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CLEAN AIR ACT MAYHEM: EPA'S TAILORING RULE STITCHES GREENHOUSE GAS EMISSIONS INTO THE WRONG REGULATORY FITTING

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ABSTRACT

Regardless of whether you believe that human activities cause or contribute to global warming, regulatory action seeking to mitigate the future consequences of climate change will impact the lives of every American. On January 2, 2011, U.S. Environmental Protection Agency ("EPA") regulation of greenhouse gas emissions from stationary sources took effect. The EPA rule implementing this regulation is the conclusion, for the time being, of a sequence of recent judicial and administrative activities comparable to a regulatory domino effect.

The Supreme Court started the cascade of regulation in Massachusetts v. EPA, *in which the Court held that the EPA has the authority to regulate greenhouse gas emissions under the Clean Air Act if further evaluation indicated greenhouse gases were endangering public health and mobile sources were contributing to the threat. Under President Obama's guidance, the EPA finalized that Endangerment Finding and concluded human health was threatened by greenhouse gas emissions from mobile sources. Subsequently, the EPA published three codependent directives to regulate greenhouse gases under the Clean Air Act: (1) the Tailpipe Rule to regulate emissions from mobile sources; (2) an official interpretation of the Clean Air Act, concluding that when greenhouse gases are "actually regulated" under the Tailpipe Rule, stationary sources are also subject to regulation; and (3) the Tailoring Rule, a revision of statutory thresholds aimed at shielding small sources from rigorous Clean Air Act permitting requirements.*

In light of the unique challenges presented by global climate change, this Comment analyzes whether the EPA's Tailoring Rule is lawful under existing statutory authority. According to the express language of the Clean Air Act, congressional intent underlying the statute, and legal precedent, the EPA's Tailoring Rule represents an unauthorized expansion of EPA authority and is an arbitrary use of the Clean Air Act to regulate greenhouse gases. Because the Tailoring Rule violates the unambiguous language of the Clean Air Act, subverts the congressional intent underlying the Act, infringes upon the separation of legislative and executive powers, and relies improperly upon the disfavored legal doctrines, the Tailoring Rule should fail judicial review.

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I. INTRODUCTION

"The health effects of [man's alterations of the environment] are often unknown, sometimes unknowable . . . the statutes—and common sense—demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable."[1] Yet the question remains: In the face of uncertainty, can precautionary regulatory action proceed beyond statutory authority?

The potential impacts of global climate change pose unique challenges. Only recently have climate scientists been able to explain decades of research in plain language to create widespread awareness that the planet is warming and humans are largely responsible. Still, the science is non-consensual and uncertain, specifically regarding how human activities directly or indirectly affect the global temperature and whether changes in human conduct can affect change.[2] Such uncertainty makes the government's task, as "trustee" of the public domain, even more difficult. Quite certainly, however, the unknown proportion and unforeseen impacts of global climate change will challenge and require change from all three branches of the government.

Part II of this Comment will show that the Supreme Court recognizes the uniqueness of the climate change challenge and is willing to adapt notwithstanding uncertainty. The text and legal implications of *Massachusetts v. EPA* indicate that the judicial branch acknowledges

1. Ethyl Corp. v. Envtl. Prot. Agency, 541 F.2d 1, 24–25 (D.C. Cir. 1976).

2. *See* Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 554 (2007) ("[T]here is considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases and aerosols."); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 72–73 (The Core Writing Team, ed. 2007) (reporting that the analysis required to translate the physical consequences of climate change to localized economic and human impacts is evolving but inherently uncertain); Lisa Schenk, *Climate Change "Crisis" – Struggling for Worldwide Collective Action*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 319, 343 (2008) ("Scientific predictions regarding climate change are unclear as to where, when, and how climate change will strike."); Kimberly A. Strassel, *The Climate Change Climate Change*, THE WALL STREET JOURNAL, June 26, 2009, http://online.wsj.com/article/SB124597505076157449.html ("The collapse of consensus has been driven by reality. The inconvenient truth is that the earth's temperatures have flat-lined since 2001, despite growing concentrations of [carbon dioxide].").

the scientific nexus between greenhouse gas emissions and global warming as well as the scientific predictions of future harm. Further, the Court seems willing to acknowledge that strict judicial constructs will not always offer an appropriate remedy to such unusual problems. Finally, the Court is unwilling to allow the Environmental Protection Agency ("EPA") to rely on scientific uncertainty for inaction; the EPA must find policy guidance regarding regulation of greenhouse gases in the Clean Air Act.

Part III details the regulatory cascade resulting from the intersection of the *Massachusetts v. EPA* opinion, the change in executive administration, and the accompanying political priorities. In response to the Supreme Court's interpretation of the Clean Air Act, the EPA undertook the prescribed process to determine if greenhouse gas emissions threaten public health and welfare. Contemporaneously, Congress entertained, and rejected, legislation that proposed to establish a comprehensive, nationwide program to control greenhouse gas emissions. Because Congress was unable to provide consensual legislation to address global warming in the face of the economic impacts of regulating greenhouse gas emissions, the EPA forged ahead to "comply with the Supreme Court's decision recognizing EPA's obligation to address climate change."[3]

In the absence of comprehensive legislation to address global climate change, existing legislation, specifically the Clean Air Act, will be stretched and manipulated to accommodate the unique problems. However, such action forces the question of whether the uncertain scope and intensity of climate change impacts are great enough to grant a regulatory agency the power to act outside legislative direction. In Part IV, this Comment argues that the EPA has exceeded its authority to regulate under the precautionary approach. Although the EPA has broad discretion to implement provisions to protect public health and welfare under the Clean Air Act, the Agency exceeded its statutory authority by issuing the Tailoring Rule. To evade the "absurd results" and "administrative impossibility" resulting from its hasty greenhouse gas rulemaking, the EPA unilaterally amended the Clean Air Act and impermissibly substituted its political judgment for that of Congress. Since the Tailoring Rule confers extraordinary power on the EPA, fails to abide by the text of the Clean Air Act, and undermines unambiguous congressional intent expressed in the Clean Air Act, the EPA's Tailoring Rule is arbitrary and capricious and should fail judicial review.

3. Memorandum from Lisa P. Jackson, Envtl. Prot. Agency Adm'r, to All Envtl. Prot. Agency Emps. (Jan. 23, 2009), *available at* http://www.epa.gov/Administrator/memotoemployees.html.

II. The Supreme Court Directs the EPA to Mend a Seam in Climate Change Policy

A. *The* Massachusetts v. EPA *Opinion*

A series of events culminated in the EPA's current effort to regulate greenhouse gases under a patchwork of rules; however, the triggering event was the April 2007 Supreme Court decision in *Massachusetts v. EPA*.[4] Massachusetts and eleven other states, a number of local governments, and private organizations sued the EPA for failing to regulate greenhouse gas emissions in the transportation sector.[5] The petitioners claimed that respected scientific findings connect increasing atmospheric concentrations of greenhouse gases to a rise in global temperatures.[6] Further, the petitioners claimed that such global warming adversely impacts Massachusetts because a significant portion of the State's coastal property would be permanently or temporarily lost to sea level rise or periodic flooding events.[7]

In review of a petition for rulemaking, which requested that the Agency regulate greenhouse gases, the EPA concluded that it lacked the authority to regulate new vehicle emissions under the Clean Air Act because Congress did not intend for greenhouse gases to be regulated under the Act and that carbon dioxide was not an "air pollutant" as defined by the Act.[8] Although the Court conceded that a governmental agency has broad discretion to choose how to carry out its delegated responsibilities, an agency's refusal to issue rules is subject to judicial review.[9] In contrast to the EPA's reading of the Clean Air Act, the Court used a tight textual interpretation of the statute and found that it has a "sweeping definition of 'air pollutant' [which] includes '*any* air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters ambient air.'"[10] Because greenhouse gases, including carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons, are physical and chemical substances, which are emitted into ambient air, the Court found that these greenhouses gases were unambiguously "air pollutants" under the Clean Air Act.[11]

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4. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007).

5. *Id.* at 505.

6. *Id.*

7. *Id.* at 523. The U.S. Supreme Court dedicated a substantial portion of the opinion to establishing the petitioners' standing. The Court stated that, since the party seeking review of a congressionally-created procedural right—here, a challenge to EPA action—is a sovereign state rather than a private party, only one of the petitioners needs to have standing for the Court to review the petition. *Id.* at 517–18. The Court focused on Massachusetts' standing.

8. *Id.* at 528; *see also*, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,929–33 (Sept. 8, 2003).

9. *Massachusetts*, 549 U.S. at 527.

10. *Id.* at 528–29.

11. *Id.* at 529.

The arguments that the EPA posed to show that it could not regulate greenhouse gases are interesting to note now that the Agency has actually proceeded to regulate the same gases. First, the EPA argued that congressional actions and deliberations that occurred after passing the Clean Air Act were conclusive illustrations that Congress did not intend for the Agency to regulate greenhouse gases under the Act.[12] The Court found, however, that the "EPA identifie[d] nothing suggesting that Congress meant to curtail EPA's power to treat greenhouse gases as air pollutants."[13] Next, the EPA argued that regulating carbon dioxide emissions would force it to regulate fuel economy standards, a job that Congress delegated to the Department of Transportation ("DOT").[14] The Court responded by asserting that the responsibilities of agencies may overlap when addressing an interdisciplinary issue like global warming; however, the fact that DOT sets mileage standards "in no way licenses EPA to shirk its environmental responsibilities."[15] Finally, the EPA argued that even if it has authority to regulate greenhouse gases, it would be "unwise to do so at this time" because such action might interfere with the President's efforts to negotiate with developing nations to reduce their emissions.[16] Once again, the Court dismissed the argument because the EPA's statutory command is clear.[17] The Court held that greenhouse gases are "air pollutants" within the meaning of the Clean Air Act and gave the EPA three alternatives: (1) issue a finding that greenhouse gas-related air pollution "may reasonably be anticipated to endanger public health or welfare;" (2) issue a finding of no endangerment; or (3) explain why making such a finding would be impossible.[18] Further, if the EPA makes a finding of endangerment, the Act requires the Agency to regulate the emissions of "the deleterious pollutant[s] from new motor vehicles."[19]

B. *The Legal Significance of* Massachusetts v. EPA

It is important to recognize that the Court's decision did not require the EPA to regulate greenhouse gases, even from mobile sources. Rather, the decision closely tracked the text of the Clean Air Act and determined that the EPA has the authority to regulate greenhouse gases if the Agency determines that the emissions of such gases pose a threat to human health and well-being.[20] Further, the decision mandated an evaluation of whether greenhouse gases were endangering

12. *Id.*
13. *Id.*
14. *Id.* at 531–32.
15. *Id.* at 532.
16. *Id.* at 532–33.
17. *Id.* at 534.
18. *Id.* at 532–33.
19. *Id.* at 533 (citing Clean Air Act, 42 U.S.C. § 7521(a)(1) (2006)).
20. *Id.* at 519–20.

public health and the environment, whether mobile emissions were contributing to the endangerment, and whether regulation of mobile sources was required—components of an Endangerment Finding and Cause or Contribute Finding.[21]

Critics of the *Massachusetts v. EPA* decision contend that the Court majority was beguiled by the narrow focus of the controversy at issue when it concluded that an endangerment finding would not lead to "extreme measures."[22] In reality, as Justice Scalia highlights in his dissent, the Clean Air Act is a "malleable statute giving broad discretion" to the EPA.[23] Further, scholars point out that the Clean Air Act is a highly-interconnected statute; therefore, once the EPA regulates greenhouse gases under one provision of the Act, it must regulate greenhouse gases under multiple other provisions.[24] In fact, Professor Jonathon Adler contends that the *Massachusetts v. EPA* decision granted the EPA broad authority, and perhaps duty, to regulate materials contributing to atmospheric harm.[25] Thus, the impact of *Massachusetts v. EPA* does not stop at greenhouse gas emissions from mobile sources. It will be interesting to see how closely courts track the text of the Clean Air Act now that the EPA faces legal challenges to its regulation of greenhouse gas emissions under Clean Air Act authority.

Other critiques of the *Massachusetts v. EPA* opinion focus on the Court's standing analysis. After emphasizing that the test for standing is easier to satisfy when a sovereign entity brings the action and a procedural right is involved, the opinion addresses the traditional three-part standing test:[26] (1) a concrete and particularized injury that

21. William J. Walsh, Mark A. Erman & Jane C. Luxton, *Industry Cries Foul to EPA's Attempt to Regulate GHG Emissions Using the Clean Air Act*, 10 SUSTAINABLE DEV. L. & POL'Y 39, 40 (2010) (citing *Massachusetts*, 549 U.S. at 533).

22. George F. Allen & Marlo Lewis, *Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of* Massachusetts v. EPA, 44 U. RICH. L. REV. 919, 922 (2010).

23. *Massachusetts*, 549 U.S. at 560 (Scalia, J., dissenting).

24. NATHAN RICHARDSON, ART FRAAS & DALLAS BURTRAW, GREENHOUSE GAS REGULATION UNDER THE CLEAN AIR ACT: STRUCTURE, EFFECTS, AND IMPLICATIONS OF A KNOWABLE PATHWAY 3 (Resources for the Future 2010), *available at* www.rff.org/RFF/Documents/RFF-DP-10-23.pdf; Allen & Lewis, *supra* note 22, at 922; Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does* Chevron *Set the EPA Free?*, 29 STAN. ENVTL. L.J. 283, 288 (2010) [hereinafter *Does* Chevron *Set the EPA Free?*].

25. Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 63–64 (2007) (arguing that "[u]nder the Court's new interpretation, the Clean Air Act . . . provides EPA with roving authority, if not responsibility, to regulate any substance capable of causing or contributing to environmental harm in the atmosphere.").

26. *Massachusetts*, 549 U.S. at 517–19; *see also* Daniel A. Farber, *A Placed-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1524 (2008) ("The idea that procedural injuries have a lower threshold for standing was not new, but the Court had not previously indicated that judicial review of an agency action might itself be a component of such a 'procedural' right.").

is actual or imminent; (2) reasonably traceable to the challenged action that would (3) likely be redressed by a favorable decision.[27] The Court's treatment of each standing element in the *Massachusetts* opinion has been criticized—questioning whether sea level rise and potential flooding in Massachusetts was a particularized and imminent injury in fact;[28] whether the EPA's failure to regulate greenhouse gas emissions was "fairly traceable" to cause global warming and potential subsequent sea level rise and flooding;[29] and whether finding that the EPA has authority to regulate greenhouse gas emissions from automobiles would "redress" global warming.[30] All of these critiques have merit based on Supreme Court precedent for environmental litigation; however, a full discussion of this debate is beyond the scope of this Comment.

The general consensus is that the *Massachusetts v. EPA* decision adopted a lenient standing framework for sovereign environmental litigants;[31] however, one could also argue that the *Massachusetts* Court

27. *Massachusetts*, 549 U.S. at 517 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

28. *See id.* at 541 (Roberts, C.J., dissenting) ("The very concept of global warming seems inconsistent with th[e] particularization requirement. Global warming is a phenomenon 'harmful to humanity at large.'" (quoting Massachusetts v. Envtl. Prot. Agency, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in part))).

29. *See e.g.*, Mary Kathryn Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 495 (2010) (arguing that "if the *Massachusetts* Court had fully abided by the precedents in *Simon* [*v. Eastern Kentucky Welfare Rights Organization*] and *Lujan* [*v. Defenders of Wildlife*], the Court would have concluded that the public law claims against the EPA in *Massachusetts* were not fairly traceable to the plaintiffs' injury"); Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1078 (2009) (arguing that under the *Massachusetts* "loosened standard, *any* contribution of *any* size to a cognizable injury would be sufficient for causation, and *any* step, no matter how small, is sufficient to provide the necessary redress").

30. *See Massachusetts*, 549 U.S. at 541 (Roberts, C.J., dissenting) ("the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world."); Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 755 (2009) (agreeing with Justice Roberts's dissent because "[g]iven the small portion of greenhouse gases attributable to domestic automobiles, it is doubtful whether the EPA's regulation of automobile emissions would create a 'substantial likelihood' of remedying the threatened injury to Massachusetts's coastline.").

31. Approval or disapproval of the *Massachusetts* standing test, however, is nonconsensual. *See, e.g.*, Susan Muller, *Unprecedented Harm: Will the Roberts Court Recognize the Distinction Between Global Warming and Its Effects?*, 44 NEW ENG. L. REV. 317, 341 (2010) (arguing that "[c]onsiderable confusion already exists due to ambiguity in the *Massachusetts* holding on [the standing] issue, and the varied attempts of circuit courts to apply that holding."); Mark Gabel, Note, *Generalized Grievances and Judicial Discretion*, 58 HASTINGS L.J. 1331 (2007) (suggesting that *Massachusetts v. EPA* discards the ban against generalized grievances); Randall S. Abate, Massachusetts v. EPA *and the Future of Environmental Standing in Climate Change Litigation and Beyond*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 121, 175 (2008) (concluding that *Massachusetts v. EPA* may be an indispensible tool for progress in combating climate change in the immediate future by enhancing access to the

expressly recognized the unique nature of the climate change challenge. The causal connection between human conduct and resulting climate change is attenuated and cumulative. Especially, the gap in time between an emission event and resulting consequences, such as sea level rise, can be decades-long. Further, not a single factory or automobile, but aggregates of sources, combine to cause the adverse impacts of global climate change. Finally, this aggregate nature of the resulting injury requires regional and global efforts to effect change. Therefore, the tripartite requirements of federal standing—a concrete and particularized injury rather than a general grievance, that is "fairly traceable" to the conduct of the defendants, and can be redressed by a favorable finding in the court—are problematic, if not impossible, to satisfy for climate change matters. In light of these unique characteristics of climate change, the Court's opinion appears to recognize the need for a new understanding about the nature of the harm, the causal relationships, and the potential for redress in climate change litigation.

III. THE EPA SEIZES THE NEEDLE AND THREAD

A. *The Endangerment Finding*

Although the *Massachusetts v. EPA* decision clearly found that greenhouse gas emissions are an "air pollutant" and that the EPA could not avoid determining whether greenhouse gas emissions endangered human health and welfare (an "Endangerment Finding"), the out-going Bush administration punted the obligation by issuing an Advanced Notice of Proposed Rulemaking ("ANPR").[32] The ANPR summarizes available climate change science and its effects on the Endangerment Finding at issue under section 202 of the Clean Air Act; reviews the EPA's work to-date on greenhouse gas emission standards in motor vehicles; analyzes interconnections among Clean Air Act provisions; examines opportunities and challenges different regulatory approaches would face; and seeks public comment on petitions to set greenhouse gas emission standards for other types of mobile sources.[33] The ANPR does not propose or recommend the use of any particular Clean Air Act provision to regulate greenhouse gases or commit to specific subsequent steps.[34] In fact, then-EPA Administrator Stephen Johnson used the ANPR to argue against regulating

courts. However, the decision could be interpreted to be limited to actions brought by states); Jonathan H. Adler, *supra* note 29, at 1087 (arguing that after decisions in *Massachusetts v. EPA* and *Sprint Commc'ns Co. v. APCC Servs. Inc.*, the Roberts Court has expanded the realm of justiciable claims under Article III).

32. Patricia F. Sharkey, *Recent Developments in Greenhouse Gas Regulations*, ASPATORE, 2010 WL 3252450, at *8 (2010); *see generally* Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule, 73 Fed. Reg. 44,354 (proposed July 30, 2008) [hereinafter ANPR].

33. *See generally* ANPR, *supra* note 32.

34. *See id.*

greenhouse gases and asserted that greenhouse gas regulation was ill-suited to the structure of the Clean Air Act.[35]

The ANPR document actually substantiates concerns voiced in response to the *Massachusetts v. EPA* decision because the document details how the EPA's regulation of greenhouse gases under one provision of the Clean Air Act will mandate regulation under multiple provisions—leading to "extreme measures."[36] As commentators have pointed out, the ANPR provides a veritable roadmap for the regulation of greenhouse gas emissions under the Clean Air Act—including hundreds of pages that hypothesize how to reduce greenhouse gas emissions from cars, trains, ships, airplanes, power plants, factories, and refineries.[37]

The ANPR includes several unprecedented components which highlight the controversial nature of greenhouse gas regulation in America.[38] The published document commences with a letter from the President's Office of Information and Regulatory Affairs and Office of Management and Budget, which states that the EPA Administration agreed to publish the ANPR under a statement that it did not represent Administrative Policy.[39] The letter was drafted and published due to interagency disagreement about the document, particularly regarding interpretations of law, economics, science, and policy published in the ANPR.[40] In fact, the ANPR included letters from four other agencies criticizing the draft; however, *all* of the agencies agreed with the EPA that the Clean Air Act is an "unsuitable vehicle" for reducing greenhouse gas emissions.[41] The interagency reviewers concluded that following the "regulatory roadmap" detailed in the ANPR "could result in piecemeal application of command-and-control regulation . . . covering both U.S. manufacturing activity and a

35. *Id.* at 44,354–55 ("I believe the ANPR demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time consuming and, likely, convoluted set of regulations.").

36. Allen & Lewis, *supra* note 22, at 922.

37. *See Does* Chevron *Set the EPA Free?*, *supra* note 24, at 294 (arguing that an Endangerment Finding has significant implications because of the interrelationships between provisions in the Clean Air Act for other greenhouse emitters); Sandy Liddy Bourne, *EPA Advance Notice of Proposed Rulemaking (ANPR): Alert 3*, THE HEARTLAND INST. (August 26, 2008), http://www.heartland.org/policybot/results/23773/EPA_Advance_Notice_of_Proposed_Rulemaking_ANPR_Alert_3.html (noting that under the ANPR, EPA's proposal includes applying what's been dubbed "the Grass Mileage Standard" to lawn mower engines and weed whackers).

38. Gabrielle Sigel, Oscar F. Marrero & Allison A. Torrence, eds., *Climate Change Update: EPA ANPR Defers Making Endangerment Finding for GHGs, Requests Public Comment, Publishes Inter-Agency Debate*, JENNER & BLOCK LLP 1 (July 2008), www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/5715/climate_change_digest_07.08.pdf.

39. *Id.*

40. ANPR, *supra* note 32, at 44,356.

41. *Id.*

broad range of commercial and household activities to an extent well beyond the scope of current regulation."[42] Such regulation of greenhouse gas emissions under the Clean Air Act would result in unprecedented expansion of EPA authority, would affect every industrial sector, and could impact every household in the country.[43]

Notwithstanding the discord among administrative agencies, the Obama Administration made clear its intention to regulate greenhouse gas emissions.[44] On April 17, 2009, less than four months after President Obama took office, the EPA signed the *Proposed Endangerment and Cause or Contribute Findings Under Section 202(a) of the Clean Air Act* ("Proposed Endangerment Finding").[45] The proposed rule included two key findings: (1) elevated concentrations of six greenhouse gases endanger both public health and welfare of current and future generations; and (2) the emissions of these greenhouse gases from new motor vehicles and their engines contribute to the endangerment.[46] After a sixty-day public comment period, during which the EPA reportedly received over 380,000 comments, the EPA released the final *Endangerment and Cause or Contribute Findings under Section 202(a) of the Clean Air Act* ("Final Endangerment Finding") on December 5, 2009.[47] In reaching its finding, the EPA reviewed the Supreme Court's instructions in *Massachusetts v. EPA* and associated legal requirements in the Clean Air Act, evaluated available scientific data regarding greenhouse gas emission impacts on climate change, and assessed the accompanying impacts on public health and well-being.[48]

The EPA's Final Endangerment Finding was based on scientific data primarily provided by the U.S. Global Climate Research Program, the Intergovernmental Panel on Climate Change ("IPCC"), and the National Research Council.[49] The scientific and technical information associated with the Final Endangerment Finding was

42. *Id.* at 44,357.

43. *Id.* at 44,355.

44. Ronald Zdrojeski & Peter Knight, *Filling the Void: Agencies Don't Wait for Federal Legislation to Respond to Climate Change*, *in* WORKING WITH GOVERNMENT AGENCIES IN CLIMATE CHANGE LAW: LEADING LAWYERS ON COMMUNICATION WITH GOVERNMENT OFFICIALS, UNDERSTANDING LEGAL CHALLENGES, AND NAVIGATING RECENT AND UPCOMING CLIMATE CHANGE REGULATIONS 33, 33–34 (Aspatore 2009), *available at* 2009 WL 1342288, at *1.

45. Proposed Endangerment and Cause or Contribute Findings Under Section 202(a) of the Clean Air Act; Proposed Rule, 74 Fed. Reg. 18,886 (Apr. 24, 2009) [hereinafter Proposed Endangerment Finding].

46. *Id.*

47. Endangerment and Cause or Contribute Findings Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,500 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1) [hereinafter Final Endangerment Finding].

48. *See* DAVID WOOLEY & ELIZABETH MORSS, CLEAN AIR ACT HANDBOOK § 5:35 (20th ed. 2010), *available at* Westlaw CAAHBK.

49. Final Endangerment Finding, *supra* note 47, at 66,497.

presented in a separate Technical Support Document ("TSD").[50] The applicable TSD was first drafted in 2007 and released as part of the ANPR published on July 30, 2008; however, the final TSD purportedly included new scientific reports associated with greenhouse gas emissions and climate change.[51]

Although a majority of the comments received by the EPA on the Proposed Endangerment Finding were identical mass-mail comments, a large number of individual comments concerned the legitimacy of the science behind the endangerment determination.[52] The EPA, however, rejected "climategate" alarmists by issuing a press release asserting that "[s]cience overwhelmingly shows greenhouse gas concentrations at unprecedented levels due to human activity."[53] Subsequently, the EPA received ten petitions for reconsideration of the Final Endangerment Finding.[54] The petitions were submitted by fossil fuel interests, the U.S. Chamber of Commerce, anti-regulatory organizations, and the state governments of Texas and Virginia.[55] The petitions generally challenged the science behind the Final Endangerment Finding, particularly the EPA's reliance on IPCC findings.[56] Specifically, the petitioners rely on a mass of emails and information released on the Internet from University of East Anglia's Climatic Research Unit ("CRU"), which purportedly revealed that "the IPCC reports were not the product of a rigorous, transparent and neutral scientific process."[57] The petitions alleged that the information released by CRU revealed that many of the key scientists that authored IPCC sci-

50. CLIMATE CHANGE DIVISION, OFFICE OF ATMOSPHERIC PROGRAMS, U.S. ENVTL. PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT FOR ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES UNDER SECTION 202(A) OF THE CLEAN AIR ACT (Dec. 7, 2009), *available at* http://www.epa.gov/climatechange/endangerment/downloads/Endangerment%20TSD.pdf.

51. *See id.* at 2.

52. *See generally Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act: EPA's Response to Public Comments, Vol. 1*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/climatechange/endangerment/comments/volume1.html#foreword (last updated Apr. 14, 2011).

53. *EPA News Release: Greenhouse Gases Threaten Public Health and the Environment*, U.S. ENVTL. PROT. AGENCY (Dec. 7, 2009), http://yosemite.epa.gov/opa/admpress.nsf/0/08D11A451131BCA585257685005BF252.

54. *See* EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 49,556, 49,557 (Aug. 13, 2010), *available at* http://epa.gov/climatechange/endangerment/downloads/response-decision.pdf.

55. *See Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, http://epa.gov/climatechange/endangerment/petitions.html (last updated on Apr. 14, 2011).

56. *See* EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. at 49,557.

57. Petition for Reconsideration of Peabody Energy Company at ES-1, No. EPA-HQ-OAR-2009-0171 (Feb. 11, 2010), *available at* http://epa.gov/climatechange/endangerment/downloads/Petition_for_Reconsideration_Peabody_Energy_Company.pdf.

entific assessments were motivated by a policy agenda that did not align with scientific data and "caused them to cross the line from neutral science to advocacy."[58] The petitions for reconsideration also challenged the EPA's Final Endangerment Finding based on alleged and confirmed mistakes in the IPCC reports and new scientific data not previously considered in the Final Endangerment Finding.[59]

On July 29, 2010, the EPA issued a statement denying the petitions for reconsideration of the Final Endangerment Finding.[60] After "months of consideration," the EPA found no evidence in the petitions' claims that the science underlying the Final Endangerment Finding cannot be trusted.[61] The EPA subsequently published its formal denial of the petitions, dedicating almost forty pages to reinforce the science behind its determination.[62] According to the *Denial of Petitions for Reconsideration*, the Agency examined the processes used by IPCC and the U.S. Government's approach to approving IPCC reports and found that they are well-grounded in science, not based on policy considerations.[63] Additionally, the EPA reviewed alleged errors in the appropriate IPCC reports and found that the errors are minor and do not affect the validity of the overall report or the Final Endangerment Finding.[64] The EPA released its denial with biased language stating that "scientific evidence is robust, voluminous, and compelling. Climate change is happening now, and humans are contributing to it."[65]

The extent of on-going legal challenges to the Final Endangerment Finding are beyond the scope of this Comment; however, it is relevant to point out that the EPA's proposed roadmap to regulating greenhouse gases has been challenged at every step. While the petitions for reconsideration were pending with the EPA, seventeen court challenges were filed with the Court of Appeals for the District of Colum-

58. *Id.* at ES-3.

59. *See* EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. at 49,558.

60. *See EPA Rejects Claims of Flawed Climate Science*, U.S. ENVTL. PROT. AGENCY (July 29, 2010), http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/56eb0d86757cb7568525776f0063d82f!OpenDocument.

61. *Id.*

62. *See generally* EPA's Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. at 49,557.

63. *Fact Sheet, EPA's Denial of Petitions to Reconsider EPA's Greenhouse Gas Endangerment Findings*, U.S. ENVTL. PROT. AGENCY, 2, http://www.epa.gov/climatechange/endangerment/downloads/endangerment-factsheet.pdf (last visited Aug. 15, 2011).

64. *Id.*

65. *Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, *supra* note 55.

bia Circuit.[66] The D.C. Circuit has consolidated these cases under *Coalition for Responsible Regulation, et al. v. EPA* (D. D.C. 09-1322).[67] The petitioners, including many of the same states and industrial entities that petitioned the EPA for reconsideration, are asking the judiciary to review the process and procedures the EPA followed to generate the Final Endangerment Finding. On the opposing side, environmental advocacy organizations and seventeen states requested to intervene in support of the EPA.[68] The petitions for judicial review seek to force the EPA to re-evaluate the Final Endangerment Finding in light of the revelations regarding the IPCC reports and to re-open the public comment period to ensure the Endangerment Finding is based on reliable science, as required by the Clean Air Act.[69]

Scholars argue that the Final Endangerment Finding is likely to withstand legal challenge because the standard for review of an administrative ruling based on health, safety, and welfare is extremely difficult to overcome.[70] Before the court reaches the merits, the petitioners will have to survive a challenge to their standing to bring suit. The EPA will likely argue that the Final Endangerment Finding imposes no direct obligations on the regulated community, and therefore, the petitioners lack an actual injury;[71] however, the petitioners will likely argue that the Final Endangerment Finding is a precursor to

66. *See* Martin T. Booher & Andrew N. Davis, *New Federal Regulatory Initiatives and Compliance Obligations for Emitters of Greenhouse Gases*, ASPATORE, 2010 WL 3252456, at *7 (2010).

67. The petitioners include American Iron and Steel Institute, Gerdau Amsteel Corp., American Farm Bureau Federation, National Mining Association, Peabody Energy Company, Massey Energy Company, Rosebud Mining Company, the U.S. Chamber of Commerce and the Southeastern Legal Foundation, Inc. on behalf of fifteen House Republicans and business associations, and the states of Alabama, Virginia, Texas, Alaska, Michigan, Nebraska, Florida, Hawaii, Indiana, Kentucky, Louisiana, Mississippi, North Dakota, South Dakota, Oklahoma, South Carolina, and Utah.

68. The intervener-respondents include the Commonwealth of Pennsylvania Department of Environmental Protection, the City of New York and the states of Arizona, California, Connecticut, Delaware, Iowa, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Minnesota. Robin Bravender, *States Take Sides in Greenhouse Gas 'Endangerment' Brawl*, N.Y. TIMES, Mar. 19, 2010, http://www.nytimes.com/gwire/2010/03/19/19greenwire-states-take-sides-in-greenhouse-gas-endangerme-29019.html.

69. *See* Petitioners' Motion for Stay at 31, Coal. for Responsible Regulation, Inc. v. Envtl. Prot. Agency, No. 10-1281 (D.C. Cir. Sept. 15, 2010), *available at* http://www.eenews.net/assets/2010/09/16/document_gw_03.pdf.

70. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1100, 1122 (2008) (explaining that agencies win 68.8% of the time before the Supreme Court and that agency affirmance rates are even higher before the lower federal courts).

71. *See* Jeffrey A. Lamken, *EPA Greenhouse Gas Regulation: State Impacts and State Interests*, WASH. LEGAL FOUND. LEGAL BACKGROUNDER (Mar. 12, 2010), http://www.wlf.org/Upload/legalstudies/legalbackgrounder/03-12-10Lamken_LegalBackgrounder.pdf.

a cascade of regulation which would cause actual injury to commercial interests and the general economy of the states.[72] Further, as sovereign entities, States can assert "special solitude" in the standing analysis, as established under *Massachusetts v. EPA*.[73]

Assuming the petitioners establish standing in federal court, the D.C. Circuit must determine whether the EPA's Final Endangerment Finding was "arbitrary, capricious, or an abuse of discretion" under the Administrative Procedure Act.[74] The scope of review under the "arbitrary and capricious" standard is narrow, and a court should not substitute its judgment for that of the EPA. However, the Supreme Court has explained that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[75] Because courts are not panels of scientists nor do they have the capacity to evaluate the validity and reliability of climate change science, the court will give broad deference to the EPA's administrational expertise. Unless the petitioners can show that the EPA had no reasonable basis for its determination, challenges to the scientific basis of the Final Endangerment Finding will probably be defeated in court.

The Final Endangerment Finding was the EPA's pledge to regulate greenhouse gas emissions under the Clean Air Act, unless Congress passes comprehensive legislation addressing the issue.[76] Critics of the regulatory road map, presented in the ANPR and anticipated after the Final Endangerment Finding, assert that the Clean Air Act is an im-

72. Robin Bravender, *Climate: Lawsuits Roll In As EPA 'Endangerment' Deadline Looms*, E&E PUBLISHING, LLC (Feb. 15, 2010), http://www.eenews.net/public/Greenwire/2010/02/15/1 ("[T]here is a good likelihood that ultimately the endangerment determination petitions become consolidated with any challenges to the motor vehicle rule itself, which likely would moot any standing questions." Roger Martella, former EPA general counsel during the George W. Bush administration).

73. *See* Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 520 (2007) ("Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis"); *see also* Lamken, *supra* note 71.

74. PAUL G. ULRICH, P.C. & SIDLEY AUSTIN LLP, FEDERAL APPELLATE PRACTICE GUIDE 9TH CIRCUIT, § 11:16 (2d ed. 2010).

75. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

76. Both President Obama and EPA Administrator Lisa Jackson have repeatedly stated they would prefer Congressional action to Agency action. *See* Steven Mufson & David A. Fahrenthold, *EPA is Preparing to Regulate Emissions in Congress's Stead,* THE WASHINGTON POST, Dec. 8, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/07/AR2009120701645.html ("Jackson said her agency and other administration officials would still prefer if Congress acted before they did."); Darren Samuelsohn, *Climate: Obama Prefers Congress to EPA When It Comes to Emission Cuts—Browner*, E&E PUBLISHING, LLC (Feb. 23, 2009), http://www.eenews.net/public/EEDaily/2009/02/23/2 ("The president continues to believe the best path forward is through legislation, rather than through sort of the weaving together the various authorities of the Clean Air Act, which may or may not end in a cap-and-trade program.")

proper tool to effectively regulate greenhouse gas emissions.[77] Such critics argue that greenhouse gases are fundamentally different from the air quality problems the Clean Air Act was intended to address.[78] Absent congressional action otherwise, however, the Final Endangerment Finding opens the door for EPA to regulate greenhouse gas emissions under the Clean Air Act not only from motor vehicles, but also from stationary sources.[79]

B. *The Clean Air Act Structure*

The Court's interpretation of the Clean Air Act to require an endangerment determination under section 202(a)(1) and the subsequent Endangerment Finding compels a closer look at the statute—"one of the most complex regulatory statutes in American Law."[80] In fact, the complexity of the statute closely matches the perceived complexity of air pollution when it was enacted in 1970.[81] The Clean Air Act is primarily devoted to regulation of mobile and stationary sources of air pollution.[82] Mobile sources generally include vehicles and their engines while stationary sources include industrial facilities.[83] Title II of the Clean Air Act provides that the EPA can set emission standards for new vehicles under section 202, the primary point of controversy in *Massachusetts v. EPA*.[84] According to the statute,

77. *See* ANPR, *supra* note 32, at 44,359; Richard A. Epstein, *Carbon Dioxide: Our Newest Pollutant*, 43 SUFFOLK U. L. REV. 797, 815 (2010) (arguing that coercion under the Clean Air Act is likely to fail and innovation has a better chance of success).

78. *See, e.g.*, Jeffrey J. Rachlinski, *The Psychology of Global Climate Change*, 2000 U. ILL. L. REV. 299, 301 (2000) ("Global climate change, however, differs fundamentally from other environmental problems."); Memorandum from Robert E. Fabricant, Gen. Counsel, to Marianne L. Horinko, Acting Adm'r, (Aug. 28, 2003), *available at* http://www.icta.org/doc/FabricantMemoAug282003.pdf (concluding that "[i]n view of consistent congressional action to learn more about global climate change, the absence of express authority to regulate global climate change, no indication of congressional intent to provide such authority, and the far-reaching implications of regulation to address global climate change," the EPA cannot regulate greenhouse gases under the Clean Air Act); Bonnie Barnett, Mark Hammond & Yesenia Villasenor, *Tailoring Rule Finalized: EPA Issues Much Anticipated "Fix" for PSD and Title V Greenhouse Gas Permitting*, DRINKER BIDDLE ENVTL. ENERGY GRP. 1 (June 2010), http://www.drinkerbiddle.com/files/Publication/28c2b9ff-2f3b-4898-b88e-61937634dabd/Presentation/PublicationAttachment/cae0e16a-43ad-4e65-a624-69479a50c915/FixForPSD%26TitleV.pdf (stating "the [Clean Air Act] was not designed to regulate emissions like [greenhouse gases]").

79. *See* WOOLEY & MORSS, *supra* note 48, at § 5.35.

80. *Does* Chevron *Set the EPA Free?*, *supra* note 24, at 287.

81. *See* Jay M. Zitter, Annotation, *Construction and Application of § 202(a)(1) of the Clean Air Act*, 13 A.L.R. FED. 2D 703, 703 (2006) (reporting that Congress enacted the Clean Air Act after "finding that the growth in the amount and complexity of air pollution had resulted in mounting dangers to the public health and welfare").

82. *Does* Chevron *Set the EPA Free?*, *supra* note 24, at 287.

83. *Id.*

84. *Id.*

> The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, 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.[85]

As previously discussed in Part II(A), the *Massachusetts v. EPA* Court held that the Clean Air Act "unambiguously" provides that greenhouse gases can be treated as air pollutants.[86] Thus, the EPA has the authority, and perhaps a duty, to consider whether greenhouses gases endanger public health and welfare.[87] In accordance with Title II of the Clean Air Act, if EPA makes a finding of endangerment, it must regulate the harmful emissions from new motor vehicles.[88]

Although this regulatory process appears to be clearly defined by the Clean Air Act, the interconnected nature of the statute creates significant implications for commercial stakeholders outside of the motor vehicle sector. In accordance with the Clean Air Act, when the EPA establishes greenhouse gas emissions standards for new motor vehicles, the greenhouse gases become "subject to regulation" under the statute.[89] Consequently, greenhouse gases would also be "subject to regulation" under other provisions of the Clean Air Act, including the Prevention of Significant Deterioration ("PSD") and Title V permitting programs for stationary sources.[90] Although these stationary source provisions are regulated under section I and section V of the Clean Air Act, respectively, the immediate connection between all three provisions was clarified by an EPA memo authored by then-Administrator Stephen Johnson on December 18, 2008, commonly referred to as "the Johnson Memo."[91] The Johnson Memo determined the Clean Air Act requires PSD and Title V permits for air pollutants "actually regulated" under the Act.[92] If the EPA finds that greenhouse gas emissions from motor vehicles endanger public health and thereafter implements regulations to control the deleterious emis-

85. Clean Air Act, 42 U.S.C.A. § 7521(a)(1) (West Supp. 2010).

86. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 529 (2007).

87. *Id.* at 530–31.

88. *Id.* at 533.

89. Allen & Lewis, *supra* note 22, at 923 (citing the ANPR, *supra* note 32, at 44,367 (noting that an endangerment finding under section 202(a) may prompt regulation of greenhouse gases from stationary sources)).

90. *Id.*

91. Memorandum from Stephen L. Johnson, Envtl. Prot. Agency Adm'r, to Reg'l Adm'rs (Dec. 18, 2008), *available at* http://www.epa.gov/NSR/documents/psd_interpretive_memo_12.18.08.pdf [hereinafter The Johnson Memo].

92. *Id.* at 1 ¶ 1 ("As of the date of this memorandum, EPA will interpret this definition of 'regulated NSR pollutant' to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.").

sions, then greenhouse gases would be "actually regulated" under the Act, and stationary source permits would be required for greenhouse gases as well.[93] The Johnson Memo received considerable criticism and the EPA granted a petition for reconsideration; however, the agency reaffirmed and slightly refined its interpretation of "pollutants subject to regulation" in "the Jackson Memo" in April 2010.[94] As a result, once greenhouse gases are "actually regulated" under section II of the Clean Air Act, other provisions of the statute would be implicated, effectuating greenhouse gas emission regulation on stationary sources as well as other mobile sources including heavy-duty trucks, off-road vehicles, marine vessels, and aircraft.[95]

Following in the wake of *Massachusetts v. EPA* and the Final Endangerment Finding, the EPA and the National Highway Transportation Safety Administration ("NHTSA") undertook a joint rulemaking "to establish a National Program consisting of new standards for light-duty vehicles that will reduce greenhouse gas emissions and improve fuel economy."[96] The rule consists of two components: (1) the EPA Tailpipe Rule, promulgated under Clean Air Act § 202(a); and (2) the NHTSA Fuel Economy Act, promulgated under the Energy Policy Conservation Act.[97] According to the EPA's interpretation of the Clean Air Act under the Johnson and Jackson memos, the Tailpipe Rule also triggers the EPA's authority to regulate greenhouse gas emissions from stationary sources.[98]

C. *Sewing onto the Clean Air Act*

On January 2, 2011, the EPA's greenhouse gas emissions standards for light-duty vehicles took effect.[99] On that date, in accordance with the Jackson Memo, permits issued under the PSD and Title V Operating programs must also begin to address greenhouse gases because those pollutants became "subject to regulation" under the Clean Air Act.[100] The PSD Program is a pre-construction permitting program

93. Marybeth Houlihan, et al., *2009: A Year of Significant CAA Developments on All Fronts*, 40 ENVTL. L. RPTR. NEWS & ANALYSIS 10,250, 10,252 (2010).

94. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,004 (Apr. 2, 2010), *available at* http://www.gpo.gov/fdsys/pkg/FR-2010-04-02/pdf/2010-7536.pdf (stating that the EPA is refining its interpretation to establish that the PSD and Title V permitting requirements "will not apply to a newly regulated pollutant until a regulatory requirement to control emissions of that pollutant 'takes effect.'").

95. Allen & Lewis, *supra* note 22, at 922–23.

96. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, & 600).

97. *See id.* at 25,677–728.

98. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. at 17,007.

99. *Id.*

100. Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of

for new and modified major sources of pollution.[101] To comply, a company must obtain a PSD permit from the EPA or a state environmental agency before constructing any new or modified source of pollution emitting or having the potential to emit 100 tons per year or more of any criteria pollutant in an attainment area; however, if a facility does not fall into one of twenty-eight listed categories, then a threshold of 250 tons per year applies.[102] The EPA estimates that 280 sources require a PSD permit per year,[103] the administrative cost of processing the paperwork for the permit is $84,500 for each applicant, and it takes approximately one year to obtain a permit.[104]

The Title V Program requires any source that emits more than 100 tons per year of "any regulated air pollutant" to obtain an operating permit.[105] The Title V Program was implemented in attempt to facilitate compliance with other Clean Air Act programs by consolidating all of a facility's requirements into a single permit.[106] The Title V Program currently includes 15,000 regulated sources of pollution,[107] administrative costs to obtain a permit average $46,350,[108] and it currently takes approximately six months to obtain a Title V permit.[109]

The text of the Clean Air Act explicitly establishes the applicability of the PSD and Title V permits at the 100 and 250 tons per year thresholds described above.[110] Applying these statutory thresholds to greenhouse gases, however, is problematic because carbon dioxide is emitted at quantities that are many times greater than traditional air

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Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77,698, 77,699 (Dec. 13, 2010), *available at* http://69.175.53.6/register/2010/Dec/13/2010-30854.pdf; OFFICE OF AIR QUALITY PLANNING AND STANDARDS, U.S. ENVTL. PROT. AGENCY, PSD AND TITLE V PERMITTING GUIDANCE FOR GREENHOUSE GASES, 2–3 (Nov. 2010), *available at* http://www.epa.gov/region4/air/permits/GHG%20Permitting%20Guidance%20-%2011-10-10%20public.pdf.

101. 40 C.F.R. § 52.21 (2010).

102. Clean Air Act, 42 U.S.C. § 7479 (2006).

103. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,535 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70 & 71), *available at* http://www.gpo.gov/fdsys/pkg/FR-2010-06-03/pdf/2010-11974.pdf#page=1 [hereinafter Final Tailoring Rule].

104. *Id.* at 31,535.

105. Clean Air Act, 42 U.S.C. § 7661 (2006).

106. *Air Pollution Operating Permit Program Update: Key Features and Benefits*, U.S. ENVTL. PROT. AGENCY, 1, http://www.epa.gov/oaqps001/permits/permitupdate/brochure.html#what (last updated July 26, 2011).

107. Final Tailoring Rule, *supra* note 103, at 31,540.

108. LINDA M. CHAPPELL, U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE FINAL PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE GAS TAILORING RULE 35 (May 2010), *available at* http://www.epa.gov/ttn/ecas/regdata/RIAs/riatailoring.pdf.

109. Final Tailoring Rule, *supra* note 103, at 31,536.

110. 40 C.F.R. § 52.21(b)(1)(i)(a)–(b) (2010); Clean Air Act, 42 U.S.C. §§ 7475(a), 7502(c)(5), 7602(j) (2006).

pollutants in similar economic-activity levels.[111] Inclusion of greenhouse gas emissions in the PSD and Title V Operating Permits will significantly expand both programs. Application of the current statutory thresholds will require large office buildings, residential buildings, hotels, retail stores, and other similarly sized building projects to undergo case-by-case EPA permitting.[112] The EPA itself reported that when greenhouse gas emissions trigger PSD permitting, 82,173 new construction projects will require permits annually, which will take a "decade or longer" to obtain.[113] Similarly, once greenhouse gas emissions must be included in Title V Operating Permits, 6,118,252 sources will need permits, and each will take ten years to obtain.[114] The new Title V permits will cost permit authorities more than $123 billion annually, which does not include the costs to the regulated facilities.[115]

Even the EPA recognized that imposing the statutory threshold levels of greenhouse gases on the PSD and Title V permits would "greatly increase the number of required permits, impos[e] undue costs on small sources, overwhelm[ ] the resources of permitting authorities, and severely impair[ ] the functioning of the programs."[116] The EPA's solution was additional rulemaking—the Tailoring Rule, which "tailors" the requirements of the PSD and Title V Programs to initially limit the number of facilities that will be required to obtain permits.[117] Under the Tailoring Rule, permitting requirements for stationary sources will be implemented in phases.[118]

In the first phase, which began on January 2, 2011, only sources currently subject to PSD requirements due to emissions other than greenhouse gases (facilities that are constructed or modified in a way that significantly increases emissions of other pollutants) will be subject to permitting requirements for greenhouse gases.[119] For these sources, projects with greenhouse gas emission increases of 75,000 tons per year or more on a carbon dioxide equivalent basis will need to determine best-available control technologies for their greenhouse gas

111. Barnett, Hammond & Villasenor, *supra* note 78, at 2.

112. *See* Allen & Lewis, *supra* note 22, at 923–24 ("[A]n immense number and variety of entities—including office buildings, hotels, large retail stores, enclosed shopping malls, small manufacturing firms, and commercial kitchens—have the potential to reach 250 [tons per year] of CO_2 emissions.").

113. Final Tailoring Rule, *supra* note 103, at 31,540, 31,557.

114. *Id.* at 31,540, 31,536.

115. CHAPPELL, *supra* note 108, at 19.

116. Final Tailoring Rule, *supra* note 103, at 31,514.

117. *Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Fact Sheet*, U.S. ENVTL. PROT. AGENCY, 1, http://www.epa.gov/NSR/documents/20100413fs.pdf (last visited July 18, 2011) [hereinafter *Final Tailoring Rule Fact Sheet*].

118. *Greenhouse Gas Tailoring Rule Establishes New PSD and Title V Permitting Thresholds*, 20 No. 5 AIR POLLUTION CONSULTANT 2.1, 1 (2010) [hereinafter AIR POLLUTION CONSULTANT].

119. Final Tailoring Rule, *supra* note 103, at 31,516.

emissions.[120] Similarly, in the first phase, only sources otherwise subject to Title V permitting would have to address greenhouse gases in their Title V permits.[121] During the first phase, no sources will be subject to Clean Air Act permitting solely because of greenhouse gas emissions.[122]

In the second phase, which began on July 1, 2011, PSD permitting requirements applied to new sources whose greenhouse gas emissions are 100,000 tons per year or more on a carbon dioxide equivalent basis, even if the source is not otherwise subject to PSD permitting.[123] Modified sources that increase greenhouse gas emissions by 75,000 tons per year or more on a carbon dioxide equivalent basis were also subject to PSD permit requirements.[124] Starting on July 1, 2011, Title V Operating Permits were required for facilities that have greenhouse gas emissions of 100,000 or greater on a carbon dioxide equivalent basis, even if the facility would not otherwise be subject to Title V permitting.[125]

The EPA estimated that approximately 900 additional PSD permits would be triggered by increases in greenhouse gas emissions from new and modified stationary sources.[126] Approximately 550 new sources would be subject to Title V permitting due to greenhouse gas emission thresholds.[127] The majority of sources newly covered by the Title V permitting program will likely be solid waste landfills and industrial manufacturers.[128] In the Tailoring Rule, the EPA committed to undertake another rulemaking to begin in 2011 and conclude no later than July 1, 2012.[129] As promised in the text of the rule, this next rulemaking phase will not require permitting for sources with greenhouse gas emissions below 50,000 tons per year on a carbon dioxide equivalent basis.[130] Finally, the Tailoring Rule also outlines the EPA's requirement to complete a study projecting the remaining administrative burdens with respect to permitting stationary sources of greenhouse gas emissions.[131] This study, due by April 30, 2015, will consider the permitting authorities' ability to fund, hire, and train staff; past experiences with greenhouse gas permitting for new sources and technologies; and the success of streamlining measures for reducing the permitting burdens previously discussed.[132]

120. *Id.*
121. *Id.*
122. *Final Tailoring Rule Fact Sheet*, *supra* note 117, at 2.
123. Final Tailoring Rule, *supra* note 103, at 31,516.
124. *Id.*
125. *Id.*
126. *Final Tailoring Rule Fact Sheet*, *supra* note 117, at 2.
127. *Id.*
128. AIR POLLUTION CONSULTANT, *supra* note 118, at 1.
129. *Final Tailoring Rule Fact Sheet*, *supra* note 117, at 2.
130. Final Tailoring Rule, *supra* note 103, at 31,516.
131. AIR POLLUTION CONSULTANT, *supra* note 118, at 7–8.
132. *Id.*

Despite hopes of delayed implementation or modification, January 2, 2011 marked the date of applicability for the Tailoring Rule and the beginning of a nationwide program that directly regulates greenhouse gas emissions in the United States.[133] In response, opponents filed twenty-six petitions challenging the Tailoring Rule.[134] At issue is whether the Tailoring Rule impermissibly alters the PSD and Title V statutory thresholds, respectively, established in the Clean Air Act without congressional action.[135]

IV. THE EPA'S TAILORING RULE TIES KNOTS INTO THE CLEAN AIR ACT

The EPA implemented the Tailpipe Rule and subsequent Tailoring Rule in direct response to a presidential announcement of a historic national policy that will reduce greenhouse gas emissions and improve fuel economy for all new cars and trucks sold in the United States.[136] Commentators have argued that the Obama Administration and the EPA acted on these issues to "force the issue" and prompt Congress to pass comprehensive legislation to address climate change.[137] Be-

133. Jonathan W. Dettmann & James R. Spaanstra, *Get Set for GHG Regulation: The Tailoring Rule and Reporting Rule in 2011*, FAEGRE & BENSON LLP (Jan. 4, 2011) http://www.faegre.com/12490.

134. Se. Legal Found. v. Envtl. Prot. Agency (D.C. Cir. Index No. 10-1131) (consolidating 6 cases challenging the rule) and Ga. Coal. for Sound Envtl. Policy v. Envtl. Prot. Agency (D.C. Cir. Index No. 10-1200) (consolidating 20 cases challenging the rule). In September 2010, the above two cases were consolidated under Se. Legal Found. v. Envtl. Prot. Agency (D.C. Cir. Index No. 10-1131) and in November 2010, this case was consolidated with the legal challenges to the Endangerment Finding and the Tailpipe Rule in Coal. for Responsible Regulation v. Envtl. Prot. Agency (D.C. Cir. Index No. 10-1073). Petitioners include Southeastern Legal Foundation, Inc., Coalition for Responsible Regulation, Inc., Ohio Coal Association, American Iron & Steel Institute, Gerdau Ameristeel U.S., Inc., U.S. Chamber of Commerce, Georgia Coalition for Sound Environmental Policy, National Mining Association, American Farm Bureau Federation, Peabody Energy Company, Center for Biological Diversity, Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation, South Carolina Public Service Authority, Mark R. Levin, National Alliance of Forest Owners, National Environmental Development Association's Clean Air Project Utility Air Regulatory Group, Missouri Joint Municipal Electric Utility Commission, Sierra Club, Clean Air Implementation Project, National Association of Manufacturers, National Federation of Independent Business, Portland Cement Association, Louisiana Department of Environmental Quality, and the States of Alabama and Texas. CLIMATE CASE CHART, ARNOLD & PORTER, LLP 10, http://www.climatecasechart.com (last updated June 21, 2011).

135. Richard E. Morton & Matthew E. Ross, *Addressing the Major Climate Control Issues*, 2010 ASPATORE SPECIAL REP. 21 (2010).

136. *EPA Will Propose Historic Greenhouse Gas Emissions Standards for Light-Duty Vehicles*, U.S. ENVTL. PROT. AGENCY, 1 (May 2009), http://www.epa.gov/OMS/climate/regulations/420f09028.pdf.

137. Richard A. Horsch & Neal McAliley, *Alerts: EPA's Proposed GHG Tailoring Rule - One Step Closer to Regulation of Large GHG Stationary Sources*, WHITE & CASE LLP 3 (Oct. 2009), http://www.whitecase.com/alert_10012009/ ("It may be that the [Proposed Tailoring Rule], with its continued threat of the imposition of the Act's command-and-control regime on a number of GHG sources nationwide, is yet an-

cause the legislative branch failed to act, President Obama pushed the EPA to take unilateral action.[138] However, the Clean Air Act does not provide the EPA with the express authority to regulate carbon dioxide or any other greenhouse gases on the basis of their climate impact.[139] Whether the EPA may regulate greenhouse gases using its implied authority under the Clean Air Act is the primary legal issue.[140] Even if the EPA has implied authority to regulate greenhouse gases under the Clean Air Act, its power to regulate is explicitly limited under the federal separation of powers.[141] This Part will demonstrate that the tool the EPA implemented to regulate greenhouse gas emissions from stationary sources, the Tailoring Rule, is an unreasonable extension of authority and is contrary to the Clean Air Act.

The EPA's Tailoring Rule should be found arbitrary and capricious because it is: (1) in violation of the language of the Clean Air Act; (2) contrary to congressional intent underlying the Clean Air Act; (3) an infringement on the separation of legislative and executive powers; and (4) an improper invocation of the disfavored Doctrines of "Absurd Results," "Administrative Necessity," and "One-Step-at-a-Time." Just like the petitions challenging the Tailoring Rule assert, the Rule represents an unauthorized power grab by the EPA because the Agency's interpretations of the Clean Air Act would allow "regulation of virtually every activity in the United States, strictly, loosely, or not at all," according to the EPA's choice of manner and schedule.[142]

A. *The Tailoring Rule Conflicts with Prescriptive Language in the Clean Air Act*

The EPA's interpretation of the PSD triggering provisions violates the unambiguous text of the Clean Air Act. Proper analysis begins with section 108 of the Act, the PSD program's analogy of the Endangerment Finding. Under section 108(a)(1), for the purpose of establishing ambient air quality standards, the Administrator shall publish, and revise from time to time, a list that includes each air pollutant "emissions of which, in his judgment, cause or contribute to air pollu-

other action intended, at least in part, to increase pressure on industry, states and other stakeholders to support the passage of more carefully-tailored GHG national legislation.").

138. Timothy Gardner & Thomas Ferraro, *Senate Climate Bill in Peril as Democrats Delay Action*, REUTERS, July 23, 2010, *available at* http://www.reuters.com/article/idUSTRE66L4L520100723?pageNumber=2.

139. ROBERT J. MARTINEAU & DAVID P. NOVELLO, THE CLEAN AIR ACT HANDBOOK 499 (American Bar Association, 2d ed. 2004).

140. *Id.*

141. The EPA, like all federal agencies, has no inherent powers. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

142. Petitioners' Motion for Stay, *supra* note 69, at 9.

tion which may reasonably be anticipated to endanger public health or welfare."[143] The text appears very similar to the text of section 202 upon which the EPA relied for making its Final Endangerment Finding.[144] In fact, the operative language is identical in both.[145]

As previously discussed in Part II.B., the EPA's Endangerment Finding under section 202 arguably triggers applicability of other Clean Air Act provisions.[146] The Final Endangerment Finding asserts that elevated concentrations of six greenhouse gases endanger both public health and welfare of current and future generations, and the emissions of these greenhouse gases from new motor vehicles and their engines contribute to the endangerment.[147] Under the PSD provisions of the Clean Air Act, section 108, if the EPA has determined that emissions of an air pollutant "from numerous or diverse mobile or stationary sources" endanger public health or welfare, it shall also issue air quality criteria for those identified pollutants—known as "criteria air pollutants."[148] The mobile sources considered in the Final Endangerment Finding under section 202(a) almost certainly qualify as "numerous diverse mobile sources" for the purposes of an Endangerment Finding under section 108. Thus, under the unambiguous text of the Clean Air Act, the EPA shall establish air quality criteria for greenhouse gases.

The applicable air quality criteria are called National Ambient Air Quality Standards ("NAAQS").[149] The EPA establishes NAAQS to represent maximum ambient air concentration levels such that the general public and certain sensitive populations are not adversely impacted by air pollution.[150] Although the EPA has argued that section 108 grants it discretion whether or not to establish NAAQS for criteria pollutants, the Second Circuit Court of Appeals previously opined on the same issue: "While the literal language of [section] 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."[151] When deciding whether EPA had such discre-

143. Clean Air Act, 42 U.S.C. § 7408(a)(1) (2006).

144. *See supra* Part III(B).

145. *Compare* 42 U.S.C. § 7408(a)(1) (2006), *with* 42 U.S.C. § 7541(a)(1) (2006) (both statutes use the language "reasonably . . . anticipated to endanger public health or welfare").

146. *Does* Chevron *Set the EPA Free?*, *supra* note 24, at 295 ("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 [greenhouse gases] under the NAAQS framework detailed under sections 109 through 110.").

147. Final Endangerment Finding, *supra* note 47, at 66,496.

148. Clean Air Act, 42 U.S.C. § 7408(a)(2) (2006); Allen & Lewis, *supra* note 22, at 926.

149. *See* Clean Air Act, 42 U.S.C. § 7409 (2006).

150. *See id.*; 40 C.F.R. § 50.2 (2010).

151. Natural Res. Def. Counsel v. Train, 545 F.2d 320, 327 (2d Cir. 1976).

tion to issue air quality standards for lead in *Natural Res. Def. Counsel v. Train*, the Second Circuit Court of Appeals found that it did not:

> 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. 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.[152]

Similarly here, once the conditions of sections 108(a)(1)(A) and (B) have been met, the issuance of air quality standards for greenhouse gases become mandatory. As previously discussed in Part IV(A), the Endangerment Finding under section 202 satisfies the conditions of sections 108 (a)(1)(A) and (B).[153] Even though scientists and scholars question whether NAAQS are well-suited to the regulation of greenhouse gas emissions,[154] the text of the Clean Air Act does not provide EPA the discretion whether or not it should establish air quality criteria once it makes an Endangerment Finding.[155]

The PSD program is designed to prevent violations of the NAAQS and compel the implementation of Best Available Control Technology ("BACT") to minimize air pollution from new or modified major sources of emissions.[156] Under the Tailoring Rule, however, neither of these objectives will be achieved. The text of the Clean Air expressly limits PSD permitting to maintain NAAQS for the criteria air

152. *Id.* at 328.

153. *Does* Chevron *Set the EPA Free?*, *supra* note 24, at 306.

154. *See* LARRY PARKER & JAMES E. MCCARTHY, CONG. RESEARCH SERV., R40585, CLIMATE CHANGE: POTENTIAL REGULATION OF STATIONARY GREENHOUSE GAS SOURCES UNDER THE CLEAN AIR ACT 7–8 (2009) (identifying at least three aspects of NAAQS that are ill-suited to the regulation of greenhouse gases under the Clean Air Act); Brigham Daniels et al., *Regulating Climate: What Role for the Clean Air Act?*, 39 ENVTL. L. REP. 10,837, 10,838–39, (Mar. 30, 2009) (detailing objections to using NAAQS to regulate GHGs); Louis Peck, *A Veteran of the Climate Wars Reflects on U.S. Failure to Act*, YALE ENV'T 360 (Jan. 4, 2011) http://e360.yale.edu/mobile/feature.msp?id=2356 (quoting former U.S. Rep. Rick Boucher: "What [EPA] can do is really just regulate under the 1970 Clean Air Act, which essentially means point source regulation. And that's the least efficient way to regulate greenhouse gases. So I don't think EPA can do this work well, whatever its intentions, because it simply lacks the legal mechanisms to do the job effectively."); *Does* Chevron *Set the EPA Free?*, *supra* note 24, at 296 (citing ANPR, *supra* note 32, at 44,477–86) (discussing the difficulty of setting a NAAQS level and the conceptual incompatibilities between NAAQS and greenhouse gases).

155. *See Does* Chevron *Set the EPA Free?*, *supra* note 24, at 284 (arguing that the "EPA likely lacks much of the regulatory discretion it claims to have to regulate [greenhouse gases] under the [Clean Air Act]," and "the EPA may be forced to set national ambient air quality standards (NAAQS) under sections 108 through 110 of the [Act]."

156. *Air Permits, Overview of the Prevention of Significant Deterioration Program*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/region9/air/permit/psd-public-part.html#purpose (last updated May 10, 2011).

pollutants. In fact, the EPA indicates, "the basic purpose of the PSD program . . . is to safeguard maintenance of the NAAQS."[157] The 1977 Amendments to the Clean Air Act primarily focus on attainment of NAAQS through the codification of EPA's original PSD program, which focused solely on pollutants for which NAAQS had been established.[158]

The Tailoring Rule indicates, "[t]he PSD program applies in areas that are designated 'attainment' or 'unclassifiable' for a [NAAQS]."[159] Because the EPA has not established NAAQS for greenhouse gases, no region can be designated "attainment" or "unclassifiable"; therefore, no source should trigger PSD permitting under the text of the Clean Air Act.[160] Further, the PSD program was created as a way to compel BACT on major new sources and to review proposed prior sources before construction to ensure that the major source's emissions would not interfere with NAAQS.[161] As yet, there is no effective BACT for greenhouse gases.[162] In the absence of NAAQS and BACT for greenhouse gases, PSD review would accomplish none of its intended objectives.[163]

The Title V Program was enacted solely to codify all of the requirements established for a major source in other, independently applicable Clean Air Act provisions in one place.[164] At the time the article was written, there were no independent Clean Air Act provisions addressing greenhouse gases from stationary sources; thus, Title V permitting for greenhouse gases is meaningless paperwork.[165] In effect,

157. Final Tailoring Rule, *supra* note 103, at 34,549; *see also* Wis. Electric Power Co. v. Reilly, 893 F.2d 901, 904 (7th Cir. 1990) (reporting that the PSD Program was added to the Clean Air Act in the 1977 Amendments to prevent "a decline of air quality to the minimum levels permitted by NAAQS."); 42 U.S.C.A. § 4210(a)(2)(C) (West 2010) (describing PSD permits as "necessary to assure the [NAAQS] are achieved").

158. *See* S. REP. NO. 95-127, at 11 (1977).

159. Final Tailoring Rule, *supra* note 103, at 31,520.

160. Although the PSD requirements also apply to "unclassifiable" areas, experts have argued that the "unclassifiable" designation was meant to address temporary conditions based on the absence of monitoring data needed to establish NAAQS rather than a permanent condition reflecting the inability to establish a NAAQS to manage a widespread atmospheric condition. Thomas M. Donnelly et al., *Climate Change Regulation Via the Clean Air Act: EPA's New Greenhouse Gas Rule for Facilities*, JONES DAY (June 2010), http://www.jonesday.com/climate_change_regulation.

161. Eric Groten, *EPA's Proposed New "Tailoring Rule": Cleaning Up the "Glorious Mess" by Turning Off the Lights*, VINSON & ELKINS, 8 (Oct. 2, 2009), http://www.velaw.com/uploadedFiles/VEsite/Resources/WP_ClimateChangeRegulation_2009_10_02.pdf#Page1.

162. "[W]e expect the emissions differences due to BACT controls for such sources to be relatively small due to the lack of available capture and control technologies for GHG at such sources that are akin to those that exist for conventional pollutants and sources, as well as the likelihood that even in the absence of BACT such sources would already be installing relatively efficient GHG technologies to save on fuel costs." Final Tailoring Rule, *supra* note 103, at 31,600.

163. Groten, *supra* note 161, at 8.

164. *Id.*

165. *Id.*

EPA's Tailoring Rule, which triggers PSD and Title V permitting when a source emits greenhouse gases above the statutory thresholds, fails to execute the purposes stated in the unambiguous text of the Clean Air Act.

B. *The Tailoring Rule Subverts Congressional Intent*

Critics of the EPA's greenhouse gas rulemaking argue that at the time the Clean Air Act was adopted in 1970 and amended in 1977 and 1990, Congress did not intend to authorize the EPA to regulate greenhouse gases. The Supreme Court majority, however, found that the statutory definition of "air pollutant" was broad enough to include "all airborne compounds of whatever stripe."[166] In fact, the Clean Air Act was enacted "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[167] At the time the statute was enacted, ambient levels of air pollution were much higher than they are today.[168] Therefore, scholars argue that the primary benefit Congress anticipated from the Clean Air Act was a reduction in the probability and severity of more acute health effects suffered by the presently living generation of Americans.[169] Today, health benefits from further reductions in ambient air pollution are primarily reductions in the exposure to diseases with longer latency periods; therefore, the adverse impacts Congress intended to address under the Clean Air Act are different from those adverse impacts resulting from greenhouse gas emissions.[170] Critics contend the fact that Congress likely did not consider the present-day impacts of greenhouse gas emissions in 1970 or 1977 implies that Congress did not intend for these "pollutants" to be regulated under the Clean Air Act.[171]

One could argue, however, that recent congressional action—or inaction—is more relevant to the question of congressional intent. The Clean Air Act did not even refer to carbon dioxide until the 1990

166. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 528–29 (2007).

167. Clean Air Act, 42 U.S.C. § 7401(b)(1) (2006).

168. ELISSA GUTT, VICKIE PATTON & NANCY SPENCER, BUILDING ON 30 YEARS OF CLEAN AIR ACT SUCCESS: THE CASE FOR REDUCING NO_x AIR POLLUTION 9 (2000) (reporting that "[e]missions of carbon monoxide have been cut by 31 percent, volatile organic compounds by 42 percent, [sulfur dioxide] by 37 percent, particulate matter (PM-10) by 71 percent, and lead by 98 percent.").

169. Jason Scott Johnston, *Climate Change Confusion and the Supreme Court: The Misguided Regulation of Greenhouse Gas Emissions under the Clean Air Act*, 84 NOTRE DAME L. REV. 1, 13 (2008).

170. *Id.* at 10–11.

171. *Id.* at 19; *see also* Allen & Lewis, *supra* note 22, at 933 ("The notion that Congress, in 1970 or 1977, implicitly authorized EPA to adopt economy-wide, or even industry-specific, controls on CO_2 is ludicrously unfounded."); Walsh et al., *supra* note 21, at 40 (". . . Congress simply did not have GHG emissions in mind when it originally drafted the CAA in 1970 or subsequently amended it in 1977 to include the PSD program.").

Amendments were passed.[172] The legislative history of the 1990 Amendments indicates that Congress considered and explicitly rejected proposals to regulate greenhouse gases under the Act.[173] Although the Senate version of the bill to amend the Act, S. 1630, emerged with findings and purposes specifically regarding global warming and the need to regulate greenhouse gases, the House version of the bill, H.R. 3030, prevailed in completely eliminating the language in the Senate bill that would have authorized regulation of non-ozone depleting greenhouse gases.[174] After the 1990 amendments, the Act mentions greenhouse gases *only* by authorizing their monitoring and evaluation on a non-regulatory basis.[175] Specifically, carbon dioxide is listed as one of several compounds to be considered in EPA's "basic engineering research and technology program to develop, evaluate, and demonstrate non-regulatory strategies and technologies."[176] Further, the only instance where global warming is mentioned is in Title VI, in which EPA is directed to evaluate the global warming potential of specific compounds that contribute to stratospheric ozone depletion.[177] This provision, however, also includes an express admonishment that it "shall not be construed to be the basis of any additional regulation under [the CAA]."[178] As the National Mining Association's General Counsel nicely concludes, "[b]y specifically considering this issue and resolving it against regulation, Congress clearly withheld from EPA any powers to regulate [carbon dioxide]."[179]

Within the first decade of the twenty-first century, the science presenting the causal connections between atmospheric greenhouse gas concentrations, increasing global temperatures, and potential adverse effects of the global warming phenomenon has become more

172. Frederick D. Palmer et al., *CO2: A Pollutant?, The Legal Affairs Committee Report to the National Mining Association Board of Directors on the Authority of EPA to Regulate Carbon Dioxide Under the Clean Air Act*, NAT'L MINING ASS'N (Oct. 12, 1998), http://www.nma.org/publications/coal/co2_pollutant.asp#anchor introduction.

173. Veronique Bugnion & David M. Reiner, Note, *A Game of Climate Chicken: Can EPA Regulate Greenhouse Gases Before the U.S. Senate Ratifies the Kyoto Protocol?*, 30 ENVTL. L. 491, 512 (2000).

174. Palmer et al., *supra* note 172 (citing S. 1630, 101st Cong., 135 CONG. REC. 20,521 (1989); H.R. 3030, 101st Cong., 135 CONG. REC. 16,563 (1989)).

175. *Id.*

176. Clean Air Act, 42 U.S.C. § 7403(g) (2006).

177. Palmer et al., *supra* note 172.

178. Clean Air Act, 42 U.S.C. § 7671a(e) (2006).

179. Palmer et al., *supra* note 172 ("To accept the analysis proffered by EPA's general counsel is to presume a delegation of power merely by the absence of an express withholding of such power—a view plainly out of step with the principles of administrative law. Congressional silence on carbon dioxide in this part of the CAA is audible. The intentions of Congress by such silence in the CAA's regulatory scheme become unmistakable with its deliberate choice to address global warming and carbon dioxide solely in the non-regulatory provisions of the statute.").

compelling. International politics associated with global warming thrust the issue into popular culture. Environmental litigation similar to *Massachusetts v. EPA* is becoming more common in the federal courts.[180] Logically, scholars argue that congressional support for climate policy regulation is stronger today than when the Clean Air Act was passed and amended;[181] yet, the legislature has failed to enact a comprehensive greenhouse gas regulation statute or an amendment to the Clean Air Act to address the issue. In 2007 and 2008, a number of bills were introduced into both houses of Congress proposing to reduce greenhouse gas emissions and global warming.[182] The Lieberman-Warner Climate Security Act earned the most attention and was approved by the U.S. Senate Environment and Public Works Committee, making it the first climate cap-and-trade bill to be reported to the full Senate.[183] Under the cap-and-trade measure proposed by the Climate Security Act, a shrinking cap on greenhouse gas emissions from specified facilities was designed to achieve a 10% reduction from 2005 levels by 2020 and a 70% reduction from 2005 levels by 2050.[184] The Senate, however, tabled the bill after a few days of procedural debate on the political difficulties of passing "groundbreaking" climate legislation.[185]

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180. *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (plaintiffs brought climate-change nuisance claims based on alleged greenhouse gas emitters); Comer v. Murphy Oil USA, 598 F.3d 208 (5th Cir. 2010) (a group of Gulf Coast landowners sued oil, coal, chemical, and insurance companies alleging that the defendants were responsible for greenhouse gas emissions that caused weather extremes and the sea level to rise which increased the severity of Hurricane Katrina); Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (Native Village of Kivalina, Alaska sued two dozen energy companies in an attempt to recover damages for public nuisance related to emissions of greenhouse gases that the Village alleged contributed to global warming and caused the sea level to rise, destroying parts of the Village).

181. Allen & Lewis, *supra* note 22, at 933 (citing Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 74 (2007) ("As this is being written, the wheels of federal climate regulation are already in motion.")); Scott H. Segal, *Be Cool! Staying Open Minded About Climate Policy Development*, 18 DUKE ENVTL. L. & POL'Y F. 307, 307 (2008).

182. John C. Dernbach & Seema Kakade, *Climate Change Law: An Introduction*, 29 ENERGY L.J. 1, 29 n.192 (2008) (referring to seven comprehensive climate change bills: Climate Stewardship and Innovation Act of 2007, S. 280, 110th Cong. (2007) and companion bill Climate Stewardship Act of 2007, H.R. 620, 110th Cong. (2007), Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007), Global Warming Pollution Reduction Act, S. 309, 110th Cong. (2007), Global Warming Reduction Act of 2007, S. 485, 110th Cong. (2007), Safe Climate Act of 2007, H.R. 1590, 110th Cong. (2007), and America's Climate Security Act, S. 2191, 110th Cong. (2007)).

183. Lauren E. Schmidt & Geoffrey M. Williamson, *Recent Developments in Climate Change Law*, 37 COLO. LAW. 63, 65 (2008).

184. BRIAN C. MURRAY & MARTIN T. ROSS, *The Lieberman-Warner America's Climate Security Act: A Preliminary Assessment of Potential Economic Impacts*, NICHOLAS INST. FOR ENVTL. POLICY SOLUTIONS, DUKE UNIV., 2 (Oct. 2007), http://www.usclimatepartnership.org/documents/Lieberman_WarnerDukeEconomicSummary_Oct2007.pdf.

185. Schmidt & Williamson, *supra* note 183, at 66.

During the next congressional session in 2009, the House passed a comprehensive climate change bill, the American Clean Energy and Security Act ("ACES" or the "Waxman-Markey bill").[186] The Senate Environment and Public Works Committee also voted to bring a similar bill to the floor of the Senate—the Clean Energy Jobs and American Power Act ("the Kerry-Boxer Act").[187] Both the House and Senate bills addressed the same greenhouse gases and facilities, proposed a cap-and-trade scheme in which greenhouse gas emissions could be traded among regulated facilities, and provided incentives for carbon sequestration and the use of energy-efficient construction.[188] The Senate bill, however, was more demanding and required major sources to reduce GHG emissions to levels 20% below 2005 levels by 2020, as opposed to the House bill's 17% reduction.[189] More critically, unlike the House bill, the Senate bill retained EPA authority to regulate greenhouse gas emissions under the Clean Air Act.[190] The bill faced trouble from the beginning, however, because Republicans objected to the way the bill passed out of committee and one of the sponsors, Senator John Kerry, started working on an apparent replacement bill with Senators Lindsay Graham and Joe Lieberman.[191] In May 2010, Senators Kerry, Graham, and Lieberman released a draft discussion of their American Power Act which aimed to garner more bipartisan support.[192] None of these bills were passed into law.

Including the bills already mentioned, more than a dozen bills were proposed or introduced into the 111th Congress that were intended to reduce greenhouse gas emissions using market-based strategies.[193] Citing a lack of bipartisan support overshadowed by the recent "climategate" scandal associated with the IPCC science, Senate Majority Leader Harry Reid announced that upcoming energy legislation would not include a cap on greenhouse gas emissions and effectively

186. H.R. 2454, 111th Cong. (2009).

187. S. 1733, 111th Cong. (2009).

188. Walsh et al., *supra* note 21, at 39.

189. *Id.*

190. Gabrielle Siegel & Jennifer L. Cassel, *2009 Climate Change Year in Review: Building Foundations for Change or Just Castles in the Sand?*, 2010 EMERGING ISSUES 4838, 21 (Jan. 2010), http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/2780/Sigel_Cassel_2009_Climate_Change_Year_in_Review_LexisNexis_.pdf.

191. Patrick Tutwiler, *Climate Change Legislation: Where Does it Stand?*, GOVTRACK INSIDER (Apr. 27, 2010), http://www.govtrackinsider.com/articles/2010-04-27/climate-change.

192. *111th Congress Climate Change Legislation*, PEW CENTER ON GLOBAL CLIMATE CHANGE, http://www.pewclimate.org/federal/congress/111 (last visited Aug. 16, 2011).

193. *An Introduction to Climate Change Legislation*, RESOURCES FOR THE FUTURE, http://www.rff.org/News/Features/Pages/climate-change-legislation-introduction.aspx (last visited Aug. 16, 2011) (Other major proposals included H.R. 1337, S. 2877, and S. 2995, 111th Cong. (2009)).

ended the action on climate legislation for the 111th Congress.[194] As the Supreme Court has said, congressional rejection of a statute "strongly militates against a judgment that Congress intended a result that it expressly declined to enact."[195] Starting with the Clean Air Act Amendments in 1990 and continuing through two decades of debate on the issue, Congress has repeatedly rejected efforts to regulate greenhouse gas emissions.[196]

In the absence of congressional action providing, or pre-empting, express authority to regulate greenhouse gas emissions, the EPA pressed forward to regulate greenhouse gas emissions from stationary sources under "implied authority" in the Clean Air Act. However, the regulation of greenhouse gas emissions as pollutants does not fit within the air pollution regulatory scheme created by Congress. The air pollution concerns anticipated to be addressed by the Clean Air Act, and particularly the PSD program, were primarily local in nature.[197] Under the structure of the Clean Air Act, once the EPA establishes NAAQS for regulating criteria pollutants, states apply NAAQS to individual stationary sources through state implementation plans, and the states ensure that each air quality control region within the state meets the applicable NAAQS.[198] In *Alabama Power Co. v. Costle*, the D.C. Circuit held that the PSD permit requirement of the Clean Air Act is based on location rather than impact on an area.[199] Unlike traditional pollutants, however, greenhouse gases are globally well-mixed and cause harm based on their total atmospheric concentrations rather than localized concentrations.[200] As a result, PSD provisions, which are local or regional in nature, are illogical solutions to regulate the impacts of greenhouse gas emissions.[201]

Congress did not intend to apply PSD and Title V to small sources, did not intend for those programs to crash under their own weight,

194. PEW CENTER ON GLOBAL CLIMATE CHANGE, *supra* note 192.

195. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974).

196. Palmer et al., *supra* note 172.

197. Johnston, *supra* note 169, at 13–14.

198. Clean Air Act, 42 U.S.C. § 7410 (2006).

199. Ala. Power Co. v. Costle, 636 F.2d 323, 365 (D.C. Cir. 1979) ("The plain meaning of the inclusion in section 165 of the words 'any area to which this part applies' is that Congress intended location to be the key determinant of the applicability of the PSD review requirements.").

200. Vera P. Pardee & Kassie R. Siegel, *The Clean Air Act: An Indispensable Tool to Combat Global Warming*, 24 NAT. RESOURCES & ENV'T 38, 41 (2010).

201. Bugnion & Reiner, *supra* note 173, at 515 ("The local and regional focus of the criteria air pollutant . . . provisions seems to create an almost insuperable obstacle to the implementation of restrictions on the emissions of greenhouse gases through Titles I and II of the CAA."); Epstein, *supra* note 77, at 815 ("it doesn't make a difference whether you emit them in a heavy industrial zone like Los Angeles, or in the Dakota Badlands or in Bangladesh. When it comes to the question of trying to trace its consequences, all atoms are treated equally regardless of their source. Why then use a local strategy for a newly-designated statutory pollutant that has no distinctive local effects?").

and did not intend for PSD to stifle economic growth.[202] The purpose statement of the Clean Air Act illustrates the delicate balance underlying most environmental legislation: the statute was enacted "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[203] Implicit in this statement is congressional intent to protect *both* human health *and* the national economy. In fact, the related congressional reports emphasize the legislature's intent not only to protect public health and welfare, but also to assure that future air resources will be available for promoting industrial and energy development critical to the growth of the nation.[204] One stated purpose of the PSD program is "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources."[205] The Title V program imposes no additional pollution control requirements but is meant to streamline other Clean Air Act provisions to encourage compliance with the Act.[206] Increasing the number of facilities requiring PSD permits, however, necessarily undermines the stated purpose of protecting economic growth.[207] Further, compelling more facilities to apply for Title V operating permits will not encourage compliance with the Clean Air Act.[208]

Most importantly, investors and energy developers are frustrated by the Tailoring Rule's uncertain consequences: "Lenders and investors are parting with their money grudgingly as it is nearly impossible to price the risk."[209] In fact, reports indicate the Tailoring Rule is discouraging renewable energy investments—the same type of projects that could cooperatively work to reduce global warming.[210] A study

202. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Proposed Rule, 74 Fed. Reg. 55,292, 55,308 (Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70 & 71) [hereinafter Proposed Tailoring Rule]); *see also Ala. Power Co.*, 636 F.2d at 353 ("Congress' intention [in passing the Clean Air Act] was to identify facilities which, due to their size, are financially able to bear substantial regulatory costs imposed by PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air."); H.R. REP. NO. 95-294, at 144–45 (1977); S. REP. NO. 95-172, 96–97 (1977) ("Such a [permitting] process is reasonable and necessary for very large sources, such as new electrical generating plants or new steel mills. But the procedure would prove costly and potentially unreasonable if imposed on construction of storage facilities for a small gasoline jobber or on the construction of a new heating plant at a junior college, each of which may have the potential to emit 100 tons of pollution annually.").

203. Clean Air Act, 42 U.S.C. § 7401(b)(1) (2006).

204. H.R. REP. NO. 95-294, at 154.

205. Clean Air Act, 42 U.S.C. § 7470(3).

206. Final Tailoring Rule, *supra* note 103, at 31,521.

207. Proposed Tailoring Rule, *supra* note 202, at 55,308.

208. *Id.* at 55,311.

209. Morton & Ross, *supra* note 135.

210. *See EPA Tailoring Rule Jeopardizes Renewable Energy Investment, Jobs, Production Goals*, NAT'L ALLIANCE OF FOREST OWNERS, (Dec. 15, 2010), http://nafoalliance.org/featured/epa-tailoring-rule-jeopardizes-renewable-energy-investment-jobs-production-goals/.

commissioned by the National Alliance of Forest Owners and conducted by Forisk Consulting found that the Tailoring Rule's treatment of biomass emissions would put over 130 renewable energy projects at risk for cancellation causing "$18.0 billion fewer dollars of capital investment in renewable electricity generation" in 2011.[211] This study is only one illustration of how using the overbroad provisions of the Clean Air Act to combat global warming can lead to unintended and antithetical consequences.

C. *The Tailoring Rule Relies Upon Disfavored Doctrines*

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the seminal case discussing the judiciary's deference to administrative statutory construction, courts must reject administrative constructions of a statute that frustrate the unambiguous policy Congress sought to implement.[212] As the previous discussion has demonstrated, Congress did not intend the effects of the Tailoring Rule when it enacted the Clean Air Act or added the PSD and Title V programs. In fact, the EPA expressly acknowledges its subversion of the congressional intent in the Tailoring Rule. The text of the Tailoring Rule's preamble admits that Congress did not intend to overwhelm the PSD or Title V permit programs "for relatively little gain, a result EPA finds 'absurd' enough to conclude that Congress didn't intend to apply the 250-ton threshold to GHGs."[213] The EPA, however, argues that the Tailoring Rule mitigates the absurdities by "tailoring" the statutory thresholds.[214]

The judicial doctrines the EPA relies upon for promulgating the Tailoring Rule are unpersuasive. To justify its actions, the EPA invokes the rarely used doctrines of "absurd results," "administrative necessity," and "one-step-at-a-time."[215] In short, the absurd results doctrine provides that administrative agencies shall interpret statutes in a way that implements the law without having an absurd result.[216] The administrative necessity doctrine suggests that, when interpreting statutes, an administrative necessity can sometimes justify the agency's

211. FORISK CONSULTING, ECONOMIC AND REGIONAL IMPACT ANALYSIS OF THE TREATMENT OF BIOMASS ENERGY UNDER THE EPA GREENHOUSE GAS TAILORING RULE, at 9 (Dec. 2010), *available at* http://nafoalliance.org/wp-content/uploads/NAFO-Study-Tailoring-Rule-Economic-Impact-20101214.pdf.

212. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). For a thorough discussion of the *Chevron* analysis as it applies to the Tailoring Rule, *see Does* Chevron *Set the EPA Free?*, *supra* note 24.

213. Groten, *supra* note 161, at 4.

214. Final Tailoring Rule, *supra* note 103, at 31,516 ("EPA is relieving overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources. We accomplish this by tailoring the applicability criteria that determine which GHG emission sources become subject to the PSD and Title V programs of the CAA.").

215. *Id.*

216. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).

plan of implementation.[217] The "one-step-at-a-time" doctrine is a new judicial instrument created by the EPA that would allow it to revise statutory language as long as it promises to comply with that language sometime in the future.[218]

In the Agency's own words, "[a]pplying the threshold provisions literally [to PSD and Title V permits] would lead to results that contravene congressional intent and, in fact, undermine Congress's purposes for both permitting programs."[219] Further, the EPA admits that "the administrative strains would lead to multi-year backlogs in the issuance of PSD and Title V permits, which would undermine the purposes of those programs."[220] As previously discussed in Part III, the EPA and its state counterparts would have to review approximately 82,000 PSD permits and 6.1 million Title V operating permits each year.[221] The drain on governmental resources would result in significant delay, deter new construction, and expose millions of companies to legal uncertainty—a cost not advocated by Congress.[222] These "absurd results" from regulating greenhouse gas emissions under the PSD and Title V programs would force the EPA to violate other statutory requirements. Under the "Preconstruction Requirements" in section 165 of the Clean Air Act, a permitting authority must grant or deny any completed permit for a major emitting facility not later than one year after the filing of the application.[223] The Tailoring Rule conclusively states that such a timeline would be impossible to meet: "It would be flatly impossible for permitting authorities to meet this statutory requirement if their workload increases from some 14,000 permits to 6.1 million. Instead, permit applications would face multi-year delays in obtaining their permits."[224]

In the face of these absurd results, the EPA's Tailoring Rule rewrites the statutory thresholds prescribed in the Clean Air Act. Marlo

217. Ala. Power Co. v. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979).

218. Petitioners' Motion for Stay, *supra* note 69, at 31 (citing to 75 Fed. Reg. at 31,544 (2010)).

219. Proposed Tailoring Rule, *supra* note 202, at 55,303.

220. Final Tailoring Rule, *supra* note 103, at 31,533.

221. *Id.* at 31,540, 31,536.

222. Marlo Lewis, *EPA Endangerment Showdown: Should Congress Heed Russell Train's Advice?*, MASTERRESOURCE, (June 1, 2010), http://www.masterresource.org/2010/06/epa-endangerment-showdown-rt-advice/. Russell Train served as EPA Administrator under the Nixon and Ford Administrations (1973–1977); *see also* 42 U.S.C. § 7470 (1990) (The PSD program was intended "to insure that economic growth will occur in a manner consistent with the preservation of existing clear air resources."); H.R. REP. NO. 95-294, at 144 (1977) (legislation "not only protect[s] public health and welfare but also assur[es] future air resources will be available for continuing the industrial and energy development so necessary for the growth of the Nation"); Walsh et al., *supra* note 21, at 40 (citing S. REP. NO. 94-717, at 23 (1976)) (noting that Congress did not intend to simply create delays or impair economic growth).

223. Clean Air Act, 42 U.S.C. § 7475(c) (2006).

224. Final Tailoring Rule, *supra* note 103, at 31,564.

Lewis, Senior Fellow at the Competitive Enterprise Institute, comments that the EPA appears to have us believe that Congress wrote such self-destruction provisions into the statute from the start. "Then all of a sudden, the dormant bug became active, and now the [Clean Air Act] is going haywire, working at cross purposes with itself, subverting congressional intent, and imperiling the nation's economic future. Therefore, EPA must step in, play lawmaker, and amend the Act."[225] The problem with using the doctrines of absurd results and administrative necessity to regulate greenhouse gases from stationary sources, however, is analogous to police officers creating exigent circumstances to avoid the Fourth Amendment's warrant requirement.[226] As previously discussed, none of the EPA's actions were statutorily compelled; therefore, the Agency erred in calling upon these doctrines to solve its self-imposed emergency.

Although administrative necessity has been used to expand the scope of federal authority, the EPA's use of the doctrine in the Tailoring Rule stretches its implied authority too far. Even though the Supreme Court has recognized that "administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the [Clean Air Act]," the Court also warned that "its role was not 'to overturn congressional assumptions embedded into the framework of regulations established by the Act.'"[227] The EPA argues that the circumstances underlying the Tailoring Rule support invocation of the administrative necessity doctrine; however, the Agency could not cite a single case in which a court approved a prospective use of the doctrine.[228] While administrative agencies may have discretion to create modifications at the margins of a regulatory field, the EPA should not be permitted to substitute its judgment for the unambiguous intent of Congress.[229]

Finally, in case its use of "absurd results" and "administrative necessity" were not convincing, the EPA created its own judicial doctrine, taking its regulatory mandate "one step at a time."[230] The Agency explains that Congress is presumed to allow it to administer the statutory requirements "on a step-by-step basis, as appropriate, when the agency remains on track to implement the requirements as a whole."[231] Under the Tailoring Rule, however, the EPA has no inten-

225. Marlo Lewis, *EPA's Tailoring Rule: Temporary, Dubious, Incomplete Antidote To* Massachusetts v. EPA*'s Legacy of Absurd Results (Part 1)*, MASTERRESOURCE (Jan. 7, 2010), http://www.masterresource.org/2010/01/epas-tailoring-rule-temporary-dubious-incomplete-antidote-to-massachusetts-v-epas-legacy-of-absurd-results/.

226. *See, e.g.*, United States v. Coles, 437 F.3d 361, 366 (3d Cir. 2006) ("Exigent circumstances, however, do not meet Fourth Amendment standards if the government deliberately creates them.").

227. Ala. Power Co. v. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979).

228. *See* Proposed Tailoring Rule, *supra* note 202, at 55,316.

229. Pub. Citizen v. Fed. Trade Comm'n, 869 F.2d 1541, 1557 (D.C. Cir. 1989).

230. Final Tailoring Rule, *supra* note 103, at 31,544.

231. *Id.* at 31,517.

tions of eventually complying with the statutory thresholds prescribed by the PSD and Title V provisions. Rather, the Tailoring Rule rewrites the Clean Air Act's regulatory thresholds and only hints at future rulemaking that may approach the statutory requirements.[232] The revision of statutory thresholds in the Tailoring Rule is substantively different from gradually implementing compliance with statutory requirements; therefore, the "one-step-at-a-time" doctrine is equally unpersuasive.

D. *The EPA's Rulemaking Violates the Federal Separation of Powers*

In *Chevron*, the Supreme Court held that administrative agencies have considerable discretion to interpret statutes where the text is "silent or ambiguous with respect to a specific issue";[233] however, there is nothing ambiguous about the statutory thresholds written in the Clean Air Act. Although the Tailoring Rule doesn't say it in so many words, the EPA is unilaterally amending the Clean Air Act. To avoid absurd results, the Rule purports to change numerical, statutorily codified, thresholds for applying the PSD and Title V programs to stationary sources of greenhouse gas emissions.[234] Nothing in the Clean Air Act permits the EPA to dilute or suspend the statutory requirements, and the Agency should not be allowed to amend legislation to cure an unreasonable interpretation of that legislation.[235] As Marlo Lewis persuasively argues, "[t]he Tailoring Rule is actually an Amending Rule. As such, it is *prima facie* illegal—an unconstitutional breach of the separation of powers."[236]

The regulation of greenhouse gas emissions from stationary sources, a matter with such significant impact and far spread reach, and with such an elaborate history of congressional attention, is most likely not appropriate for an administrative agency to implement. Political, economic, and environmental issues of nationwide impact should be decided by Congress in a comprehensive bill. The delegation doctrine ensures that "important choices of social policy are made by Congress, the branch of our Government most responsible to the popular will."[237] Given the decades of congressional debate concerning greenhouse gas emission regulation and the absence of persuasive mandate,

232. *Id.* at 31,518; Petitioners' Motion for Stay, *supra* note 69, at 31.

233. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

234. Motion for Coordination of Related Cases at 13, Coal. for Responsible Regulation v. Envtl. Prot. Agency, No. 10-1131 (D.C. Cir. Aug. 26, 2010), *available at* http://www.eenews.net/assets/2010/09/13/document_gw_06.pdf.

235. *See* Proposed Tailoring Rule, *supra* note 202, at 55,295.

236. Lewis, *supra* note 225.

237. Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

the EPA has very little support for its implied authority to regulate greenhouse gas emissions.[238]

V. CONCLUSION

The import and widespread impact of climate change will challenge all three branches of the government to change. As presented in this Comment, the judiciary appears to recognize the scientific nexus between greenhouse gas emissions and global warming as well as the projected harms anticipated to result from climate change. Further, the plurality opinion from *Massachusetts v. EPA* appears to embrace the need to adjust traditional judicial constructs, such as standing, causation, and aggregate harm, to provide a remedy for climate change controversies.

Under the direction of the Obama Administration, the EPA has forged ahead with regulation of greenhouse gas emissions under the Clean Air Act in the absence of another piece of comprehensive legislation. Yet attempting to fit the climate change problem into the complexity of the Clean Air Act has presented numerous problems. The EPA attempted to remedy the problems with the Tailoring Rule; however, the Rule is an unreasonable expansion of the EPA power because it acts outside of congressional intent and direction unambiguously expressed in the Clean Air Act. Notably missing from the EPA's justification for imposing the Tailoring Rule is any analysis of the environmental benefits associated with the significant regulatory burden.[239] Perhaps the Agency's silence speaks volumes about the true effectiveness of its command-and-control regimen on a global issue.

238. ARNOLD W. REITZE JR., AIR POLLUTION CONTROL LAW: COMPLIANCE & ENFORCEMENT 427 (Environmental Law Institute 2001).

239. Reed Rubenstein, *More on the GHG Rule*, E2 LAW BLOG, GREENBERG TRAURIG (May 13, 2010), http://www.environmentalandenergylawblog.com/tags/tailoring-rule/.