

CHANGING CLIMATE, UNCHANGING ACT,
IMPROVISING AGENCY, ENABLING COURT: THE STORY
OF *COALITION FOR RESPONSIBLE REGULATION V. EPA*

Laura King*

<i>Introduction</i>	267
I. <i>Background: Greenhouse Gases Under the Clean Air Act</i>	268
II. <i>The Court’s Reasoning and Decision</i>	273
A. <i>The Endangerment Finding and Tailpipe Rule Are Not Arbitrary and Capricious</i>	274
B. <i>The Endangerment Finding and Tailpipe Rule Trigger Regulation of Stationary Sources</i>	275
C. <i>No Petitioner Has Standing to Challenge the Timing and Tailoring Rules</i>	275
III. <i>EPA’s Difficult Choice</i>	276
A. <i>What EPA Stood To Lose</i>	276
B. <i>How Close EPA Came to a Loss</i>	278
C. <i>Why EPA Took the Risk</i>	279
D. <i>Whether EPA’s Risk Was Necessary</i>	280
IV. <i>The D.C. Circuit’s Difficult Choice</i>	281
<i>Conclusion</i>	282

INTRODUCTION

*Coalition for Responsible Regulation v. EPA*¹ follows from and amplifies the Supreme Court’s decision in *Massachusetts v. EPA*.² Both cases announce the Environmental Protection Agency’s (“EPA”) power to regulate greenhouse gases under the Clean Air Act (“CAA” or “the Act”) — with *Massachusetts v. EPA* prodding a reticent EPA into regulation of greenhouse gases under the motor vehicle provision of the Act, and *Coalition for Responsible Regulation v. EPA* affirming both EPA’s obedience to *Massachusetts v. EPA* and the agency’s new willingness to extend greenhouse gas regulation to stationary sources. The cases are significant because they together stimulated and sustained the first controls on greenhouse gases in the United States, altering a status quo in which greenhouse gas emissions were free — not taxed or regulated or otherwise constrained.³

Overall, *Coalition for Responsible Regulation v. EPA* is a win for the environment. Its effect is to preserve permitting requirements for stationary sources that emit greenhouse gases. It also supports and extends the Supreme Court’s

* J.D. Candidate, Harvard Law School, 2013. The views herein expressed are solely those of the author.

¹ 684 F.3d 102 (D.C. Cir. 2012).

² 549 U.S. 497 (2007).

³ Other potential but so far unsuccessful constraints on greenhouse gas emissions include market solutions (for example, cap and trade) and common law suits (for example, those claiming nuisance).

recognition in *Massachusetts v. EPA* that EPA may regulate greenhouse gases under the Clean Air Act. However, what the case reveals about the American legal system's ability to respond to changes in the natural world is sobering. It exposes a system in need of revision: one in which lawmaking, designed to be measured, manages instead to be dawdling, and agencies and courts must summon all of their resources — prognostication, strategy, rhetorical finesse, and luck — to turn outdated statutes toward pressing threats. In this case, in an effort to provide some response to climate change and thus fulfill broader public mandates, both EPA and the D.C. Circuit held statutory language at arm's length: EPA, by promulgating rules that "tailored" the clearest kind of statutory language — numbers; the court, by calling on standing doctrine to avoid facing — and thus having to overturn — EPA's fast-and-loose interpretation.

These choices, which were essentially workarounds to avoid the application of straightforward statutory language, together succeeded in preserving greenhouse gas regulation, but not without risk and compromise to environmental positions. Whenever an agency departs from statutory language, it risks reversal. That risk is especially acute when the reviewing court is the D.C. Circuit and the reviewing panel includes David Tatel, who, in his capacity as a judge on the D.C. Circuit, has urged agency officials — if they are to satisfy the court and fulfill their role as responsible public servants — to "(1) [r]ead the statute; (2) read the statute; (3) read the statute!"⁴ The D.C. Circuit, for its part, preserved EPA's workaround by doing a workaround itself, one that shrinks somewhat that cornerstone of environmental litigation: standing doctrine.

Part I of this comment puts *Coalition for Responsible Regulation v. EPA* in context by reviewing the history of greenhouse gas regulation under the Clean Air Act. Part II profiles the case itself. Parts III and IV use *Coalition for Responsible Regulation v. EPA* as a showcase for the nimble, risky choices required of agencies and courts as they use outdated statutory frameworks to respond to new environmental challenges. Thus, Part III shows EPA balancing the danger of taking a red pen to the Act, on the one hand, against the danger of overseeing a sprawling regulatory program, on the other. Part IV shows the D.C. Circuit preserving EPA's approach to regulation of greenhouse gases at the cost of narrowing the doctrine of standing. The trade, as we will see in the details, is not terrible, but it is a compromise nevertheless.

I. BACKGROUND: GREENHOUSE GASES UNDER THE CLEAN AIR ACT

Coalition for Responsible Regulation v. EPA is the latest move in a protracted game over federal control of greenhouse gas emissions — a game in which, over the course of more than ten years, environmentalists have pushed for government regulation and emitters have resisted. The Clean Air Act is the

⁴ David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 3 (quoting Felix Frankfurter's "self-evidently good advice" for students of administrative law).

centerpiece of this contest — the potential lever for regulation. Environmentalists argue that the Act obligates EPA to regulate greenhouse gases. Industry groups counter that the Act provides no support for — indeed, forbids — EPA’s regulation of greenhouse gases. The environmentalists have so far prevailed. EPA, the D.C. Circuit, and the United States Supreme Court have all examined whether the Act reaches greenhouse gases and have answered “yes.” To begin to detail that yes, this section briefly reviews EPA’s initial refusal to regulate greenhouse gases and the agency’s ultimate about-face, as well as the 2007 decision by the U.S. Supreme Court, *Massachusetts v. EPA*, that prompted EPA’s reversal. This history is essential to understanding *Coalition for Responsible Regulation v. EPA*, in which the D.C. Circuit evaluated both EPA’s new willingness to regulate greenhouse gases pursuant to *Massachusetts v. EPA*, and its innovation to extend and tailor regulation beyond that contemplated by *Massachusetts v. EPA*.

The story begins on October 20, 1999, when twenty organizations filed a rulemaking petition that asked EPA to regulate greenhouse gases under the motor vehicle provision of the Clean Air Act.⁵ EPA declined to do so,⁶ drawing strength especially from the Supreme Court’s decision in *FDA v. Brown & Williamson*.⁷ Rejecting the Food and Drug Administration’s assertion of authority over tobacco, the *Brown & Williamson* Court “caution[ed] agencies against using broadly worded statutory authority to regulate in areas raising unusually significant economic and political issues.”⁸ Working within this background of caution, EPA concluded that Congress had not intended the CAA to reach greenhouse gases. The agency noted, for example, that greenhouse gases were a poor fit for an act targeting local air pollutants.⁹ Moreover, EPA pointed out, Congress did not add greenhouse gases to the Clean Air Act during the 1990 amendments but did address climate change in contemporaneous legislation, suggesting that the omission of greenhouse gases from the Act was intentional.¹⁰

Those pushing for greenhouse gas regulation were undiscouraged. In response to this setback, a group of states, local governments, and private organizations challenged EPA’s failure to regulate greenhouse gases. Their effort was rewarded by the U.S. Supreme Court’s decision in *Massachusetts v. EPA*, in which the Court supplied a finding foundational to the regulation of greenhouse gases: that greenhouse gases are “unambiguously” an “air pollutant” under the Clean Air Act.¹¹ By establishing the Clean Air Act as an appropriate vehicle

⁵ Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act (Oct. 20, 1999), available at <http://209.200.74.155/doc/ghgpet2.pdf>.

⁶ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

⁷ 529 U.S. 120 (2000).

⁸ 68 Fed. Reg. at 52,925.

⁹ *Id.* at 52,926–27.

¹⁰ *Id.* at 52,927.

¹¹ 549 U.S. at 528–29.

for greenhouse gas regulation, *Massachusetts v. EPA* cleared a major hurdle for the environmental position, essentially squelching the arguments advanced by EPA (those noted above and others) about why the Act was not an appropriate vehicle for greenhouse gas regulation. In particular, the Court found that the Act does not merely reach only those “local” pollutants that sully the air we breathe, but that its “capacious,”¹² “sweeping”¹³ definition of “air pollutant” “embraces all airborne compounds of whatever stripe.”¹⁴

This conclusion was not preordained. On the contrary, given the substantial deference a court is required to give to “an executive department’s construction of a statutory scheme it is entrusted to administer,”¹⁵ the Court’s action was radical, requiring resort to the *Chevron I* doctrine under which a court dispenses with agency deference under the weight of the statute’s clarity.¹⁶ Here, the Court found that Congress had spoken directly, unambiguously including greenhouse gases as an air pollutant regulable under the Clean Air Act. It followed that EPA had been “arbitrary, capricious . . . or not in accordance with law” when it declined the petition for rulemaking on the basis that it lacked authority to regulate greenhouse gases, since the Act clearly granted it that authority.¹⁷

For the D.C. Circuit in *Coalition for Responsible Regulation v. EPA*, determining what level of support *Massachusetts v. EPA* offered for regulation of greenhouse gases under the Clean Air Act required some work. On the one hand, the Court clearly said that EPA *can* regulate greenhouse gases under the Act. On the other hand, the Court did not say that EPA *must* regulate; and yet, it came close. First, after the Court concluded that greenhouse gases are an air pollutant on the face of the statute, the question remained whether they are regulable under the Act’s motor vehicle provision — which requires that greenhouse gases be an air pollutant “from any class or classes of new motor vehicles or new motor vehicle engines, which in [the EPA Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”¹⁸ Although the Court expressly declined to reach whether the EPA Administrator must make this “endanger-

¹² *Id.* at 532.

¹³ *Id.* at 528.

¹⁴ *Id.* at 529.

¹⁵ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

¹⁶ Technically speaking, a court applying the first step of *Chevron* (*Chevron I*) does not dispense with agency deference, but never reaches the question. Under *Chevron*, “when a court reviews an agency’s construction of the statute which it administers,” the first question it asks is whether Congress “has directly spoken to the precise question at issue.” If it has, “that is the end of the matter,” and “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–843.

¹⁷ *Massachusetts*, 549 U.S. at 534 (quoting 42 U.S.C. § 7607(d)(9)(A)).

¹⁸ 42 U.S.C. § 7521(a)(1) (2006).

ment finding” on remand,¹⁹ the opinion is far from neutral. The Court nudges EPA toward regulation by weighing in on a range of associated questions.²⁰

The seed of *Coalition for Responsible Regulation v. EPA* lies in EPA’s response to *Massachusetts v. EPA*. In 2009, EPA made an endangerment finding pursuant to CAA § 202(a)²¹ for six greenhouse gases (“GHGs”) — carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, and sulfur hexafluoride — on the basis that GHGs are changing the climate, and that climate change endangers human health and welfare.²² Having determined that the aggregate group of these six gases is an “air pollutant” which “may reasonably be anticipated to endanger health or welfare,” and pursuant to § 202(a)’s mandate that the Administrator “shall by regulation prescribe . . . standards” for any such air pollutant, EPA established standards for greenhouse gas emissions from new motor vehicles.²³

Although the Endangerment Finding was made in the context of the motor vehicle rule, it has had broader effects. One such effect is on stationary sources under the Prevention of Significant Deterioration (“PSD”) program,²⁴ which imposes preconstruction permitting requirements²⁵ on “major emitting facilities.”²⁶ Driven by the language of the Clean Air Act, the Endangerment Finding caused the PSD program to expand to reach even small stationary sources emitting greenhouse gases. EPA then tried to shrink the program by enacting the Timing²⁷ and Tailoring Rules,²⁸ which were in turn contested in *Coalition for Responsible Regulation v. EPA*.

¹⁹ *Massachusetts*, 549 U.S. at 534.

²⁰ *Massachusetts v. EPA*’s basic holding was that EPA must “ground its reasons for action or inaction in the statute.” 549 U.S. at 535. Taken alone, this language would appear to support EPA in either making an endangerment finding or not — as long as the agency gives reasons for its action. However, the opinion taken as a whole pushes EPA towards an endangerment finding. It does so, for example, by cautioning EPA not to lean on the word “judgment” as an excuse not to wade into the “cause or contribute” and “endangerment” determinations, 549 U.S. at 532–34, by directing EPA to keep its “laundry list” of policy considerations out of the endangerment determination, 549 U.S. at 533, and by insisting that scientific uncertainty is no excuse for failing to make a judgment — unless that uncertainty is so “profound” that it prevents EPA from making a reasoned judgment, 549 U.S. at 534.

²¹ CAA § 202(a) reads: “The 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 health or welfare.” 42 U.S.C. § 7521(a)(1).

²² Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) [hereinafter Endangerment Finding].

²³ *Id.* at 66,501; Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, Final Rule, 75 Fed. Reg. 25,324, 25,398 (May 7, 2010) [hereinafter Tailpipe Rule].

²⁴ 42 U.S.C. §§ 7470–79.

²⁵ *Id.* § 7475(a)(1).

²⁶ *Id.* § 7479(1).

²⁷ See Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) [hereinafter Timing Rule].

In effect, *Massachusetts v. EPA* laid the groundwork for regulation of stationary emitters of greenhouse gases; EPA acted to create and shape such regulation; and *Coalition for Responsible Regulation v. EPA* affirmed EPA's approach. *Massachusetts v. EPA* laid the groundwork in two ways. First, it encouraged EPA's Endangerment Finding. Second, once EPA had made the Endangerment Finding in the context of the motor vehicle provision, the Finding worked inside the Act to ignite an expansion of the PSD program, with *Massachusetts v. EPA*'s affirmation that GHGs are "any air pollutant" serving as the spark.²⁹

That is, because GHGs are "any air pollutant," as established by *Massachusetts v. EPA*, their emission at threshold levels by stationary sources anywhere in the United States can trigger preconstruction permitting under PSD. The logic of this result is as follows. As a foundational matter, the PSD program applies nationwide. This is because it applies to all parts of the country designated "attainment" or "unclassifiable" for a National Ambient Air Quality Standard ("NAAQS") pollutant,³⁰ and all parts of the country are in attainment for at least one NAAQS pollutant.³¹ In addition to being located in an area designated attainment or unclassifiable — in short, anywhere — a facility must meet two further conditions to trigger the program's preconstruction permitting requirements: It must be undergoing construction or modification,³² and it must be a "major emitting facility," defined as a stationary source that has the potential to emit 100 or 250 tons per year ("tpy") — depending on the facility type — of "any air pollutant,"³³ including, after the Endangerment Finding, GHGs.

By straightforwardly applying statutory language, however, EPA found itself in frightening territory. The PSD program's thresholds of 100–250 tpy are simply too low to accommodate sensible regulation of greenhouse gases at current administrative capacities. Application of these thresholds to GHGs would have increased the number of sources subject to the program from 15,000 to more than 6 million.³⁴ Each affected source would be required to analyze its impacts on ambient air quality, soil, vegetation, and visibility.³⁵ More significantly, each facility would be required to apply Best Available Control Tech-

²⁸ See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) [hereinafter Tailoring Rule].

²⁹ 549 U.S. at 528–29.

³⁰ 42 U.S.C. § 7407(d)(1).

³¹ See NAT. RESEARCH COUNCIL, NEW SOURCE REVIEW FOR STATIONARY SOURCES OF AIR POLLUTION 23 (1st ed. 2006) ("Because no area violates all the NAAQS, PSD applies nationwide.").

³² The facility must be one "on which construction is commenced." 42 U.S.C. § 7475(a). "Construction" also includes "modification," which means "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7479(2)(c); § 7411(a)(4).

³³ 42 U.S.C. § 7479(1) (emphasis added).

³⁴ Tailoring Rule, *supra* note 28, at 31,540.

³⁵ 42 U.S.C. § 7475(e)(3)(B).

nology (“BACT”) “for each pollutant subject to regulation under this chapter” — *not just the pollutant triggering PSD*.³⁶ Under these pressures, the cost to run the PSD program would increase from \$12 million per year to \$1.5 billion per year, while the number of work hours required to run the program would increase from about 150,000 to 19.7 million.³⁷

As a practical matter, EPA would be unable to bear this enormous new burden. The result would be a rule — a prohibition on the unpermitted release of greenhouse gases — that would implicate thousands of businesses, but that would be practically unenforceable. As described in more detail in Part III, such a dormant rule would create uncertainty for both business interests and EPA.

Thus, EPA felt cornered by statutory language to extend regulation over stationary emitters of greenhouse gases and yet compelled to moderate that regulation. In order to limit the number of facilities subject to PSD for GHGs, EPA chose to “tailor” the term “subject to regulation,” which in effect increased the triggering thresholds.³⁸ In its “Timing Rule,” EPA also delayed application of GHG regulation until January 2, 2011.³⁹

II. THE COURT’S REASONING AND DECISION

A number of regulated industries and states separately petitioned the D.C. Circuit⁴⁰ for review of EPA’s greenhouse gas regulations, including the Timing and Tailoring Rules.⁴¹ *Coalition for Responsible Regulation v. EPA* is the consolidation of those petitions.⁴²

In *Coalition*, a three-judge panel of the D.C. Circuit upheld EPA’s Endangerment Finding and Tailpipe Rule, its determination that those rules triggered greenhouse gas regulation under the PSD program, and its Timing and Tailor-

³⁶ 42 U.S.C. § 7475(a)(4). Determination of BACT involves identifying all control technologies, eliminating technically infeasible options, and ranking the remaining options by control and cost effectiveness. Tailoring Rule, *supra* note 28, at 31,520.

³⁷ Tailoring Rule, *supra* note 28, at 31,540.

³⁸ Thus, under step 2 of the Tailoring Rule, which took effect July 1, 2011, GHGs are only “subject to regulation” for new facilities if (1) the source is subject to PSD anyway and emits or has the potential to emit 75,000 tons per year of GHGs, or (2) the source would not otherwise be subject to PSD but it emits or has the potential to emit 100,000 tons per year of GHGs. *Id.* at 31,540. For modified facilities, GHGs are only “subject to regulation” if (1) the source would be subject to PSD anyway and the source increases GHG emissions by 75,000 tpy, or (2) the source would not otherwise be subject to PSD, but the existing source has the potential to emit 100,000 tpy of GHGs and the modification increases GHG emissions by 75,000 tpy. *Id.*

³⁹ Timing Rule, *supra* note 27, at 17,019.

⁴⁰ Direct review by the D.C. Circuit is provided by 42 U.S.C. § 7607(b)(1).

⁴¹ *See, e.g.*, Petition for Review, Coal. for Responsible Regulation v. EPA, 684 F.3d 102 (D.C. Cir. 2012) (No. 09-1322), 2009 WL 7339935.

⁴² The named petitioner, Coalition for Responsible Regulation, is associated with the Quintana Minerals Company, the largest private owner of coal reserves in the country. *See* Vickie Patton, *Attacks on EPA Led by Group That Is Linked to Owner of Largest Private U.S. Coal Reserves*, ENVTL. DEF. FUND BLOG (Dec. 21, 2010), <http://blogs.edf.org/climate411/2010/12/21/attacks-on-epa-led-by-group-that-is-linked-to-owner-of-largest-private-u-s-coal-reserves/>. Other petitioners included mining companies and energy companies. *Id.*

ing Rules. First, the Court relied for core support on *Massachusetts v. EPA* in establishing that the Endangerment Finding and the Tailpipe Rule are not arbitrary and capricious. Second, it tracked how the Endangerment Finding and Tailpipe Rule move through the Act, triggering regulation of stationary sources. Third, it excused itself from a merits review of the Timing and Tailoring Rules by concluding that no petitioner had standing to bring a challenge to rules that limit burdens, since petitioners are benefitted, not harmed, by such rules.

A. *The Endangerment Finding and Tailpipe Rule Are Not Arbitrary and Capricious*

As touched on above, *Massachusetts v. EPA* nudged EPA to regulate greenhouse gases under the Clean Air Act. The court in *Coalition for Responsible Regulation v. EPA* interpreted *Massachusetts v. EPA* strongly, however — as providing more than just nudges. The D.C. Circuit noted that the Supreme Court had “held that EPA had a ‘statutory obligation’ to regulate harmful greenhouse gases,” that the opinion had “spurred a cascading series of greenhouse gas-related rules and regulations,” and that “in direct response” to the Supreme Court’s “directive,” EPA had issued an Endangerment Finding for greenhouse gases.⁴³

In addition to interpreting *Massachusetts v. EPA* as a spur to regulation, the D.C. Circuit marshaled — and in some cases amplified — points made by *Massachusetts* in order to knock down arguments against regulation of greenhouse gases. Specifically, the court cited to *Massachusetts v. EPA* for the propositions that: (1) The Endangerment Finding involves “a ‘scientific judgment’ about the potential risks greenhouse gas emissions pose to public health or welfare — not policy discussions”;⁴⁴ (2) EPA may not use scientific uncertainty as an excuse to avoid making an endangerment finding, unless that uncertainty is “profound”;⁴⁵ and (3) EPA’s Endangerment Finding automatically triggers the Tailpipe Rule under the Act.⁴⁶ Thus, the D.C. Circuit emphasized EPA’s obedience to *Massachusetts v. EPA* in establishing that EPA had not acted arbitrarily or capriciously in making its Endangerment Finding and Tailpipe Rule.⁴⁷

⁴³ *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114 (D. C. Cir. 2012).

⁴⁴ *Id.* at 117–18 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007)).

⁴⁵ *Id.* at 122 (quoting *Massachusetts*, 549 U.S. at 534).

⁴⁶ *Id.* at 126–27 (citing *Massachusetts*, 549 U.S. at 533).

⁴⁷ Responding to arguments not raised before the Supreme Court in *Massachusetts v. EPA*, the D.C. Circuit filled in the gaps by also finding, among other things, that EPA did not improperly “delegate” its scientific judgment to the authors of scientific assessments, but instead used those assessments as evidence on which to make its own judgment, *id.* at 119–20; that EPA had taken “the scientific record into account in a ‘rational manner,’” which is all that a federal court can require of an agency, *id.* at 122 (citing *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981)); and that EPA was not arbitrary or capricious in failing to quantify, among other things, the level at which greenhouse gases endanger public health or welfare, since the CAA’s “precautionary thrust” encourages early action, even if grounded in a qualitative approach — and the Act does not require quantification, *id.* at 122–23.

B. The Endangerment Finding and Tailpipe Rule Trigger Regulation of Stationary Sources

Having upheld the Endangerment Finding and Tailpipe Rule, the D.C. Circuit then found that, as a result of those rules, the PSD program covers greenhouse gases.⁴⁸ The court's reasoning was as follows. First, the PSD program applies to "major emitting facilities" — defined as stationary sources which emit specific levels of "any air pollutant."⁴⁹ Second, EPA has long interpreted the phrase "any air pollutant" in the definition of "major emitting facility" as "any air pollutant regulated under the Act" — and this interpretation is consistent with the text "any air pollutant," with contextual clues in other parts of the CAA, and with legislative history indicating Congressional intent.⁵⁰ Finally, when the Tailpipe Rule took effect, greenhouse gases became an air pollutant regulated under the Act.⁵¹ Therefore, stationary sources that emit given levels of greenhouse gases trigger permitting requirements under the PSD program.

The court rejected petitioners' argument that the PSD program only addresses "local" pollutants, and thus does not encompass greenhouse gases, whose impacts are global.⁵² The court reasoned that, as a matter of plain meaning, the statute makes no distinction among air pollutants. Instead, the statute's reference to "each pollutant subject to regulation under [the CAA]" extends unambiguously to all pollutants, including greenhouse gases.⁵³ Moreover, the court noted, the PSD provision's "Congressional declaration of purpose" is expansive, extending to threats to "public health and welfare from *any* actual or potential adverse effect . . . from air pollution."⁵⁴

C. No Petitioner Has Standing to Challenge the Timing and Tailoring Rules

Finally, the D.C. Circuit concluded that petitioners failed to establish standing. To establish standing, petitioners needed to demonstrate that they suffered an "injury in fact" that (1) is "concrete and particularized . . . [and] actual or imminent, not conjectural or hypothetical," (2) was caused by the conduct complained of, and (3) is "likely . . . [to] be redressed by a favorable decision."⁵⁵ First, the court found no causation because the injury petitioners complained of — regulation of greenhouse gases — was not caused by the Tailoring Rule, but by "automatic operation of the statute."⁵⁶ Second, the panel found no redressability because vacatur of the rule would not redress petitioners' injuries, but would exacerbate petitioners' injuries by causing them to bear

⁴⁸ See *Coalition*, 684 F.3d at 132–33.

⁴⁹ *Id.* at 133; 42 U.S.C. § 7479(1) (2006).

⁵⁰ *Coalition*, 684 F.3d at 133–38.

⁵¹ *Id.* at 133.

⁵² *Id.* at 136–38.

⁵³ *Id.* at 137 (quoting 42 U.S.C. § 7475(a)(4)).

⁵⁴ *Id.* at 138 (quoting 42 U.S.C. § 7470(1)).

⁵⁵ *Id.* at 146 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

⁵⁶ *Coalition*, 684 F.3d at 146.

the full brunt of regulation.⁵⁷ Moreover, the court said, redressability cannot be founded on the idea that Congress will enact corrective legislation, for few bills become laws, and even if a corrective law is passed, there is no guarantee that it would be the one that petitioners had envisioned.⁵⁸ The court also rejected state petitioners' alternative basis for standing — that, under the theory of *Massachusetts v. EPA*, they are harmed by EPA's failure to regulate sooner — on the grounds that petitioners cannot assert a new injury in their reply brief and moreover cite no evidence in the record to suggest that they are adversely affected by climate change.⁵⁹

III. EPA'S DIFFICULT CHOICE

Although *Coalition for Responsible Regulation v. EPA* is a victory for the environment, it narrowly missed being a loss. EPA courted defeat when, in promulgating the Timing and Tailoring Rules, it took a red pen to the numerical thresholds in the PSD and Title V programs. In the following pages, this comment explores what EPA stood to lose by this choice; how close EPA came to a loss; why EPA chose to take the risk; and whether that difficult choice was necessary. In describing a near miss of not insignificant consequences, and in suggesting that, despite the agency's wariness of the alternative, the risk it took might have been unnecessary, the aim is not to find fault with EPA but instead to make vivid the difficult and delicate choices that agencies face when they must use outdated statutory frameworks to respond to new environmental challenges.

A. What EPA Stood To Lose

The loss that EPA risked was not insignificant. In the wake of oral argument — when it seemed possible that the D.C. Circuit might strike down the Tailoring Rule or remand it to the agency for further work⁶⁰ — one rationale for rejection of the rule loomed particularly large. This rationale, founded on industry petitioners' identification of a "situs requirement"⁶¹ in the PSD permitting provision,⁶² was both compelling to the D.C. Circuit and potentially damaging to the reach of the Act. The "situs" argument hinged on the statutory language "in any area to which this part applies."⁶³ As described in Part I above, three conditions must be met in order for a facility to trigger the PSD

⁵⁷ *Id.*

⁵⁸ *Id.* at 147.

⁵⁹ *Id.* at 147–48.

⁶⁰ See e.g., Cathy Cash, 'Tailoring' of GHG Regulation Thresholds Could Be Vulnerable in Court, But Outlook Uncertain, *ELECTRIC UTIL. WK.*, Mar. 5, 2012.

⁶¹ See Petitioners' Joint Opening Brief at 30-35, *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1073), 2011 WL 1789633.

⁶² 42 U.S.C. § 7475(a) ("No major emitting facility on which construction is commenced after August 7, 1977, may be constructed *in any area to which this part applies* unless . . .") (emphasis added)

⁶³ *Id.*

program's preconstruction permitting requirements: The facility must be (1) undergoing construction or modification,⁶⁴ (2) a "major emitting facility,"⁶⁵ and (3) located "in any area to which this part applies."⁶⁶ In this last phrase, industry petitioners saw the potential for a chokepoint. EPA's view had long been that an area "to which this part applies" is an area that is in attainment for *any* NAAQS — a requirement that every area meets. But, industry petitioners argued, if the phrase "any area to which this part applies" simply equates to "everywhere," the term is surplus.⁶⁷

Industry petitioners offered an alternative interpretation that would give the term meaning. First, they said, the phrase "in any area to which this part applies" must be read as pollutant specific; thus, an area that is in attainment for one pollutant and in nonattainment for another pollutant is simultaneously an area "to which this part applies" and "to which this part" does not apply.⁶⁸ Then, they said, the phrase "in any area to which this part applies" must be read together with the previous phrase "major emitting facility." Thus, a facility only triggers permitting if it is "major" for the pollutant for which its area is in attainment.⁶⁹ As Peter Keisler, attorney for industry petitioners, explained at oral argument, the phrase "an area to which this part applies" acts as a "a narrow funnel," with a "broader set of procedures once you pass through that funnel."⁷⁰ In other words, to trigger preconstruction permitting requirements, a stationary source must emit the NAAQS pollutant for which its area is in attainment, but thereafter can be regulated for any pollutant regulated under the Act.⁷¹

The solution appealed to the D.C. Circuit panel, which had seemed both impatient with the agency's attempt to revise plain language and hungry to hear about alternative ways that EPA might have read the statute to avoid absurdity. With his funnel analogy, Keisler had made the work-intensive "situs" interpretation seem almost elegant. And the reading did manage to thread the needle between two undesirable outcomes: like EPA's Tailoring Rule, it would limit the number of sources regulated under the Act; but unlike EPA's Tailoring Rule, it would do so without resort to statutory revision.⁷² Judge Tatel, who had seemed quick to object whenever he found fault with the advocates' reasoning, fell silent as Keisler explained at length his interpretation of the statute.⁷³ Later in the argument, both Judge Tatel and Chief Judge Sentelle hammered Keisler's position back at Perry Rosen, the advocate for EPA, trying to force Rosen into

⁶⁴ See *supra* note 32.

⁶⁵ "Major emitting facility," 42 U.S.C. § 7475(a), is defined in 42 U.S.C. § 7479(1).

⁶⁶ 42 U.S.C. § 7475(a).

⁶⁷ Petitioners' Joint Reply Brief at 19, *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1073), 2011 WL 3420627 ("EPA's interpretation of Section 165(a) reads the situs requirement out of the statute.").

⁶⁸ Petitioners' Joint Opening Brief, *supra* note 61, at 32-33.

⁶⁹ *Id.* at 23-24.

⁷⁰ See Transcript of Oral Argument at 67, *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1073).

⁷¹ *Id.* at 67.

⁷² *Id.* at 66-68.

⁷³ See *id.*

conceding that where there is another plausible interpretation of the statute that will avoid absurd results, an agency is not free under *Chevron II* to opt to avoid absurdity by instead changing plain statutory language.⁷⁴

The “situs” reading was appealing, but also dangerous, for it would have shrunk the PSD program, instead of merely restoring the program to its scope before the Endangerment Finding. Industry petitioners claimed that the “situs” reading would have no major practical effect, while curing the “separation of powers” problem caused by the Tailoring Rule.⁷⁵ They emphasized one consequence of the “situs” interpretation: It would mean that no facility would be subject to PSD merely on account of its GHG emissions, since (1) the phrase “in any area to which this part applies” is NAAQS pollutant specific, and (2) GHGs are not a NAAQS pollutant.⁷⁶ However, petitioners left unmentioned that, under the “situs” interpretation, the PSD program would also not apply, for example, (1) when a facility is “major” for one NAAQS pollutant, but the area is in attainment for other NAAQS pollutants; and (2) when the facility is “major” for non-NAAQS pollutants regulated under the Act, such as hydrogen sulfide.⁷⁷ These additional exclusions would cause a significant shrinking of the PSD program.

B. *How Close EPA Came to a Loss*

In using absurdity and other “last resort” doctrines to justify its revision of quintessentially plain language — numbers — EPA opened itself up first to attack from industry and state petitioners, and then to searching judicial scrutiny. An agency’s departure from statute invites reversal in any court, but especially in the D.C. Circuit, which is particularly familiar with and faithful to the strictures of administrative law.

Judge Tatel has been especially vocal about his and his court’s adherence to statutory language. Petitioners spoke directly to this perspective. For example, Jonathan Mitchell’s brief for the state petitioners made a series of compelling points that dovetailed with Judge Tatel’s views, as expressed, for example, in a recent law review article.⁷⁸ The logic of the states’ brief was as follows: “Congress ‘speaks’ only in the form of enacted statutory language.”⁷⁹ And a rule, by contrast with a standard, says something very specific: “The entire point of legislating by rule is to tolerate suboptimal policies in order to constrain an agency’s discretion and force it to seek congressional legislation (and therefore congressional input)”⁸⁰ Judge Tatel’s article contains similar reasoning; its theme is that doctrines of administrative law, such as the require-

⁷⁴ See *id.* at 103–16.

⁷⁵ See Transcript of Oral Argument, *supra* note 70, at 68.

⁷⁶ See Petitioners’ Joint Opening Brief, *supra* note 61, at 34.

⁷⁷ See Transcript of Oral Argument, *supra* note 70, at 136–37.

⁷⁸ See Brief of State Petitioners and Supporting Intervenor at 19, 35, *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1073); Tatel, *supra* note 4.

⁷⁹ See *id.* at 35.

⁸⁰ *Id.* at 19, 39.

ment that agencies adhere to plain language, “keep agencies tethered to Congress and to our representative system of government.” Indeed, arguing that agencies may not overlook plain statutory language in the quest for good policy, Judge Tatel cited examples that are strikingly similar to EPA’s revision of the PSD and Title V programs’ numerical thresholds, such as EPA’s reading of “total maximum daily” loads to mean total maximum seasonal or annual loads instead.⁸¹ Referring to EPA’s substitution (in effect) of “seasonal” or “annual” for “daily,” Tatel concluded, “EPA’s decision to ignore the statute’s plain words rather than returning to Congress for authority to pursue its preferred policy still baffles me.”⁸²

At oral argument, the judges expressed the same skepticism about EPA’s power to rewrite statutory language. Judge Sentelle was dismissive of the absurdity doctrine,⁸³ while Judge Tatel declared that the absurdity doctrine would trigger a more searching judicial review, not the deferential review that Department of Justice attorney Perry Rosen had urged.⁸⁴ Not surprisingly, a loss for the Tailoring Rule seemed possible to many who had watched the argument.⁸⁵

Indeed, the regulation of greenhouse gas emissions from stationary sources through the PSD program is not yet assured. The D.C. Circuit recently denied rehearing en banc in the case; however, two strong and lengthy dissents to the denial of rehearing en banc, by Judge Janice Brown and Judge Brett Kavanaugh, provide fodder for a petition for certiorari from industry to the U.S. Supreme Court.⁸⁶

C. Why EPA Took the Risk

Why did EPA choose to tailor the statute, thus making itself vulnerable in court, with consequences for the scope of the Act in case of a loss? Perhaps it was because EPA believed the alternative was more dangerous. Perhaps the agency thought that fully embracing a program of greenhouse gas regulation, as envisioned under the statute, would mean undercutting the effectiveness of that program. There are several reasons why this might be so. First, without clear signals to the industry about how to comply with the law, or to the agency about how to enforce the law, the law was likely to be not just underenforced but even paralyzed. Examples abound of overambitious environmental laws that have stalled precisely because their idealistic reach overshoots the possi-

⁸¹ Tatel, *supra* note 4, at 3.

⁸² *Id.* at 4.

⁸³ See Transcript of Oral Argument, *supra* note 70, at 122.

⁸⁴ See *id.* at 130 (“[W]here an agency feels the need to invoke the Absurd Results Doctrine, our review should be particularly searching . . . not especially deferential.”).

⁸⁵ See, e.g., Karl S. Coplan, *GHG Endangerment Finding Argument in the DC Circuit*, GREENLAW (Mar. 1, 2012), <http://greenlaw.blogs.law.pace.edu/2012/03/01/ghg-endangerment-finding-argument-in-the-dc-circuit/>.

⁸⁶ Order Denying Petitions for Rehearing En Banc, Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1073).

ble.⁸⁷ Second, taking charge of a regulatory program so much beyond its capacity to enforce would also open the agency to citizen suit challenges.⁸⁸ Given that environmental groups notoriously do not always agree on the right way to reach their shared values, it is not unlikely that some groups would bring suit. Finally, EPA may have been attentive to the plight of industry under the law. A business that is technically in violation of law has a cloud over its activities — even if that law will as a practical matter never be enforced.

D. Whether EPA's Risk Was Necessary

Accepting responsibility for full implementation might not have been as disastrous as EPA envisioned. Swallowing some of the downsides mentioned above, the agency could have used its substantial discretion to delay, giving itself time to uncover creative solutions and ultimately achieve full implementation within a reasonable timeframe. During the oral argument on *Coalition*, both Judges Tatel and Rogers mentioned possible efficiency measures that EPA could take to bring all sources in, including group permitting, online permitting, and agency auditing of self-permitting.⁸⁹ Indeed, while EPA waited for the *Coalition* decision, the agency convened a workgroup to formulate a streamlining plan in case the Tailoring Rule was vacated⁹⁰ — a demonstration of the agency's willingness and ability to regulate effectively even without the benefit of its "tailoring" approach.

A "delay" approach would have had several benefits. It would have been supported by *Massachusetts v. EPA*; it would not have given the court pause over whether the agency was flouting neutral principles of administrative law; and it would be likely to survive under *Chevron I* and thus not invite the court to search for other plausible interpretations of the statute under *Chevron II*. The Supreme Court in *Massachusetts v. EPA* was alert to the possible administrative burdens that would flow from regulating greenhouse gases — an outcome that it anticipated, even arguably urged — and the Court emphasized that EPA is empowered to flexibly meet such burdens.⁹¹ Specifically, the Court noted that, should the agency determine that GHGs do fall under the CAA, "EPA no doubt has significant latitude as to the manner, *timing*, content, and coordination of its regulations with those of other agencies."⁹² Elsewhere, the Court paints a picture of incremental agency action that directly supports gradual implementation: "Agencies, like legislatures, do not generally resolve mas-

⁸⁷ See, e.g., Richard Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 323–28 (1991) (describing how the impossible ambitions of various federal environmental statutes have led to less action than might have been possible under more measured laws).

⁸⁸ The Clean Air Act's citizen suit provision provides that any person may bring suit to compel the EPA Administrator to comply with non-discretionary duties. 42 U.S.C. § 7604(a)(2).

⁸⁹ See Transcript of Oral Argument, *supra* note 70, at 24, 41.

⁹⁰ Stuart Parker, *EPA Hurries GHG Permit Streamlining Plan as Hedge Against Lawsuit Loss*, CLEAN ENERGY REPORT (Apr. 30, 2012).

⁹¹ 549 U.S. at 533.

⁹² *Id.* (emphasis added).

sive problems in one fell regulatory swoop. . . . They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.”⁹³ EPA cited these selections from *Massachusetts* in its briefing, but the passages provide better support for an EPA that is convincingly refining its approach to achieve full implementation, not just “tailoring” what seems an impossible program.

Although the D.C. Circuit’s invocation of standing has saved EPA for now, the agency would have been safer by avoiding “tailoring” numbers, and instead embarking, as slowly as it needed to, on achieving full compliance with the Act. In effect, with its decision in *Coalition for Responsible Regulation v. EPA*, the D.C. Circuit has given EPA a kind of free pass — the chance to achieve, on its own timeline, the application of greenhouse gas regulations, including BACT, to stationary sources nationwide. It is a permission slip that EPA should have straightforwardly demanded itself.

IV. THE D.C. CIRCUIT’S DIFFICULT CHOICE

Invalidation of the Tailoring Rule was a legally supported alternative, and one that might have been expected from the D.C. Circuit, with its strict approach to statutory text. It was thus a surprising twist that, rather than striking down the rule, the court excused itself from considering it, on the basis that no petitioner had standing to challenge it.

Why did the D.C. Circuit take this approach? The assumption underlying this question is that, where there is no clear legal answer, judges are attuned to the practical consequences of their decisions.⁹⁴ Thus, in addition to being legal, judges’ choices are frequently also strategic. In this case, the D.C. Circuit appears to have acted in a way calculated to preserve EPA’s ability to effectively regulate greenhouse gases, at minimum cost to environmental values.

Thus, just as EPA had strategized to create an effective program of greenhouse regulation, the court seems to have strategized to protect that regulation. And, as was true for the agency, the court’s path forward was fraught. In the end, the court’s choice was a win for the environment, with a few necessary perils.

The short-term consequence of the ruling was a win: the preservation of EPA’s chosen approach to regulation of greenhouse gases.⁹⁵ Looking to the long term, there are two major consequences of note. First, in stopping at standing, the court avoided ruling on whether EPA has the power, under doctrines of administrative necessity, to revise statutory numbers. That restraint is good news for environmentalists, since a ruling either way — and, perhaps

⁹³ *Id.* at 499.

⁹⁴ See RICHARD A. POSNER, *HOW JUDGES THINK* 9 (2008) (identifying the “open area in which judges have decisional discretion”).

⁹⁵ Note that what was preserved was EPA’s *approach* to regulation of GHGs. Had the court struck down the Tailoring Rule, greenhouse gas regulation itself could still have been preserved.

particularly a ruling that EPA *does* have such power — could cut against environmental interests in other contexts. Second, the D.C. Circuit’s ruling undercuts standing doctrine somewhat, although the effect for environmental plaintiffs is not huge.

The opinion has several consequences for standing. First, the opinion is an obstacle to plaintiffs challenging rules that will reduce their regulatory burdens. Because only industry has regulatory burdens, environmentalists are safe on this score. Second, the opinion expands what is “speculative” — that is, it makes it more difficult to establish the element of standing that requires an injury to be “likely, as opposed to merely speculative [to] be redressed by a favorable decision.”⁹⁶ Specifically, after *Coalition*, a plaintiff’s anticipation of responsive action from a government actor may not satisfy redressability; certainly, redressability cannot be established by reference to Congress’ expected actions. This part of the ruling probably affects industry and environmental actors equally, but in any case is not a major diminishment of standing law. Third, *Coalition* may be cited in contexts in which a set of interlocking laws acts as a whole. After *Coalition*, if the one rule you have a legal hook on helps you, tough luck if the group of rules as a whole harms you. This part of the ruling may affect industry and environmental actors equally and could encourage more crabbed interpretations of larger statutory frameworks.

In sum, the D.C. Circuit in *Coalition* was a court with a tricky legal question and an impulse to lean towards environmental protection. The court strategized successfully to secure greenhouse gas regulation, but its position also held compromises for environmental values, including standing.

CONCLUSION

Coalition for Responsible Regulation v. EPA is simultaneously a victory for the environment, a demonstration of agile strategy by an agency and a court both working for environmental protection, and a reminder that we live in a country whose legal tools are ill-fitted to the problem of climate change. Of course, EPA and the D.C. Circuit deserve applause for the outcome of the case. At the same time, the case makes vivid the degree to which we are relying on the finesse and good intentions of the legal actors who wield environmental laws, rather than the laws themselves, for our planet’s protection.

⁹⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotes omitted).