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Greenhouse Gas Regulation under the Clean Air Act: Does Chevron Set the EPA Free

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Greenhouse Gas Regulation Under the Clean Air Act: Does *Chevron* Set the EPA Free?

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I. INTRODUCTION

The threat of climate change is prompting Congress to consider legislation aimed at regulating greenhouse gases (GHGs). If and when this legislation passes, it will create new regulatory mechanisms for controlling GHG emissions, likely including a cap-and-trade system. The future of these legislative efforts is unclear, however, and short-term prospects for new legislation seem slim.

Comprehensive and proven air pollution legislation already exists in the form of the Clean Air Act (CAA), which grants the Environmental Protection Agency (EPA or the Agency) a variety of tools to regulate air pollutants.[1] Long before recent debates about new climate change legislation, possible regulation of GHGs under the CAA had been discussed by courts, scholars, stakeholders, and the EPA itself. Most notably, the Supreme Court's well-known 2007 ruling in *Massachusetts v. EPA* settled the question of whether GHGs could be regulated under the CAA.[2] Ever since the decision, the EPA has been working to promulgate such regulations. This process was relatively slow under the Bush administration, but has been somewhat quicker under the Obama administration.

To date, the EPA's efforts to regulate GHGs under the CAA have focused almost exclusively on GHG emissions from vehicles—so-called "mobile sources." Most significantly, in December 2009, the EPA finalized its "Endangerment Finding" under section 202 of the CAA for GHGs, which both allows and requires regulation of pollutants from mobile sources.[3] These new regulations were

1. Clean Air Act, 42 U.S.C §§ 7401-7671q (Westlaw 2010).

2. *See* Massachusetts v. EPA, 549 U.S. 497 (2007) (finding that carbon dioxide and other GHGs are "pollutants" under the CAA and that the EPA therefore must consider regulating them under section 202 of the Act).

3. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) [hereinafter Endangerment Finding].

finalized on April 1, 2010.[4] An implicit understanding has existed for some time that the EPA would move to regulate mobile sources under the CAA as required by *Massachusetts v. EPA*, while Congress would pass new legislation aimed at "stationary sources"—primarily industrial facilities and power plants. This new legislation would most likely create an emissions trading (cap-and-trade) system. Climate legislation is currently stalled in the Senate, however, and the EPA is now faced with questions of whether and how to regulate stationary sources under the CAA. The EPA appears to have answered the first of these questions by deciding to move ahead with at least some regulation of stationary sources.[5] The question of how and under which programs stationary-source GHGs will be regulated, however, remains open. The Agency believes that it has a relatively wide variety of options available to it for regulating these stationary-source GHGs under the statute.[6]

In this paper, I argue that the EPA likely lacks much of the regulatory discretion it claims to have to regulate GHGs under the CAA, and that the EPA will probably – at least initially – be forced down a narrow regulatory path that is generally considered a poor fit for addressing the GHG problem. Specifically, the EPA may be forced to set national ambient air quality standards (NAAQS) under sections 108 through 110 of the CAA.[7] The reasons for this lie in interconnections and statutory triggers built into the CAA itself. First, the EPA has already made broad claims in its recent section 202 Endangerment Finding that GHGs endanger public health or welfare.[8] These are the only substantive determinations necessary to fulfill the requirements for NAAQS regulation in

4. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, (to be published in the Federal Register), *available at* http://www.epa.gov/otaq/climate/regulations/ldv-ghg-final-rule.pdf.

5. *See* Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,476-520 (proposed July 30, 2008) [hereinafter ANPR] (proposing and discussing alternative CAA regulatory schemes for stationary GHG sources); *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (proposed October 27, 2009) [hereinafter Proposed Tailoring Rule] (proposing restriction of new source review of stationary GHG sources to "major" emitters).

6. ANPR, *supra* note 5, at 44,476 ("In this section, we explore three major pathways that the CAA provides for regulating stationary sources, as well as other stationary source authorities of the Act, and their potential applicability to GHGs.").

7. Clean Air Act, 42 U.S.C. §§ 7408-7410 (Westlaw 2010).

8. *See* Endangerment Finding, *supra* note 3, at 66,497 (stating that "the Administrator finds that greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare").

section 108 of the CAA.[9] Second, the statutory interpretation on which the EPA relies for its position (that it retains discretion despite this finding of endangerment) was rejected by a Federal Court of Appeals more than thirty years ago.[10] The basis for the EPA's belief that a court would decide the issue differently now – the intervening decision in *Chevron v. NRDC* – is likely insufficient.[11] The legal process that will lead to resolution of this question is already underway. At least one environmental group has petitioned the EPA seeking regulation of GHGs under the NAAQS.[12]

The reasons why this process will, I predict, force the EPA to regulate GHGs under the NAAQS are relatively technical. Their roots are in analysis of the CAA itself and in judicial doctrines of statutory interpretation. There are important real-world implications, however. The NAAQS program that the EPA would be forced to implement is widely believed to be a poor choice for regulation of GHGs. The program is in many ways conceptually inconsistent with the GHG problem, is slow, and precludes regulation under other CAA programs that might be a better fit. As a result, regulation of GHGs under the CAA may be more complex, more expensive, and otherwise more problematic than it would otherwise be.

The implications of using the NAAQS program to regulate GHGs are significant—if the EPA lacks the flexibility it claims to have, pressure on Congress to pass legislation that would supersede EPA CAA authority would increase. The likelihood of drawn-out litigation would also increase and the courts might then force the EPA to act more quickly than the Agency would prefer, stretching Agency resources and possibly undermining the quality of eventual regulation. The political fallout for courts and the EPA could also be significant if either or both are perceived to be imposing a suboptimal but vast regulatory program in an undemocratic fashion.

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9. 42 U.S.C. § 7408.

10. *See* NRDC v. Train, 545 F.2d 320, 328 (2d Cir. 1976) (holding issuance of air quality standards under section 108 of the CAA is not discretionary).

11. 467 U.S. 837 (1984).

12. *See, e.g.*, CTR. FOR BIO. DIVERSITY & 350.ORG, PETITION TO ESTABLISH NATIONAL POLLUTION LIMITS FOR GREENHOUSE GASES PURSUANT TO THE CLEAN AIR ACT BEFORE THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, 15 (2009) *available at* http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf.

II. STRUCTURE OF THE CLEAN AIR ACT

The Clean Air Act is among the most complex regulatory statutes in American law. It creates a wide variety of regulatory schemes targeted at different types and sources of air pollution, grants significant discretion to the EPA in implementing these schemes, and divides regulatory responsibility between federal and state governments.[13]

The majority of the CAA is devoted to regulation of air pollution from two types of sources: mobile and stationary. Generally speaking, mobile sources include vehicles and vehicle engines (primarily cars), and stationary sources include power plants and industrial facilities. The mobile source regulatory provisions in Title II of the CAA allow the EPA, among other things, to set federal emissions standards for new vehicles (section 202)[14] and to regulate fuel additives (section 211).[15]

The CAA provides that stationary sources may be regulated under one or more of three regulatory schemes. First, the EPA can set NAAQS under sections 108 through 110 of the Act.[16] The states are then charged with maintaining the NAAQS through state implementation plans (SIPs) that must be submitted to the EPA.[17] Only six pollutants are currently regulated through NAAQS, and none have been added since the 1970s.[18] Nevertheless the NAAQS are the most significant regulatory program in the CAA—the Supreme Court has called the NAAQS "the engine that drives nearly all of Title I [stationary source regulation] of the CAA."[19]

Second, the EPA can set new source performance standards (NSPS) under CAA section 111 that require new and modified emissions sources to implement specified systems for pollution control.[20] States must then regulate existing sources according to

13. For an overview of the structure and function of the CAA, see generally THE CLEAN AIR ACT HANDBOOK (David P. Martineau Jr. & David P. Novello eds., 2d ed. 2005).

14. 42 U.S.C. § 7521 (Westlaw 2010).

15. *Id.* § 7545.

16. *Id.* §§ 7408-7410.

17. *Id.*

18. 40 C.F.R. §§ 50.2-50.16 (Westlaw 2010); *see also* EPA Air and Radiation, *National Ambient Air Quality Standards*, www.epa.gov/air/criteria.html (last visited Feb. 12, 2010) (listing the NAAQS for the six criteria pollutants: carbon monoxide, lead, nitrogen dioxide, particulate matter PM_{10}, particulate matter $PM_{2.5}$, ozone, and sulfur dioxide).

19. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

20. *See* 42 U.S.C. § 7411.

guidelines set by the EPA.[21]

Third, under section 112 of the CAA, the EPA can regulate "toxic" pollutants (hazardous air pollutants, or HAPs) believed to be particularly dangerous to health or the environment by imposing strict national emissions standards.[22]

A. *Interconnected Schemes for Regulation of Air Pollution*

Among the most important features of the CAA are connections between these regulatory schemes and other elements of the statute. Regulation of a pollutant under one provision of the CAA will likely trigger regulation under other provisions, or at least force the EPA to consider regulation elsewhere. The various provisions of the CAA are best understood not as independent regulatory islands but as part of a more-or-less comprehensive framework for addressing air pollution.

One example of these interconnections is the permitting provisions of the CAA. Under the Prevention of Significant Deterioration (PSD) Program detailed in sections 160 through 169 of the CAA, new or modified emissions sources must undergo a detailed permitting process.[23] This requirement applies to any facility where emissions of a pollutant subject to regulation under the CAA exceed a specified threshold.[24] In practice, this means that the EPA lacks discretion to decide which kinds of emitters have to go through the permit process. As soon as the EPA decides to regulate emissions of a pollutant under almost any provision of the CAA, however, PSD permitting is required for all new or modified facilities that emit the regulated pollutant at levels above the statutory threshold.[25] This mandatory interrelationship will impose substantial economic and administrative costs if and when GHGs are regulated under the CAA. This trigger is also the source of substantial concern for the EPA. The Agency's recently proposed "tailoring" rule is an attempt to avoid the PSD permitting

21. *Id.* § 7411(c).

22. *Id.* § 7412.

23. *Id.* §§ 7470-7479.

24. *Id.* § 7475(a)(3).

25. The EPA recently reexamined the link between PSD permit requirements and regulation of a pollutant under other CAA provisions, and broadly confirmed the traditional legal interpretation described here. *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (April 2, 2010).

requirement for small emitters of GHGs as the Agency moves to regulate these pollutants under the CAA.[26]

B. *Endangerment Provisions*

Another important link between various regulatory schemes in the CAA, and ultimately the focus of this article, is the presence of similar threshold requirements in many of the statute's schemes. These similar provisions require the EPA to establish that a pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare,"[27] and are therefore termed "endangerment" provisions, requiring an "endangerment finding" before regulation can proceed. Endangerment provisions are found in section 108 (NAAQS),[28] section 111 (NSPS),[29] section 202 (vehicle emissions standards),[30] and section 211 (fuel additives)[31] of the CAA, among others. Many of these endangerment provisions are also framed by mandatory language, such that if the EPA does make a positive endangerment finding, it is compelled to regulate. These endangerment provisions therefore simultaneously act as threshold requirements and regulatory triggers. For example, section 202(a)(1) of the CAA provides that

> [t]he Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[32]

Therefore, section 202 of the CAA requires that the EPA issue emissions standards if it makes a finding that a pollutant emitted from vehicles endangers (or might endanger) public health or welfare. Similar mandatory language introduces other endangerment provisions elsewhere in the CAA.

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26. *See generally* Proposed Tailoring Rule, *supra* note 5.
27. 42 U.S.C. § 7521(a)(1) (Westlaw 2010).
28. *Id.* § 7408(a)(A).
29. *Id.* § 7411(b)(1)(A).
30. *Id.* § 7521(a)(1).
31. *Id.* § 7545(c)(1).
32. *Id.* § 7521(a)(1).

The mandatory character of endangerment provisions, their similar language, and their prevalence throughout the CAA create another significant set of interrelationships and triggers in the statute. If all of the endangerment provisions in the CAA were identical, any endangerment finding in one section would seem to trigger regulation throughout the entire CAA, because fulfillment of the requirements of any of the provisions for a given pollutant would fulfill the requirements of all other endangerment provisions.[33] In fact, however, no two endangerment provisions are exactly the same. Subtle differences between them mean that, in many cases, an endangerment finding in one section of the CAA will only partially fulfill the requirements of another endangerment provision; or, at most would create a presumption of endangerment under a different section. The first finding would then not automatically trigger a positive endangerment finding (and therefore regulation) under other sections. For example, compare the endangerment language under section 111(b)(1)(A) of the CAA, quoted here, with that of section 202(a)(1), quoted above:

> [t]he Administrator shall . . . publish . . . a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. [The EPA is then required to issue NSPS for listed categories].[34]

The differences between the endangerment provisions are subtle but significant. While section 202(a)(1) refers to pollutants from vehicles, section 111(b)(1)(A) instead refers to source categories—that is, classes of emitters. Furthermore, an EPA finding under section 202 that a given pollutant from vehicles endangers public health or welfare would only be relevant, not determinative, to a finding under section 111. At most, such a finding would foreclose the argument that emissions from the source category are not harmful at all, or are not pollutants. The EPA could still claim, for example, that emissions from a source category of a vehicle pollutant regulated under section 202 are at such a low level that the source category does not meet the

33. *See* ANPR, *supra* note 5, at 44,419.

34. 42 U.S.C. § 7411(b)(1)(A).

endangerment criteria and therefore need not be listed and regulated under section 111.[35] Differences among other endangerment provisions may offer the EPA similar freedom to make separate endangerment findings and, therefore, regulatory flexibility.

One endangerment provision, however, has created problems for the EPA when the Agency has attempted to distinguish it from others within the CAA. The endangerment provision in section 108(a)(1), the entry-point for the expansive NAAQS regulatory program, is structured in broad language that is very similar to that in other endangerment provisions.[36] It therefore leaves little room for the kind of discretionary gymnastics described in the previous paragraph. The EPA's attempts to exploit its perceived discretion have resulted in litigation and controversy[37] and the CAA's apparent inflexibility in this regard presents a serious problem for regulation of GHGs under the Act.

Before discussing the history and character of this problem in detail, however, it is useful to take a brief detour to explain the current status of GHG regulation under the CAA.

III. REGULATION OF GHGS UNDER THE CLEAN AIR ACT

Climate change caused by emissions of carbon dioxide and other GHGs is widely recognized as a serious problem, and has spurred both international negotiations and efforts to create new domestic legislation. Under the CAA, the U.S. already has a comprehensive statute for control of air pollution. The questions of whether and how the CAA can or should be used to regulate GHG emissions has spawned much debate and litigation, but, in 2010, may finally be reaching the point where actual regulations are imminent. Unless Congress acts to circumscribe the EPA's CAA

35. While an endangerment finding under section 202 does not fulfill the conditions of the section 111 endangerment provision, some environmental groups argue that the EPA is required to issue some GHG NSPS's. This is due – they argue – not to the section 202 Endangerment Finding, but to the Court's decision in *Massachusetts v. EPA* that GHGs are pollutants. *See* Massachusetts v. EPA, 549 U.S. 497, 529 (2007). Since the EPA has already determined that a wide variety of source categories should be regulated under the NSPS scheme, these environmental groups argue that the EPA must issue GHG NSPSs for these categories. They do not argue, however, that the EPA must make an endangerment finding for any *new* source categories. For a brief discussion of these arguments, see generally Roger Martella & Matthew Paulson, *Regulation of Greenhouse Gases Under § 115 of the Clean Air Act*, 40 Envtl. Rep. Current Dev. (BNA) 585 (Mar. 13, 2009).

36. *See* 42 U.S.C. § 7408(a)(1).

37. *See generally* NRDC v. Train, 545 F.2d 320 (2d Cir. 1976).

authority, the Agency will regulate GHG emissions under the statute—it is already well on its way to doing so for mobile-source emissions. Exactly how this will take place, particularly for stationary-source emissions, remains an open question.

A. *Massachusetts v. EPA Forces the EPA to Act*

The Supreme Court's well-known *Massachusetts v. EPA* decision in 2007 opened the door for regulation of GHGs under the CAA.[38] In the case, Massachusetts and other states sued the EPA seeking to compel the Agency to begin regulating GHGs under section 202 of the CAA (governing mobile-source emissions).[39] Under the Bush Administration, the EPA argued that GHGs were not "pollutants" within the definition of the CAA, and therefore not subject to regulation.[40] The Court rejected this argument, overturning the D.C. Circuit's holding and finding that GHGs were CAA pollutants.[41] This finding brought GHGs within the scope of the CAA not just in section 202, but also throughout the statute. It did not, however, immediately require that GHGs be regulated under the CAA. As discussed above, the regulatory schemes in the statute have endangerment provisions, requiring an assessment of whether a given pollutant endangers public health or welfare. The Court in its ruling therefore ordered the EPA to act on the endangerment provision of section 202 in one of three ways: by making an endangerment finding, by making a finding of no endangerment, or by explaining why such a finding would be impossible.[42]

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38. 549 U.S. 497 (2007).

39. *Id.* at 504-06.

40. *Id.* at 513 ("EPA believed it followed that greenhouse gases cannot be 'air pollutants' within the meaning of the Act.").

41. *Id.* at 528-29 (finding that "[t]he statutory text forecloses EPA's reading. The Clean Air Act's sweeping definition of 'air pollutant' includes '*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . . .' § 7602(g). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.' Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical . . . substance[s] which are emitted into . . . the ambient air.' The statute is unambiguous.") (alteration in original).

42. *Id.* at 533-35.

B. *Endangerment Under Section 202*

The Bush-administration EPA did not make an endangerment decision under section 202. It instead issued an "Advanced Notice of Proposed Rulemaking" in 2008 that, among other things, detailed possible regulatory approaches for GHGs under the CAA and requested comments.[43] In contrast, the Obama Administration has moved relatively quickly to respond to the Supreme Court's *Massachusetts v. EPA* directive, issuing a final endangerment finding for mobile sources under section 202 of the CAA in December 2009.[44] The current EPA's general position on GHGs is summarized by its statements regarding the December endangerment finding:

> Endangerment Finding: The Administrator finds that the current and projected concentrations of the six key well-mixed greenhouse gases . . . in the atmosphere threaten the public health and welfare of current and future generations.
>
> Cause or Contribute Finding: The Administrator finds that the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution which threatens public health and welfare.[45]

The mandatory language of section 202 described above will require the EPA to regulate mobile source emissions once the endangerment finding is finalized. The EPA formally proposed at least one component of such regulations in September 2009, announcing plans for new GHG emissions and fleet fuel economy (CAFE) standards.[46] These standards were finalized in March of 2010.[47]

In short, the EPA appears to be well on its way to regulating GHGs under the CAA. In fact, the endangerment finding means that regulation under at least one CAA provision, section 202, is

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43. *See* ANPR, *supra* note 5.

44. *See* Endangerment Finding, *supra* note 3.

45. EPA Climate Change Regulatory Initiatives, Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act, *available at* http://epa.gov/climatechange/endangerment.html (last visited Feb. 10, 2010); *see also* Endangerment Finding, *supra* note 3.

46. Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pt. 86 and pt. 600).

47. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards, *supra* note 46.

legally required. This has significant implications not only for the vehicle and engine manufacturers that will be regulated under section 202 of the statute, but also because of the interrelationships between provisions in the CAA for other GHG emitters.

C. *Options for Regulation of Stationary-Source Emissions?*

Massachusetts v. EPA, the proposed section 202 Endangerment Finding, and the EPA's recent regulations are all directed only at mobile sources of GHGs. In fact, all relate specifically to a single section of the CAA: section 202. Emissions from stationary sources, above all from fossil-fuel electricity generating plants, are an even larger source of GHGs. As discussed above, the CAA contains a variety of mechanisms for regulating these stationary sources.

In parallel, of course, Congress is considering comprehensive climate legislation that would likely supersede some of the EPA's authority under the CAA. The Waxman-Markey climate bill that the House passed in 2009 would specifically block listing GHGs under section 108 of the CAA, cleanly resolving the problem presented in this paper.[48] The 2009 Senate Kerry-Boxer bill, at least in its initial version, contains no such exclusion.[49] Early reports indicate that new legislation proposed in the Senate by Senators John Kerry, Lindsey Graham, and Joe Lieberman would include exclusionary language blocking most EPA authority over GHGs under the CAA.[50] Until and unless new legislation is passed, however, the CAA regulatory process for GHGs will continue.

Many view the EPA as having substantial discretion to decide the regulatory scheme under which it regulates stationary sources—NAAQS under section 110, NSPS under section 111, and regulation as toxic pollutants under section 112, etc. Under this

48. *See* American Clean Energy Security Act ("Waxman-Markey Act"), H.R. 2454, 111th Cong. § 831 (2009) ("As of the date of the enactment of the Safe Climate Act, no greenhouse gas may be added to the list under section 108(a) on the basis of its effect on global climate change.") Note that this would not prevent the EPA from addressing GHGs under other CAA provisions, including section 202 (mobile sources) and section 111 (performance standards for stationary sources).

49. *See* Clean Energy Jobs and American Power Act ("Kerry-Boxer Act"), S. 1733, 111th Cong. (2009); *see also* Daniel Morris, Side-by-Side Comparison of Climate and Energy Legislation, www.rff.org/wv/archive/2009/10/29/updated-side-by-side-comparison-of-climate-and-energy-legislation.aspx (last visited Nov. 23, 2009).

50. *See* Robin Bravender, *Senate Democrats, States Wary of Draft Climate Bills Pre-emption Language*, N.Y. TIMES, March 19, 2010, http://www.nytimes.com/cwire/2010/03/19/19climatewire-senate-democrats-states-wary-of-draft-climat-57897.html.

view, the Agency would be able to select the option that best allows it to design an effective regulatory program for stationary GHG sources. The EPA's 2008 ANPR takes this view.[51] It devotes hundreds of pages to a detailed analysis of these and other CAA schemes for regulation of stationary sources, and evaluates the positives and negatives of each (while requesting comment on all of them).[52] Scholars and commentators who have analyzed regulation of GHGs under the CAA have also explicitly or implicitly taken the view that the EPA has a choice among regulatory schemes.[53]

This view—that the EPA has unlimited or even broad discretion among regulatory schemes for stationary sources—is likely incorrect. Links between different provisions in the CAA circumscribe the EPA's flexibility to regulate stationary sources. As the following sections will show, the EPA very likely will be forced by its section 202 Endangerment Finding to issue a similar finding under section 108, which will then trigger regulation of GHGs under the NAAQS framework detailed under sections 109 through 110. The EPA would still retain some discretion in deciding how to implement the NAAQS, but the option of choosing *not* to issue a NAAQS for GHGs will very likely be unavailable.[54]

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51. *See* ANPR, *supra* note 5.

52. *Id.* at 44,476-520.

53. *See, e.g.*, INIMAI CHETTIAR & JASON SCHWARTZ, THE ROAD AHEAD: EPA'S OPTIONS AND OBLIGATIONS FOR REGULATING GREENHOUSE GASES (Institute For Policy Integrity) (2009) *available at* www.policyintegrity.org/publications/documents/TheRoadAhead.pdf; Larry Parker & James E. McCarthy, *Climate Change: Potential Regulation of Stationary Greenhouse Gas Sources Under the Clean Air Act*, Congressional Research Service (BNA) 1 (October 13, 2009); *see also* Martella & Paulson, *supra* note 35, at 1; Schnapf Environmental Law Center, Potential Clean Air Act Authorities for Regulating Green House Gas Emissions, www.environmental-law.net/article/documents/PotentialCAAAuthoritiesforRegulatingGHGEmissions.pdf (last visited Nov. 18, 2009); CTR. FOR CLEAN AIR POLICY, A PRAGMATIC APPROACH TO REGULATING GREENHOUSE GASES UNDER THE CLEAN AIR ACT (2009), *available at* www.ccap.org/docs/resources/614/Clean%20Air%20Act%20and%20GHGs_CCAP_March%202009.pd. All of these sources represent the EPA as having a range of options for regulation of stationary source GHGs under the CAA, and most do not address the issue of legal limits on the agency's discretion at all. Instead, most of these sources explicitly or implicitly assume that the agency has full discretion. The Chettiar and Schwartz work is an exception to this, and its discussion of limits on the EPA's discretion is discussed in detail in Sections 5.1 and 5.2 below.

54. The EPA's discretion is further limited because many of the findings that the agency must make for regulatory programs are scientific, and not purely policy-oriented. For example, the Supreme Court has held that the EPA is forbidden to consider costs when setting NAAQS: "Were it not for the hundreds of pages of briefing respondents have

Whether the EPA has this choice is important. Many observers, and the EPA itself, have criticized the NAAQS scheme as ill suited to regulation of GHGs.[55] There are three main reasons for this. First, the NAAQS are in many ways conceptually inconsistent with the GHG problem.[56] The program requires the EPA to set a national ambient air quality standard, but it is hard to see what this standard should be for GHGs. Carbon dioxide and other GHGs are ubiquitous and cause relatively little harm today, however dangerous business-as-usual emissions will be in the future. It will be difficult to determine, for example, if a GHG NAAQS should be set above or below current atmospheric levels. If it were set below current levels, it would imply that current GHG levels are dangerous to public health or welfare, which would be relatively difficult to prove. If it were set above current levels, it would similarly imply that no immediate action is required. The NAAQS program also requires states to create plans showing how the standard would be achieved, but this seems futile given the global character of the climate change problem. Unlike the local and regional pollutants currently regulated under the NAAQS program, carbon dioxide concentrations are uniform everywhere. States' contributions to emissions are also relatively small—even if a state reduced its GHG emissions to zero, it would have almost no effect on global GHG concentration or on the risk of climate change.[57]

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submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards. The language, as one scholar has noted, 'is absolute.'" Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465 (2001).

55. *See* ANPR, *supra* note 5, at 44,477-79 (discussing the difficulty of setting a NAAQS level) and at 44,480-82 (discussing difficulties for states charged with achieving or maintaining a GHG NAAQS); *see also* Brigham Daniels et al., *Regulating Climate: What Role for the Clean Air Act?*, 39 Envtl. L. Rep. (Envtl. Law Inst.) 10,837-38, (March 30, 2009) (noting that "most speakers at the conference [on CAA regulation of GHGs] argued that, if at all possible, EPA should *avoid* using the NAAQS program" and detailing objections to using NAAQS to regulate GHGs); Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1966 (2007) (stating that "regulation of carbon dioxide under the . . . NAAQS and . . . SIPs of Clean Air Act sections 109 and 110 would likely fail if carbon dioxide were listed as a "pollutant" by the EPA under section 108 of the Clean Air Act"); CTR. FOR CLEAN AIR POLICY, *supra* note 53, at 1.

56. For a more detailed account of the conceptual incompatibilities between the NAAQS and GHGs, see Daniels et al., *supra* note 55, at 10,838-39; *see also* ANPR, *supra* note 5, at 44,477-86.

57. Though the CAA requires states to regulate under the NAAQS, it also provides authority for the EPA to do so if states fail to act. One scholar has used this fact as the basis for a proposal to avoid the problem of requiring state-level regulation of stationary source GHG emissions. Under this proposal, states would submit SIPs, which the EPA would

Second, the process of listing a pollutant, setting a NAAQS, and regulating through states also takes a long time. The EPA is required by the CAA to issue a NAAQS within one year of listing a pollutant under section 108.[58] States then must create and submit implementation plans for achieving (or maintaining) that standard within three years.[59] Under this timeline, there would be a delay of up to four years between the listing of a pollutant and its regulation. Even if the NAAQS is set at a level below that of current atmospheric GHG concentrations (so that the entire United States is "in nonattainment"), states have at least ten years to come into compliance with the standard.[60] Regulation under the NAAQS therefore might not be effective for a decade or more. This does allow the EPA to avoid at least some of the problematic aspects of NAAQS regulation, and gives Congress more time to act to remedy these problems (or create a new GHG regulatory program). In the meantime, however, the Agency would still be prevented from regulating under some other CAA programs that present likely preferable alternatives to the NAAQS.

The preclusion of other CAA regulatory schemes is the third and possibly most serious of the problems caused by NAAQS regulation of GHGs. The text of the CAA specifically makes some regulatory schemes mutually exclusive with the NAAQS, including the section 112 toxic pollutants scheme[61] or, most importantly, performance standards for existing sources in section 111(d).[62] Even those programs that would not be directly precluded by NAAQS regulation might have difficulty operating effectively

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reject in favor of a federal implementation plan that all states would share. *See* Wiener, *supra* note 55, at 1967.

58. 42 U.S.C. § 7408(a)(2) (Westlaw 2010).

59. *Id.* § 7410(a). The EPA can extend this period by eighteen months for SIPs applying only to a secondary NAAQS, bringing the total delay to over five years from the date of listing. *See id.* § 7410(b).

60. If the EPA sets a "primary" NAAQS based on dangers to public health, the states have five years to meet the NAAQS, extendable by the agency to ten years. 42 U.S.C. § 7502(a)(2)(A). If the EPA only sets a "secondary" NAAQS, based on dangers to public welfare, states have no specific deadline (only the general requirement that the standard be met "as expeditiously as practicable"). *Id.* § 7502(a)(2)(B).

61. *Id.* § 7412(b)(2) (stating that, subject to narrow exception, "[n]o air pollutant which is listed under section 7408(a) may be added to the list"). The existence of this exclusion suggests that the EPA might be able to regulate under a combination of section 202 and section 112, but not sections 108 and 110. Section 112, with its strict language and low emission threshold levels, however, is considered by most to be a poor fit for GHG regulation.

62. *Id.* § 7411(d)(1)(A)(i).

alongside it. This is perhaps the most significant negative impact if the EPA is forced down the NAAQS path. Performance standards are a particularly attractive method of regulating GHGs under the CAA, and would require use of section 111(d) to include existing sources.[63] This would be impossible if a GHG NAAQS exists. These statutory preclusions come into effect as soon as a pollutant is listed, exacerbating the problem. The EPA cannot use the delays inherent in NAAQS regulation to institute a more effective and/or efficient GHG regulatory program in the short term if elements of that program are precluded by the first stage of the NAAQS process. The result is that the EPA may not be able to regulate GHGs effectively under the CAA in the short term, and may be distracted by setting up a NAAQS program that will be of limited value when it is finally implemented.

All of these problems are distinct from those most frequently identified as arising from the section 202 endangerment finding and CAA GHG regulation in general—permitting (PSD/NSR) requirements for small GHG sources. It is these permitting problems that the EPA's proposed tailoring rule is designed to address, not those discussed above arising from NAAQS regulation of GHGs. The tailoring rule, even if it is found by the courts to be legal or rendered unnecessary by congressional action, will unfortunately do nothing to alleviate the problems identified in this paper.

A few commentators have argued that a GHG NAAQS could be a useful part of broader GHG regulation.[64] It is true that the NAAQS are not without some advantages. There is precedent, for example, for creating a cap-and-trade style program for pollutants regulated under the NAAQS.[65] The fact that a GHG NAAQS would

63. *See, e.g.*, Parker & McCarthy, *supra* note 53, at 11-12 (noting that "[g]iven the difficulties in following the first two paths [NAAQS and section 112], much of the attention, including EPA's, has been on the third path [NSPS]"); *see also* CHETTIAR & SCHWARTZ, *supra* note 53, at 86-91.

64. *See generally* Thomas D. Peterson et al., *Developing a Comprehensive Approach to Climate Change Policy in the United States that Fully Integrates Levels of Government and Economic Sectors*, 26 VA. ENVTL. L.J. 227 (2008); *see also* CHETTIAR & SCHWARTZ, *supra* note 53, at 78-86.

65. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356, 57,456-76 (Oct. 27, 1998) (creating an emissions trading system for nitrous oxides through SIPs submitted under the nitrous oxide NAAQS). The nitrous oxide trading system is among the largest emissions trading programs in the world and is widely perceived to have been successful at reducing nitrous oxide emissions at

be problematic does not, of course, tell us whether other CAA schemes such as regulation under section 111 (NSPS) would have problems of their own. They might, and any analysis of the NAAQS must not fall victim to the "nirvana fallacy"—NAAQS and any other regulatory option should be compared to realistic alternatives. Nevertheless, for the reasons discussed above, the prevailing view – both within the EPA and among scholars – is that air quality standards are a poor fit for GHG regulation. At best, being forced to regulate through the NAAQS would saddle the EPA (and the country as a whole) with a suboptimal and expensive regulatory scheme. At worst, it would do this while simultaneously crippling the Agency's ability to implement better alternatives.

IV. THE SECTION 108 ENDANGERMENT PROVISION

The source of this triggering link is the breadth of the endangerment provision in section 108 of the CAA. Section 108(a)(1) of the Act provides:

> [f]or the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970 [the date of enactment of the Clean Air Act Amendments], 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.[66]

The EPA must then issue a NAAQS, forcing states to regulate each listed pollutant.[67] After making an endangerment finding, the EPA retains control over how and at what level a pollutant will be regulated, but not whether to issue a NAAQS at all—once a pollutant is listed, a NAAQS must follow.

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relatively low cost.

66. 42 U.S.C. § 7408(a)(1) (Westlaw 2010).

67. *Id.* § 7408(a)(2).

A. *The Link Between Section 108 and Section 202*

Parts (A) and (B) of the section 108(a)(1) endangerment provision are relatively straightforward.[68] Under part (A), the EPA must determine whether a pollutant "may reasonably be anticipated to endanger public health or welfare"—this is a detailed scientific inquiry, but a process that is well established by legal precedent and Agency experience.[69] Under part (B), the EPA must simply establish whether emissions of this pollutant come from "diverse" sources—a factual, even commonsense observation.[70]

These elements of the section 108(a)(1) test are mirrored in the section 202 endangerment provision and finding.[71] Under section 202, the EPA must determine if a pollutant – here, GHGs – endangers public health or welfare, and if it is emitted from vehicles in the US, a set of diverse sources. The operative language, "reasonably . . . anticipated to endanger public health or welfare," is identical in both sections.[72] The EPA in its proposed section 202 Endangerment Finding is unequivocally claiming that GHGs meet this CAA statutory standard.[73]

Therefore, if section 108(a)(1) consisted only of parts (A) and (B) there would be no question that the section 202 endangerment finding, when finalized, would compel a similar finding under section 108. Whether such a finding is in fact compelled therefore depends on the content and interpretation of section 108(a)(1)(C).[74]

B. *The EPA Claims Section 108(a)(1)(C) Grants Unlimited Flexibility*

The EPA's stated interpretation of the section 108(a)(1) provision is that it grants the Agency full discretion to decide whether to list a pollutant (and, therefore, issue a NAAQS) even if that pollutant meets the criteria set out in parts (A) and (B).[75] Specifically, the EPA claims that a pollutant must be listed only if it

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68. *See id.* §§ 7408(a)(1)(A)-(B).
69. *Id.* § 7408(a)(1)(A).
70. *Id.* § 7408(a)(1)(B).
71. *See id.* § 7521(a)(1).
72. *See* §§ 7408(a)(1), 7521(a)(1).
73. *See* Endangerment Finding, *supra* note 3.
74. 42 U.S.C. § 7408(a)(1)(C).
75. ANPR, *supra* note 5, at 44,477.

meets the (A) and (B) tests *and* the EPA then "plans to issue air quality criteria" (the part (C) test).[76] Since the EPA has discretion over what it "plans," the Agency argues, it therefore has discretion over which pollutants to list. The EPA relies on this interpretation of section 108(a)(1)(C) when it presents regulation under the NAAQS program as a discretionary option in its ANPR. Scholars who have discussed the EPA's regulatory options for GHGs under the CAA have implicitly relied on the same interpretation.[77]

C. *NRDC v. Train*

The EPA's current interpretation of section 108(a)(1)(C) is not new. As one might expect, the Agency considered the key threshold provision of this major regulatory program in the past and these interpretations have been the subject of significant litigation.[78] Perhaps contrary to expectations, however, the discretionary interpretation of section 108(a)(1)(C) that the EPA is now advancing was rejected by a federal appellate court more than thirty years ago. In *NRDC v. Train* (1976), the Second Circuit adopted a narrower interpretation of the statute and denied the EPA any discretion under this specific provision.[79] Since the ruling, no Agency or other party has challenged the court's interpretation.

In *Train*, the EPA offered essentially the same interpretation of section 108(a)(1)(C) that it now offers here, under very similar circumstances. The Agency had already made an endangerment finding under section 211 of the CAA to regulate lead as a fuel additive, but was seeking to avoid setting a lead NAAQS.[80] The EPA conceded that the section 211 endangerment finding established that lead met the conditions of parts (A) and (B) of the section 108(a)(1) test, but maintained that "under section 108(a)(1)(C) of the Act, the Administrator retains discretion whether to list a pollutant, even though the pollutant meets the criteria of section

76. *Id.; see also* 42 U.S.C. § 7408(a)(1)(C).

77. *See supra* text accompanying note 53.

78. *See, e.g.*, NRDC v. Train, 545 F.2d 320 (2d Cir. 1976).

79. 545 F.2d at 328 ("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 section 108 discretionary.")

80. *Id.* at 324.

108(a)(1)(A) and (B)."[81]

The Second Circuit, noting that, "the issue is one of statutory construction,"[82] rejected this interpretation on three grounds: canons of statutory construction, the structure of the CAA, and its legislative history.[83] First, the court pointed to the mandatory language in section 108 providing that the EPA "shall . . . publish . . . a list . . . ."[84] This language, the court determined, "would become mere surplusage" if the Agency's interpretation of section 108(a)(1)(C) were accepted.[85] The EPA's interpretation, therefore, would have violated the traditional canon that courts must give effect to all words in a statute if possible.[86] Under the court's interpretation, section 108(a)(1)(C) retains independent meaning of its own – it simply establishes that the EPA does not have to go through the elaborate regulatory process of section 108 and section 109 for pollutants for which the Agency had already issued air quality criteria before the 1970 amendments came into effect (and could therefore more quickly issue NAAQS for those pollutants). Section 108(a)(1)(C) is therefore a procedural shortcut available under certain limited circumstances, rather than a broad grant of regulatory discretion.[87]

Second, in further examining the EPA's interpretation of section 108(a)(1)(C), the court reasoned from the structure of the

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81. *Id.*

82. *Id.*

83. *See id. at 324-25.*

84. *Id.* at 325 (quoting 42 U.S.C. § 7408(a)(1) (Westlaw 2010)).

85. *Id.*

86. United States v. Menasche, 348 U.S. 528, 538-39 (1955) (stating "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute'") (quoting Inhabitants of Montclair Tp. v. Ramsdell, 107 U.S. 147, 152 (1883)). Of course, rejecting the EPA's interpretation runs the risk of creating statutory "surplusage" in the form of section 108(a)(1)(C) itself—if it does not give the EPA discretion based on the agency's "plans," what does it do? The court in Train therefore took care to establish a role in the statute for section 108(a)(1)(C), agreeing with the court below that it is directed at the initial list of pollutants required by the 1970 amendments to the CAA, of which section 108 is a part. *See* Train, 545 F.2d at 325.

87. 42 U.S.C. § 7408(a)(1)(C) (Westlaw 2010). An alternative interpretation of section 108(a)(1)(C) is that it provides discretion to the EPA to list pollutants that do not (or may not) meet the 108(a)(1)(A) and (B) criteria, but for which the agency nevertheless "plans" to issue criteria and regulate with NAAQS. *See* 42 U.S.C. § 7408(a)(1)(A)-(B). This interpretation would give the EPA additional authority to regulate independent of sub parts (A) and (B), but would not allow the EPA discretion to refuse to regulate once criteria under (A) and (B) had been met. This interpretation seems consistent with the Senate Report (on S.4358, 91st Cong., § 2 (1969)) cited in Train. *See* 545 F.2d at 326.

CAA as a whole that regulation of emissions sources (under section 211, section 202, and other provisions) was "a supplement to air quality standards [under sections 108-110], not an alternative to them."[88] This conclusion was supported by citation to Supreme Court interpretations of the CAA's structure.[89] The court in *Train* determined that this structural understanding of the CAA undermined the EPA's position that the statute should be construed to give the Agency full discretion over setting NAAQS.

Third, the court in *Train* looked to the CAA's legislative history, ruling that the congressional record also failed to support the EPA's interpretation of section 108(a)(1)(C). The court determined that Congress drafted the mandatory language in section 108 in response to perceived inaction on the part of states under the previous regulatory scheme (the Air Quality Act of 1967).[90] As a result, Congress created a strict, mandatory timetable for the NAAQS process under sections 108-110. This timetable, the court, reasoned, showed Congress's intent that listing under section 108 be mandatory—if it were not, the court claimed, the timetable would be "an exercise in futility."[91]

The most convincing piece of legislative history cited by the *Train* court, however, is a Senate report on the bill that became the 1970 amendments to the CAA. According to the report,

> [t]he agents on the initial list [of pollutants] must include all those pollution agents or combinations of agents which have, or can be expected to have, an adverse effect on health and welfare and which are emitted from widely distributed mobile and stationary sources, and all those for which air quality criteria are planned.[92]

In this report, the section 108(a)(1)(A) and (B) criteria are clearly established as sufficient conditions for listing a pollutant, and the (C) criteria – the EPA's "plans" – as an independent,

88. Train, 545 F.2d at 327.

89. *Id.* (citing Train v. NRDC, 421 U.S. 60, 66 (1975)).

90. *Id.* at 325 (citing the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 465 (1967), *amended by* Clean Air Act, 42 U.S.C. § 7401 (Westlaw 2010)).

91. *Id.* at 327. The court was also able to point to language in a Senate Conference Report for the 1970 amendments specifically mentioning lead as a pollutant that Congress "expect[ed]" to be regulated under sections 108 and 110. *See* S. REP. NO. 91-4358, at 454 (2d Sess. 1970).

92. *Id.* at 326 (quoting S. REP. NO. 91-4358, at 454 (2d Sess. 1970)).

alternative basis for listing. To the extent that this document should inform interpretation of the CAA, it is powerful evidence for rejecting the EPA's position.

Based on this and other evidence of congressional intent, the Second Circuit concluded that the EPA's discretionary interpretation of section 108(a)(1)(C) was incompatible with the legislative history of the 1970 amendments to the CAA. As the court stated,

> [t]he 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 section 108 discretionary. The Congress sought to eliminate, not perpetuate, opportunity for administrative foot-dragging. Once the conditions of sections 108(a)(1)(A) and (B) have been met, the listing of lead and the issuance of air quality standards for lead become mandatory.[93]

D. *Is Train Still Good Law?*

The Second Circuit therefore comprehensively rejected the same interpretation of section 108(a)(1)(C) that the EPA recently offered in the ANPR. The holding of the court in *Train* has not been challenged in more than thirty years, and the lead NAAQS that the decision forced the EPA to set remain in effect.[94] How, then, can the EPA's current position be justified? In the ANPR, the EPA offers its defense:

> With respect to the third criterion [section 108(a)(1)(C)], while there is a decision of U.S. Court of Appeals for the Second Circuit to the contrary, *NRDC v. Train*, 545 F.2d 320 (2nd Cir. 1978) (sic), EPA notes that that decision was rendered prior to the Supreme Court's decision in *Chevron v. Natural Resources Defense Council* . . . Thus, a proper and reasonable question to ask is whether this criterion affords EPA discretion to decide whether it is appropriate to apply the NAAQS structure to a global air pollution problem like GHGs.[95]

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93. *Id.* at 328.

94. *See* EPA Air and Radiation NAAQS, *supra* note 18.

95. *See* ANPR, *supra* note 5, at 44,477 n. 229 (citing Chevron v. NRDC, 467 U.S. 837 (1984)).

In short, the EPA believes that the redefinition of the level of deference shown to Agency interpretations of statutes established by *Chevron* gives it another shot at its favored interpretation of section 108(a)(1)(C).[96] The Agency will almost certainly get the opportunity to test this theory. Now that it has issued its final section 202 Endangerment Finding, environmental groups have already filed petitions under the CAA seeking to compel the EPA to issue a GHG NAAQS, much as the NRDC sued in *Train* to compel issuance of a lead NAAQS.[97] The next section analyzes the EPA's chances of success in such a suit.

V. CAN THE EPA REINTERPRET SECTION 108?—THE *CHEVRON* QUESTION

A. *Can Train Be Distinguished?*

The EPA's claim that it now has a new opportunity to prevail in litigation regarding the interpretation of section 108(a)(1)(C) is surely correct as a procedural matter. First, amendments to the CAA since 1976 have given the D.C. Circuit exclusive jurisdiction over CAA litigation.[98] The Second Circuit's holding in *Train* will therefore have (at most) persuasive impact, rather than precedential value.[99] Second, the EPA will argue that *Train* and a

96. 467 U.S. 837, 837 (1984); *see also* 42 U.S.C. § 7408(a)(1)(C).

97. *See* Endangerment Finding, *supra* note 3. Some have argued that environmental groups might refrain from filing suit because they prefer the EPA to have flexibility to address GHGs. *See* CHETTIAR & SCHWARTZ, *supra* note 53, at 39. While this may be true for some – or even most – environmental groups, all it takes is one suit to force judicial examination of the issue. The EPA would thus be unwise to rely on a perceived lack of a plaintiff. Environmental groups should also consider carefully whether they want to take the position that the EPA has discretion over section 108 listings. While the optimal answer for GHGs might seem to be yes, these same groups might later oppose EPA discretion in other cases. If the EPA's discretionary interpretation of section 108(a)(1)(C) were to prevail, it would be unlikely that the Agency would ever be forced to relinquish it again under the current CAA. The Center for Biological Diversity and 350.org have rendered this controversy academic by petitioning the EPA to issue a GHG NAAQS, and, relying on *Train*, claim in their petition that the agency lacks the discretion not to do so. *See* CTR. FOR BIO. DIVERSITY & 350.ORG, *supra* note 12. Interestingly, NRDC, the plaintiffs in *Train*, have publicly stated that they have reversed their position on the interpretation of section 108(a)(1)(C) and oppose the Center for Biodiversity's petition. *See* David Doniger, Policy Dir., NRDC Climate Ctr., Seminar Address at Resources for the Future: Climate Policy Under the Clean Air Act (March 3, 2010) (transcript available at http://www.rff.org/Documents/RFF-March2010FW-Transcript.pdf).

98. 42 U.S.C. § 7607(b)(1) (Westlaw 2010) (granting exclusive jurisdiction over CAA suits to the D.C. Circuit).

99. The somewhat unusual result is that while *Train* would not carry precedential value, a contrary decision would overrule *Train*, since the D.C. Circuit would have

case regarding section 108 discretion for GHGs concern different statutory language. Second, new litigation would concern the linkage between different endangerment provisions—section 202 and section 108 instead of section 211 and section 108 in *Train*. This is a distinction without a difference, as the language of the section 202 endangerment provision fulfills the requirements of sections 108(a)(1)(A) and (B) in the same way as the section 211 provision does, but the Agency could at least attempt to argue that this distinction should affect the result. Finally, as the EPA observes in the ANPR, *Chevron* could create a basis for deferring to the EPA's interpretation of the statute.

Similarly, the EPA might argue that *NRDC v. Train* can be distinguished because it deals with the initial publication of the list of criteria pollutants, rather than the revision that listing GHGs would involve. A recent paper by Inimai Chettiar and Jason Schwartz includes a brief analysis of a potential challenge to the EPA's NAAQS discretion and points to this distinction as a source of possible relief for the Agency.[100] It is true that the relevant language in section 108(a) for publication of the list ("shall . . . publish") is different from that for revisions ("shall from time to time thereafter revise").[101] The mandatory language in both is the same, however, and the general requirement that the list "include[] each air pollutant" that meets the (A)-(C) criteria still applies.[102] Furthermore, it would make little sense for Congress to have given the EPA no discretion over the initial list but complete discretion over revisions of it. If this was the case, the Agency could not only decide not to add new pollutants to the list, it could also remove pollutants that it had been required to put on the initial list. The result would be full EPA discretion over the entire list, the exact outcome that the *Train* court rejected. The clearest difference between the initial listing and revision language in section 108(a) is that the former contains a strict timetable (thirty days), while the latter specifies only "from time to time thereafter."[103] If the distinction has any value for the Agency, therefore, it is that it may provide some discretion over the timing

jurisdiction over both that case and any future case regarding the interpretation of section 108.

100. CHETTIAR & SCHWARTZ, *supra* note 53, at 37.

101. 42 U.S.C. § 7408(a)(1).

102. *Id.*

103. *Id.*

of its listing of GHGs.[104]

While in principle any of these distinctions between *Train* and a future GHG NAAQS case could support a different outcome, *Chevron* is by far the Agency's best justification for such a result. The remainder of this section will therefore address the impact *Chevron* might have.

B. *A Brief Overview of Chevron*

Chevron purported to modify the standard of deference shown by courts to agency interpretations of their own statutory authority. It created a widely cited two-step process for review of such agency interpretations. First, the reviewing court must determine whether the statute in question is ambiguous (*Chevron* Step One).[105] If the statute is unambiguous, its plain meaning prevails. If, however, the court determines that the statute is ambiguous, it proceeds to ask whether the agency's interpretation of the statute is "reasonable" or "permissible" (*Chevron* Step Two).[106] So long as the interpretation is found to be within this reasonable range, the court will defer to the agency. Agency interpretations are therefore said to receive "*Chevron* deference."[107]

Thus, a prediction of how the D.C. Circuit (or the Supreme Court on appeal) would treat the EPA's interpretation of section 108(a)(1)(C) requires analysis of whether the interpretation would survive *Chevron* Step One and prevail under *Chevron* Step Two. These questions overlap to a large extent. Indeed some scholars have suggested that it would be more useful to treat *Chevron* as having only a single step, which asks whether the agency's interpretation falls within a range of reasonableness or permissibility.[108] This range might be smaller or larger depending on the ambiguity of the statutory language. Other scholars have suggested that *Chevron* may not have changed the deference courts show to agency interpretations very much,[109] or that judges' policy

104. *See* CHETTIAR & SCHWARTZ, *supra* note 53, at 37.

105. Chevron v. NRDC, 467 U.S. 837, 842-43 (1984).

106. *Id.* at 843-44.

107. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 842 (2006).

108. *See generally* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing that Step One and Step Two analyses are conceptually indistinguishable, and that the two-step approach has resulted in unnecessary confusion).

109. *See* Miles & Sunstein, *supra* note 107.

preferences may be more important than the nominal level of deference.[110] Despite these revisionist interpretations of *Chevron* and its importance, it is still useful to begin with a straightforward analysis of the Step One and Step Two questions.

C. *The EPA's Interpretation of Section 108 Under Chevron Step One*

If a court reviewing the EPA's interpretation of the section 108 endangerment provision did find that this interpretation is contradicted by unambiguous meaning of the statute, the agency's arguments would fail at *Chevron* Step One and the court's inquiry would end. This analysis might follow similar lines to that in *Train*—the court would first look to its traditional tools of statutory construction (rather than interpretation), including the canon against surplusage, and find that the EPA's interpretation is wholly foreclosed by the language of the statute. The D.C. Circuit has explicitly held that the three tools of statutory construction set out in *Train* are relevant factors at *Chevron* Step One.[111] Applying *Chevron* in *Immigration & Naturalization Service v. Cardoza-Fonseca,* the Supreme Court stated that "traditional tools of statutory construction" allow a reviewing court to determine whether a statute is ambiguous (and therefore passes Step One).[112] *Fonseca,* however, is a relatively old case by *Chevron* standards and this kind of clean distinction between questions of law, reserved to courts, and questions of application, over which an agency reserves some discretion, has not generally been applied in more recent cases.

The Supreme Court has nevertheless repeatedly used canons of construction to resolve *Chevron* questions at Step One.[113] More

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110. *See* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine,* 72 WASH. U. L.Q. 351, 359 (1994) ("The most general finding of the survey was that *Chevron* had not made a dramatic difference in the frequency with which the Supreme Court deferred to agency interpretations of statutes.").

111. Ohio v. Dep't of Interior, 880 F.2d 432, 441 (2d Cir. 1989).

112. 480 U.S. 421, 446 (1987) (holding that the issue of whether two different standards in a statute are the same in practice is one for courts, not agencies, to decide. In reaching its decision regarding differing standards, the Court relied on "traditional tools of statutory construction" to identify Congress's intent.).

113. *See, e.g.,* Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 320 n. 45 (2001). The relationship between *Chevron* deference and canons of statutory construction remains an issue of significant debate in judicial and academic circles. *See also* Stephenson & Vermeule, *supra* note 108, at 607-08 (noting this debate and citing a pair of Ninth Circuit opinions with further discussion); Cass R. Sunstein, *Law and Administration After Chevron,* 90 COLUM. L. REV. 2071, 2105-19 (1990) (discussing the relationship between *Chevron* and preexisting interpretive principles).

deeply, *Chevron* refers to "the unambiguously expressed intent of Congress" as the legal force that supersedes agency interpretations of statutes.[114] The canon against surplusage is intended to reveal and preserve this intent. It therefore seems to be within the class of interpretive tools courts could use to resolve apparent ambiguity and foreclose agency interpretations (as the court in *Train* indeed did). The Supreme Court applied another canon of construction in interpreting section 109 of the CAA in *Whitman v. American Trucking Ass'ns.*[115] There, Justice Scalia stated in the majority opinion that "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[116] Like the canon against surplusage, this principle could also be applied to section 108(a)(1)(C), indicating that Congress would have been much clearer had it intended to give the EPA the wide discretion it claims.

These canons of construction seem even more appropriate for the *Chevron* Step One analysis given that they both help to resolve the narrow problem of interpreting statutory language, as opposed to substantive canons (such as interpretations that avoid constitutional problems). The Supreme Court has used both types of canon in Step One analyses. The "textual" canons at issue here seem less intrusive on the part of courts and are less likely to encode policy judgments.[117]

Supreme Court precedent also suggests that legislative history and the structure of statutes as a whole are relevant at *Chevron* Step One. Therefore even if reliance only on canons of construction does not satisfy the court that section 108(a)(1)(C) is unambiguous, the structural analysis of the CAA and substantial legislative history cited in *Train* may do so. In *Fonseca*, cited above, the Supreme Court used legislative history along with "traditional tools of statutory construction" to reject the Agency's interpretation of a statute, much as the Second Circuit did in *Train.*[118] In *Dole v. United Steelworkers*, the Supreme Court used

114. 467 U.S. 837, 842-43 (1984).

115. 531 U.S. 457, 468 (2001).

116. *Id.*

117. For more discussion of substantive canons in *Chevron* cases, see Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. (forthcoming 2010).

118. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

legislative history to help establish "the clearly expressed intent of Congress" and, based on its determination of that intent, refused to defer to the Agency's interpretation of the statute.[119] In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court further indicated that legislative history is also apparently relevant when it supports agency interpretations of statutes.[120] Not all judges, of course, believe that legislative history should play a significant role in court decisions. As discussed below, these judges may not be much help to the EPA however.[121]

The structure of statutes also seems to be relevant for *Chevron* Step One analysis. In *Babbitt v. Sweet Home*, the Court engaged in a detailed analysis of the Endangered Species Act.[122] The majority determined that relationships between different provisions of that statute – its internal structure – were relevant to a determination of congressional intent.[123] In his dissent, Justice Scalia relied on inconsistencies he perceived between the EPA's interpretation of the statute and its structure to explain why he would have rejected that interpretation as "unreasonable[]."[124] With statutory structure playing a major part in the analysis of both the majority and dissent, *Babbit* confirms its place in the *Chevron* Step One toolkit.

In sum, the three tools that the Second Circuit used to interpret the CAA in *Train* – canons of statutory construction, statutory structure, and legislative history – have all been used in the progeny of *Chevron* to determine whether statutory language is ambiguous under Step One. In this respect, *Chevron* does not appear to have changed courts' approach very much. The same arguments that were used to defeat the EPA's broad interpretation of section 108(a)(1)(C) in 1976 seem to be just as relevant today.

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119. Dole v. United Steelworkers, 494 U.S. 26, 40-43 (1990) (citing *Chevron*, 467 U.S. at 843, for the proposition that a court can reject an agency interpretation of a statute if the court determines that the agency's interpretation violates clearly expressed congressional intent).

120. Babbitt v. Sweet Home Chapter of Cmties. for a Great Or., 515 U.S. 687, 704 (1995) (holding that EPA's interpretation of the Endangered Species Act is permissible, based in large part on the legislative history of the relevant term "harm").

121. The EPA might argue that legislative history is less relevant in this context than it was in *Train* because Congress foresaw the regulation of lead, whereas it could not have foreseen GHG regulation. The Court, however, rejected this kind of argument in *Massachusetts v. EPA*. *See* 549 U.S. 497, 528-29 (2007).

122. 515 U.S. at 708.

123. *Id.*

124. *Id.* at 722. Use of reasonableness language indicates that this determination might fit better under Step Two than under Step One.

The EPA needs to survive *Chevron* Step One to access the standard of deference that it believes will permit a new interpretation of the section 108 endangerment provision. If the same facts that led the Agency to lose in *Train* enable a court to find that the statute is unambiguous, the Agency will be prevented from getting to Step Two, and any additional deference in the face of statutory ambiguity is irrelevant. *Chevron* will have changed nothing.

Ironically, the EPA's best argument to survive Step One may also be found in *Train*. There, the Second Circuit suggests that "[w]hile the literal language of 108(a)(1)(C) is somewhat ambiguous, this ambiguity is resolved when this section is placed in the context of the Act as a whole and in its legislative history."[125]

Superficially, this statement seems helpful to the EPA: if the court in *Train*, having marshaled all the evidence at its disposal, still determined that the statute was ambiguous, one would think a post-*Chevron* court would find similarly, and permit the Agency to reach the deferential Step Two. The Second Circuit's statement, however, should not be viewed as conclusive on the issue of ambiguity. In 1976, the Second Circuit was not using "ambiguous" in its post-*Chevron* sense, as a talismanic ticket to increased deference. The word was not magic in 1976, and it should not carry as much meaning as it would if a modern court was to make a similar declaration. Second, the court's statement is best read only as an indication that the statute is *superficially* ambiguous. After declaring the statute to be "somewhat ambiguous," the court immediately states that "this ambiguity is resolved" by the structure and legislative history of the CAA. This analytical move is no different from that which a post-*Chevron* court would make: if legislative history, canons, and structure of statutes are ever relevant under Step One, it must be when plain language alone is not enough to render a statutory provision unambiguous on its face. If such clearly unambiguous language were necessary for agencies to lose at Step One, there would be no need to bring up other evidence of congressional intent at all. In short, the quoted language from *Train* is best read as indicating that the statute is *not* ambiguous once all relevant information is considered. For these reasons, an attempt by the EPA to use *Train* for its own benefit to escape defeat at *Chevron* Step One would probably fail.

In their commentary on a post-*Chevron* reinterpretation of

125. NRDC v. Train, 545 F.2d 320, 327 (2d Cir. 1976).

section 108(a)(1)(C), Chettiar and Schwartz argue that legislative history and statutory structure evidence may not be as compelling as they were in *Train*. Some statements in the legislative history couch revisions of the section 108 list (as opposed to the initial list) in permissive, rather than mandatory language.[126] As discussed in Section 5.1 above, however, the revision language in section 108(a) is just as mandatory as the initial listing language and subject to the requirements of section 108(a)(1)(A)-(C). The language cited in the legislative history (e.g., that the EPA "can add to the list periodically")[127] can also be interpreted not as indicating that the Agency has discretion to decide not to list a pollutant, but as expressing uncertainty about whether additions will be necessary.[128]

Chettiar and Schwartz also note that the structure of the CAA, both in the statutory language and in practice, has changed somewhat since *Train* was decided.[129] It is now common practice, they note, for the EPA to regulate emitters of some pollutants by setting NSPS under section 111 of the CAA even though those pollutants may not be listed under section 108 and regulated with a NAAQS.[130] These "designated pollutants" were not a feature of CAA regulation in 1976 (they are in large part the result of changes to the section 111 endangerment provision in 1977 amendments to the CAA). This fact is unlikely to change the result in a case over the link between section 202 and section 108, however. There have been no changes to the endangerment provisions in either of those sections (or that in section 211, the subject of *Train*).

The court in *Train* does make general statements that regulation in the CAA by air quality standards (sections 108-110) and by performance standards (section 202, section 211, section

126. CHETTIAR & SCHWARTZ, *supra* note 53, at 37.

127. *Id.* (quoting S. REP. NO. 91-1196, at 436-39 (1970)).

128. This distinction is admittedly harder to draw from Chettiar and Schwartz's third quote from the Senate Report: "*If* the Secretary subsequently should find that there are other pollution agents for which the ambient air quality standards procedure is *appropriate*, he *could* list those agents." S. Rep. No. 91-1196, at 436-39 (1970) (emphasis added by Chettiar and Schwartz). The court would therefore have to weigh this statement against the other legislative history cited in *Train* and available elsewhere. For the reasons discussed in Section 5.1, however, it seems very unlikely the court would determine that section 108(a) gives the EPA discretion over revisions to the pollutant list, but not over the initial listing, the conclusion that this quote from the Senate Report seems to support.

129. CHETTIAR & SCHWARTZ, *supra* note 53, at 36-39.

130. *Id.* at 38.

111, etc.) are intended to be parallel, not separate programs.[131] These general statements may no longer hold with respect to section 111. Still, there is no reason for a court to conclude that the specific exception created by Congress in the 1977 amendments should extend to regulation under section 202 or section 211, when no changes were made to those sections.[132] If anything, it should increase a court's confidence that the structure of the CAA indicates that the NAAQS and mobile source regulation are intended to operate together. The 1977 amendments to section 111 show that Congress clearly knows how to authorize independent regulation through performance standards while the fact that section 202 and section 211 were not changed then, or since, is evidence that Congress intended no such independent regulation under these schemes.

The legislative history and the changes in statutory structure identified by Chettiar and Schwartz will be examined by a court, but overall they seem unlikely to significantly weaken either type of evidence in *Chevron* Step One analysis. The result indicated by the analysis presented above – that the *Train* decision and its legal foundations will prove sufficient for a modern court to declare the statute unambiguous – is the most likely result of new litigation over section 108(a)(1)(C). It is nevertheless possible that a court would find some ambiguity and that the Agency would therefore survive *Chevron* Step One analysis. Some examination of the likelihood of success on *Chevron* Step Two is therefore useful.

D. *The EPA's Interpretation of Section 108 Under Chevron Step Two*

Should the EPA survive *Chevron* Step One, its chances for success are much greater. At least as of 2006, the Supreme Court had never ruled against an agency decision of law in Step Two (though some appellate courts have made such rulings).[133] Step Two is true "*Chevron* deference." As some D.C. Circuit judges[134] and

131. NRDC v. Train, 545 F.2d 320, 326 (2d Cir. 1976).

132. *See* 1977 Amendments to the CAA, Pub. L. No. 95-190, 91 Stat. 1405 (1977).

133. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 247 (6th ed. 2006).

134. *See, e.g.*, Arent v. Shalala, 70 F.3d 610, 619-20 (D.C. Cir. 1995) (Wald, J., concurring) (arguing that *Chevron* Step Two analysis and "garden-variety APA review" often overlap in judicial practice); Ohio v. Dep't of Interior, 897 F.2d 1151, 1151-52 (2d Cir. 1989) (Silberman, J., concurring in denial of rehearing en banc) (criticizing panel for conducting in-depth analysis of statutory provisions under Step Two, allegedly encoding policy preferences).

some scholars[135] have observed, Step Two is difficult to separate from Step One ambiguity analysis and traditional Administrative Procedure Act arbitrariness review of agency decisions (as opposed to interpretations of law).[136] Step Two analysis often includes detailed review of agency decision-making processes, much like arbitrariness review.[137] No such decision-making process is present for the EPA's interpretation of the section 108 endangerment provision, however. This could be evidence that review of this interpretation fits better in *Chevron* Step One—the Second Circuit's analysis in *Train* of essentially the same question certainly has much more in common with post-*Chevron* cases decided on Step One grounds than those decided on Step Two grounds.

If an agency's action does, however, survive to reach Step Two, the court will have to base its analysis on the same types of evidence discussed above for Step One. The question under Step Two is, of course, somewhat different. Where Step One may be viewed as an attempt by the court to determine whether traditional interpretive tools can resolve a statute's meaning to a point, Step Two allows the court to determine whether an agency's interpretation falls within a reasonable or permissible *range*.[138] Despite this distinction, the facts that tend to show whether the agency's interpretation is outside this range are the same as those that can be used to determine if ambiguity exists in the first place. Canons of construction, statutory structure, and legislative history all narrow the reasonable range of interpretation by excluding certain views of a statute. Indeed, these two inquiries may be so similar that there is no real difference in practice, and the decision of whether to frame a decision in Step One or Step Two may be somewhat arbitrary or driven by exogenous factors.[139]

Given the lack of any significant precedent for decisions against agencies on Step Two grounds, it is generally difficult to

135. *See generally* Stephenson & Vermeule, *supra* note 108.

136. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (Westlaw 2010).

137. *See, e.g.*, Ohio v. Dep't of Interior, 880 F.2d 432, 443-58 (2d Cir. 1989) (providing detailed analysis of multiple provisions of *Chevron* Step Two in the context of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (Westlaw 2010)).

138. Stephenson & Vermeule, *supra* note 108, at 600.

139. Courts might, for example, perceive a risk that decisions against an agency on Step Two would be more likely to be reversed on appeal, or believe that Step One decisions declaring statutes to be unambiguous are more politically or rhetorically credible.

foresee the EPA's interpretation of section 108(a)(1)(C) being rejected at this stage. Victory for the Agency would not be certain, however. The strong evidence for a non-discretionary interpretation of the provision cited in *Train* is just as relevant in Step Two as in Step One, and could be enough for a court to rule against the Agency. The dissimilarities between a hypothetical suit over section 108(a)(1)(C) and most *Chevron* Step Two cases also point toward a tendency on the part of courts to resolve such narrow questions of statutory interpretation (or construction, depending on one's point of view) at Step One. This just does not look like a Step Two case, but even if it is treated as one, the Agency still might not win it.

E. *Other Perspectives on Chevron's Impact*

Some scholars who have analyzed court review of decisions since *Chevron* have come to the conclusion that judges' policy preferences play a significant role, possibly exceeding that of the level of deference nominally shown to agencies.[140] Research shows, for example, that while "conservative" Justices on the Supreme Court are more likely to invalidate agency decisions than "liberal" Justices on the Court, the Justices are more likely to validate decisions from agencies under ideologically similar presidential administrations.[141] Viewed from this legal realist perspective, the EPA's chances of securing a new interpretation of the section 108 endangerment provision seem even bleaker.

In a suit over the interpretation of section 108(a)(1)(C), the EPA would likely be defending its interpretation against a challenge from environmental groups, much like it attempted to defend its preferred definition of "pollutant" against the pro-regulation states in *Massachusetts v. EPA*. Conservative Supreme Court Justices such as Justice Thomas or Justice Scalia, who might arguably prefer a result that did not compel regulation, are historically also the most likely Justices to reject agency interpretations in *Chevron* cases. They are also the most likely to rule against agencies under Democratic administrations (though this latter data point may have less relevance, since the EPA would be sued from its leftward flank). Similarly, those Justices that might ideologically favor the plaintiffs in such a suit are traditionally

140. *See* Miles & Sunstein, *supra* note 107, at 823-27.

141. *Id.* at 823-27, 833-34.

highly deferential to agency interpretations.[142] If the Supreme Court reviews a D.C. Circuit decision on this issue, therefore, the chances of cobbling together a five vote majority for the Agency's interpretation seem remote.

Another way of looking at the politics of the Court is that the EPA would essentially be asking the majority in *Massachusetts v. EPA* to switch their votes rejecting one agency interpretation of a term in the CAA, and instead accepting another agency interpretation of a different provision. In both instances, agency interpretations would result in less regulation. Of course the facts would be completely different in a section 108(a)(1)(C) case, but the research of Sunstein and Miles shows that the Justices' levels of deference to agencies is somewhat stable over time.[143] This research analyzes the Supreme Court Justices' voting patterns over a series of cases, and does not claim to predict outcomes in any specific case. The study is relevant, however, in that it shows that a vote for the EPA in a section 108(a)(1)(C) case would be at odds with the general voting pattern of many of the Justices on which the EPA might expect to rely. If the Justices in the majority in *Massachusetts v. EPA* do vote in line with their historical pattern, the Agency would have to hope for an odd coalition of Justices that are either ideologically opposed to the result sought by the plaintiffs or exceptionally willing to show deference to agencies.

F. *A Broader View*

This case raises broader issues related to *Chevron* and the judicial review of agency interpretations. The first of these is the intersection between *Chevron* and *stare decisis* principles. As mentioned above, the D.C. Circuit in a hypothetical case over the EPA's interpretation of section 108(a)(1)(C) would be reviewing the issue *de novo* and thus the Second Circuit's holding in *NRDC v.*

142. The ideological positions in this hypothetical case might be somewhat hard to characterize. If mainstream environmental groups support the EPA's position, and the plaintiffs appear to be only fringe groups, "liberal" Supreme Court Justices might be relatively more likely to favor the Agency's position. If this is the case, then those same Justices' traditional deference to agency interpretations would support, rather than counter, their liberal ideological position. As a result, an Agency victory might be more likely. If, on the other hand, mainstream environmental groups act as plaintiffs, or file briefs in favor of a non-discretionary interpretation of the provision in question (perhaps for strategic reasons), the "liberal" Justices will face a clash of their traditional preferences, as described above. *See also supra* text accompanying note 97.

143. *See* Miles & Sunstein, *supra* note 107, at 823-27.

Train would not hold precedential value.

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[144] Thus the precedential value of previous cases appears to hinge on the same ambiguity finding that courts today have to make at *Chevron* Step One. Some scholars have criticized the focus on ambiguity here and in *Chevron* cases generally.[145] As mentioned above, pre-*Chevron* courts could not have known their declarations that a given text was ambiguous or unambiguous would later be given such effect. They similarly could not have used *Chevron* and its extensive progeny to determine what tools and methods were appropriate for determining ambiguity. Some courts might have declared statutes unambiguous using methods that would now be considered outside the boundaries of *Chevron* Step One, and others might have declared statutes ambiguous when full use of the tools now available under Step One would have led them to a different conclusion.

With respect to the *Train* court, this dilemma is particularly salient. As discussed above, the Court called the language in question "somewhat ambiguous" before ruling that this ambiguity "is resolved" once certain tools are applied (the canon against surplusage, the statutory structure, and legislative history).[146] A court revisiting the issue today could, citing *National Cable*, simply disregard *Train* as precedential or persuasive because the Second Circuit declared the statute to be ambiguous. On the other hand, as also discussed above, the best reading of the Second Circuit's statement is that it believed the statute was *not* ambiguous.[147] Even if one disagrees with that interpretation, the result is that *Train* itself is ambiguous on this point, which is profoundly unhelpful. In short, *National Cable* does little to resolve the *stare decisis* issue here, and a case re-litigating the interpretation of section 108(a)(1)(C) may illustrate that its value is limited generally.

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144. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

145. *See generally* Slocum, *supra* note 117.

146. Train v. NRDC, 545 F.2d 320, 327 (2d Cir. 1976).

147. *See* Section 5.3 above.

A second issue is strategic: if the EPA really believes that, given *Chevron*, its interpretation of section 108(a)(1)(C) is now legally valid, why has it waited thirty-four years to challenge *Train*? Surely the Agency must have considered regulating some pollutant under section 211, section 202, or some other CAA provision that would have triggered *Train*'s presumption of endangerment under section 108. The EPA has not even issued NAAQS for any new pollutant since lead was added to the list in the wake of *Train*. This implies, but does not prove, that the EPA adhered to the non-discretionary interpretation of section 108(a)(1)(C) established by *Train* even after *Chevron* gave the Agency an opportunity to challenge that interpretation (that is, until the Agency advanced its new, discretionary interpretation in the 2008 ANPR).[148]

To be sure, agencies may change their interpretations of statutes and still receive *Chevron* deference. Similarly, an agency's refusal to change an interpretation probably has limited legal relevance, if any (though the Supreme Court has held that "longstanding" interpretations are entitled to additional deference, implying a preference for the status quo).[149] Nevertheless the EPA apparently acquiesced to a non-discretionary interpretation of section 108(a)(1)(C), then operated under that assumption for more than thirty years. It only recently has shown willingness to challenge that interpretation, and then only when a court's rejection of its interpretation of a different part of the CAA (in *Massachusetts v. EPA*) put the Agency into an uncomfortable position. Whatever the legal relevance, these facts present the EPA with a rhetorical challenge. It must confront them or the Agency will appear to be twisting the meaning of the CAA for its own convenience. Even if that perception has little effect on the outcome of a suit over section 108(a)(1)(C), it may damage the credibility of both the Agency and the CAA.

148. It is possible, of course, that the Agency has simply determined there are no pollutants that it might want to regulate under section 202, section 211, or other sections that would, under *Train*, trigger section 108. As discussed above, Congress amended the CAA in 1977 to allow the EPA explicit regulation of pollutants under section 111 (NSPS) without simultaneous regulation under the NAAQS. New pollutants regulated by the EPA since *Train* have been regulated under this provision, or under section 112 (which contains an exclusion preventing parallel regulation under the NAAQS). *See* 42 U.S.C. § 7412(b)(2) (Westlaw 2010).

149. Barnhart v. Walton, 535 U.S. 212, 219-20 (2002) (showing long-term and additional deference to agency's interpretation of the Social Security Act, 42 U.S.C. § 423 (Westlaw 2010)).

VI. CONCLUSIONS AND IMPLICATIONS

With congressional action on climate change apparently paralyzed, the EPA is moving ahead with its section 202 Endangerment Finding and other initiatives. Thus, gradually, CAA regulation of GHGs is moving from speculation to reality. Though few believe that the CAA is an ideal tool for regulating stationary sources of GHGs, it is widely (though not universally) viewed as a plausible second-best alternative.[150] Most who suggest that CAA GHG regulation is practical, however, explicitly or implicitly assume the EPA has a choice among the regulatory schemes in the Act. Most commentators also agree that a NAAQS for GHGs would create serious regulatory problems. Congress has recognized the problem as well—the authority to issue a GHG NAAQS is explicitly taken away from the EPA in the Waxman-Markey cap-and-trade bill that passed the House.[151]

If the EPA does not have a choice among regulatory schemes and is instead required by law to issue a NAAQS, and if Congress does not act to prevent this (either through cap-and-trade legislation or a separate "rifle shot" law that would surgically correct perceived problems with the current statute), the Agency will face significant administrative challenges while being precluded from developing CAA GHG regulations that most claim would be superior to the NAAQS.[152] To be sure, regulation of GHGs through the NAAQS would not necessarily be a total disaster: assuming the problems discussed above could be resolved, the EPA might even be able to administer a cap-and-trade style regulatory program through state SIPs, as it has done for regulation of nitrous oxides.[153] Indeed, a small minority of commentators feels that the NAAQS are at least part of their preferred CAA regulatory program for GHGs. The prevailing view, however, is that NAAQS are a very poor fit for regulation of GHG emissions. They are such a poor fit, in fact, some argue that even if the EPA loses a suit over the interpretation of section 108(a)(1)(C), the Agency could be saved from having to issue a NAAQS by applying the "absurd results" canon.[154] This is the same

150. *See supra* text accompanying notes 53 and 64 (listing works in which GHG regulation under the CAA is discussed as a viable alternative to new legislation).

151. H.R. 2454, 111th Cong. § 831 (2009).

152. *See, e.g.*, Daniels et al., *supra* note 55, at 10,838-39.

153. *See supra* text accompanying note 65.

154. *See* CHETTIAR & SCHWARTZ, *supra* note 53, at 39.

legal position advanced by the EPA in its proposed Tailoring Rule, in which it is attempting to limit permitting requirements to certain large GHG emitters despite clear CAA language to the contrary.[155] While a full analysis of the likelihood of success in either case based on the absurd results canon is beyond the scope of this paper, the canon is rarely applied. It is not really so much a legal "canon" as the Agency throwing itself at the mercy of a court. To the extent that it is a legal strategy at all, it is a strategy of last resort.

The slow nature of the NAAQS process is a double-edged sword. The EPA would not have to implement NAAQS-based regulations (through the states) immediately, which would allow some time for other regulations and/or congressional action to resolve the problems discussed in this paper. At the same time, the Agency might be distracted from efforts to regulate GHGs and other pollutants while the NAAQS process continues. More importantly, key regulatory tools that the EPA might use to regulate GHGs under the CAA, particularly section 111(d) performance standards for existing sources, would be unavailable during this time due to preclusions in the CAA itself.

The EPA is also unlikely to be able to "sneak through" by refusing to address the question. Some environmental groups, seeing delay in regulation of stationary-source GHGs on other fronts, will almost certainly file suit to compel the EPA to issue GHG NAAQS as soon as the section 202 endangerment finding is finalized (though other groups might support the EPA's claim of discretion). Indeed, one group has already filed an administrative petition with the EPA seeking such a result.[156] Now that the section 202 Endangerment Finding has been finalized, the die has been cast and the EPA will almost certainly have to defend its new interpretation of section 108(a)(1)(C) in court.[157]

The EPA might win such a suit by claiming that *Chevron* entitles it to essentially overrule the Second Circuit's holding in *Train*. For all the reasons discussed above, however, this seems unlikely. It is possible, however, that this type of suit will take so long that Congress will eventually resolve the issue. While Chettiar and Schwartz are somewhat more optimistic than I am that a court would be able to distinguish *Train* and accept the EPA's

155. *See* Proposed Tailoring Rule, *supra* note 5, at 55,306-07.

156. *See* CTR. FOR BIO. DIVERSITY & 350.ORG, *supra* note 12.

157. *See* Endangerment Finding, *supra* note 3.

discretionary interpretation of section 108(a)(1)(C), their broader conclusion is very similar to the one I reach here, that, as they put it:

> [c]hoosing not to issue NAAQS for greenhouse gases may be a risky strategy from both a legal and practical perspective. Moreover, such an action could create a dangerous precedent granting EPA too much discretion on listing other criteria pollutants in the future. A legislative fix to this potential problem may be necessary and appropriate if EPA does not wish to pursue NAAQS for greenhouse gases.[158]

Of course, recent experience suggests that legislative inertia should not be underestimated when it comes to climate change issues. If Congress does not act – either to pass legislation that would supersede the EPA's CAA authority over GHGs or to put in effect a "rifle shot" law – regulation of GHGs under the CAA is likely to create significant regulatory problems for the EPA and the nation as a whole.[159] The EPA is currently trying to dodge one oncoming regulatory train with its proposed Tailoring Rule.[160] This may or may not succeed. The Agency, Congress, regulated industries, and the policy community should be aware that a second train – lack of NAAQS discretion – is right behind.

The challenge presented by lack of EPA discretion over setting a GHG NAAQS is twofold. First and most obviously, Congress should act to resolve these issues by passing comprehensive climate legislation or by surgical modification of the CAA with a "rifle shot" law. Second, the academic and policy communities should consider the possibility of regulating GHGs under the NAAQS more seriously. While most scholars have rejected the NAAQS

158. CHETTIAR & SCHWARTZ, *supra* note 53, at 39.

159. Such a "rifle shot" might come in one of three varieties. First and most obviously, Congress could remove GHGs from NAAQS consideration, as the Waxman-Markey bill does. Second, the EPA could modify section 108(a) to explicitly grant the EPA the discretion that it claims it has to decide whether a pollutant should be listed. Third, Congress could adjust section 111(d) so that performance standards for existing sources could be issued even if a pollutant has been listed (either for all pollutants, or for GHGs only). This last option would not solve the conceptual problems of a GHG NAAQS, but would at least allow effective CAA regulation to proceed while those problems are solved. Note also that "rifle shot" legislation has been proposed for the other significant problem caused by the section 202 Endangerment Finding: triggering of PSD/NSR permitting for small GHG sources (the problem the tailoring rule is designed to address).

160. *See* Proposed Tailoring Rule, *supra* note 5.

relatively quickly, it may turn out to be both the first and only real option for regulation of stationary-source GHGs under the CAA. The NAAQS have been used to regulate other pollutants more or less efficiently, most notably with the creation of a cap-and-trade system for nitrous oxide. Despite the conceptual inconsistencies and other problems presented by NAAQS in the GHG context, it is possible that an effective regulatory program could be set up for GHGs within the statutory limits of the NAAQS. More legal, policy, and economic analysis needs to be done to determine whether and how this might be possible.

Errata

Page 140, line 14 should read, "negotiate treaties with foreign nations;[51] and 3) the right to . . . ."

Page 140, line 19 should read, "support this "special solicitude,"[63] and noted that Massachusetts . . . ."

Line 6 of footnote 74 on page 143 should read, "a public interest organization?")."

Page 150, line 12 should read, "them sovereignty to one degree or another. So what does . . . ."

Line 5 of footnote 122 on page 154 should read, "A just war requires, first and foremost, a just cause, such as self-defense, recovering stolen . . . ."

Line 6 of footnote 196 on page 168 should read, "http://www.msaj.com/papers/feddeleg.htm."