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THE EPA IS ONLY “SORT OF” PERMITTED TO REGULATE GREENHOUSE GASES UNDER THE CLEAN AIR ACT: HOW *UTILITY AIR REGULATORY GROUP V. EPA* SHOWS THE SUPREME COURT IS STILL HOT AND COLD ON CLIMATE CHANGE

*Kristen Curley**

I. INTRODUCTION

The recent Supreme Court decision in *Utility Air Regulatory Group v. EPA*¹ (“*UARG*”) addressed the scope of the Environmental Protection Agency’s (“EPA”) authority to regulate greenhouse gas² (“GHG”) emissions from stationary sources under the Clean Air Act³ (“CAA” or “the Act”).⁴ In *UARG*, the Court examined the EPA’s permitting requirements for stationary sources that emitted, or potentially would emit, GHGs.⁵ The Court determined that the EPA is not authorized to regulate a stationary source based on its potential to emit GHGs, and that stationary sources’ emissions of GHGs cannot alone trigger the CAA’s Prevention of Significant Deterioration⁶

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¹ 134 S. Ct. 2427 (2014).

² GHGs are gases that trap heat in the atmosphere. They include carbon dioxide, methane, nitrous oxide, and fluorinated gases. Carbon dioxide enters the atmosphere by the burning of fossil fuels, trees, and also as a byproduct of some chemical reactions. See *Overview of Greenhouse Gases*, EPA, <http://www.epa.gov/climatechange/ghgemissions/gases.html> (last visited Feb. 28, 2015).

³ 42 U.S.C. § 7401-7515 (2014).

⁴ *UARG*, 134 S. Ct. at 2438.

⁵ *Id.* at 2438-42.

⁶ See 42 U.S.C. § 7471 (providing that “each applicable implementation plan shall contain emission limitations . . . to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.”). Title V imposes both permitting and reporting requirements, but does not include any

(“PSD”) program or Title V permitting requirements.⁷ The Court based this determination upon its interpretation of the term “any air pollutant” and whether that term should be inclusive of GHGs under the PSD provision and Title V permitting requirements of the CAA.⁸ The Court further held that the EPA acted impermissibly in promulgating the Tailoring Rule,⁹ which adjusted numerical threshold limitations in order to provide more practical limits for GHG emissions.¹⁰ In its analysis, the Court examined the bounds of the EPA’s authority under the CAA based upon both the statutory language and the EPA’s regulatory history under the CAA.¹¹

Arguably, the Court used a results-driven analysis, as it redefined the term “any air pollutant” solely for the PSD provision and Title V, and determined that GHGs should not be included. Moreover, the Court, by invalidating the Tailoring Rule, effectively stated that the EPA is limited in its authority to regulate GHGs under the CAA, despite knowledge of the dangers of GHG emissions to public health and welfare.¹² This Comment will compare and contrast the Court’s reasoning in *UARG* with its reasoning in previous GHG cases, and argue that the PSD provision and Title V permitting requirements should be inclusive of GHGs. Section II will introduce the pertinent provisions of the CAA, and offer some history of its interpretation by the EPA and the Supreme Court. Section III will provide a summary of the Court’s decision in *UARG* as well as an analysis of the Court’s decision, and show how the *UARG* decision digresses from the Congressional intent behind the CAA as well as the Supreme Court’s past decisions concerning the EPA’s regulation of GHGs under the Act.

II. THE CLEAN AIR ACT AND THE EPA’S REGULATORY AUTHORITY

Although this Comment centers on the Court’s decision in

substantive limitations on emissions. *See also* 42 U.S.C. § 7661 (2014).

⁷ *UARG*, 134 S. Ct. at 2444.

⁸ *Id.* at 2439-40.

⁹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) [hereinafter Tailoring Rule].

¹⁰ *UARG*, 134 S. Ct. at 2446.

¹¹ *Id.* at 2445.

¹² *Id.* at 2446.

UARG, the case cannot be understood without an understanding of the general background of the CAA and the provisions pertinent to the *UARG* decision. The CAA is a federal law designed to address air pollution by requiring comprehensive state and federal regulation for industrial and mobile sources of air pollution.¹³ The Act “regulates pollution-generating emissions from both stationary sources,¹⁴ such as factories and power plants, and moving sources, such as cars, trucks, and aircraft.”¹⁵ President Lyndon B. Johnson signed it into law on December 17, 1963, in order to respond to increasing concerns about air pollution, and the inadequacy of state and local ability to regulate.¹⁶ The Act has since been amended to protect the public from emerging hazards associated with air pollution.¹⁷ In 1970, the Act was amended to delegate to the EPA the authority to direct the air pollution control program in accordance with an objective of protecting public health, agricultural viability, and natural ecosystems.¹⁸ The EPA was given discretionary authority to promulgate regulations that prescribe air quality standards and hold states accountable for implementing and enforcing these standards.¹⁹

The 1977 Amendments expanded the Act further, establishing National Ambient Air Quality Standards (“NAAQS”) for air pollutants that pose known health and environmental risks.²⁰ The Act, as amended, requires stationary and mobile sources to comply with various air quality standards in order to maintain pollution levels at or below the applicable NAAQS.²¹ Furthermore, the 1977 Amendments provide for the authority of the EPA to add to this list of pollutants, and set the NAAQS at levels it deems necessary to protect human

¹³ 42 U.S.C. § 7401.

¹⁴ The CAA defines stationary source as “any building, structure, facility, or installation which emits or may emit any air pollutant.” 42 U.S.C. § 7411(a)(3).

¹⁵ *UARG*, 134 S. Ct. at 2435.

¹⁶ Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What’s Worked; What’s Failed; What Might Work*, 21 ENVTL. L. 1549, 1585-88 (1991) (discussing tragic incidents associated with air pollution, including one in which 200 deaths were attributed to “smog” that had engulfed New York City in 1963).

¹⁷ *Id.* at 1588-91. The CAA was amended in 1965 to provide for federal control over emissions of new automobiles. It was again amended in 1970 to give the Administrator of the EPA the authority to prescribe NAAQS with the primary objective of protecting public health.

¹⁸ *Id.* at 1591.

¹⁹ *Id.*

²⁰ 42 U.S.C. § 7410; *see also UARG*, 134 S. Ct. at 2435.

²¹ 42 U.S.C. § 7407(d).

health and welfare.²² The EPA has since used the CAA as a means of regulating GHG emissions in some contexts due to the increasing concern surrounding the effect of these emissions upon public health and welfare, which has been approved in several instances by the Supreme Court.²³ The continued evolution of the Act through numerous amendments²⁴ further evidences a Congressional purpose to “protect and enhance an invaluable national resource, our clean air.”²⁵

A. The PSD Provision and Title V Permitting Requirements

The PSD provision of the CAA²⁶ requires certain sources in “clean air areas”²⁷ of the country to obtain a permit so that emissions of air pollutants can be monitored and regulated, and degradation of air quality can be prevented.²⁸ The PSD program was created in order to prevent degradation of acceptable air quality in certain areas, so that the air quality in these areas should not be degraded to levels below those permitted by CAA standards.²⁹ Pursuant to the Act, a permit must be obtained before constructing or modifying any “major emitting facility” in an area where PSD applies.³⁰ In order to ensure that the ambient air quality in “clean air” areas is maintained, each of

²² 42 U.S.C. § 7408(a)(1); Rich Raiders, Comment, *How EPA Could Implement a Greenhouse Gas NAAQS*, 22 FORDHAM ENVTL. L. REV. 233, 253-54 (2011).

²³ See *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

²⁴ Reitze, *supra* note 16, at 1587-91.

²⁵ *Alabama Power Co. v. Costle*, 636 F.2d 323, 344 (D.C. Cir. 1979). In the section of the CAA entitled “Congressional declaration of purpose,” Congress stated that its purpose was “to protect public health and welfare from any actual or potential adverse effect which in [EPA’s] judgment may reasonably be anticipated to occur from air pollution.” 42 U.S.C. § 7470(1).

²⁶ The PSD program was created as a result of the 1972 decision in *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), in which the district court emphasized the congressional purpose of the CAA to protect and enhance air quality. Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling versus Site-Shifting*, 74 IOWA L. REV. 1, 10 (1988).

²⁷ The term “clean air areas” generally refers to regions of the country designated as having ambient air quality better than the applicable national primary or secondary ambient air quality standard. 42 U.S.C. § 7407(d)(1).

²⁸ John-Mark Stensvaag, *Preventing Significant Deterioration under the Clean Air Act: New Facility Permit Triggers*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,003, 10,006 (2008).

²⁹ *Id.* at 10,003-04.

³⁰ 42 U.S.C. § 7475(a)(1).

the six pollutants for which the EPA established NAAQS, known as “criteria pollutants,” is given a specific numerical threshold that designates the permissible concentration of the pollutant in the air. All areas within each state are designated as “attainment” (meaning “clean air”), “nonattainment” (or “dirty air”), or “unclassifiable” for each criteria pollutant, based upon whether they have met the NAAQS for each of the six criteria pollutants: carbon monoxide, lead, nitrogen oxide, ozone, particle pollution, and sulfur dioxide.³¹ Every area of the country meets the NAAQS for at least one of these pollutants and thus qualifies as an “attainment” or “clean air” area for at least one criteria pollutant.³² Therefore, there is no area in the country where PSD does not apply.³³

Title V of the CAA³⁴ sets forth the permitting requirements for stationary and mobile sources, and explicitly states that major emitting sources must apply for permits.³⁵ Title V permits are general operating permits that serve as a single document containing all control requirements that apply to a particular source for a particular pollutant.³⁶ For example, PSD permitting Best Available Control Technology (“BACT”) requirements would be found on a Title V permit. All “major sources” require a Title V permit.³⁷

Because PSD permitting is both time and labor-intensive, it is reserved for larger sources that emit higher levels of air pollutants and, as a result, place areas at risk for significant deterioration of air quality.³⁸ PSD permits are required to construct or modify the operations of a “major emitting facility.”³⁹ The sources subject to PSD permit obligations include those major emitting facilities that emit, at the defined levels, “any air pollutant.”⁴⁰ A “major emitting facility”

³¹ 42 U.S.C. § 7409.

³² Stensvaag, *supra* note 28, at 10,006-08.

³³ *Id.*

³⁴ 42 U.S.C. § 7661a.

³⁵ *Id.*; Meredith Wilensky, *The Tailoring Rule: Exemplifying the Vital Role of Regulatory Agencies in Environmental Protection*, 38 *ECOLOGY L.Q.* 449, 458 (2011).

³⁶ 42 U.S.C. § 7661a; Wilensky, *supra* note 35, at 458.

³⁷ 42 U.S.C. § 7661a.

³⁸ Stensvaag, *supra* note 28, at 10,007-08.

³⁹ 42 U.S.C. § 7475(a).

⁴⁰ 42 U.S.C. § 7479(1); *see also* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676 (1980). The 1980 rule applied the PSD permitting program to several pollutants for which NAAQS had not been promulgated, including asbestos, beryllium, mercury, vinyl

is defined as any stationary source with the potential to emit 100 tons per year or 250 tons per year of “any air pollutant,” depending upon the type of source.⁴¹ This definition is not specific to any one pollutant, but refers to sources that emit quantities of any air pollutant that exceeds the statutory threshold.⁴²

Finally, in order to satisfy the PSD permitting requirements, the source must comply with the BACT provision for each pollutant subject to regulation under the Act, and utilize the best technology, processes, and techniques available for reducing pollution emitted by the applicant’s facility.⁴³ Both new and modified stationary sources must install technologies in compliance with BACT in order to control significant emissions of any regulated pollutant.⁴⁴ Existing, unmodified sources that significantly increase their emissions of “any air pollutant” are also subject to BACT.⁴⁵

The EPA’s definition of “stationary source” within the PSD provision was reviewed by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*.⁴⁶ In *Chevron*, petitioners filed for review of the EPA’s definition of “stationary source” under the CAA.⁴⁷ As the CAA required nonattainment states to regulate “new or modified stationary sources,”⁴⁸ the EPA used a definition of “stationary source” that referred to either a power plant as a whole, or

chloride, fluorides, sulfuric acid, total reduced sulfur/reduced sulfur, hydrogen sulfide, methyl mercaptan, dimethyl sulfide, dimethyl disulfide, carbon disulfide, and carbonyl sulfide. Five non-NAAQS pollutants (fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, and reduced sulfur compounds) have been subject to the PSD program since the EPA’s 1980 rule applied PSD to all regulated pollutants. *Id.* at 52,708-09.

⁴¹ 42 U.S.C. § 7479(1); *see also Alabama Power*, 636 F.2d at 352.

⁴² 42 U.S.C. § 7479(1).

⁴³ 42 U.S.C. § 7475(a)(4). The BACT provision provides:

The term “best available control technology” means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility . . . through application of production processes and available methods . . . for control of each such pollutant.

42 U.S.C. § 7479(3).

⁴⁴ 42 U.S.C. § 7475.

⁴⁵ *Id.* In order to determine BACT, the EPA must identify which emissions control technologies are available. The available options are ranked by control and cost effectiveness in order to determine the appropriate BACT. *See Tailoring Rule*, 75 Fed. Reg. at 31,520.

⁴⁶ 467 U.S. 837 (1984).

⁴⁷ *Id.* at 840.

⁴⁸ 42 U.S.C. § 7502.

smaller units within the plant.⁴⁹ The Court permitted the EPA to use this definition, recognizing that Congress had conferred authority upon the EPA to regulate air pollution under the CAA.⁵⁰ The Court reasoned that the EPA's definition of the term was "a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth."⁵¹ According to *Chevron*, when a statute is silent or ambiguous with respect to an issue, courts must defer to an administrative agency's reasonable interpretation of the statute.⁵² The Court in *Chevron* set the precedent of high deference to the EPA's interpretation of the ambiguous terms of the CAA.

B. The CAA as a Platform for Regulating GHGs

The EPA has used the Act as a platform for regulating GHGs, as scientific research has demonstrated their harmful effects on humans and the environment.⁵³ In 2009, the EPA announced its finding that GHGs emitted by motor vehicles are the greatest cause of "human-induced climate change," and that this poses a danger to public health and welfare.⁵⁴ This determination is known as the "Endangerment Finding," which triggers the EPA's duty to regulate GHGs under the CAA.⁵⁵ In *Massachusetts v. EPA*,⁵⁶ a group of organizations petitioned the EPA to regulate motor vehicle emissions of GHGs under the Act.⁵⁷ The EPA argued that it lacked authority to address climate change through the CAA and that regulation at that time would be unwise.⁵⁸ The Supreme Court held that GHG emis-

⁴⁹ *Chevron*, 467 U.S. at 840.

⁵⁰ *Id.* at 866.

⁵¹ *Id.*

⁵² *Id.* at 843-44.

⁵³ See Tailpipe Rule: Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) [hereinafter Tailpipe Rule].

⁵⁴ Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) [hereinafter Endangerment Finding].

⁵⁵ *Massachusetts*, 549 U.S. at 533-34; Endangerment Finding, 74 Fed. Reg. at 66,4976.

⁵⁶ 549 U.S. 497 (2007).

⁵⁷ *Massachusetts*, 549 U.S. at 513.

⁵⁸ *Id.* The EPA claimed that it would be unwise because of lack of certainty of science and because it might "hamper the President's ability to persuade key developing countries to reduce [GHG] emissions." *Id.* at 513-14.

sions from motor vehicles could each be characterized as an “air pollutant” under the CAA so long as the EPA had first determined that these emissions were a threat to human health and to the environment.⁵⁹ *Massachusetts* established that carbon dioxide, which is known as the most prevalent and harmful GHG, is an “air pollutant” under § 7602(g) of the Act, which section defines “air pollutant” for the NAAQS program.⁶⁰ In *Massachusetts*, the Court emphasized that “without regulatory flexibility, changing circumstances and scientific developments would soon render the [CAA] obsolete.”⁶¹ *Massachusetts* also emphasized the EPA’s duty to protect the health and welfare of the public.⁶² Furthermore, despite a high level of deference to the EPA’s discretion, the Court in *Massachusetts* found that the EPA was mandated to regulate GHG emissions as failing to regulate “presents a risk of harm . . . that is both ‘actual’ and ‘imminent.’”⁶³ The Court further asserted its position that the harms associated with global warming are “serious and well recognized.”⁶⁴

Because the CAA conferred authority on the EPA to regulate threats to the environment, as well as human health and safety, the Court held that the EPA was required to address these concerns by

⁵⁹ *Id.* at 533.

⁶⁰ Daniel Brian, *Regulating Carbon Dioxide under the Clean Air Act as a Hazardous Air Pollutant*, 33 COLUM. J. ENVTL. L. 369, 378 (2008); 42 U.S.C. § 7602(g) defines “air pollutant” as:

[A]ny air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term “air pollutant” is used.

Id.

⁶¹ *Massachusetts*, 549 U.S. at 532.

⁶² *Id.*

⁶³ *Id.* at 521.

⁶⁴ *Id.*; see Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1160 (2009):

As [GHG] emissions continue to increase, exponentially larger, and potentially more economically disruptive, emissions reductions will be necessary in the future to bring atmospheric concentrations down to desired levels. Future technological advances, therefore, would likewise have to be able to achieve those exponentially greater reductions to make up for lost time.

Id.

promulgating regulations under the CAA.⁶⁵ In *Massachusetts*, the Court recognized that the CAA's drafters "might not have appreciated the possibility that burning fossil fuels could lead to global warming."⁶⁶ In that case, the Court concluded that the broad language of the CAA indicates Congress's intent to confer flexibility in interpretation.⁶⁷ The Court further emphasized that the EPA is mandated to regulate "any air pollutant" that presents a danger to public welfare.⁶⁸ *Massachusetts* established the EPA's duty to regulate GHGs if it determines that they are harmful, and that the EPA can no longer refuse to act, unless it can support its inaction in the language of the CAA.⁶⁹ In fact, in *Massachusetts*, the Court determined that the EPA is obligated to regulate GHG emissions from mobile sources under the CAA if it makes an Endangerment Finding, or otherwise render the CAA obsolete.⁷⁰ The Court stated that the EPA has a responsibility to regulate emission of GHGs to try and slow global warming, including regulations of both mobile and stationary sources.⁷¹ As a result of the Endangerment Finding,⁷² the EPA began regulating GHGs for mobile sources (the type of sources at issue in *Massachusetts*).⁷³

The Supreme Court again addressed the EPA's regulation of GHGs under the Act in *American Electric*, in which plaintiffs sued electric companies that operated power plants in twenty states based

⁶⁵ *Massachusetts*, 549 U.S. at 533.

⁶⁶ *Id.* at 532.

⁶⁷ *Id.*; see also *Dept. of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) (noting the expansive meaning of the word "any" as "one or some indiscriminately of whatever kind" (internal quotations omitted)).

⁶⁸ *Massachusetts*, 549 U.S. at 533.

⁶⁹ *Id.*

Under the clear terms of the [CAA], [the] EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.

⁷⁰ *Id.* at 532-33 (noting that even if Congress did not foresee global warming, it surely appreciated the need for regulatory flexibility in order to adapt to changing circumstances and scientific developments in the area of air pollution).

⁷¹ *Id.* at 528-29.

⁷² Endangerment Finding, 74 Fed. Reg. at 66,497 ("[T]he Administrator finds that greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare. . . . The Administrator has determined that the body of scientific evidence compellingly supports this finding.")

⁷³ See Tailpipe Rule, 75 Fed. Reg. at 25,324.

upon the “public nuisance” doctrine as applied to GHG emissions.⁷⁴ The Court refused to allow these claims, determining that the EPA regulations on GHG emissions displaced any public nuisance claim.⁷⁵ In *American Electric*, the EPA was given deference as the expert in the area of climate change risks, and the defendants were determined to be legally operating within those limits.⁷⁶ The Court plainly stated that “emissions of carbon dioxide qualify as air pollution subject to regulation under the [CAA].”⁷⁷ The CAA “entrusts such complex balancing to [the] EPA in the first instance, in combination with state regulators.”⁷⁸ The Court’s decision in *American Electric* unequivocally supported the authority of the EPA to regulate GHGs, by way of the reasoning in *Chevron* and *Massachusetts*.

C. The Tailoring Rule Provided Workable Threshold Limits for GHGs for the PSD Program

Massachusetts made clear that GHGs are “air pollutants” under the Act, and that, as such, the EPA has a responsibility to regulate them if an Endangerment Finding is made.⁷⁹ Thus, after making its Endangerment Finding for GHGs,⁸⁰ the EPA responded by enacting the Tailoring Rule,⁸¹ a regulation that provided workable threshold limits for GHGs under PSD.⁸² Because GHGs are emitted at much higher concentrations than other air pollutants,⁸³ the result of the PSD threshold limits is that smaller sources like small businesses, hospitals, and apartment buildings, would be required to apply for a permit under the PSD program, thus dramatically expanding the scope of the

⁷⁴ *Am. Elec.*, 131 S. Ct. at 2532.

⁷⁵ *Id.* at 2540.

⁷⁶ *Id.* at 2539.

⁷⁷ *Id.* at 2537 (citing *Massachusetts*, 549 U.S. at 528-29).

⁷⁸ *Id.* at 2539-40 (emphasizing that because Congress designated the EPA as the expert agency to make determinations regarding GHGs, it is not within the authority of federal judges, who lack the scientific resources and expertise, to determine what amount of GHG emissions is “reasonable” and what level of reduction is feasible).

⁷⁹ *Massachusetts*, 549 U.S. at 533.

⁸⁰ Endangerment Finding, 74 Fed. Reg. at 66,496.

⁸¹ Tailoring Rule, 75 Fed. Reg. at 31,514.

⁸² *Id.*

⁸³ Matthew R. Oakes, *Questioning the Use of Structure to Interpret Statutory Intent: A Critique of Utility Air Regulatory Group v. EPA*, 124 YALE L.J. F. 56, 56 (2014).

program.⁸⁴ In order to avoid the PSD's numerical threshold limits becoming unworkable for GHGs, the EPA developed the Tailoring Rule.⁸⁵ The Tailoring Rule was issued in May 2010 in order to implement PSD and Title V permitting requirements for GHG emissions in phases, and to adapt the requirements in order to meaningfully regulate GHGs.⁸⁶ To do so, the EPA relied upon its authority under § 7601, which authorizes the EPA to "prescribe such regulations as are necessary to carry out [its] functions under [the CAA]."⁸⁷

Under the Tailoring Rule, the EPA adjusted the threshold requirements under the CAA so that only major emitting sources or those sources that emit GHGs at the highest levels must seek a permit pursuant to PSD, so as to not affect small businesses, hospitals, and the like.⁸⁸ Particularly, the Tailoring Rule changed the threshold limits for GHGs from 100 and 250 tons per year depending on the type of source, to 75,000 and 100,000 tons per year depending on the type of source.⁸⁹ The tailored thresholds limit the PSD permitting requirement to only those major sources that emit very large quantities of GHGs. The EPA focused on those industrial sources responsible for 70 percent of the GHG pollution from stationary sources, while reserving some discretion for the EPA to identify the most cost-effective emissions control options for major emitting sources.⁹⁰ This tailoring was consistent with Congress's intent to subject only larger emitting facilities to PSD and Title V permitting requirements.⁹¹

In enacting the Tailoring Rule, the EPA relied upon the reasoning of the D.C. Circuit in *Alabama Power Co. v. Costle*,⁹² which invoked the "absurd results doctrine," as well as the "administrative necessity doctrine," in order to adapt the PSD numerical thresholds to GHG emissions.⁹³ In *Alabama Power*, the D.C. Circuit determined

⁸⁴ *Id.* at 56 (noting that "regulating GHG emissions at the levels apparently required by the CAA would have increased the number of permitted sources at least a hundredfold").

⁸⁵ *UARG*, 134 S. Ct. at 2437.

⁸⁶ *Id.*

⁸⁷ 42 U.S.C. § 7601(a)(1).

⁸⁸ Wilensky, *supra* note 35, at 459.

⁸⁹ Tailoring Rule, 75 Fed. Reg. at 31,516.

⁹⁰ See *Clean Air Act Permitting for Greenhouse Gases: Guidance and Technical Information Fact Sheet*, EPA, <http://www.epa.gov/nsr/ghgdocs/ghgpermittingtoolsfs.pdf> (last visited Apr. 7, 2014).

⁹¹ Tailoring Rule, 75 Fed. Reg. at 31,516.

⁹² 636 F.2d 323 (1979).

⁹³ *Raiders*, *supra* note 22, at 250.

that the EPA must abide by statutory language unless its literal terms would lead to absurd results.⁹⁴ The “absurd results doctrine” thus authorizes agencies such as the EPA to apply statutory requirements differently from the literal meaning, if necessary, to avoid absurd or futile results that are at odds with the purpose of the legislation.⁹⁵ The court in *Alabama Power* also acknowledged the agency’s need for flexibility in determining when interpretations that depart from the literal text of the statute are administratively necessary.⁹⁶ The court further supported this finding with the “administrative necessity doctrine,” which permits agencies to avoid the impossibilities of applying statutory requirements in certain circumstances.⁹⁷ As a result, the court sustained the EPA’s decision to excuse certain sources from PSD review in order to avoid the absurd results that would ensue from a literal interpretation of the statute.⁹⁸

The EPA recognized that the application of the numerical threshold limits of 100 and 250 tons per year for “major sources” would be “absurd” if applied to GHGs because the PSD program’s requirements would apply to sources for which the regulatory scheme was not at all intended, such as sources as small as large single-family homes.⁹⁹ In response to the dilemma created by the Supreme Court’s insistence in *Massachusetts* that air pollutants include GHGs, together with the practical difficulties that would result from utilizing the existing 100 and 250 tons per year thresholds, the EPA promulgated the Tailoring Rule, adjusting the threshold limits to meaningfully regulate GHGs and adopted a phase-in approach to the GHG regulations in order to prevent the “absurd results” that would ensue if the PSD program requirement were immediately applied to all stationary sources that emit GHGs at quantities above the statutory thresholds.¹⁰⁰ The EPA determined that it was administratively nec-

⁹⁴ *Alabama Power*, 636 F.2d at 353 (emphasizing the importance of Congressional intent for interpreting language within the CAA).

⁹⁵ *Id.* at 411 n.89.

⁹⁶ *Raiders*, *supra* note 22, at 250; *see also Alabama Power*, 636 F.2d at 357.

⁹⁷ *Alabama Power*, 636 F.2d at 361; *see also* *Env’tl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980).

⁹⁸ *Alabama Power*, 636 F.2d at 361-62 (finding that PSD permitting requirements are triggered by NAAQS and any other pollutants regulated under CAA).

⁹⁹ Tailoring Rule, 75 Fed. Reg. at 31,533.

¹⁰⁰ *Id.* “[A]bsurd results” would ensue if the PSD and Title V programs’ requirements were immediately applied to all stationary sources emitting GHGs in amounts above the statutory thresholds. To avoid these consequences, the EPA prescribed higher thresholds for

essary to adapt the numerical PSD thresholds to levels that were meaningful for GHG emissions in order to avoid such unduly burdensome results. Thus, the Tailoring Rule was an attempt to preserve the Congressional intent of maintaining safe levels of air pollutants that are known to endanger public health and welfare.¹⁰¹

III. *UARG* AND THE COURT'S ABRUPT LIMITATION ON THE EPA'S AUTHORITY UNDER THE CAA

In *UARG*, petitioners challenged the EPA's authority to regulate GHGs under the PSD provision, which required certain GHG-emitting sources to obtain permits.¹⁰² *UARG* concerned the permitting requirements for stationary sources under the PSD and Title V provisions, as well as whether those sources were subject to the PSD program's BACT provision.¹⁰³ The Court examined the language of these provisions in order to determine whether the EPA acted within the scope of its authority by concluding that the PSD program and Title V applied to GHGs, and implementing the Tailoring Rule to limit the number of smaller sources required to obtain PSD permits and thus become subject to the BACT provision.¹⁰⁴ The Court's decision turned on the definition of "any air pollutant" within the PSD provision as well as within the Act as a whole.¹⁰⁵ The Court emphasized the importance of a reasonable statutory interpretation, and relied upon its past decisions in *Chevron* and *Massachusetts*, which set forth the framework for EPA authority under the CAA, to reach its conclusion.¹⁰⁶

The decision, written by Justice Scalia, consisted of three distinct holdings, which will be addressed in turn. First, the Court held that stationary sources could not be subject to PSD permitting re-

GHGs, so that only the largest sources are affected.

¹⁰¹ Wilensky, *supra* note 35, at 474. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 866 n.9.

¹⁰² *UARG*, 134 S. Ct. at 2439-40.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2439-40, 2444-45; *see supra* Section II.A (discussing PSD program and BACT).

¹⁰⁵ *UARG*, 134 S. Ct. at 2441-42 (observing that the EPA is not bound by the Act-wide definition of "air pollutant" when interpreting operative provisions of the Act such as the PSD provision. In the Court's view, the inclusion of GHGs in the definition of "any air pollutant" in this case would be incompatible with the program).

¹⁰⁶ *See generally UARG*, 134 S. Ct. 2427.

quirements based upon their potential to emit GHGs.¹⁰⁷ The Court determined that the phrase “any air pollutant” within the PSD provision, used when describing the pollutants that trigger PSD and Title V, did not include GHGs.¹⁰⁸ Second, the Court found that the EPA exceeded its authority when it adjusted the numerical limitations on emissions from 100 and 250 tons per year to 75,000 and 100,000 tons per year for GHGs in order to adapt the provision to workable levels for GHGs.¹⁰⁹ The Court reasoned that the numerical limits in the Act were unambiguous and provided no room for interpretation by the agency.¹¹⁰ Finally, the Court held that the EPA’s interpretation of the phrase “each pollutant subject to regulation under [the Act]”¹¹¹ in the PSD program’s BACT provision as including GHGs was a reasonable construction of the Act.¹¹² Overall, under *UARG*, the EPA does not have authority to regulate GHGs under Title V and PSD in clean air areas, while sources that emit the threshold level of GHGs that are already subject to PSD permitting requirements must comply with BACT.

A. The Court in *UARG* Held That the Term “Any Air Pollutant” within the PSD Provision and Title V Implicitly Excludes GHGs

The Court in *UARG* determined that the phrase “any air pollutant” does not include GHGs within the PSD provision and Title V.¹¹³ This determination was made despite the plain language of the statute, and does not appear to conform with Congress’s intent or the Court’s previous mandate that the EPA take action if an Endangerment Finding is made.¹¹⁴ The CAA defines “air pollutant” as “any air pollution agent or combination of such agents, including any physical, chemical, biological [or] radioactive substance . . . or matter which is emitted into or otherwise enters the ambient air.”¹¹⁵ The

¹⁰⁷ *Id.* at 2442.

¹⁰⁸ 42 U.S.C. § 7479(1); *UARG*, 134 S. Ct. at 2444.

¹⁰⁹ *Id.* at 2445.

¹¹⁰ *Id.* at 2427.

¹¹¹ 42 U.S.C. § 7475(a)(4).

¹¹² *UARG*, 134 S. Ct. at 2449.

¹¹³ *Id.* at 2442.

¹¹⁴ *Massachusetts*, 549 U.S. at 533.

¹¹⁵ 42 U.S.C. § 7602(g).

Court in *Massachusetts* affirmatively stated that GHGs are “air pollutants” subject to the Act.¹¹⁶ The PSD permit requirement applies to major sources that emit “any air pollutant” at the defined levels.¹¹⁷ Historically, the EPA has interpreted PSD to apply to sources emitting any regulated air pollutant, even those for which it had not promulgated NAAQS.¹¹⁸ However, the Court in *UARG* determined that the EPA can no longer interpret the language “any air pollutant” as inclusive of GHGs.¹¹⁹ The Court, in making this determination, disregarded the plain language of the statute, namely, the word “any,”¹²⁰ as well as the Court’s prior holding that it is the EPA’s responsibility to act upon an Endangerment Finding with regard to sources emitting GHGs.¹²¹

The Court relied upon *Chevron* to support this finding, reasoning that Congress did not intend for an expansion of the EPA’s authority that would impact so many small sources as well as the economy as a whole.¹²² However, according to the Court in *Chevron*, the EPA’s interpretation of the CAA is subject to deference when the statute is ambiguous or silent with regard to the issue, and the agency’s interpretation is reasonable within the purpose of the statute.¹²³ Thus, the “permissible construction” approach of *Chevron* requires deference to the administrative agency’s (in this case, the EPA’s) reasonable construction of the statute when the statute is ambiguous, and neither requires nor permits an evaluation of whether there are possible consequences of the agency’s statutory interpretation.¹²⁴ As the Court in *Chevron* first explained, when Congress has not spoken directly to the issue and an administrative agency has addressed Congress’s silence, “the court [cannot] simply impose its own construction [of] the statute, as would be necessary in the absence of an

¹¹⁶ *Massachusetts*, 549 U.S. at 533.

¹¹⁷ 42 U.S.C. § 7479(1).

¹¹⁸ See *supra* note 40 and accompanying text.

¹¹⁹ *UARG*, 134 S. Ct. at 2441.

¹²⁰ 42 U.S.C. § 7479(1) (subjecting “stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant” to PSD requirements).

¹²¹ *Massachusetts*, 549 U.S. at 533.

¹²² *UARG*, 134 S. Ct. at 2442-43.

¹²³ *Chevron*, 467 U.S. at 843.

¹²⁴ *Id.* at 866 n.20 (citing Emissions Offset Interpretative Ruling, 41 Fed. Reg. 55,524, 55,527 (1976) (“[T]he Act does not allow economic growth to be accommodated at the expense of the public health.”)).

administrative interpretation.”¹²⁵

The Court in *UARG* treated the term “any air pollutant” as ambiguous in its analysis, asserting that inclusion of GHGs in this term would be inconsistent with the statute as a whole.¹²⁶ Presuming that Congress had not spoken directly to the question at issue, the Court then determined that the EPA’s inclusion of GHGs under the PSD requirement was not a reasonable interpretation of the statute, but yet it found that the inclusion of GHGs under the BACT provision was a reasonable construction of the statute.¹²⁷ The Court’s reading of the term “any air pollutant” as excluding GHGs seems to defy all logic, particularly when the Court had explicitly recognized GHGs as an air pollutant for the purposes of the Act in *Massachusetts*.¹²⁸ By holding that the EPA’s interpretation of the term “any air pollutant” was unreasonable, the Court imposed its own interpretation that excludes GHGs.

In *UARG*, the Court shifted its focus from the text of the Act, emphasizing that a reasonable statutory interpretation under *Chevron* must account for both the specific context of the provision as well as the Act-wide context.¹²⁹ The Court noted that the EPA has given “air pollutant” a narrower meaning in the context of specific operative provisions of the CAA.¹³⁰ Particularly, the EPA has previously interpreted “air pollutant” within the PSD program as limited to only regulated air pollutants.¹³¹ The Court in *UARG* determined that the term “air pollutant” in this context includes a narrower subset of airborne compounds that do not include GHGs because, although the Act-wide definition includes GHGs, the specific context of the provision applies only to a narrower class of “regulated” pollutants.¹³² Interestingly, the Court relied on the EPA’s past regulations to form this conclusion rather than evaluating the plain language of the statute along with Congressional intent.¹³³ The Court also reasoned that, as a practical matter, PSD cannot apply to “any” air pollutant regulated by

¹²⁵ *Chevron*, 467 U.S. at 843.

¹²⁶ *UARG*, 134 S. Ct. at 2441.

¹²⁷ *Id.* at 2448.

¹²⁸ *Massachusetts*, 549 U.S. at 528-29.

¹²⁹ *UARG*, 134 S. Ct. at 2442.

¹³⁰ *Id.* at 2439.

¹³¹ *Id.* at 2439-40.

¹³² *Id.* at 2440.

¹³³ *Id.*

the CAA, but only those pollutants that the EPA can workably regulate under the PSD program without adjusting the numerical threshold limits.¹³⁴ For these reasons, the Court determined that PSD did not apply to GHGs, and that the EPA had overstepped its authority.¹³⁵

The Court in *UARG* referenced *Chevron* to support its determinations that the EPA acted impermissibly with respect to the PSD program triggering provision and permissibly with respect to the BACT provision,¹³⁶ when in fact, this reasoning does not comport with *Chevron*'s command of deference to the EPA,¹³⁷ or with the Court's prior holding in *Massachusetts*.¹³⁸ In *Massachusetts*, the Court held that the Act-wide definition of "air pollutant" encompassed "all airborne compounds of whatever stripe."¹³⁹ However, because the EPA has previously interpreted the PSD permitting trigger language "any air pollutant" to include only regulated air pollutants, the Court in *UARG* determined that the PSD provision can apply only to a "narrower, context-appropriate" subset, which does not include GHGs.¹⁴⁰

The Court in *UARG* failed to acknowledge that the EPA's course of conduct was in direct response to the Court's finding in *Massachusetts* that the words "air pollutant" in § 202(a)(1) includes carbon dioxide.¹⁴¹ The Court in *Massachusetts* rejected a variety of efforts by the EPA to exempt GHGs from the plain language of the CAA.¹⁴² It held that GHGs are "air pollutants" within the meaning of the Act and that their unique characteristics or the possible economic and administrative consequences of regulation were not a basis upon which to avoid the CAA's requirements.¹⁴³

¹³⁴ *UARG*, 134 S. Ct. at 2445.

¹³⁵ *Id.* at 2449.

¹³⁶ *Id.*

¹³⁷ *Chevron*, 467 U.S. at 865.

¹³⁸ *Massachusetts*, 549 U.S. at 533.

¹³⁹ *Id.* at 528-29; 42 U.S.C. § 7602(g). Congress typically uses the "expansive" word "any" to further broaden the application of a given definition. *United States v. Gonzalez*, 520 U.S. 1, 5 (1997).

¹⁴⁰ *UARG*, 134 S. Ct. at 2439.

¹⁴¹ *Massachusetts*, 549 U.S. at 528-29.

¹⁴² *Id.* at 533 (suggesting that even a "laundry list of reasons not to regulate" has nothing to do with whether GHG emissions contribute to global climate change, and does not support noncompliance with the CAA's clear statutory commands).

¹⁴³ *Id.* at 534-35; *see also Am. Elec.*, 131 S. Ct. at 2537 (explaining that "emissions of carbon dioxide qualify as air pollution subject to regulation under the [CAA]").

Furthermore, the Court in *Massachusetts* explained that the EPA need not “resolve massive problems” like GHG emissions “in one fell regulatory swoop.”¹⁴⁴ Instead, it continued, the EPA may “whittle away at them over time, refining [its] preferred approach as circumstances change and as [the EPA] develops a more nuanced understanding of how best to proceed.”¹⁴⁵ The Court in *UARG* attempted to reconcile its conclusion with the holding in *Massachusetts* by drawing a distinction between the “[a]ct-wide definition” and the definition used for specific provisions.¹⁴⁶

As a result, the Court in *UARG* impermissibly substituted its own judgment in place of the EPA’s judgment, in contravention of its prior holdings in both *Chevron* and *Massachusetts*. This apparent inconsistency in reasoning suggests that the EPA’s authority to apply various provisions of the CAA to GHG emissions is subject to case-by-case determinations made by the courts. Arguably, this approach to the Act is significantly less efficient and clear than the EPA’s solution, as it may lead to continued case-by-case determinations of whether the EPA may regulate GHGs throughout operative provisions of the Act.

The Court impermissibly evaluated the potential administrative and economic impact of including GHGs in the term “any air pollutant” in order to conclude that the EPA may not regulate GHGs under PSD and Title V. Such an analysis is not permitted by the plain text of the Act, nor by the Court’s prior holding in *Massachusetts*.¹⁴⁷ Acknowledging its departure from the plain meaning of the phrase “any air pollutant,” the Supreme Court in *UARG* made the assertion that the regulation of GHGs under PSD and Title V would be inconsistent with the design and structure of the CAA.¹⁴⁸ The Court reasoned that the administrative and economic costs of regulation suggest that the EPA’s view cannot be a “reasonable construction” of the Act.¹⁴⁹ The Court used a results-driven analysis to conclude that the application of PSD and Title V permitting to sources emitting GHGs would result in “plainly excessive demands on limited gov-

¹⁴⁴ *Massachusetts*, 549 U.S. at 524.

¹⁴⁵ *Id.*

¹⁴⁶ *UARG*, 134 S. Ct. at 2439-40.

¹⁴⁷ *Massachusetts*, 549 U.S. at 533.

¹⁴⁸ *UARG*, 134 S. Ct. at 2442.

¹⁴⁹ *Id.*

environmental resources” and expand the EPA’s authority beyond Congress’s intent.¹⁵⁰

Justice Breyer’s dissenting opinion asserted that the majority created “an atextual greenhouse gas exception to the phrase ‘any air pollutant.’ ”¹⁵¹ Indeed, it appears as though the term “any air pollutant” would be inclusive of GHGs by virtue of the word “any.” Although the Court acknowledged that the EPA’s interpretation of the phrase is “plausible,” the Court concluded that the results would be unreasonable, as they would require a great number of small sources to obtain permits.¹⁵² While the Court need not exclude GHGs from the set of “any air pollutant,” neither the Court nor the EPA could fathom the application of the existing numerical threshold limits to GHGs because of the number of sources that would be required to obtain a permit.¹⁵³ The Court resolved this concern by concluding that GHGs are not “air pollutants” for the purpose of the PSD provision.¹⁵⁴ The EPA resolved this concern by enacting the Tailoring Rule, which is discussed below.

B. The Court in *UARG* Held that the EPA Exceeded Its Authority by Enacting the Tailoring Rule

As for its second holding, the Court determined that the EPA exceeded its authority by enacting the Tailoring Rule.¹⁵⁵ Unlike the first holding, in this portion of the opinion, the Court championed adherence to the plain text of the statute.¹⁵⁶ Specifically, the Court found that the EPA exceeded its authority when it adjusted the numerical limitations for PSD and Title V permitting to provide meaningful limits for GHGs.¹⁵⁷ Denouncing the Tailoring Rule for its departure from the plain language of the Act,¹⁵⁸ the Court, instead of

¹⁵⁰ *Id.* at 2444.

¹⁵¹ *Id.* at 2452 (Breyer, J., dissenting).

¹⁵² *Id.* at 2446.

¹⁵³ *UARG*, 134 S. Ct. at 2442-43 (“[A]nnual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from \$12 million to over \$1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide.”).

¹⁵⁴ *Id.* at 2444.

¹⁵⁵ *Id.* at 2445-46.

¹⁵⁶ *Id.* at 2444-45.

¹⁵⁷ *Id.* at 2442.

¹⁵⁸ *UARG*, 134 S. Ct. at 2444.

acknowledging the inherent inconsistency in the Act between the terms “any air pollutant” and the numerical threshold limits provided by the PSD provision, invalidated the Tailoring Rule.¹⁵⁹

The Court ruled that because the EPA is not permitted to “re-write clear statutory terms,” the EPA’s promulgation of the Tailoring Rule was not entitled to *Chevron* deference.¹⁶⁰ However, the Court failed to consider Congress’s silence with respect to threshold limits that could workably apply to GHGs. Since PSD’s numerical threshold limits cannot feasibly be applied to GHG-emitting sources (a point agreed upon by both the Court and the EPA), and the Act does not specifically mention GHGs, at least arguably, it can be presumed that the CAA is silent or ambiguous with respect to threshold limits for GHGs. Thus, pursuant to *Chevron*, in such cases when Congress is silent or leaves ambiguity in a statute, courts must defer to the administrative agency’s reasonable interpretation. But here, rather than deferring to the agency’s interpretation, the Court held that the EPA had no authority to tailor the numerical requirements for GHGs.¹⁶¹

Presuming the CAA is indeed ambiguous with respect to numerical threshold limits for GHGs, the EPA would be authorized to make a reasonable construction of the statute under *Chevron*. The Tailoring Rule was an attempt to reconcile the “any air pollutant” language of the PSD provision and Title V with the statutory threshold limits for air pollutants. The Court could have permitted the EPA’s promulgation of the Tailoring Rule in this respect, as it was an attempt to resolve a statutory inconsistency while complying with Congress’s intent.¹⁶²

Instead, this holding diverged from the *Massachusetts* mandate that the EPA has liberal discretion with regard to the regulation of harmful pollutants if they place public health and welfare at risk.¹⁶³ Rather than compelling the EPA to act upon its Endangerment Finding, the Court prohibited the EPA from requiring PSD permits for sources emitting 100,000 tons a year of GHGs.¹⁶⁴ By refusing to allow the EPA to exercise its duty to address quantities of GHGs emit-

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2446.

¹⁶¹ *Id.*

¹⁶² 42 U.S.C. §7470(1); Tailoring Rule, 75 Fed. Reg. at 31,533.

¹⁶³ *UARG*, 134 S. Ct. at 2446; *see also Massachusetts*, 549 U.S. at 533.

¹⁶⁴ *UARG*, 134 S. Ct. at 2444.

ted by major sources, the Court prevented the EPA from abiding by the rule in *Massachusetts* that the EPA must act when it perceives a danger to public health and safety.¹⁶⁵

Moreover, Justice Scalia, writing the majority opinion, failed to acknowledge in *UARG* an important and relevant holding in *Massachusetts*: the EPA cannot avoid an Endangerment Finding based on its belief that regulating GHGs would be overly burdensome, and, if the EPA finds that GHGs pose a danger (i.e., makes an Endangerment Finding), the agency must regulate them.¹⁶⁶ This omission permits a presumption that the EPA acted unreasonably in promulgating the Tailoring Rule, whereas the EPA was actually doing precisely what the Court in *Massachusetts* directed. Arguably, the EPA addressed the conflict posed by GHG emissions and the statutory threshold limits as efficiently as possible under the CAA's terms and pursuant to the authority delegated by Congress when it implemented the Tailoring Rule.¹⁶⁷ When an agency faces conflicting statutory commands, it "may deviate no further from the statute than is needed to protect congressional intent."¹⁶⁸ The EPA's interpretation was arguably fully consistent with its authority as well as the Congressional intent behind the CAA.

Justice Breyer, in his dissent, pointed out that Congress's intent underlying the 250 tons per year threshold was to limit PSD's obligations to larger sources rather than imposing regulatory burdens upon smaller sources.¹⁶⁹ The EPA's interpretation acknowledged this concern by promulgating the Tailoring Rule, which exempted the smaller GHG emitting sources in order to avoid placing undue administrative burdens upon sources which Congress never intended to apply to permits.¹⁷⁰ Therefore, not only was the EPA's definition plausible, it was directly aligned with the Congressional intent in two respects: (1) to subject only larger sources with greater ability to bear the burden of permitting requirements to the PSD requirements¹⁷¹ and (2) for the EPA to take action to protect public health and welfare by

¹⁶⁵ See *Massachusetts*, 549 U.S. at 533.

¹⁶⁶ *Id.*

¹⁶⁷ See generally Tailoring Rule, 75 Fed. Reg. 31,514.

¹⁶⁸ *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

¹⁶⁹ *UARG*, 134 S. Ct. at 2450-51 (Breyer, J., dissenting).

¹⁷⁰ Tailoring Rule, 75 Fed. Reg. at 32,533.

¹⁷¹ *Id.*

regulating GHG emissions.¹⁷²

The Court's adherence to the plain language of PSD for the purpose of invalidating the Tailoring Rule,¹⁷³ just after holding that GHGs should be excluded from the PSD provision category of "any air pollutant," obviates the flawed reasoning in this opinion.¹⁷⁴ The effect of GHG emissions is a pressing concern of both Congress and the EPA.¹⁷⁵ The legislative intent behind the CAA bestows upon the EPA the authority to interpret and construct the CAA in order to protect public health and welfare.¹⁷⁶ Furthermore, the EPA carried out the PSD and Title V permitting programs in a manner that contemplated both expressed congressional objectives and prior holdings of the Supreme Court, as well as the practical realities of implementation.¹⁷⁷ Nevertheless, the Supreme Court invalidated the Tailoring Rule in *UARG*.

C. The Court in *UARG* Held that the Term "Any Air Pollutant Subject to Regulation under This Chapter" within the BACT Provision Includes GHGs

The Court's determination that the language subjecting "any pollutant subject to regulation under this chapter" to BACT is inclusive of GHGs, while also finding that the broader term subjecting "any air pollutant" to the PSD provision is not inclusive of GHGs, is counterintuitive.¹⁷⁸ The Court stated that the EPA went too far when it determined that the term "any air pollutant" is inclusive of GHGs under the PSD provision.¹⁷⁹ The Court reasoned that the implications of the EPA's proposed definition would be unreasonable and therefore impermissible.¹⁸⁰ Nevertheless, the Court determined that "any-

¹⁷² 42 U.S.C. § 7475(a). Congress specifically contemplates "major emitting facilit[ies]" as subject to PSD requirements. *See id.*

¹⁷³ *UARG*, 134 S. Ct. at 2444.

¹⁷⁴ *See Massachusetts*, 549 U.S. at 533.

¹⁷⁵ Endangerment Finding, 74 Fed. Reg. at 66,497.

¹⁷⁶ *See Massachusetts*, 549 U.S. at 533.

¹⁷⁷ *Id.*

¹⁷⁸ *UARG*, 134 S. Ct. at 2444.

¹⁷⁹ *Id.*

¹⁸⁰ "[T]he dubious breadth of 'any air pollutant' in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue." *UARG*, 134 S. Ct. at 2448.

way sources,” or sources that would be required to obtain PSD permits “anyway” based upon their emissions of pollutants other than GHGs, must comply with BACT emission standards for GHGs.¹⁸¹ The language of the provision dictates that BACT applies to “any pollutant subject to regulation under this chapter.”¹⁸² The Court viewed this language as “far less open-ended” than the “any air pollutant” language of PSD and Title V.¹⁸³

The Court ruled that GHG emissions can be subject to the BACT provision, and yet cannot be subject to PSD, when the language indicates that emissions of “any air pollutant” are regulated.¹⁸⁴ The Court supported its holding that “anyway” sources emitting GHGs are subject to BACT, while at the same time holding that GHGs cannot trigger PSD reasoning that “applying BACT to [GHGs] is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority.”¹⁸⁵ The language of the provision dictates that BACT applies to “any pollutant subject to regulation under this chapter.”¹⁸⁶ The Court’s manipulation of the statutory language failed to show how GHGs do not trigger PSD and yet still can be subject to BACT.¹⁸⁷ Instead, the Court resorted to an application of the *Chevron* standard of “reasonable interpretation,” and concluded that allowing PSD to apply to GHGs is more unreasonable than subjecting GHGs to the BACT provision.¹⁸⁸ In doing so, the Court ignored the explicit language of “any air pollutant,” which is not permitted by *Chevron*,¹⁸⁹ and reached another results-driven conclusion.

The Court clearly and impermissibly substituted its own judgment for that of the EPA, the expert agency to which Congress delegated the authority to implement and enforce regulations under the CAA, in order to make this determination. As the EPA is explic-

¹⁸¹ *UARG*, 134 S. Ct. at 2448-49.

¹⁸² 42 U.S.C. § 7475(a)(4).

¹⁸³ *UARG*, 134 S. Ct. at 2448.

¹⁸⁴ *Id.* at 2449.

¹⁸⁵ *Id.* at 2448.

¹⁸⁶ 42 U.S.C. § 7475(a)(4).

¹⁸⁷ *UARG*, 134 S. Ct. at 2448.

¹⁸⁸ *Id.*

¹⁸⁹ *Chevron*, 467 U.S. at 864 (noting that it was impermissible for the court to make a distinction that “may well be a sensible one, but . . . is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute”).

itly charged by Congress with the authority to interpret the Act, it is the Court in this case that overstepped its authority. The decision in *UARG* is also directly contrary to the Court's reasoning in *Massachusetts*, in which the Court went so far as to say that the EPA is mandated to regulate "any air pollutant" it believes to be a threat.¹⁹⁰ The Court somehow reasoned that the term "any air pollutant" necessarily implicates agency judgment, when the language of BACT implicates "each pollutant subject to regulation under this chapter," and when Congress has already determined which pollutants are covered.¹⁹¹

The fact that the Court read "each pollutant subject to regulation in this chapter" more broadly than "any air pollutant" suggests that the Court placed undue emphasis on administrative costs at the expense of public health. The resulting conclusion defies logic, as GHGs can be regulated by the EPA for sources in clean air areas only when that source is already subject to PSD and Title V. The Court's decision in *UARG* appears to be founded upon the consideration of factors that are not permitted by the plain text of the statute. The decision was a departure from the Supreme Court's prior holdings in *Chevron* and *Massachusetts*, and contravened the clear purpose of the CAA to protect both the environment and public health from the damaging effects of air pollution.

IV. CONCLUSION

The EPA is the expert agency delegated by Congress with the authority to regulate air pollution under the CAA.¹⁹² As GHG emissions pose an endangerment to public health and welfare,¹⁹³ the Supreme Court has acknowledged that the EPA must regulate GHGs as air pollutants under the CAA.¹⁹⁴ The Court clearly stated in *Massachusetts* that GHGs are air pollutants subject to regulation in the Act.¹⁹⁵ However, in *UARG*, the Court used alternative reasoning divorced from the plain meaning of "any air pollutant," and held that this term is not inclusive of GHGs for the purposes of the PSD provi-

¹⁹⁰ *Massachusetts*, 549 U.S. at 533.

¹⁹¹ *UARG*, 134 S. Ct. at 2448.

¹⁹² *Am. Elec.*, 131 S. Ct. at 2539-40.

¹⁹³ *See generally* Endangerment Finding, 74 Fed. Reg. 66,496.

¹⁹⁴ *Massachusetts*, 549 U.S. at 533.

¹⁹⁵ *Id.* at 527-28.

sion and Title V of the Act.¹⁹⁶ The EPA's promulgation of the Tailoring Rule demonstrated that the framework of the CAA is indeed workable for regulating GHG emissions and protecting the environment from climate change.

The EPA acted in accordance with Congressional intent and in compliance with the Court's ruling in *Massachusetts* when it promulgated the Tailoring Rule. As the Supreme Court emphasized in *Massachusetts*, the CAA must be flexible enough to support the legislative intent of Congress while protecting the health and welfare of the public.¹⁹⁷ Congress expressly authorized the EPA to make reasonable interpretations of ambiguity in the Act.¹⁹⁸ As the numerical threshold limits provided by PSD and Title V did not contemplate GHGs, and cannot meaningfully apply to GHGs, the EPA has the authority to resolve such ambiguity. Further, the EPA's enactment of the Tailoring Rule was a direct response to the framework provided by the Court in *Massachusetts*; however, the Court in *UARG* impermissibly considered the potential economic and administrative costs over Congressional intent and the protection of public health and welfare.¹⁹⁹

Finally, the Court's holding that BACT is applicable to GHGs for "anyway sources" is counterintuitive.²⁰⁰ The Court read "any pollutant subject to regulation under this chapter" for BACT purposes as broader than the term "any air pollutant" for PSD and Title V.²⁰¹ After effectively contradicting its previous holding in *Massachusetts*, in which the Court determined that GHGs were an air pollutant subject to regulation under the Act, the conclusion that GHGs could not be included in the term "any air pollutant" for PSD purposes showcases the Court's selective application of the plain statutory text geared toward achieving certain results.

The EPA is authorized to promulgate reasonable regulations that can effectively regulate GHGs under the CAA. Because of the potential for significant harm to public health and welfare, courts should support the EPA's responsibility to regulate GHGs as sup-

¹⁹⁶ *UARG*, 134 S. Ct. at 2439-40.

¹⁹⁷ *Id.* at 533.

¹⁹⁸ *Massachusetts*, 549 U.S. at 842-43.

¹⁹⁹ *Id.* at 866 n.20 (citing Emissions Offset Interpretative Ruling, 41 Fed. Reg. 55,524, 55,527 (1976)).

²⁰⁰ *UARG*, 134 S. Ct. at 2449.

²⁰¹ *Id.*

ported by the language of the CAA, as intended by Congress, and as confirmed in the Supreme Court's previous GHG decisions. By first commanding the EPA to regulate (as in *Massachusetts*), and then prohibiting meaningful regulation of stationary sources for PSD purposes (as in *UARG*), the Supreme Court provided the EPA with conflicting law that will likely result in continued litigation depending upon case-by-case determinations as to which CAA provisions are applicable to GHGs. The Court's previous determinations that the EPA is obligated to promulgate regulations to prevent harms associated with global warming that are both "actual" and "imminent"²⁰² were undercut by its determination in *UARG*.

²⁰² *Massachusetts*, 549 U.S. at 521.