be attributed to GHG atmospheric "build up," projected climate change, and projected risks. *Id.* The assessments include "emissions-to-potential harm chain necessary for the" Finding." *Id.* at 66511. The assessments weave the available "body of scientific evidence . . ." which is ". . . peer review[ed] by expert[s]. . . and are excepted as the U.S. governments view of the state of the knowledge on [GHG's] and climate change," independent[2] of any EPA view, or assessment, of GHG's prior to the Finding. *Id.*

D. The EPA's 2009 Endangerment Finding is rationally based.

COGA asserts the EPA interpretation of CAA § 108 and § 202 regarding the text "reasonably anticipated to endanger" is improper and the science relied on is too uncertain to anticipate endangerment.

The EPA found significant evidence GHG's cause "global and regional temperature increases and other climate changes," and that in turn creates "benefits" and "adverse risk." *Id.* at 66523. It was determined the adverse risk outweighed the benefits. *Id.* at 66524. Based on scientific study, the rise in heat related "mortality" is expected to outweigh the reduction in cold related mortality; anticipated ozone pollution increases due to climate change are expected to outweigh decreases; anticipated increases in "severe weather" are expected to exacerbate flooding and the problems it causes; and "food, water borne, and insect borne" illness are anticipated to rise with the temperature. *Id.* at 66525-66526. The EPA asserts

[2] The EPA was a contributor to CCSP, IPCC, and NRC assessments, however, the EPA does not assert its contribution is the basis for said assessments. *See* Federal Register Vol. 74, No. 239, 66511.

The D.C. Circuit held EPA endangerment findings do not require assignment of precise quantitative "risk and harm." *Id.* at 122-123. (*citing* CAA § 202(a)(1); *Ethyl Corp. v. EPA,* 541 F.2d 1, 18 (D.C. Cir. 1976). In *Ethyl,* "find[ing] a specific concentration of the air pollutant . . . failed to account for the wide variability of [air pollutant] intake and lacked predictive value." *Id.* at 123 (*citing Ethyl,* at 56-57). A "qualitative approach relying on predictions based on uncertain data" and substantial evidence was not arbitrary or capricious. *Id.* The EPA's lack of precise quantitative thresholds of safety and danger are the result of the forward thinking "precautionary thrust of the CAA . . ., not a sign of arbitrary and capricious decision making." *Id.* 123.

The D.C. Circuit noted EPA reliance on "scientific evidence" that "support[s] the proposition that greenhouse gases trap heat on earth that would otherwise dissipate into space" and "that this warms the climate" and "that human activity is contributing to increased atmospheric levels of greenhouse gases." *Id.* at 120. The EPA already understood recent "natural forces such as solar and volcanic activity" should "cool[]" the earth. However, it warmed in correlation with GHG increase, and the rate of change was "unusual" compared to empirical evidence, and that rate could only be duplicated in computer models by introducing GHG's into the equation. *Id.* (*citing* Endangerment Finding, Response to Comments Vol. 3, at 20; 74 Fed. Reg. at 66,518; 74 Fed. Reg. at 66,523).

From this, and other evidence, the EPA judged global warming "very likely" caused by the documented rise in "[GHG] emission." *Id.* (*citing* Endangerment Finding, Fed. Reg. at 66518). Petitioners argued the evidence supporting causation was uncertain. *Id.* at 121. However, certainty and prevention are inconsistent. *Id.* (*citing Ethyl Corp. v. EPA,* 541 F.2d 1, 25, 28 (D.C. Cir. 1976). Furthermore, the Court held "the existence of 'some residual

uncertainty' did not excuse EPA's decision to decline to regulate greenhouse gases." *Id.* at 122 (*quoting Massachusetts v. EPA,* 549 U.S. at 534).

The D.C. Circuit did not, and will not, "re-weigh the scientific evidence . . . and reach [its] own conclusion." *Id.* at 122. The standard of review is to determine whether the EPA Endangerment Finding was based on "substantial evidence." *Id.* (*citing New York v. EPA,* 413 F.3d 3, 30 (D.C. Cir 2005). When the evidence is "scientific" the standard of review is to determine whether the "EPA evaluate[d] scientific evidence . . . in a rational manner." *Id.* (*citing Am. Petroleum Inst. V. Costle,* 665 F.2d 1176, 1187 (D.C. Cir 1981). Petitioners failed to show the D.C. Circuit the Endangerment Finding was not rational. *See id.*

E. Changes in scientific evidence cannot make the EPA's 2009 Endangerment Finding irrational.

COGA asserts the old scientific evidence in the Finding combined with currently observed global temperature increases is too uncertain to support a current endangerment finding.

Any change in scientific evidence since the Finding does not affect the question of whether the EPA had substantial evidence to anticipate endangerment at the time of the Finding. If there was in fact a change in the scientific evidence that now precludes regulation it would be considered in the "criteria published under [CAA 108]" and during subsequent review of such criteria as deemed necessary by the EPA, or least within "five year intervals." *See* Title 42 U.S.C. § 7409 (a)(2), (d). Here, a carbon dioxide criteria document has not been issued.

III. The 2009 Endangerment Finding is Not Valid with Respect to Public Health Because the Clean Air Act Commits Endangerment Findings to the Effects on climate to public welfare

During proceedings below, COGA made various arguments that Congress intended endangerment to public health as adverse health effects of direct exposure to an air pollutant. The EPA now believes Congress committed an air pollutant consequence of climate change to welfare.

A. The EPA's assertion of endangerment to public health is not entitled to deference.

CHAWN, citing *U.S. v. Mead Corp.,* 533 U.S. 218 (2001), argues this Court should not defer to EPA's redaction because it was not subject to the promulgation process and subsequently does not have the force of law. CHAWN, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), argues the EPA's original interpretation, defining pollution-induced-climate-change effects on health, to fall under the umbrella of "health effects," is entitled to deference.

In *Mead,* there was a question whether a U.S. Customs "tariff classification ruling" (TCR) was entitled to deference under *Chevron.* The Court held TCR's were not entitled to deference because they do not have the force of law. *Mead, supra* at 221. The U.S. Customs Service issues tariff classification rulings via "ruling letter." *Id.* at 222. "Any . . . Customs offices may issue ruling letter . . .," and issued in response to a particular situation without formal promulgation, and valid in future "identical" situations. *Id.* at 223. Generally, ruling letters consider existing formal rules an apply them to a particular situation. *Id.* at 225. The Court seemed to limit *Chevron* by holding "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated

authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 227.

Here, it is true the EPA's partial redaction was not subject to rule promulgation, but the statute is silent. The EPA argues the original interpretation was authoritative and made under implicit agency authority to define ambiguity in a matter inseverable from rule promulgation; subsequently the original interpretation, and the new interpretation, have the force of law, entitling it to *Chevron* deference. *See Mead, supra; see also Chevron, supra.*

In *Chevron,* there was a question of the way administrative agencies interpret statutes they are charged with executing. *Chevron, supra.* In reviewing such a question, the courts must determine if Congress clearly "expressed intent." *Id.* at 842. If so, the agency must comply. *Id.* "[S]ilen[ce] or ambigu[ity]" results in "delegation" of power. *Id.* at 843. If the agency exerts power to the "reasonable accommodation of conflicting policies" in a manner Congress would have permitted ". . . we should not disturb it . . .." *Id.* at 845.

Here, it is true "effects on public health" or "public health" is not defined. However, it was not permissible for the EPA to judge whether climate change was reasonably anticipated to endanger public health because the statute only authorizes a judgement whether an air pollutant is reasonably anticipated to endanger public health. *See* Title 42 U.S.C. § 7408(a)(1)(A). Notwithstanding, the statue authorizes the EPA to judge whether an air pollutant is reasonably anticipated to endanger public welfare, and the definition of welfare expressly includes effects on climate. *Id.* at § 7408(a)(1)(A), § 7602(h). In either case, Congressional intent is clearly expressed.

B. Welfare is expressly defined in the Clean Air Act and is subject to secondary National Ambient Air Quality Standards by statute.

The CAA defines

> [a]ll 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 economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants. Title 42 U.S.C. § 7602(h).

Applying that definition to CAA § 109, secondary NAAQS are designed to "specify a level of air quality" to stop or prevent an "air pollutant" from causing climate change. *See* Title 42 U.S.C. § 7409(b)(2), § 7602(h). In contrast, primary NAAQS designate "ambient air quality standards" required "to protect the public health." Title 42 U.S.C. § 7409(b)(1).

The EPA asserts primary and secondary NAAQS are distinguished by direct health impacts and indirect welfare impacts, or the risks of each thereof, respectively. *See id.; see also* § 7409(c). Congress legislated promulgation of a primary NAAQS for Nitrogen Dioxide presumably due to the health risks like asthma from direct exposure; there is a secondary NAAQS for Nitrogen Dioxide to address the welfare risk like poor visibility from its presence. *See id.; see also* EPA website Nitrogen Dioxide (NO2) Pollution (2020).

Here, the EPA never asserted GHG's has or will build up in such quality as to directly endanger public health from direct exposure. The scientific data supports the proposition that it will build up in such quantity as to change the climate.

In conclusion, the Endangerment Finding is strictly a question of science. It was rationally based on a substantial scientific record that essentially accounts for variability in uncertain data through criteria document review. Since Congress defined welfare to include effects on climate and did not give the EPA power to judge whether climate change may reasonably endanger health, the Endangerment Finding reasonably anticipates endangerment

only to public welfare. Subsequently, this Court should find the EPA's Endangerment Finding in accordance with law.

IV. The EPA has discretion whether to list a pollutant under Clean Air Act Section 108.

At issue here is whether CAA § 108 "imposes on the EPA a mandatory, non-discretionary duty to list any substance found by the Agency" to be an air pollutant that endangers public health or welfare. *NRDC, Inc. v. Thomas,* 689 F. Supp. 246, 253 (S.D.N.Y. 1988). CHAWN argues the Endangerment Finding triggers a duty that is not discretionary to list a GHG as a criteria pollutant under CAA 108, which states:

> (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—
>
> > (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
> >
> > (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
> >
> > (C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.
>
> 42 U.S.C. § 7408(a)(1).

In its 1976 ruling, the Supreme Court determined that the legislative history, statutory context, and plain language of the Clean Air Act required the EPA to issue criteria for lead, a harmful air pollutant. *NRDC, Inc. v. Train,* 545 F.2d 320 (2d Cir. 1976). Without mention of deference to the EPA's interpretation, the court concluded that "[o]nce the conditions of §§ 108(a)(1)(A) and (B) have been met, the listing of lead and the issuance of air quality standards for lead become mandatory." *Id.* at *327.*

Despite the court's strong reliance on *NRDC v. Train*, there is no indication that Congress intended to burden the EPA with a non-discretionary duty to list GHG as a criteria pollutant under the CAA. Newer precedent indicates that the court should defer to the EPA's interpretation

of the Clean Air Act when Congress did not directly address the issue, and only interfere if the EPA's interpretation is "arbitrary, capricious or manifestly contrary to the statute." *Chevron U.S.A., Inc. V. NRDC, Inc.,* 467 U.S. 837 (1984). Congress did not directly address this issue, as a non-discretionary duty can only be inferred from the plain language of CAA §§ 108, and the EPA's interpretation is reasonable. Finally, otherwise forcing the EPA to list GHG as a criteria pollutant could undermine the EPA's ability to effectively enforce the CAA in its entirety.

V. The EPA is Entitled to "Chevron Deference" With Respect to Interpreting the Provisions of the Clean Air Act.

More recent court opinions hold that when a statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity "within the bounds of its statutory authority." *Util. Air Regulatory Group v. EPA,* 573 U.S. 302, 314 (2014) (citing *Arlington v. FCC,* 569 U.S. 290, 297 (2013)). Accordingly, in the years since *NRDC v. Train* was first decided in 1976, the court has afforded "considerable weight" to executive departments' construction of statutes they are entrusted to administer. *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 844 (1984). See, e.g., *Ctr. For Biological Diversity v. EPA,* 749 F.3d 1079, 1087 (D.C. Cir. 2014) ("We have an obligation to defer to EPA's interpretation of the Clean Air Act."); *Nat'l Wildlife Fed'n v. EPA,* 286 F.3d 554, 560 (D.C. Cir. 2002) ("[P]articular deference is given by the court to an agency with regard to scientific matters in its area of technical expertise. . .."); and *Troy Corp. V. Browner,* 120 F.3d 277, 283 (D.C. Cir. 1997) ("...we show considerable deference, especially where the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise.").

Specifically:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the

> unambiguously expressed intent of Congress. . . . If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron at 842. Agency legislative regulations that are designed to fill a statutory gap are given controlling weight "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843.

A. Congress has not directly spoken as to whether the EPA has a non-discretionary duty to list harmful air pollutants as criteria pollutants.

Congress did not prescribe a timeline nor an express duty to list harmful air pollutants as criteria pollutants under the Clean Air Act. Rather, this duty was determined through judicial review of the statute in 1976. *NRDC, Inc. v. Train,* 545 F.2d 320 (2d Cir. 1976). Acknowledging that "the literal language of § 108(a)(1)(C) is somewhat ambiguous," the court proceeded to resolve the ambiguity directly by reviewing "the Act as a whole and in its legislative history." *Id.* at 327. The court did not provide the EPA with the Chevron deference that should be accorded to it today.

Today, any statutory duty on the part of the EPA to issue criteria for a harmful air pollutant was merely inferred from CAA § 108 by the court in *NRDC v. Train*. However, a renewed analysis of the plain language of the statute shows that it is more appropriately interpreted as a discretionary duty. First, Section A suggests that GHG may be added to the criteria pollutant list because it has been found to endanger public welfare. However, the statutory language is inclusive, with "and" in Section B, which indicates that GHG presence in ambient air must also result from numerous sources *and* be one in which the Administrator plans to issue air quality criteria under CAA § 108. Despite the inclusive "and," the court in *NRDC v. Train* concluded that "shall" in Section 1 is mandatory language that requires the EPA to issue criteria for harmful pollutants. *NRDC*, 545 F.2d at 325. However, *even if* "shall" is mandatory language, Congress wrote this section inclusively and the "shall" can reasonably be interpreted to

apply only to pollutants that meet all three of the subparts of CAA § 108. Since the EPA does not currently plan to issue air quality criteria under CAA § 108, Section C is not met and the mandatory language does not apply.

B. The EPA's interpretation is based on a permissible construction of the Clean Air Act and is not arbitrary, capricious, or manifestly contrary to the statute.

When a statute is ambiguous as to a provision, "a court may not substitute its own construction of [the] provision for a reasonable interpretation made by the administrator of an agency." C*hevron v. NRDC* at 843. Similarly, "with its broader perspective, and access to a broad range of undertakings, and not merely the program before the court, the agency has a better capacity than the court to make the comparative judgments involved in determining priorities and allocating resources." *Nat'l Cong. of Hispanic Am. Citizens (el Congreso) v. Marshall,* 626 F.2d 882, 889 (D.C. Cir. 1979).

The EPA is tasked through the CAA with protecting and enhancing air quality to promote public health and welfare of the population; initiating and accelerating an air pollution research and development program; providing technical and financial assistance to State and local governments for development and execution of pollution control programs; and encouraging and assisting the development and operation of regional air pollution prevention programs. Title 42 U.S.C. § 7401(b). The Agency must therefore take into consideration not only public health and welfare, but also technical, financial, and operational limitations as it determines how to successfully execute the Act.

Here, the EPA interprets that the duty to issue criteria for harmful pollutants is discretionary based on the plain language of the statute, as described above. Further, the Supreme Court ruled that the finding in *Massachusetts v. EPA*, which led to the GHG endangerment finding, "*does not strip [the] EPA of authority to exclude greenhouse gases from*

the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme." Util. Air Regulatory Group v. EPA, 573 U.S. 302, 319 (2014). A nondiscretionary duty would trigger mandatory deadlines for criteria documents, implementation plans, and remediation attainment, thereby stripping the EPA of its duty to balance regulatory and enforcement priorities under the Act. It is not reasonable to expect that Congress intended to task the EPA with multiple statutory priorities, but not with the authority to determine how best to approach them. Public commenters raised the issue in response to the EPA's endangerment finding, to which the EPA reassured that they have the ability to "fashion a reasonable and common-sense approach to address GHG emissions and climate change." Federal Register 74:239, p. 66516.

A non-discretionary duty to list GHG as a criteria pollutant under CAA § 108 would trigger a series of enforcement activities under CAA §§ 109 and 110 including: publication of an air quality criteria document that includes the scientific basis for the numeric standard to be set, proposal and subsequent promulgation of a national ambient air quality standard to attain and maintain GHG air pollution at or below the EPA-determined level, and subsequent enforcement of the development and implementation of State Implementation Plans for the pollutant. *Lead Industries Ass'n v. EPA,* 647 F.2d 1130, 1136 (D.C. Cir. 1980).

VI. The EPA's Ten-Year Delay in Taking Any Action on Listing Greenhouse Gases as Criteria Pollutants Under Clean Air Act § 108(a) Does Not Constitute an Unreasonable Delay Because the EPA is Entitled to Significant Deference to Determine How to Effectively Regulate Greenhouse Gases

"To establish a claim of unreasonable delay, petitioners must show that they have 'a right the denial of which we would have jurisdiction to review upon final agency action but the integrity of which might be irreversibly compromised by the time such review would occur.'" *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 554 (D.C. Cir. 2015). Courts have identified two

potential paths to assert a claim of unreasonable delay. First, the plaintiff may demonstrate that, "an agency violated a statutory 'right to timely decision making' implicit in the agency's regulatory scheme", or second that "some other interest—financial, aesthetic, or related to human health and welfare, for example—'will be irreparably harmed through delay."" Id. at 554 (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 796-97 (D.C. Cir. 1987)). The right to timely decision making "resembles to some extent claims involving "agency recalcitrance . . . in the face of a clear statutory duty," except that the statutory duty involved here does not specify what course of action shall be taken. Rather, regardless of what course it chooses, the agency is under a duty not to delay unreasonably in making that choice" *Sierra Club*, 828 F.2d at 794. Courts assess claims of unreasonable delay by evaluating six factors: (1) the time agencies take to make decisions must be governed by a "rule of reason,". . . ; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason, . . . ; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; . . . ; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, . . . ; (5) the court should also take into account the nature and extent of the interests prejudiced by delay, . . . ; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" (*Telecomms. Rsch. & Action Center v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984) (quoting *Pub. Citizen Health Rsch. Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 34 (D.C. Cir. 1984)) (citations omitted).

A. TRAC does not apply because the review of agency inaction is under the district court's purview, not the circuit court.

The Clean Air Act provides that any person may commence a civil action against the Administrator only when the Administrator is alleged to have failed to perform a non-discretionary duty. Title 42 U.S.C. § 7604. Additionally, the citizen suits section of the CAA explicitly provides that "[t]he district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed." Title 42 U.S.C. § 7604. The court in *Sierra Club* held that "TRAC does not apply where a statute instead commits review of an alleged instance of agency inaction to the district court, as does section 304(a)(2)." *Sierra Club*, 828 F.2d at 790. The Clean Air Act expressly prohibits unreasonable delay claims in circuit courts, and consistent with the district court's holding in *Sierra Club*, we urge this court to rely on the precedent set in *Sierra Club* to protect the appellate court's prospective jurisdiction.

B. If the six TRAC factors are applied here, on balance, the EPA has not unreasonably delayed listing GHGs as a criteria pollutant under CAA § 108(a).

Litigation that alleges an agency unreasonably delayed a decision or rulemaking are numerous. The lower court's decision below indicated multiple cases in which courts have held agency delays as unreasonable. *See, e.g.,* I*n re Core Commc'ns, Inc.,* 531 F.3d 849 (D.C. Cir. 2008) (seven-year delay unreasonable); *In re Pesticide Action Network N. Am., Inc.*, 798 F.3d 809 (9th Cir. 2015); *In re A Cmty. Voice v. U.S. E.P.A.*, 878 F.3d 779 (9th Cir. 2017) (eight-year delay unreasonable). However, in the absence of a bright-line rule defining exactly how much time constitutes an unreasonable agency delay, courts must evaluate these claims on a case-by-case, fact-specific basis. A ten-year delay is not unreasonable if the matter has been given "considerable attention" by an agency. *Debba v. Heinauer*, 366 F. App'x 696, 699 (8th Cir.

2010). Here, the EPA has given GHG regulation significant attention through the Tailoring Rule[3], Clean Power Plan[4], Affordable Clean Energy Rule[5], and the FY 2018-2022 U.S. EPA Strategic Plan[6].

Additionally, when an agency is tasked with matters of equal or greater importance, a five-year delay is not unreasonable. *E.g.*, *Kokajko v. Fed. Energy Regul. Com.*, 837 F.2d 524 (1st Cir. 1988). Even in matters that involve human health and welfare, a four- and one-half-year wait is not unreasonable. *E.g.*, *In re City of Va. Beach*, 42 F.3d 881 (4th Cir. 1994).

The first TRAC factor requires the court to apply a rule of reason to the time agencies take to make decisions. *Telecomm. Research & Action Ctr.*, 750 F.2d at 80. "[R]easonableness of the delay must be judged 'in the context of the statute' which authorizes the agency's action." *Cutler v. Hayes*, 818 F.2d 879, 897 (U.S. App. D.C. 1987).

Here, the EPA's ten-year delay is reasonable because greenhouse gases do not readily lend themselves to NAAQS regulations for two reasons. First, a reasonable NAAQS for GHGs is difficult to ascertain and promulgate. The 2009 endangerment finding states that GHGs are "reasonably anticipated both to endanger public health and to endanger public welfare." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of

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[3] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule 75 Fed. Reg 31,514 (June 3, 2010). The Supreme Court invalidated the Tailoring Rule, holding that emission sources are not required to meet PSD and Title V permitting requirements based on GHG emissions alone. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

[4] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 35,520 (July 8, 2019).

[5] The EPA finalized the proposed Affordable Clean Energy (ACE) Rule while simultaneously repealing the CPP. *Id.* at 35,520.

[6] FY 2018-2022 U.S. EPA Strategic Plan (Sept. 2019), https://www.epa.gov/sites/production/files/2019-09/documents/fy-2018-2022-epa-strategic-plan.pdf

the Clean Air Act; Final Rule, 74 Fed. Reg. 66,497 (Dec. 15, 2009). The language that GHGs are "anticipated" to endanger public health and welfare implies that GHGs do not endanger public health or welfare at current levels. Setting a NAAQS at the current GHG levels is contrary to the 2009 endangerment finding. Setting NAAQS for GHGs above the current levels implies that they are not currently a threat to public health or welfare; thus, EPA is not required to act. If forced to set NAAQS for GHGs, the EPA will undoubtedly have difficulty rectifying the dichotomy posed by the 2009 endangerment finding.

Second, GHGs are dissimilar to the current criteria pollutants regulated under the CAA. The six GHGs are well-mixed and exhibit significant atmospheric mobility. The criteria pollutants currently regulated under the CAA are harmful on a local level. For example, particulate matter (PM) and ground-level ozone result in immediate, localized effects such as visibility impairment and respiratory irritation. Because the current criteria pollutants exhibit less mobility relative to GHGs, the NAAQS regulatory scheme and corresponding 264 Air Quality Control Regions (AQCRs) throughout the US allow for more efficient and practical regulation of criteria pollutants. 40 CFR § 81 Subp. B. The nature and uniform global distribution of GHGs frustrates the purpose of AQCRs and NAAQS regulation.

The EPA has also raised concerns about regulating GHGs as a criteria pollutant and the potential ramifications that would follow the Clean Air Act's corresponding provisions. Specifically, in the Advanced Notice of Proposed Rulemaking (ANPR) for regulating GHGs under the Clean Air Act, EPA carefully stated that "careful attention needs to be paid to the consequences and specifics of decisions regarding endangerment and regulation of any particular category of GHG sources under the Act." Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule 73 Fed. Reg. 44,418 (July 30, 2008). Additionally, "listing an air

pollutant under section 108(a) also precludes regulation of that air pollutant from existing sources under section 111(d)". Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule 73 Fed. Reg. 44,421 (July 30, 2008). The conflict created by these competing provisions could result in future GHG regulations that are difficult to comply with or ineffective. The EPA attempted to address this problem when it issued the "Tailoring Rule" in 2010. The Tailoring Rule sought to implement a commonsense approach to permits under the Prevention of Significant Deterioration (PSD) program and Title V of the Act. *See, Util. Air Regulatory Group v. EPA,* 573 U.S. 302 (2014). The Tailoring Rule was struck down by the Supreme Court, holding that the EPA "has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms" *Id.* at 325.

The second TRAC factor provides that when "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." *Telecomm. Research & Action Ctr.*, 750 F.2d at 80. "Indeed, absent a statutory timetable in the enabling statute, an agency is entitled to considerable deference in how expeditiously it proceeds with agency action." *Beyond Pesticides/Nat'l Coal. Against the Misuse of Pesticides v. Johnson*, 407 F. Supp. 2d 38, 40 (D.D.C. 2005). In *Beyond Pesticides*, the Court found the second TRAC factor satisfied because EPA notified Beyond Pesticides that it would either grant or deny the petitions when it completes the reregistration process. *Id.* at 40. Here, just as in *Beyond Pesticides*, Congress has not provided a clear timetable for EPA to list GHGs as an air pollutant. The only deadline imposed on the EPA under 42 U.S.C. 7408 is that once an air pollutant is listed, the EPA is required to issue air quality criteria within twelve months. Title 42 U.S.C. § 7408. Courts are also hesitant to impose a deadline on agency action that would undermine or jeopardize the quality and

uniformity of agency decisions. *Heckler v. Day*, 467 U.S. 104, 115 (1984). As discussed previously concerning the first TRAC factor, given the complexity and nuance of the Clean Air Act and GHG regulations, an expedited timeframe to list GHGs under section 108 of the Act and promulgate NAAQS would threaten the quality and uniformity of Clean Air Act regulations.

The third TRAC factor considers whether delays that might be reasonable in the sphere of economic regulation are less tolerable with human health and welfare are at stake. *Telecomm. Research & Action Ctr.*, 750 F.2d at 80. The third "factor alone can hardly be considered dispositive when, as in this case, virtually the entire docket of the agency involves issues of this type" *Sierra Club,* 828 F.2d at 798. The EPA's focus is not on economic regulation but on health and welfare. Economic concerns have always been a secondary or tertiary consideration in the scope of environmental regulations. Examining strip-mining regulations under the Clean Air Act, the court in *Thomas* held that when "the public health and welfare will benefit or suffer from accelerating this particular rulemaking depends crucially upon the competing priorities that consume EPA's time, since any acceleration here may come at the expense of delay of EPA action elsewhere." *Id.* at 798.

The fourth TRAC factor requires the court to consider the effect of expediting delayed action on agency activities of a higher or competing priority. Courts recognize that "given that Congress provides EPA with finite resources to satisfy these various responsibilities, the agency cannot avoid setting priorities among them. Sierra Club, 828 F.2d at 798. Additionally, the "[I]mpact of the delay is irrelevant where "putting the plaintiff at the head of the queue simply moves all others back one space and produces no net gain" *Id.* at 798. Among the litany of high priority items on the EPA's docket include regulation of Per- and Polyfluoroalkyl substances

(PFAS) under the Safe Drinking Water Act[7], pesticide reregistration under the Federal Insecticide, Fungicide, and Rodenticide Act[8], and evaluating the financial responsibility requirements of industries under the Comprehensive Environmental Response, Compensation, and Liability Act section 108(b)[9]. Resolution of these docket items is crucial to the EPA's mission of protecting human health and welfare.

The fifth TRAC factor requires that the court consider the nature and extent of the interests prejudiced by the delay. *Telecomm. Research & Action Ctr.*, 750 F.2d at 80. Here, neither the petitioners nor the court below has specifically identified which interests are prejudiced by the alleged delay. The petitioners may assert that the EPA's alleged delay infringes upon their right to timely decision making. As discussed earlier, the absence of a date certain by which the EPA must list GHGs as a criteria pollutant precludes any right to timely decision making. Also discussed earlier concerning the language in the endangerment finding, GHGs are "anticipated" to endanger human health and welfare suggests that GHG levels are either not currently a threat to human health and welfare or that the endangerment finding is flawed.

The sixth TRAC factor specifies that the court does not need to find any impropriety lurking behind agency lassitude to hold that agency action is unreasonably delayed. *Telecomm. Research & Action Ctr.*, 750 F.2d at 80. It is "the well established presumption that public officials . . . act in good faith and are conscientiously proper in the discharge of their duties."

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[7] EPA's Per- and Polyfluoroalkyl Substances (PFAS) Action Plan (Feb. 2019), https://www.epa.gov/sites/production/files/2019-02/documents/pfas_action_plan_021319_508compliant_1.pdf

[8] Registration Review; Draft Human Health and/or Ecological Risk Assessments for Several Pesticides; Notice of Availability 85 Fed. Reg. 94 (Jan. 2, 2020).

[9] EPA entered a consent decree by which it is required to evaluate the hardrock mining, electric utility, and petroleum and chemical manufacturing industries to determine if financial assurance standards should be imposed. *See In re Idaho Conserv. League*, 811 F.3d 502 (D.C. Cir. 2016).

Bayshore Res. Co v. U.S., 2 Cl. Ct. 625, 632 n.4 (1983). Here, the petitioner does not assert any impropriety on the part of the EPA. Accordingly, this factor should be given less weight than the others when considering the claim of unreasonable delay.

C. Congress intentionally omitted any provisions to compel agency action for claims of unreasonable delay.

The Administrative Procedures Act (APA) provides that a reviewing court shall compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. 706(1) The APA provision regarding unreasonable delay is intentionally omitted from the CAA and cannot be read into the CAA provisions. Further, the provisions of 706(2) are incorporated into 40 U.S.C. § 7607(9), but the provision to compel unreasonably delayed agency action is absent. The canons of statutory interpretation apply to the CAA's § 7607(9) omission of the provision to compel agency action. *Casus omissus* prohibits the addition of terms or provisions into a statute beyond what is stated or reasonably implied. *State v. Schultz*, 939 N.W.2d 519, 536 (Wis. 2020) (citing Antonin Scalia & Bryan Garner, Read*ing Law: The Interpretation of Legal Texts 93 (*2012))

Further, "Congress, after it displaced the APA at large, then expressly reincorporated many of the APA standards, section 307(d)(9)(A)-(D), but did not reimpose the prohibition against unreasonable delay found in section 706(1) of the APA." *Sierra Club*, 828 F.2d at 796. As such, a reasonable interpretation regarding the absence of a prohibition against unreasonable delay is that Congress supplied specific deadlines for specific actions required elsewhere under the Clean Air Act. *Sierra Club*, 828 F.2d at 796.

CONCLUSION

Per the foregoing, Appellant Environmental Protection Agency respectfully requests that this court uphold the district court's rulings as to public health and public welfare but reverse its decision as to unreasonable delay and nondiscretionary duty.

Respectfully submitted this 21st day of November, 2020,

[redacted]

CERTIFICATION

We hereby certify that the brief for [redacted] is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

Respectfully submitted this 21st day of November, 2020,

[redacted]