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NECESSARILY HYPOCRITICAL: THE LEGAL VIABILITY OF EPA'S REGULATION OF STATIONARY SOURCE GREENHOUSE GAS EMISSIONS UNDER THE CLEAN AIR ACT

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Abstract: The Supreme Court's ruling in *Massachusetts v. EPA* made clear that greenhouse gases fall within the realm of air pollutants the Clean Air Act was designed to regulate. The Court's decision sparked a chain reaction forcing the EPA to regulate greenhouse gases under different provisions of the Act. The EPA's decision to regulate drew fierce criticism, especially from industries that would be forced to reduce emissions. Opponents argue that greenhouse gases are not traditional pollutants and therefore the drafters of the Clean Air Act did not intend them to be regulated. Furthermore, they argue that the EPA over-stepped its authority in "tailoring" a new rule to incorporate greenhouse gases more appropriately into the Act's framework. This Note defends the EPA's decision to regulate greenhouse gases, as well as its Tailoring Rule. In light of the Clean Air Act's explicit language and legislative intent, the EPA was not only legally justified in implements its decision, but it had no other choice.

INTRODUCTION

Since the landmark Supreme Court decision in *Massachusetts v. EPA*, federal regulation of greenhouse gases (GHGs) has become one of the most controversial environmental issues of the 21st century.¹ Rather than inspiring unified action, this controversy has led to legislative indecision in an attempt to devise a solution to global warming.² The United States has refused to sign the Kyoto Protocol,³ and the potential

* Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2011-12.

¹ See James R. Farrell, *Happy New Year? With the Advent of Greenhouse Gas Regulation Only Days Away, Many in Industry Might Prefer, Instead, to Turn Back the Clock*, AM. C. ENVTL. LAW. (Dec. 28, 2010), <http://www.acoel.org/post/2010/12/28/happy-new-year-with-the-advent-of-greenhouse-gas-regulation-only-days-away-many-in-industry-might-prefer-instead-to-turn-back-the-clock.aspx>. See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007).

² See Farrell, *supra* note 1.

³ *Massachusetts v. EPA*, 549 U.S. at 509.

for enactment of federal legislation specifically tailored to address GHGs has been clouded by doubt.⁴

The Clean Air Act (CAA) was not meant to address GHGs when it was drafted.⁵ In fact, climate change-related pollutants do not fit easily into the structure contemplated by the Act.⁶ The *Massachusetts v. EPA* decision, however, was the first in a series of developments that establishes the CAA as the preeminent statute in the climate change battle.⁷ The Court's decision all but mandated the Environmental Protection Agency (EPA) to find that GHGs "may reasonably be anticipated to endanger public health or welfare," and to regulate the pollutants under several provisions of the Act.⁸

Despite its flexibility, the CAA, if literally applied to GHGs, threatened to seize regulatory control of millions of U.S. businesses.⁹ The EPA itself noted that such application would paralyze permitting authorities and render the statute unworkable.¹⁰ Thus, to avoid this disaster, the EPA effectively rewrote the provision of the CAA that would regulate GHGs and lead to such absurd results, invoking judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹¹

Many commentators, industrialists, and state governments have taken issue not only with the *Massachusetts v. EPA* decision and the applicability of the CAA to GHGs, but also with the EPA's implementation of the Act.¹² This Note argues, however, that given the Court's decision in *Massachusetts v. EPA*, the mandatory and interdependent triggering rules in the statute, and the flexible, forward-looking, and precautionary nature of the CAA, the EPA was not only within its legal authority to enact such regulation but it was practically forced to do so.¹³

⁴ George F. Allen & Marlo Lewis, *Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of Massachusetts v. EPA*, 44 U. RICH. L. REV. 919, 919, 933 (2010). Federal bills include the Lieberman-Warner Climate Security Act of 2007 and the Waxman-Markey American Clean Energy and Security Act of 2009, among others. *Id.* at 919.

⁵ See *Massachusetts v. EPA*, 549 U.S. at 532.

⁶ John Copeland Nagle, *Climate Exceptionalism*, 40 ENVTL. L. 53, 55 (2010). "Unlike most air pollutants, CO₂ occurs naturally in the atmosphere, is actually necessary for human life, is not toxic when breathed . . . and harms people and the environment indirectly by facilitating the greenhouse effect that has begun to change the world's climates." *Id.*

⁷ See *infra* notes 29–49 and accompanying text.

⁸ See *id.*

⁹ See Allen & Lewis, *supra* note 4, at 923–24.

¹⁰ See *infra* notes 126–154 and accompanying text.

¹¹ See *infra* notes 126–168 and accompanying text.

¹² See *infra* notes 169–183 and accompanying text.

¹³ See *infra* notes 184–254 and accompanying text.

Part I of this Note outlines the basic legal framework of the CAA, as well as how the Court's decision in *Massachusetts v. EPA* impacts that regulatory framework with respect to GHGs. Part II presents the potentially explosive applicability of the CAA to GHGs in a post-*Massachusetts v. EPA* world. Part III delineates the EPA's regulatory response to the *Massachusetts v. EPA* decision and the subsequent applicability of the CAA to GHGs. Part IV presents the legal challenges that have arisen in the wake of the EPA's actions. Part V defends the EPA's actions, drawing on the text and legislative history of the CAA, as well as judicial precedent.

I. LEGAL FRAMEWORK

A. Overview of the Clean Air Act

The CAA is a comprehensive federal statute regulating pollutant emissions from various sources.¹⁴ A forward-looking and precautionary statute, the CAA seeks to regulate pollutant emissions in order to reduce levels of air pollution to certain health-based standards nationwide.¹⁵

In its central provision, the CAA calls for the Administrator of the EPA to identify and list air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."¹⁶ The EPA must then set National Ambient Air Quality Standards (NAAQS)¹⁷ at a level that provides an "adequate margin of safety" that is necessary to protect public health.¹⁸ States must then attempt to achieve the NAAQS promulgated by the EPA for each air pollutant through the adoption of a State Implementation Plan, which the EPA may either approve or reject based on certain criteria.¹⁹ To date, the EPA has set NAAQS for six different pollutants un-

¹⁴ *Laws & Regulations: Summary of the CAA*, ENVTL. PROT. AGENCY, <http://www.epa.gov/regulations/laws/caa.html> (last updated Aug. 11, 2011).

¹⁵ See Jill Jaffe, *Scientific Uncertainty and the Regulation of Greenhouse Gases Under the Clean Air Act*, 37 *ECOLOGY L.Q.* 765, 765–66 (2010).

¹⁶ 42 U.S.C. § 7408(a)(1) (2006).

¹⁷ *Id.* § 7409(a)–(b). NAAQS are health-based, ambient air quality standards that denote an acceptable amount of certain pollutants in the air for each air pollutant. *Id.* The EPA is authorized to set both primary and secondary NAAQS—the former at a level necessary to protect public health and the latter at a level necessary to protect public welfare. *Id.* The secondary NAAQS are less relevant to the analysis in this Note.

¹⁸ *Id.* § 7409(a)–(b).

¹⁹ *Id.* § 7410(a), (c). A State Implementation Plan (SIP) is a regulatory plan, promulgated by each state and approved by the EPA, that provides a comprehensive legal frame-

der the Act.²⁰ To facilitate the maintenance of NAAQS, the CAA also contains provisions for review of new and modified sources to ensure that these sources employ advanced technology.²¹ New or modified major sources must obtain permits prior to construction and must meet certain requirements.²²

The Act's Prevention of Significant Deterioration (PSD) Program is a subset of the CAA's preconstruction permitting scheme that applies in areas of the country with air quality clean enough to meet the NAAQS for each pollutant (attainment areas), or in areas that are unclassifiable.²³ The purpose of the PSD Program is to prevent the deterioration of air quality in these regions of the country that would otherwise not be regulated because they meet the NAAQS.²⁴ The provision applies to all new or modified facilities that have the potential to emit at least 250 tons per year of any air pollutant.²⁵

Finally, Title II of the CAA contains a provision that regulates automobile emissions.²⁶ Specifically, Title II provides that the EPA shall promulgate regulations and "standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator's] judgment cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare."²⁷ It is this provision that brought the regulation of greenhouse gases (GHGs) before the United States Supreme Court.²⁸

work through which the state intends to meet the requirements of the Act. *See id.* § 7410(a). If the EPA does not approve a state's SIP, or if a state refuses to participate, the EPA will issue a federal implementation plan on the state's behalf. *Id.* § 7410(c).

²⁰ Patricia Ross McCubbin, *EPA's Endangerment Finding for Greenhouse Gases and the Potential Duty to Adopt National Ambient Air Quality Standards to Address Global Climate Change*, 33 S. ILL. U. L.J. 437, 444 & n.44 (2009). "Those six pollutants are particulate matter, sulfur dioxide, carbon monoxide, nitrogen oxides, ozone and lead." *Id.*

²¹ 42 U.S.C. §§ 7502(c), 7503 (applicable in "nonattainment" areas), 7470–7479 (applicable in "attainment" or "unclassifiable" areas).

²² *See id.* §§ 7501–7503 (for "nonattainment" preconstruction permitting definitions and requirements), 7470–7479 (for "attainment" or "unclassifiable" preconstruction permitting definitions and requirements).

²³ *See id.* §§ 7470–7479.

²⁴ *See id.* § 7470.

²⁵ *Id.* §§ 7475, 7479.

²⁶ *See id.* § 7521.

²⁷ 42 U.S.C. § 7521(a)(1).

²⁸ *See Massachusetts v. EPA*, 549 U.S. at 505.

B. *The CAA's Applicability to GHGs: Massachusetts v. EPA and the EPA's Endangerment Finding*

Until recently, the CAA was thought to apply only to emissions that conjure up traditional ideas of pollution—chemicals that are directly hazardous to human health.²⁹ Throughout the late 20th century, however, an awareness emerged that pollution could lead to problems other than direct effects to human health.³⁰ With a landmark decision by the United States Supreme Court in 2007, the traditional framework of pollution regulation was about to change.³¹

1. Historical Background: The Climate Change Debate

At the time Congress passed the CAA in 1970, the science behind human-generated global warming was just underway.³² In fact, there was very little attention paid to the issue during the debates surrounding passage of the Act.³³ In the late 1970s, the awareness of global warming and its risks gained momentum.³⁴ In response to an Act passed by Congress,³⁵ President Carter placed the task of investigating the scientific implications of man-induced climate change with the National Research Council (NRC).³⁶ The NRC found that carbon dioxide generates climate change and that “[a] wait-and-see policy may mean waiting until it is too late.”³⁷

Later, the Intergovernmental Panel on Climate Change published a comprehensive report on the issue that echoed the NRC Report linking human-generated GHG emissions to global warming.³⁸ The growing international recognition of global warming spurred an international meeting in Kyoto, Japan in 1997.³⁹ Representatives from various nations drafted a protocol setting mandatory targets for GHG emissions

²⁹ See *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008).

³⁰ See *Massachusetts v. EPA*, 549 U.S. at 507–09.

³¹ See *id.* at 528 (holding that the CAA authorizes the regulation of GHGs).

³² *Id.* at 507.

³³ *Id.* at 507 n.8.

³⁴ *Id.* at 507.

³⁵ 15 U.S.C. §§ 2902, 2904 (2006). The National Climate Program Act requires the President to “establish a national climate program that will assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications.” *Id.*

³⁶ *Massachusetts v. EPA*, 549 U.S. at 507–08.

³⁷ *Id.* at 508.

³⁸ *Id.* at 508–09.

³⁹ *Id.* at 509.

reductions in industrialized nations, which the United States refused to sign.⁴⁰

2. *Ethyl Corp. v. EPA*: The Evolution of a Statute

As the political environment evolved to encompass new discoveries regarding climate change, the CAA itself was being interpreted more expansively by courts.⁴¹ In November 1973, the EPA published final regulations concluding that lead in gasoline endangers⁴² public health and thus should be regulated under the CAA.⁴³ Industry groups challenged the final rule on the ground that there was not sufficient concrete evidence to prove that lead additives in gasoline endanger public health, and thus the rulemaking was found to be arbitrary and capricious.⁴⁴

Nevertheless in 1979, the D.C. Circuit upheld the rulemaking in *Ethyl Corp. v. EPA*, holding that because the CAA is a precautionary and preventative statute, it is the EPA's responsibility to regulate and prevent harm, even if that harm is not certain or is based on incomplete evidence.⁴⁵

Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect.⁴⁶

Instead, the CAA and “common sense demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.”⁴⁷

⁴⁰ *Id.*

⁴¹ See *Ethyl Corp. v. EPA*, 541 F.2d 1, 25, 28 (D.C. Cir. 1976) (holding that regulation under the CAA must be proactive and anticipate possible but uncertain harms).

⁴² *Massachusetts v. EPA*, 549 U.S. 497, 506 n.7 (2007). At the time of the rulemaking, section 202(a)(1) of the 1970 CAA required the EPA to determine whether the pollutant “endangers” public health or welfare. *Id.* This language was later amended in 1977 to “may reasonably be anticipated to endanger.” *Id.* The implications of this modification are important to this Note and are discussed further below.

⁴³ *Ethyl Corp.*, 541 F.2d at 10.

⁴⁴ *Id.* at 11.

⁴⁵ *Id.* at 7, 28–29.

⁴⁶ *Id.* at 28.

⁴⁷ *Id.* at 25.

The holding in *Ethyl Corp.* was later codified in the CAA by the drafters of the 1990 Amendments.⁴⁸ The drafters amended the language of section 202(a)(1) from “endangers” to “may reasonably be anticipated to endanger” to afford the EPA more discretion to protect public health and welfare in the face of scientific uncertainty.⁴⁹

3. The Commencement of Legal Action in the United States

Although the CAA evolved to encompass pollutants not originally anticipated by the Act,⁵⁰ the EPA had not yet attempted to regulate GHGs.⁵¹ The growing international sentiment that humans were causing a potentially catastrophic environmental problem, coupled with U.S. inaction to prevent such a problem, spurred a group of private organizations to file a rulemaking petition with the EPA.⁵² The petition asked that the EPA regulate GHG emission from new motor vehicles under section 202 of the CAA.⁵³ In support of their request, the petitioners noted that two successive general counsels recognized the EPA’s authority to regulate GHGs under the Act.⁵⁴ However, a new administration occupied the White House by the time the EPA responded to the petition—after more than 50,000 public comments and another scientific report from the NRC.⁵⁵

The EPA, now under the George W. Bush administration,⁵⁶ denied the petition in September 2003.⁵⁷ The EPA concluded that, upon examination of the text, history of the statute, and recent court decisions, contrary to statements of prior general counsels the CAA did not give the EPA authority to regulate global climate change.⁵⁸ Therefore,

⁴⁸ See *Massachusetts v. EPA*, 549 U.S. at 506 n.7.

⁴⁹ See *id.*

⁵⁰ See *Ethyl Corp.*, 541 F.2d at 28–29.

⁵¹ See *Massachusetts v. EPA*, 549 U.S. at 505.

⁵² See *id.* at 510.

⁵³ See *id.*

⁵⁴ *Id.* at 510–11.

⁵⁵ *Id.* at 510–11; see William J. Clinton, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/williamjclinton> (last visited Jan. 19, 2012) (the Clinton Administration governed in 1999, when the petition was filed); George W. Bush, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/georgewbush> (last visited Jan. 19, 2012) (President George W. Bush entered the White House in January 2001, and his administration governed when the petition was denied in 2003).

⁵⁶ See *George W. Bush*, WHITE HOUSE, *supra* note 55.

⁵⁷ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,922 (Sept. 8, 2003).

⁵⁸ *Id.* at 52,925.

GHGs could not be considered air pollutants under the Act.⁵⁹ The EPA gave two reasons why Congress meant for GHGs to be excluded from regulation under the CAA: (1) Congress was aware of the problem when it passed the 1990 CAA amendments, and yet did not establish standards for GHG regulation, and (2) that it had addressed the GHG problem through other legislative acts.⁶⁰ In describing the EPA's decision in *Massachusetts v. EPA*, the Court stated, "[i]n essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it."⁶¹ Furthermore, the EPA noted that even if it possessed authority to regulate GHGs under the Act, given the uncertainty surrounding GHG science and the President's allegedly comprehensive alternative approach to addressing the problem, the appropriate approach would not be regulation.⁶²

Soon after, private organizations, now joined by intervening states and local governments, challenged the EPA's decision in the D.C. Circuit.⁶³ Finding that the EPA properly exercised its authority under section 202 of the CAA, the D.C. Circuit upheld the EPA's ruling.⁶⁴ Noting that the Act gave the EPA Administrator the ability to use judgment in making an endangerment finding, the court concluded that such judgment included the consideration of external factors such as scientific uncertainty and policy judgments.⁶⁵ On June 26, 2006, the United States Supreme Court granted certiorari to review the D.C. Circuit's ruling.⁶⁶

4. *Massachusetts v. EPA*: The First Spark in a Chain Reaction

In *Massachusetts v. EPA*, the United States Supreme Court issued an authoritative judicial statement that GHGs do fall under the CAA's regulatory framework.⁶⁷ In a controversial decision, the Court ruled that GHGs are air pollutants under the meaning of section 202 of the CAA, forcing the EPA to reconsider its previous decision not to issue an en-

⁵⁹ *Id.*

⁶⁰ *Id.* at 52,926–28.

⁶¹ 549 U.S. 497, 512 (2007).

⁶² See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929–31.

⁶³ See generally *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

⁶⁴ *Id.* at 58.

⁶⁵ *Id.*

⁶⁶ *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 548 U.S. 903 (U.S. June 26, 2006) (No. 05-1120).

⁶⁷ See 549 U.S. at 528–29.

dangerment finding.⁶⁸ The Court's reasoning amounted, very simply, to a strict interpretation of the statutory text.⁶⁹ Because the text of section 202 requires the Administrator to prescribe standards to regulate the emission of any air pollutant that "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," and the Act's sweepingly broad definition of air pollutant, the Court found that there is no doubt that GHGs are were controlled under the CAA.⁷⁰

Furthermore, although the EPA argued that the Act allows the Administrator to use personal judgment in issuing an endangerment finding, the Court found that this judgment extends only to a determination of whether an air pollutant "may reasonably be anticipated to endanger public health or welfare."⁷¹ In other words, the CAA, according to the Court, provides the EPA with no discretion to consider factors external to the statutory text when making the decision to regulate.⁷²

Accordingly, the Court gave the EPA three options on how to proceed: "(1) issue a finding that GHG-related air pollution 'may reasonably be anticipated to endanger public health or welfare,' (2) issue a finding of no endangerment, or (3) provide a 'reasonable explanation' for why the agency cannot or will not exercise its discretion to make such a determination."⁷³ Noting the mandatory nature of the language in the statute, the Court concluded that if the EPA were to issue an endangerment finding under the terms of the Act, it must regulate GHG emissions from automobiles.⁷⁴

5. The Endangerment Finding

In response to the *Massachusetts v. EPA* decision, after "careful consideration of the full weight of scientific evidence and a thorough review of numerous public comments," the Administrator of the EPA issued an endangerment finding on December 15, 2009.⁷⁵ The EPA Ad-

⁶⁸ See *id.* An "endangerment finding" is the common term for a finding that an air pollutant may reasonably be anticipated to endanger public health or welfare under the terms of the Act. See *id.* at 534.

⁶⁹ See *id.* at 528–29.

⁷⁰ See *id.*

⁷¹ *Id.* at 532–33.

⁷² See *id.*

⁷³ Allen & Lewis, *supra* note 4, at 921.

⁷⁴ *Massachusetts v. EPA*, 549 U.S. at 533.

⁷⁵ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009).

ministrator found the body of scientific evidence at the time compellingly supported a finding of endangerment.⁷⁶

The EPA defined the relevant air pollutant as an aggregate “mix of six long-lived and directly-emitted greenhouse gases,”⁷⁷ that taken together endanger human health by changing Earth’s climate.⁷⁸ Specifically, the Administrator found that GHGs present a risk via “changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens.”⁷⁹ Furthermore, the EPA found that automobile emissions of this air pollutant contribute to the air pollution that endangers human health and welfare.⁸⁰ Therefore, according to the words of the statute, the EPA was now required to regulate GHGs.⁸¹

II. CHAIN REACTION: THE NON-DISCRETIONARY NATURE OF REGULATION UNDER THE CAA

The Court explained in *Massachusetts v. EPA* that an endangerment finding would not result in drastic changes to the current regulatory system, but would only result in a slight regulation of new motor vehicle emissions standards tempered by a consideration of costs.⁸² Scholars have noted, citing consequences regulating greenhouse gas emissions (GHGs) under the CAA, that the Court’s reassurances seem misinformed.⁸³ They forewarn, that “[t]he CAA is a highly interconnected statute.”⁸⁴ As a result, the EPA’s endangerment finding has the potential to set off a “regulatory chain reaction” under different sections of the CAA.⁸⁵

⁷⁶ *Id.* at 66,497.

⁷⁷ *Id.* The six GHGs are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 66,499.

⁸¹ See 42 U.S.C. § 7521(a)(1) (2006). “The Administrator *shall* by regulation prescribe . . . standards applicable to the emission of any air pollutant . . . which in [the EPA Administrator’s] judgment cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare.” *Id.* (emphasis added). Indeed, in May 2010, the EPA took action to regulate GHG emissions from vehicles for model years 2012–2016. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,324 (May 7, 2010) (codified at 40 C.F.R. pts. 85, 86, and 600).

⁸² See 549 U.S. 497, 531 (2007).

⁸³ See Allen & Lewis, *supra* note 4, at 922–23.

⁸⁴ *Id.* at 922.

⁸⁵ See *id.* at 923; Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does Chevron Set the EPA Free?*, 29 STAN. ENVTL. L.J. 283, 288 (2010).

A. National Ambient Air Quality Standards

The CAA requires the EPA to issue National Ambient Air Quality Standards (NAAQS) for an air pollutant within twelve months of its listing for regulation.⁸⁶ Furthermore, the EPA must list a pollutant for regulation if: (1) the pollutant will “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare,”⁸⁷ (2) the pollutant’s existence in the air “results from numerous or diverse mobile or stationary sources,”⁸⁸ and (3) the EPA intends to provide air quality standards under section 108 of the CAA.⁸⁹

The EPA’s endangerment finding manifests that criteria (1) and (2) are satisfied.⁹⁰ First, the very fact of the endangerment finding implies that, in the EPA Administrator’s judgment, GHG emissions from mobile sources cause or contribute to air pollution that is reasonably anticipated to endanger public health and welfare.⁹¹ Satisfying the second prong, the EPA notes that GHGs are emitted by far more numerous and varied sources than are other pollutants regulated under the Act.⁹²

Commentators note, however, that the third criterion appears to provide the EPA with discretion regarding whether to issue a NAAQS for any air pollutant, even if an endangerment finding has already been issued.⁹³ In other words, read literally, the word “plans” seems to imply that the EPA Administrator has complete discretion regarding whether to list a pollutant, regardless of its dangerousness or ubiquity.⁹⁴ When looking at the structure and legislative history of the CAA, however, a scholar contends that this result was not intended.⁹⁵ For example, Title I of the CAA is centered upon a series of deadlines and mandatory EPA duties enforceable by citizen suits.⁹⁶ “If subparagraph C allows EPA to

⁸⁶ 42 U.S.C. §§ 7408(a), 7409(a). Section 7408(a) requires the EPA to issue quality criteria for each pollutant for which an endangerment finding has been issued. *Id.* § 7408(a). Section 7409(a) requires the EPA to issue NAAQS for each pollutant for which quality criteria have been issued. *Id.* § 7409(a).

⁸⁷ *Id.* § 7408(a)(1)(A).

⁸⁸ *Id.* § 7408(a)(1)(B).

⁸⁹ *Id.* § 7408(a)(1)(C).

⁹⁰ See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497, 66,543 (Dec. 15, 2009).

⁹¹ *Id.* at 66,497.

⁹² *Id.* at 66,543.

⁹³ See 42 U.S.C. § 7408(a)(1)(C); McCubbin, *supra* note 20, at 451; Richardson, *supra* note 85, at 300–01.

⁹⁴ See 42 U.S.C. § 7408(a)(1)(C); McCubbin, *supra* note 20, at 451; Richardson, *supra* note 85, at 300–01.

⁹⁵ See McCubbin, *supra* note 20, at 450–51.

⁹⁶ *Id.*

choose whether to proceed with the air quality criteria for a particular pollutant, then the whole series of apparently mandatory obligations becomes unhinged.⁹⁷

In fact, it was not long after the passage of the CAA that the Second Circuit argued this same position in their decision in *Natural Resources Defense Council, Inc. v. Train* in 1976.⁹⁸ In that case, in which the EPA believed that it had discretion not to issue a NAAQS for lead under section 108, the Second Circuit disagreed.⁹⁹

The structure of the Clean Air Act as amended in 1970, its legislative history, and the judicial gloss placed upon the Act leave no room for an interpretation which makes the issuance of air quality standards for lead under § 108 discretionary. The Congress sought to eliminate, not perpetuate, opportunity for administrative foot-dragging. Once 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.¹⁰⁰

Thus, because the GHG endangerment finding satisfied the first and second prongs of section 108 of the Act, many legal analysts have argued that the EPA now has a mandatory obligation to list GHGs as a criteria pollutant and promulgate a NAAQS.¹⁰¹ Nevertheless, the EPA has not taken any action toward this end, essentially ignoring the Second Circuit's opinion and retaining the discretion—that the court seemed to foreclose—not to list GHGs.¹⁰²

B. Regulation Under the PSD Preconstruction Permitting Program

In addition to arguably requiring the EPA to establish a NAAQS for GHGs,¹⁰³ the endangerment finding and subsequent regulation of mobile source emissions also triggers the application of the CAA's Prevention of Significant Deterioration (PSD) Program to GHGs.¹⁰⁴ The PSD Program requires new major sources and proposed modifications to existing major sources of air pollutants to obtain a permit prior to

⁹⁷ *Id.* at 451.

⁹⁸ See 545 F.2d 320, 324, 328 (2d Cir. 1976).

⁹⁹ See *id.* at 324, 328.

¹⁰⁰ *Id.* at 328.

¹⁰¹ See McCubbin, *supra* note 20, at 452.

¹⁰² See Richardson, *supra* note 85, at 300–01.

¹⁰³ See McCubbin, *supra* note 20, at 452.

¹⁰⁴ Allen & Lewis, *supra* note 4, at 923.

construction.¹⁰⁵ For PSD purposes, the CAA defines “major emitting facility”¹⁰⁶ as (1) a source in a specifically enumerated source category that is capable of emitting 100 tons per year (tpy) of any air pollutant or (2) any other facility that is capable of emitting 250 tpy of any air pollutant.¹⁰⁷

Historically, there was some debate about the definition of “major emitting facility,” and thus to which sources the PSD Program applied.¹⁰⁸ In 1978, after the EPA promulgated regulations implementing the PSD Program under the 1977 Amendments to the CAA, the regulations were challenged in court.¹⁰⁹ In its interpretation of the applicability of the PSD provisions to certain sources of air pollution, the D.C. Circuit in *Alabama Power Co. v. Costle* noted that the PSD Program applies very broadly.¹¹⁰ The term “any air pollutant,” according to the court, meant any pollutant that is otherwise regulated under the Act, even those pollutants for which NAAQS have not been established.¹¹¹ The court held that the PSD Program was not meant to apply only to a limited class of defined pollutants, but to all facilities that had the potential to emit large quantities of any harmful substances that “befoul our nation’s air.”¹¹² Thus, citing the broad applicability of the PSD provisions outlined in *Alabama Power*, scholars have noted that once GHGs are regulated under the Title II mobile source program, they also become regulated under the PSD Program.¹¹³

Unlike the promulgation of a NAAQS for GHGs,¹¹⁴ the Obama administration has chosen not to ignore the triggering of PSD applicability, and has issued a rule applying PSD provisions to GHG emitters under the CAA.¹¹⁵ This rule, which the EPA refers to as the Tailoring Rule, is the focus of this Note.¹¹⁶

¹⁰⁵ See 42 U.S.C. §§ 7475(a), 7479(2)(C) (2006) (note that “modification” is included in the Part’s definition of “construction”).

¹⁰⁶ See 40 C.F.R. § 52.21(a)(2)(i)–(iii) (2010). The EPA, in its regulations implementing the PSD provisions of the Act, uses the word “major stationary source” synonymously with “major emitting facility.” *Id.*

¹⁰⁷ 42 U.S.C. § 7479(1).

¹⁰⁸ See *Alabama Power Co. v. Costle*, 636 F.2d 323, 352 (D.C. Cir. 1979).

¹⁰⁹ See *id.* at 343.

¹¹⁰ See *id.* at 352 n.60.

¹¹¹ *Id.* at 352.

¹¹² *Id.* at 352–53.

¹¹³ See Allen & Lewis, *supra* note 4, at 923; Richardson, *supra* note 85, at 288.

¹¹⁴ See *supra* note 102 and accompanying text.

¹¹⁵ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516–18 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, and 71).

¹¹⁶ *Id.* at 31,514.

C. *Practical Implications of the Chain Reaction*

The applicability of various provisions of the CAA to GHGs has the potential to affect millions of sources across the United States.¹¹⁷ Specifically, and most relevant to this Note, the PSD provision of the CAA requires preconstruction permits for major stationary sources of any air pollutant in excess of 250 tpy.¹¹⁸ Currently, only large industrial factories (and some small manufacturers) are subject to the PSD requirements because they are the only sources large enough to emit more than 250 tpy of the currently regulated pollutants.¹¹⁹ Unlike the pollutants currently subject to regulation under the Act, however, GHGs are emitted in large quantities not only by industrial facilities, but also by small commercial structures.¹²⁰ Therefore, if the PSD provision were to become applicable to GHGs under the current text of the Act, approximately 1.2 million buildings and facilities across the country would become subject to the PSD preconstruction review process and permitting requirements (according to the U.S. Chamber of Commerce).¹²¹

This potential increase presents significant problems, as the PSD preconstruction review process is expensive.¹²² First, firms must comply with PSD requirements by implementing best available control technology to reduce emissions according to industry best practices.¹²³ Furthermore, each source must undergo a lengthy permitting process with the local agency to ensure its compliance with the PSD requirements.¹²⁴ EPA has estimated that each permit costs the regulated source an average of over \$125,000 and requires the EPA (or the state environmental agency) to invest over 300 hours and \$20,000.¹²⁵

¹¹⁷ Allen & Lewis, *supra* note 4, at 923–24.

¹¹⁸ 42 U.S.C. §§ 7475(a), 7479(1) (2006).

¹¹⁹ Allen & Lewis, *supra* note 4, at 923.

¹²⁰ *Id.* at 923–24.

¹²¹ *Id.* This includes “office buildings, hotels, large retail stores, enclosed shopping malls, small manufacturing firms, and commercial kitchens.” *Id.*

¹²² *See id.* at 924.

¹²³ 42 U.S.C. § 7475(a)(4); Allen & Lewis, *supra* note 4, at 924.

¹²⁴ Allen & Lewis, *supra* note 4, at 924.

¹²⁵ *Id.*

III. THE REGULATORY RESPONSE: THE CHAIN REACTION GENERATES ABSURD RESULTS

A. *Advance Notice of Proposed Rulemaking*

In the first official EPA response to the *Massachusetts v. EPA* decision, the EPA, under the outgoing George W. Bush administration, issued an advance notice of proposed rulemaking (ANPR), which noted the far-reaching implications of the Court's ruling and solicited comments regarding the prospect of regulating greenhouse gases (GHGs) under the CAA.¹²⁶ The EPA expressly noted the likelihood that the applicability of the Act to mobile sources would also trigger applicability of other CAA provisions to small stationary sources.¹²⁷ Specifically, the EPA noted in the ANPR the high likelihood that, if the EPA were to issue an endangerment finding, it would immediately trigger PSD requirements for sources with the potential to emit more than 250 tons per year (tpy) of GHGs.¹²⁸ Noting the harmful effects that regulating GHGs under these provisions would have on the American economy, the EPA in 2008 aligned itself emphatically against the idea.¹²⁹

[T]he Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations.¹³⁰

B. *The Tailoring Rule and the Absurd Results Canon*

1. The Tailoring Rule

The Obama administration did not take the concerns raised by the Bush administration in the ANPR lightly.¹³¹ In fact, the Obama administration echoed these concerns even more strongly, noting that “[i]f PSD . . . requirements apply at the applicability levels provided under

¹²⁶ Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,354–55 (July 30, 2008) (to be codified at 40 C.F.R. ch. I).

¹²⁷ *Id.* at 44,355.

¹²⁸ *Id.* at 44,367.

¹²⁹ *See id.* at 44,355.

¹³⁰ *Id.*

¹³¹ *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,292 (proposed Oct. 27, 2009).

the CAA, State permitting authorities would be paralyzed by permit applications in numbers that are *orders of magnitude* greater than their current administrative resources could accommodate.”¹³² The EPA noted, as it did under its predecessor regime, that the number of sources regulated under the PSD Program would be astronomically high and overwhelm administrative resources.¹³³ Specifically, the EPA estimated that per-year PSD permit applications would increase from 280 to approximately 41,000, a 140-fold increase.¹³⁴

Rather than denounce the CAA as an outdated and improper mode of regulating GHGs,¹³⁵ however, on October 27, 2009, the EPA published a proposed rule that would alter and delay the applicability of the PSD Program for certain GHG emitters.¹³⁶ To address the difficulties noted above, the proposed tailoring rule advocated a phasing approach to the application of the PSD Program to GHGs.¹³⁷

During Step I, beginning on January 2, 2011, no sources will be subject to regulation—and thus, subject to PSD permitting—based solely on GHG emissions.¹³⁸ Instead, only sources that already require PSD permits based on their potential to emit non-GHG pollutants—so called “anyway sources”¹³⁹—must meet PSD permitting for GHGs.¹⁴⁰ Furthermore, Step I only applies if the newly constructed facility will have the potential to emit at least 75,000 tpy of GHGs (or a modified facility, where the modification results in at least a 75,000 tpy emissions increase), measured in carbon dioxide equivalents (CO_{2e}).¹⁴¹

The second step, which begins on July 1, 2011, accounts for GHG emissions standing alone when determining whether a source must apply for a PSD permit.¹⁴² In addition, after this date, a new source will be subject to PSD permitting requirements if it has the potential to emit 100,000 tpy of CO_{2e} (or modification projects that increase potential

¹³² *Id.* (emphasis added).

¹³³ *Id.* at 55,294.

¹³⁴ *Id.* at 55,301.

¹³⁵ See Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008) (to be codified at 40 C.F.R. ch. I).

¹³⁶ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. at 55,292.

¹³⁷ *Id.*

¹³⁸ See 40 C.F.R. § 52.21(b)(49)(iv) (2010).

¹³⁹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,523 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, and 71).

¹⁴⁰ See 40 C.F.R. § 52.21(b)(49)(iv).

¹⁴¹ *Id.* Note that CO_{2e} are measured based on the global warming potential of each greenhouse gas. *Id.* § 52.21(b)(49)(ii).

¹⁴² *Id.* § 52.21(b)(49)(v).

GHG emissions by 75,000 tpy CO_{2e} for an existing 100,000 tpy CO_{2e}-emitting source).¹⁴³ This is a significant relaxation of the normal statutory threshold of 250 tpy of any air pollutant.¹⁴⁴

Finally, the EPA noted in the Tailoring Rule that it would issue a supplemental notice of proposed rulemaking sometime in 2011 to address the potential applicability of the PSD provisions to smaller sources.¹⁴⁵ The EPA will complete this rulemaking by July 2012 and it will go into effect in July 2013.¹⁴⁶ The Agency made clear, however, that PSD regulations would not apply to sources with the potential to emit less than 50,000 tpy of CO_{2e} until at least April 2016.¹⁴⁷

According to the EPA, this new, phased approach will not only significantly alleviate the financial burdens of the new rule (both on EPA and on regulated sources), but also will not comprise the overall goal of reducing GHG emissions.¹⁴⁸ That is, even after the second step, only about 550 new sources—as opposed to tens of thousands¹⁴⁹—will come under regulation,¹⁵⁰ while eighty-six percent of GHG emissions that would be reduced under a facial application will still be reduced under a tailored application of the statute.¹⁵¹

2. Absurd Results: The Legal Basis for Rule

The key question that arises from the Tailoring Rule is, given the statutory language that defines a major stationary source as a factory with the potential to emit 250 tpy of any air pollutant subject to regulation under CAA,¹⁵² from where does the EPA derive the authority to rewrite this definition for the purpose of regulating GHGs? The answer, according to the EPA, comes from both agency discretion established in

¹⁴³ *Id.*

¹⁴⁴ See 42 U.S.C. § 7479(1) (2006); 40 C.F.R. § 52.21(b)(49)(v).

¹⁴⁵ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, and 71).

¹⁴⁶ *Id.*

¹⁴⁷ 40 C.F.R. § 52.22(b)(2)(iii); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

¹⁴⁸ See EPA's Resp. to Mots. to Stay at 62–63, *Coal. for Responsible Regulation v. EPA*, No. 09-1322 and consolidated cases (D.C. Cir. Oct. 28, 2010) (motion denied Dec. 10, 2010).

¹⁴⁹ See *supra* note 134 and accompanying text.

¹⁵⁰ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,540, tbl.VI.

¹⁵¹ See *id.* at 31,571.

¹⁵² See *supra* notes 100–117 and accompanying text.

the wake of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁵³ as well as the absurd results doctrine.¹⁵⁴

a. *Chevron: Agency Discretion in the Face of Legislative Silence*

The United States Supreme Court's ruling in *Chevron* governs the level of review that courts exercise over agency legislative interpretation.¹⁵⁵ The case lays out a two-part test for when agency interpretations are valid under the enabling legislation: (1) if Congress's intent is clear, the agency (and the court when reviewing the agency's decision) must give effect to that unambiguous intent, or (2) if Congress has not addressed the issue, however, or if its intent is ambiguous, then the agency may employ a permissible interpretation of the statute.¹⁵⁶

The Court further noted that Congress may delegate authority on a particular issue to an agency in implicit rather than explicit terms, and, in such cases, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."¹⁵⁷ Finally, the Court observed a long judicial history of according considerable weight and deference to agency interpretations of the statutes it has been trusted to administer.¹⁵⁸

b. *Absurd Results*

By applying *Chevron* deference to the Tailoring Rule, the EPA invokes the absurd results doctrine to provide a legal justification for its decision to override the text of the statute and tailor the PSD Program to encompass GHGs.¹⁵⁹ According to the clear text of the Act, the PSD provisions are applicable to any new or modified major source that emits more than 250 tpy of any air pollutant.¹⁶⁰ Thus, under a traditional *Chevron* analysis, Congress did not afford discretion in its interpretation of the PSD applicability threshold because the statute was un-

¹⁵³ 467 U.S. 837 (1984).

¹⁵⁴ See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,517.

¹⁵⁵ Richardson, *supra* note 85, at 307.

¹⁵⁶ *Chevron*, 467 U.S. at 842–43.

¹⁵⁷ *Id.* at 843–44.

¹⁵⁸ *Id.* at 844.

¹⁵⁹ See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,517 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71).

¹⁶⁰ 42 U.S.C. § 7479(1) (2006).

ambiguous.¹⁶¹ As commentators have noted, “there is nothing ambiguous about the 250 tpy standard already established under the Clean Air Act.”¹⁶² So how does the absurd results doctrine inject ambiguity into clear legislative text?

The absurd results doctrine, according to the EPA, stands for the proposition that “where a literal reading of a statutory term would lead to absurd results, the term simply has no meaning . . . and is the proper subject of construction by EPA and the courts.”¹⁶³ In other words, if applying the literal meaning of legislation would produce a result that is senseless and is inconsistent with congressional intent, then “the literal meaning . . . should not be considered.”¹⁶⁴ In such a case, the agency should proceed under the second prong of the *Chevron* analysis—as if Congress had not addressed the issue or had done so ambiguously—applying a reasonable construction of the Act to the issue at hand.¹⁶⁵

The EPA feels that the CAA’s literal application to GHGs would be absurd, given the consequences.¹⁶⁶ Specifically, the EPA posits that the agency structure would be so backlogged that it would be impossible to implement an effective permitting program.¹⁶⁷ Thus, the EPA argues that it is free under *Chevron* to implement its own interpretation of the Act—namely, to change the PSD applicability threshold from 250 tpy to 100,000 tpy—provided it acts reasonably in light of congressional intent.¹⁶⁸

IV. LEGAL CHALLENGES TO EPA ACTION

On September 15, 2010, after the EPA published its final Tailoring Rule, a group of industry representatives (the movants)—led by the Coalition for Responsible Regulation—filed a motion seeking to stay the implementation of the EPA rules.¹⁶⁹ The movants, in a brief in support of their motion to stay, made two primary arguments that are important to this Note’s analysis. First, the movants argued that the en-

¹⁶¹ See *Chevron*, 467 U.S. at 842–43.

¹⁶² Allen & Lewis, *supra* note 4, at 931.

¹⁶³ EPA’s Resp. to Mots. to Stay, *supra* note 148, at 61 (internal quotation omitted).

¹⁶⁴ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,517.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 31,516–17.

¹⁶⁹ See generally Mot. for Stay, Coal. for Responsible Regulation v. EPA, No. 09-1322 and consolidated cases (D.C. Cir. Sept. 15, 2010) (motion for stay denied Dec. 10, 2010).

dangerment finding is not legally valid under the CAA.¹⁷⁰ Second, the movants argued that the Tailoring Rule is without legal authority and is “[an] illegal solution[] to a legal problem of EPA’s own creation.”¹⁷¹

A. Challenge to the Endangerment Finding

First, the movants argued that the EPA illegally sub-delegated their authority to outside agencies to conduct the scientific analysis underpinning the endangerment finding.¹⁷² Specifically, they contended that section 202(a) of the CAA requires the EPA Administrator to issue an endangerment finding when, in the Administrator’s judgment, the pollutants may reasonably be anticipated to endanger public health or welfare.¹⁷³ In issuing the endangerment finding, however, the EPA primarily relied on outside studies by the Intergovernmental Panel on Climate Change (IPCC) to form the basis of its scientific analysis.¹⁷⁴ Thus, according to the movants in this case, the EPA Administrator did not exercise the Administrator’s own judgment, and thus the EPA’s issuance of the endangerment finding was outside the grant of authority in the statute.¹⁷⁵

B. Challenge to the Tailoring Rule

The movants also challenged the Tailoring Rule, contending that the EPA’s invocation of the absurd results doctrine is an arbitrary and capricious answer to a problem it created through an initial misreading of the CAA.¹⁷⁶ Specifically, the movants argued that the PSD provisions in the CAA were meant only to apply to the criteria pollutants already defined in 1977, the time of passage, and not to future criteria pollutants or any other emissions.¹⁷⁷ They asserted that the correct interpretation of the language “each pollutant subject to regulation under this chapter” contained in the Prevention of Significant Deterioration (PSD) provisions is a present-tense interpretation applicable only to pollutants contemplated by the 1977 Act.¹⁷⁸ Thus, under their reading of the statute, regulation of greenhouse gases (GHGs) from vehicle

¹⁷⁰ *Id.* at 23–24.

¹⁷¹ *Id.* at 47–56.

¹⁷² *Id.* at 24–29.

¹⁷³ *Id.* at 24–25.

¹⁷⁴ *Id.*

¹⁷⁵ See Mot. for Stay, *supra* note 169, at 24–25.

¹⁷⁶ *Id.* at 48–49.

¹⁷⁷ See *id.* at 49–50.

¹⁷⁸ *Id.* at 50.

emissions would not trigger the applicability of the PSD provisions at all.¹⁷⁹ Such a reading would render the invocation of the absurd results doctrine unnecessary.¹⁸⁰

In other words, the movants argued that the EPA created the absurd results themselves by refusing to follow the unambiguous reading of the statute.¹⁸¹ The movants further argued that by applying the PSD provisions to GHGs—an act that they were without authority to do—the EPA unlawfully created the absurd result that, as the EPA claimed, gave it authority to ignore the plain text of the Act.¹⁸² “EPA cannot create its own administrative necessity by ignoring one provision of the Act, and then solve that manufactured necessity by ignoring another.”¹⁸³

V. ABSURD RESULTS? NOT SO ABSURD AFTER ALL

The movants’ arguments in *Coalition for Responsible Regulation v. EPA*, presents strong challenges to the legal authority underlying EPA’s Tailoring Rule.¹⁸⁴ The Court’s decision in *Massachusetts v. EPA*, however, set in motion a mandatory chain of greenhouse gas (GHG) regulation under the CAA, which, given the congressional intent behind the Act and the EPA’s role in implementing it, make the EPA’s actions both legally justified and mandatory.¹⁸⁵

A. *The Endangerment Finding and Applicability of the PSD Provisions Were Mandated by Massachusetts v. EPA and Legislative Intent*

First, the movants argued that the EPA was not legally authorized to issue an endangerment finding.¹⁸⁶ This argument, however, is foreclosed by the legislative history of the Act, by the Act’s broad language, and by long-standing precedent, including *Massachusetts v. EPA*.¹⁸⁷

1. The Evolution of a Flexible Statute

The precedent and legislative history surrounding the CAA urges a forward-looking, precautionary, and flexible approach to its applica-

¹⁷⁹ *See id.*

¹⁸⁰ *Id.* at 53–54.

¹⁸¹ *See* Mot. for Stay, *supra* note 169, at 53–54.

¹⁸² *Id.* at 48–54.

¹⁸³ *Id.* at 53.

¹⁸⁴ *See id.* at 47–56.

¹⁸⁵ *See supra* notes 66–125 and accompanying text.

¹⁸⁶ Mot. for Stay, *supra* note 169, at 23–35.

¹⁸⁷ *See* discussion *infra* notes 188–212 and accompanying text.

tion.¹⁸⁸ First, in *Ethyl Corporation v. EPA*, the D.C. Circuit noted that the language of CAA and related judicial interpretations manifests its precautionary nature and provides the EPA with discretion—and, in fact, a mandate—to regulate to “precede, and, optimally, prevent, the perceived threat.”¹⁸⁹ The court further noted that in the case of precautionary statutes such as the CAA, and where scientific evidence is uncertain and cutting-edge, the EPA need not provide “rigorous step-by-step proof of cause and effect,” but instead must only make a reasonable judgment based on the available science that the pollutant will endanger public health or welfare.¹⁹⁰

The legislative history of the CAA confirms the D.C. Circuit’s analysis.¹⁹¹ In 1977, Congress amended the CAA to codify the court’s holding in *Ethyl*.¹⁹² Specifically, Congress amended endangerment language in the Act, changing “which endangers” to “which may reasonably be anticipated to endanger” to solidify the EPA’s broad discretion when regulating under such a forward-looking, precautionary statute.¹⁹³

2. The Mandate of *Massachusetts v. EPA*

The Court in *Massachusetts v. EPA* clearly stated that the EPA must take action toward regulating GHGs under the CAA or provide a statutory justification for not doing so.¹⁹⁴ Specifically, the Court mandated that the EPA take one of three courses of action: (1) issue an endangerment finding; (2) “issue a finding of no endangerment;” or (3) provide a “reasonable explanation” for its decision not to act.¹⁹⁵ Although the EPA ultimately chose the first option, based on the Court’s opinion and the language of the Act, it was more a requirement than choice.

First, the language of the statute, when considered in light of judicial precedent, ensures that option two is not viable.¹⁹⁶ As is clear from case law, the EPA has broad authority and, in fact, a mandate to regulate preventatively in the face of uncertain science.¹⁹⁷ Also, the language of the Act clearly establishes that weather and climate effects are

¹⁸⁸ See *supra* notes 41–49 and accompanying text.

¹⁸⁹ See 541 F.2d 1, 13 (D.C. Cir. 1976).

¹⁹⁰ *Id.* at 28.

¹⁹¹ See *Massachusetts v. EPA*, 549 U.S. 497, 506 n.7 (2007).

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See *id.* at 532–33.

¹⁹⁵ *Id.* at 533; Allen & Lewis, *supra* note 4, at 921.

¹⁹⁶ See 42 U.S.C. § 7408(a) (2006); *Ethyl Corp.*, 541 F.2d at 13, 28

¹⁹⁷ See *Ethyl Corp.*, 541 F.2d at 13, 28.

included in the possible harms to public welfare that may be considered in an endangerment finding.¹⁹⁸

Second, the Supreme Court's explanation of the extent of the EPA's judgment in whether or not to act effectively removes the viability of the third option.¹⁹⁹ The Court noted that "the use of the word 'judgment' is not a roving license to ignore the statutory text."²⁰⁰ Instead, the only discretion that the EPA possesses is whether GHG emissions "cause[], or contribute[] to, air pollution which may reasonably be anticipated to endanger public health or welfare."²⁰¹

Furthermore, the Court makes clear that declining to regulate for external reasons, such as political circumstances or scientific uncertainty, are not valid uses of the EPA's discretion.²⁰² The only question, the Court notes, is "whether sufficient information exists to make an endangerment finding."²⁰³ Given the circumstances surrounding the case, this question could only be answered in the affirmative.²⁰⁴ Thus, the EPA may not simply decline to consider the issue of climate change under the Act.²⁰⁵

3. The Appropriateness of the Endangerment Finding

Finally, contrary to the movants' arguments in *Coalition for Responsible Regulation v. EPA*, the EPA acted appropriately in relying on IPCC research regarding climate change and did not impermissibly subdelegate its authority to the IPCC.²⁰⁶ Although an agency may not simply rubber stamp the research and reports of an external entity, it may utilize these reports in forming its own opinion.²⁰⁷

The agency did not blindly approve the scientific articles on which it based the endangerment finding.²⁰⁸ Instead, it conducted an in-depth analysis of the IPCC findings, considering the foundation, con-

¹⁹⁸ 42 U.S.C. § 7602(h).

¹⁹⁹ *Massachusetts v. EPA*, 549 U.S. at 532–33.

²⁰⁰ *Id.* at 533.

²⁰¹ *See id.* at 532–33.

²⁰² *See id.* at 533–34.

²⁰³ *See id.* at 534.

²⁰⁴ *See supra* notes 188–193 and accompanying text.

²⁰⁵ *See Massachusetts v. EPA*, 549 U.S. at 534.

²⁰⁶ *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,523–36 (Dec. 15, 2009); EPA's Resp. to Mots. to Stay, *supra* note 148, at 30–31.

²⁰⁷ *See* U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 568 (D.C. Cir. 2004).

²⁰⁸ EPA's Resp. to Mots. to Stay, *supra* note 148, at 30–31.

sensus, and trends of the scientific information, and reexamined these findings in light of public comment.²⁰⁹

Furthermore, as the D.C. Circuit noted in *Ethyl*, the EPA has a duty to regulate in a preventative manner under the CAA when faced with cutting-edge issues and uncertain science.²¹⁰ Therefore, even if the EPA itself could not find conclusive evidence of human-generated climate change, it still retained the responsibility to regulate in a reasonable manner to prevent the possibility of harm.²¹¹ Furthermore, as the EPA noted in the endangerment finding, the science was far from uncertain—rather, the evidence that GHGs endangered human health and welfare was compelling.²¹²

B. *The Tailoring Rule Is a Permissible Interpretation of the CAA and a Permissible Application of the Absurd Results Doctrine*

Opponents of the Tailoring Rule claim that it is without authority under the Act and could have been avoided by a different construction of the statute.²¹³ The Court's decision in *Massachusetts v. EPA*, however, and the regulatory cascade that followed made clear that there was no alternative construction.²¹⁴ Furthermore, judicial deference to agency interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* provides strong legal support for the Tailoring Rule.²¹⁵

I. PSD Applicability to GHGs Was Mandatory

The movants argued that the text of the Act was meant to apply only to pollutants subject to regulation at the time the PSD provisions were passed in 1977.²¹⁶ The D.C. Circuit in *Alabama Power Co. v. Costle*, however, held that the terms of the PSD provisions apply “extremely broadly” to sources that emit more than a certain threshold of “any air pollutant.”²¹⁷ In fact, the court found that the provisions apply to major

²⁰⁹ *Id.*; see Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,523–36.

²¹⁰ *Ethyl Corp.*, 541 F.2d at 13, 28.

²¹¹ See *id.*

²¹² Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,497.

²¹³ See Mot. for Stay, *supra* note 169, at 48–54.

²¹⁴ See discussion *infra* notes 216–228 and accompanying text.

²¹⁵ See discussion *infra* notes 229–240 and accompanying text.

²¹⁶ Mot. for Stay, *supra* note 169, at 49–50. The only pollutants subject to regulation at the time of passage were two criteria pollutants—sulfur dioxide and particulate matter. *Id.*

²¹⁷ 636 F.2d 323, 352 & n.60 (D.C. Cir. 1979).

emitting facilities for each pollutant that is regulated under any section of the CAA.²¹⁸

Indeed, since the decision in *Alabama Power*, the EPA's regulations have applied the provisions of the Act quite broadly—to any pollutant properly subject to regulation.²¹⁹ The EPA further defines “subject to regulation” as “subject to . . . a provision in the Clean Air Act . . . that requires actual control of the quantity of emissions of that pollutant.”²²⁰ In other words, the regulations promulgated under the PSD provisions, reflecting judicial precedent, have made clear that the phrase “any air pollutant” broadly encompass any pollutant that is subject to actual control under any provision of the CAA.²²¹ This is clearly not limited to criteria pollutants or pollutants that were subject to regulation at the time of the 1977 enactment.²²²

Therefore, as soon as the EPA passed rules governing the emission of GHGs for vehicle tailpipe emissions under section 202(a), GHGs became subject to actual control for the purposes of the PSD provision.²²³ At that time, according to the clear regulatory language and long-standing practice, GHGs were also covered under the PSD provision of the CAA.²²⁴ Thus, the movants' contention that the EPA's invocation of the absurd results doctrine was based on a misreading of the PSD provisions of the Act was, itself, based on a misreading of the Act.²²⁵ Movants argue:

[i]t makes no sense to conclude that a pollutant regulated for one purpose (tailpipe standards), from one category of sources (cars), under one title of the statute (Title II), based on one set of findings (under Section 202(a)), automatically must be regulated for an entirely different purpose (permitting programs), under a totally different regulatory scheme (Titles I and V),

²¹⁸ *Id.*

²¹⁹ See 40 C.F.R. § 52.21(b)(50) (2010). The provisions of the Act apply to any “major stationary source,” which is analogous to the definition of “major emitting facility” in the text of the Act itself. 40 C.F.R. §§ 52.21(a)(2)(i), (b)(1)(i)(b); see 42 U.S.C. § 7479(1) (2006). The EPA defines the term “major stationary source” as any source that has the potential to emit 250 tpy or more of any “regulated NSR pollutant.” 40 C.F.R. § 52.21(b)(1)(i)(b). It then goes on to define “regulated NSR pollutant” as any pollutant that is “otherwise . . . subject to regulation under this act.” *Id.* § 52.21(b)(50)(iv).

²²⁰ *Id.* § 52.21(b)(49).

²²¹ *Id.*; see *Alabama Power*, 636 F.2d at 352 & n.60.

²²² See 40 C.F.R. § 52.21(b)(49).

²²³ See *id.*

²²⁴ See *supra* note 219 and accompanying text.

²²⁵ See Mot. for Stay, *supra* note 169, at 49–51; *supra* note 216 and accompanying text.

when emitted from a wholly separate category of sources (stationary).²²⁶

The very opposite is true.²²⁷ The movants' argument that the Tailoring Rule could have been avoided by a different construction of the Act is flawed because there was no other possible construction of the CAA—the applicability of the PSD provisions to GHGs was mandatory.²²⁸

2. The Absurd Results Doctrine Is Consistent with *Chevron* and Its Invocation Is Entitled to Deference

In their brief, the movants claimed that the EPA's invocation of the absurd results doctrine was outside of its authority because the language of the statute is clear.²²⁹ According to this line of reasoning, the movants argued, the court should uphold the unambiguous nature of the statute.²³⁰ Some legal commentators have echoed this argument, noting that the EPA possesses discretion in interpreting the statute only when the text of the statute does not address an issue or does so ambiguously.²³¹ “[T]here is nothing ambiguous,” these scholars argue, “about the 250 tpy standard already established under the Clean Air Act.”²³²

A closer reading of *Chevron*, however, manifests the flaw in this logic.²³³ *Chevron* stood for the proposition that agencies enjoy wide discretion when the congressional intent is not clear from the statutory text.²³⁴ Thus, simply because the text of the legislation is clear on its face, it does not necessarily follow that congressional intent is clear when applying that text to a problem that Congress could never have anticipated.²³⁵ To understand congressional intent, one must look past the text of the statute and to its objectives and other policy considerations.²³⁶

²²⁶ Motion for Stay, *supra* note 169, at 54–55.

²²⁷ See *supra* note 219 and accompanying text.

²²⁸ See *supra* note 219 and accompanying text.

²²⁹ See Mot. for Stay, *supra* note 169, at 47.

²³⁰ *Id.*

²³¹ Allen & Lewis, *supra* note 4, at 930–31.

²³² *Id.* at 931.

²³³ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²³⁴ *Id.* (emphasis added).

²³⁵ See *id.*

²³⁶ *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1067–68 (D.C. Cir. 1998) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)).

This is precisely what motivated EPA's drafting of the Tailoring Rule.²³⁷ Rather than focus on the clear words of the statute—the 250 tpy threshold for PSD applicability—the EPA realized that these words would not represent congressional intent when applied to GHGs.²³⁸ The PSD Program was not meant to apply to small sources of air pollutants, but instead, only to the truly large emitters that presented the potential to generate serious harm to the nation's pristine air quality regions.²³⁹ Thus, an approach that exempted smaller sources, but still applied the program to larger sources was reasonable—and arguably necessary—to uphold congressional intent.²⁴⁰

3. Absurd but Necessary: The EPA's Actions Were the Only Legally Permissible Means to Uphold Congressional Intent

Not only did *Chevron* provide a legal justification for the EPA's action, but the context surrounding the decision made clear that invocation of the *Chevron* doctrine was the only legally justifiable option.²⁴¹ On the one hand, the EPA could not ignore the Court's clear instruction to act, the compelling evidence that GHGs endanger human health and welfare, and the regulatory cascade that such a finding generated.²⁴² On the other hand, the EPA could not apply the clear language of the PSD provision to GHGs because such action would override congressional intent.²⁴³

Clear precedent interpreting the CAA, its legislative history, and the Supreme Court's decision in *Massachusetts v. EPA* all reinforce the conclusion that the CAA is a flexible, precautionary statute and the EPA's mandate was to regulate in a preventative manner so as to anticipate future harms.²⁴⁴ Furthermore, the Court stated that the fact that

²³⁷ See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, and 71).

²³⁸ See *id.*

²³⁹ *Alabama Power*, 636 F.2d at 353.

²⁴⁰ See *id.*; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

²⁴¹ See *Massachusetts v. EPA*, 549 U.S. at 532–33 (2007); *Chevron*, 467 U.S. at 842–43; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

²⁴² See discussion *supra* notes 184–228 and accompanying text.

²⁴³ See *Alabama Power*, 636 F.2d at 353; Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

²⁴⁴ See *supra* notes 188–193 and accompanying text.

Congress did not contemplate PSD applicability to GHGs does not bear at all upon whether it was intended to address them.²⁴⁵

While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.²⁴⁶

Thus, the EPA faced three important considerations with respect to the CAA's application to GHGs: (1) the regulation of motor vehicle emissions mandated PSD applicability to GHGs;²⁴⁷ (2) Congress clearly did not intend the PSD Program to be applicable to small sources, such as the ones that would emit 250 tpy of GHGs;²⁴⁸ and (3) Congress clearly did intend for the EPA to have discretion to apply the CAA to novel circumstances and regulate preventatively to anticipate future harms.²⁴⁹ In the face of these three truths, the EPA's only legally viable choice was to tailor the PSD threshold—applying the PSD Program to GHGs, as was legally mandated, while exempting smaller sources that Congress clearly did not intend to include.²⁵⁰

When viewed from this angle, criticism of the EPA's action is turned on its head. Assertions that “Congress did not intend to apply PSD . . . to small entities, did not intend for those programs to crash under their own weight, and did not intend for PSD to stifle economic growth” actually supports the EPA's tailoring of the PSD applicability thresholds.²⁵¹ It is precisely because Congress did not intend the PSD provisions to apply to small entities that congressional intent with respect to GHGs is unclear.²⁵² Thus, under *Chevron*, the EPA is well within its legal authority to employ an interpretation that is reasonable.²⁵³ Moreover, the EPA must do so because the alternative would apply the PSD provisions of the CAA to millions of small sources, which would

²⁴⁵ *Massachusetts v. EPA*, 549 U.S. at 532.

²⁴⁶ *Id.*

²⁴⁷ See *supra* notes 213–228 and accompanying text.

²⁴⁸ See *supra* notes 237–240 and accompanying text.

²⁴⁹ See *supra* notes 188–193 and accompanying text.

²⁵⁰ See *supra* notes 184–240 and accompanying text.

²⁵¹ See Allen & Lewis, *supra* note 4, at 933.

²⁵² See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *supra* notes 238–240 and accompanying text.

²⁵³ See *Chevron*, 467 U.S. at 843; *supra* notes 238–240 and accompanying text.

paralyze businesses and permitting authorities and clearly undermine the intent of Congress.²⁵⁴

CONCLUSION

The landmark Supreme Court decision in *Massachusetts v. EPA* drastically changed the way the CAA dealt with GHGs.²⁵⁵ The Court itself, however, could never have anticipated or intended the regulatory consequences that its ruling generated.²⁵⁶ The Court's holding mandated the EPA's endangerment finding, which in turn mandated the promulgation of a rule regulating GHG emissions from vehicles, which in turn sparked the applicability of the CAA's PSD Program to stationary source GHG emitters.²⁵⁷

The EPA faced a perilous choice. On the one hand, it could employ a literal application of the PSD Program—requiring any new source with the potential to emit more than 250 tpy of GHGs to apply for a PSD permit before construction—paralyzing permitting authorities and potentially destroying the U.S. economy.²⁵⁸ On the other hand, the EPA could choose not to regulate GHGs under the PSD provision of the Act.²⁵⁹ Both decisions, if implemented, would violate the congressional intent underlying the CAA.²⁶⁰

Thus, the EPA chose neither.²⁶¹ Instead, it tailored the PSD applicability threshold from 250 tpy to 100,000 tpy, drastically rewriting the provision to specially account for GHGs.²⁶² While at first glance this appears to be an abuse of agency discretion, on closer examination, the EPA's action seems consistent with the principles enumerated in *Chevron*.²⁶³ Furthermore, it seems to be a well-reasoned decision, which furthers the EPA's long-established preventative role in implementing the CAA.²⁶⁴

²⁵⁴ See *supra* notes 237–240 and accompanying text.

²⁵⁵ See *supra* notes 67–125 and accompanying text.

²⁵⁶ See *supra* notes 82–85 and accompanying text.

²⁵⁷ See *supra* notes 241–254 and accompanying text.

²⁵⁸ See *supra* notes 117–125 and accompanying text.

²⁵⁹ See *supra* notes 103–116 and accompanying text.

²⁶⁰ See *supra* notes 241–254 and accompanying text.

²⁶¹ See *supra* notes 241–254 and accompanying text.

²⁶² See *supra* notes 131–168 and accompanying text.

²⁶³ See *supra* notes 213–254 and accompanying text.

²⁶⁴ See *supra* notes 186–193 and accompanying text.