

The Myth of EPA Overregulation

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The 2012 presidential nomination process highlights a widespread perception among presidential candidates, congressional leaders, legislative advocacy groups, and regulated industries that the Environmental Protection Agency is overly aggressive with its regulations, causing serious economic harm. Examining recent federal appellate decisions involving challenges to Environmental Protection Agency regulations reveals a much different picture. Courts often strike down Environmental Protection Agency regulations, but not because those regulations go too far. Rather, in the vast majority of cases, courts have found Environmental Protection Agency regulations did not go far enough in regulating activity for which Congress had mandated more vigorous regulation. Thus, the common perception that the Environmental Protection Agency is overregulating is largely a counterfactual narrative.

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Every time the liberals get into office, they pass a [sic] omnibus bill of big spending projects. What we need to do is pass the mother of all repeal bills, but it's the repeal bill that will get at job killing regulations, and I would begin with the EPA. Because there is no other agency like the EPA, it should really be renamed the job killing organization of America.¹

—Michele Bachmann

INTRODUCTION

The Environmental Protection Agency (EPA), an administrative agency within the executive branch, has the responsibility of implementing numerous environmental laws. It plays a leading role in implementing the Clean Water Act (CWA) and Clean Air Act (CAA), two comprehensive laws designed at limiting pollution in the nation's water and air, respectively. At a point in the not-too-distant past, it might have been easy to dismiss the above quote from former Republican Presidential candidate and Minnesota Congresswoman Michele Bachmann as pandering to a fringe anti-environmental element within the Republican base. However, her sentiments are now mainstream within the Republican Party, on the right in general, and even among some Democrats. Republicans now largely accept, as an article of faith, that the EPA is overregulating and thereby hurting the economy.

In this Note, I analyze the challenges brought to EPA rules in federal appellate cases since 2008 to explore whether the EPA is overregulating. My hope is that it will serve as a useful fact-check on the claim of alleged EPA overregulation. If the EPA is overregulating, one should expect to see courts routinely striking down EPA regulations as being beyond the underlying legislative authorization. Legal challenges of environmental regulations should be rare and unsuccessful, whereas challenges from regulated industries should be relatively common and successful, if overregulation is real.

Recent cases show the opposite pattern. Courts rather commonly overturn EPA regulations in legal challenges. But, since 2008, all but one successful challenge to EPA regulations resulted in a decision that the regulation *did not go far enough* relative to the directive of Congress. The winners in these suits have mainly been environmental groups and states challenging rules as being

1. *New Hampshire Debates* (CNN television broadcast June 13, 2011), available at http://www.youtube.com/watch?feature=player_embedded&v=bqjhJLxEAu0.

clearly insufficient under the underlying statutes. The loser has been the EPA, frequently joined by regulated industries (and sometimes by states) as intervenors.

Northwest Environmental Defense Center v. Brown is the latest case in this string of court decisions finding EPA regulation as insufficiently responsive to a congressional mandate for regulation.² The case is instructive because it shows the EPA's habit of attempting to carve out exemptions by regulating only specific classes of activities when Congress has mandated broad regulation of an entire class of activities. This pattern of underregulation holds true for the CWA and CAA. In *Northwest Environmental Defense Center*, the Obama Administration defended a regulation dating from the Ford Administration, which had promulgated the regulation after a similar Nixon era regulation was struck down. The EPA's history of promulgating regulations less stringent than the Congressional mandate for action dates back to the earliest days of the EPA as an agency.

I. THE EPA IS WIDELY SEEN AS AN OVERREGULATING, JOB-KILLING BUREAUCRACY

A near-universal chorus on the political right, including elected officials and interest groups, has objected to the EPA as overregulating and thereby causing economic harm. Moreover, some Democrats have supported the effort to cut back on EPA regulations for the same reason.

A. *Most Republican Presidential Candidates and Many Leading Congressional Republicans Have Harshly Criticized the EPA as Imposing Too Much Regulation*

Although the Republican primary season has passed, statements by former candidates demonstrate the hostility to perceived overregulation by the EPA. The rest of the 2012 Republican presidential field is broadly in agreement with Michele Bachmann's sentiments.³ During her campaign, Representative Bachmann went even further than an implicit threat to eliminate the EPA by making the somewhat self-contradictory promise to a crowd on August 8, 2011: "I guarantee you the EPA will have doors locked and lights turned off, and they will only be about conservation."⁴ Former House Speaker Newt Gingrich has made the same promise to shutter the EPA.⁵ Former Senator Rick Santorum indicated his agreement with Representative Bachmann's "job killing agency of America" comment⁶ and has called global warming a "hoax."⁷ Texas Governor

2. See *Nw. Envtl. Def. Center v. Brown*, 640 F. 3d 1063 (9th Cir. 2011).

3. See John M. Broder, *Bashing E.P.A. Is New Theme in G.O.P. Race*, N.Y. TIMES, Aug. 18, 2011, <http://www.nytimes.com/2011/08/18/us/politics/18epa.html>.

4. See *id.*

5. See *id.*

6. See Brian Merchant, *Michelle Bachmann: Abolish the EPA*, TREEHUGGER, June 15, 2011, http://www.treehugger.com/files/2011/06/michele-bachmann-abolish-epa-gop-video.php?campaign=th_rss (hosting content originally broadcast on CNN, June 13, 2011) (showing Santorum nodding in agreement with Bachmann).

Rick Perry and Former Utah Governor John Huntsman support a moratorium on any new EPA regulations, at least until the economy improves.⁸ Governor Perry also claims to pray daily for divine intervention to convince President Obama “that his EPA back down these regulations that are causing businesses to hesitate to spend money.”⁹ Pizza magnate Herman Cain advocates for an independent commission with oil and gas representatives to decide on the need for new environmental regulations.¹⁰ Texas Congressman Ron Paul advocates for more state and less federal involvement in environmental regulation, although he also has called for environmental disputes to be resolved by courts.¹¹ Former Massachusetts Governor Mitt Romney calls the EPA “out of control” and a tool to “crush” private enterprise.¹²

Congressional Republicans echo the sentiments of the current and former Republican Presidential candidates. Their press releases and public statements reveal a near-universal condemnation of the EPA as imposing too much regulation. Pennsylvania Senator Pat Toomey wants to “[t]ell the Environmental Protection Agency to stop breathing down our necks.”¹³ The U.S. Senate Republican Policy Committee, chaired by South Dakota Senator John Thune, decries ozone regulation (since delayed) as “EPA’s Next Job-Killing Economic Roadblock.”¹⁴ House Speaker John Boehner often uses “job-killing” as an adjective to describe the EPA, echoing Representative Bachmann.¹⁵ Regarding the “endangerment” ruling the EPA issued in response to the landmark Supreme Court case *Massachusetts v. Environmental Protection Agency*, Speaker Boehner stated that “Republicans stand united against this EPA ruling, because it is a job-killer.”¹⁶ He went on to thank numerous individual Republican members of Congress for their “commitment to fight this job-killing rule.”¹⁷ Speaker Boehner praised the Obama

7. See Troy Hooper, *Santorum and Gingrich Dismiss Climate Change, Vow to Dismantle the EPA*, COLO. INDEP. (Feb. 6, 2012), <http://coloradoindependent.com/111924/santorum-and-gingrich-dismiss-climate-change-vow-to-dismantle-the-epa>.

8. See Broder, *supra* note 3.

9. See Stephen Lacey, *Rick Perry Prays for an End to Drought and EPA Regulations*, GRIST (Aug. 9, 2011), <http://www.grist.org/climate-policy/2011-08-09-rick-perry-prays-for-an-end-to-drought-and-epa-regulations>.

10. See Broder, *supra* note 3.

11. See *id.*

12. See VIDEO CAFÉ, *Mitt Romney Calls the EPA ‘Out of Control’ for Wanting to Make Sure our Drinking Water is Safe* (Dec. 4, 2011), <http://videocafe.crooksandliars.com/heather/mitt-romney-calls-epa-out-control-wanting>.

13. See Press Release, Pat Toomey, Senator of Pa., Toomey’s Take: Protecting PA Jobs from Overzealous EPA (Aug. 1 2011), available at http://toomey.senate.gov/?p=press_release&id=227.

14. See SENATE REPUBLICAN POLICY COMM., FAST FACTS: EPA’S NEXT JOB KILLING ECONOMIC ROADBLOCK (2011), available at http://rtpc.senate.gov/public/?a=Files.Serve&File_id=09f6e0c7-03e2-4878-8e16-84223c0c9ee4.

15. See *New Hampshire Debates* (CNN television broadcast June 13, 2011), available at http://www.youtube.com/watch?feature=player_embedded&v=bqjhJLxEAu0.

16. See Press Release, Boehner Praises Barton, House Republicans for Announcing Plans to Block Job-Killing EPA “Endangerment” Ruling (Dec. 17, 2009), available at <http://johnboehner.house.gov/News/DocumentSingle.aspx?DocumentID=163656>.

17. See *id.*

administration decision to delay ozone regulations as “a good first step,” stating that the Republicans were “glad that the White House . . . recognized the job-killing impact of this particular regulation.”¹⁸ Majority Leader Eric Cantor has compiled a “top ten” list of “job-killing regulations,” six of which are EPA regulations.¹⁹

B. Industry Interests and Legislative Associations Perceive the EPA as Overregulating

Predictably, regulated industries share the view of the EPA as having a habit of overregulating, and the industries often issue non-specific accusations of overregulation. The National Association of Manufacturers “are troubled by the [EPA’s] aggressive agenda” that would “add new burdens and restrictions, increase costs, destroy jobs and undermine U.S. manufacturers’ ability to compete in the global marketplace.”²⁰ The American Farm Bureau Federation warns of a “slippery slope” of EPA “regulatory creep” and claims “[t]he history of the [CWA] since its enactment in 1972 is replete with instances in which federal agencies interpreted the law to narrow the exemption for normal farming activities.”²¹ Writers sympathetic to industry have produced works with self-explanatory titles such as “Don’t Forget the Job Killing EPA, Mr. Obama”²² and “How the EPA’s Green Tyranny is Stifling America.”²³

A leading right-of-center legislative association is in agreement with elected Republican officials. The American Legislation Exchange Council (ALEC) claims to be the “nation’s largest nonpartisan, individual membership organization of state legislators with roughly 2,000 members.”²⁴ Although nominally “nonpartisan,” it is indeed a right-leaning organization that promotes “free markets, limited government, federalism, and individual liberty.”²⁵ In 2011, ALEC produced a white paper entitled “EPA’s Regulatory Train Wreck: Strategies for State Legislators.”²⁶ This document encapsulates many of the

18. See Alana Goodman, *Obama Abandons EPA Smog Regulations*, COMMENTARY MAG., (Sept. 9, 2011, 1: 53 PM), <http://www.commentarymagazine.com/2011/09/02/obama-epa-smog-regulations/>.

19. See Memorandum from Eric Cantor to House Republicans (Aug. 29, 2011), available at <http://majorityleader.gov/blog/2011/08/memo-on-upcoming-jobs-agenda.html>.

20. *EPA Overregulation*, NAT’L ASS’N OF MANUFACTURERS, <http://www.nam.org/Issues/Energy-and-Climate/EPA-Overregulation.aspx> (last visited Apr. 15, 2012).

21. See Lynne Finnerty, *Regulations Slippery if Extended to Everything That’s Wet*, AM. FARM BUREAU FED’N (July 27, 2009), <http://www.fb.org/index.php?action=newsroom.focus&year=2009&file=fo0727.html>.

22. See Diana Furchtgott-Roth, *Don’t Forget the Job Killing EPA, Mr. Obama*, REAL CLEAR MARKETS (Sept. 8, 2011), http://www.realclearmarkets.com/articles/2011/09/08/dont_forget_the_job_killing_epa_mr_obama_99240.html.

23. See RICH TRZUPEK, *HOW THE EPA’S GREEN TYRANNY IS STIFLING AMERICA* (2011), available at <http://www.encounterbooks.com/books/how-the-epas-green-tyranny-is-stifling-america/>.

24. See AM. LEGISLATIVE EXCH. COUNCIL, *EPA’S REGULATORY TRAIN WRECK: STRATEGIES FOR STATE LEGISLATORS* (2011), available at <http://www.alec.org/docs/EPA-TRAIN-WRECK-2011-Final-Full-printres.pdf>.

25. See *id.*

26. See *id.*

attitudes toward the EPA on the right. ALEC decries “breathtaking and hostile regulatory assaults” and “a slew of overreaching and inefficient air and water rules” representing “big government market interventions” and an EPA “regulatory onslaught without regard to economic realities or democratic accountability.”²⁷

ALEC asserts the EPA “operates far more like an activist for whom no standard is too high, no impact too onerous, no risk too low and no science too speculative.”²⁸ ALEC claims “[n]owhere is EPA’s regulatory overreach more apparent than in its misguided effort to regulate greenhouse gases under the Clean Air Act.”²⁹ Chapters of the white paper bear titles such as “The Glorious Mess of EPA Regulation,” “Leaving the Station: Elements of a Train Wreck,” and “Off the Rails: Nine Reasons to Oppose EPA’s Overreach,” although it includes a chapter that surprisingly concedes the effectiveness of some environmental initiatives.³⁰ ALEC has produced an anti-EPA model resolution, introduced in at least two state legislatures in 2010, which, among other things, asserts as fact that “EPA over-regulation is driving jobs and industry out of America.”³¹

C. Some Democrats, Including President Obama, Implicitly Accept EPA Overregulation as Fact

President Obama recently cancelled, or at least substantially delayed, plans to tighten the nation’s ozone regulations.³² The decision overruled the unanimous opinion of an independent scientific panel, closely mirroring a similar action on ozone regulation by President George W. Bush.³³ The President cited the need to reduce regulatory burdens and uncertainty for businesses as partial justification for the action.³⁴ The decision drew reluctant praise from Republicans, including House Speaker Boehner, who quickly restated his standard concern with overregulation impacting the job market.³⁵ The President’s latest retreat in the face of Republican opposition shows an implicit agreement with Republicans that the EPA is overregulating. The President is not alone among Democrats. Democratic Congressman John Dingell expressly bemoans EPA regulation of greenhouse gases as a “glorious

27. *See id.* at vi.

28. *See id.* at vii.

29. *See id.* at viii.

30. *See id.*

31. *See id.* at 49; *see also* S. Res. SJ0006, 2011 Gen. Sess. (Wyo.), *available at* <http://legisweb.state.wy.us/2011/introduced/SJ0006.pdf>; H.R. Res. (Ind. 2011) (introduced by Wolkins), *available at* <http://www.in.gov/legislative/bills/2011/PDF/HRESP/HR0013.pdf>.

32. *See* Dina Capiello et al., *Obama Halts Controversial EPA Regulation*, ASSOCIATED PRESS (Sept. 2, 2011) *available at* <http://news.yahoo.com/obama-halts-controversial-epa-regulation-143731156.html>.

33. *See id.*

34. *Id.*

35. *Id.*

mess”³⁶ (lending inspiration for a chapter title in ALEC’s whitepaper). By far the fiercest criticism of the EPA has come from Republicans and the right, but the theme of the EPA as an overly aggressive environmental bureaucracy has at least some bipartisan support.

II. “CHEVRON STEP I” CASES ARE HIGHLY INSTRUCTIVE IN FACT-CHECKING THE CLAIMS OF EPA OVERREGULATION

Challenges to agency regulations are governed by a two-step analysis articulated in *Chevron v. Natural Resources Defense Council*.³⁷ At “*Chevron* Step I,” a reviewing court determines whether a statutory command from Congress is clear. If Congress has clearly mandated a course of action, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”³⁸ If an agency regulation violates a clear statutory requirement, the court must therefore invalidate the regulation. If the reviewing court determines the statutory requirement is ambiguous, however, it proceeds to “*Chevron* Step II.” At “*Chevron* Step II,” the court must show deference to the agency interpretation and uphold the regulation if it is based on a permissible construction of the statute, even if other permissible constructions exist.³⁹

The term “overregulation” as used in the current political debate about the EPA must be seen through the prism of what Congress mandates the EPA to do, and must be evaluated under *Chevron* because the EPA must regulate as diligently or leniently as Congress mandates. However, many of the attacks from the right have been against the EPA, specifically framing it as an overzealous agency. To gauge the validity of these attacks, I test claims of EPA overregulation using the factual record.

If the EPA is guilty of regulatory overreach, it should be losing many court challenges of its regulations under *Chevron* Step I on the grounds that the regulations clearly exceed the agency’s authority delegated by Congress. We would expect to see numerous successful *Chevron* Step I challenges brought by regulated industries trying to free themselves from the overregulating, power-grabbing environmental bureaucrats at the EPA. We would expect to see very few challenges brought by environmental groups, who would presumably be quite content with an aggressive approach to regulation. Thus, court challenges to the EPA regulations decided under *Chevron* Step I are highly probative of whether the EPA is overregulating as claimed.

Since the beginning of 2008, federal appellate courts have invalidated EPA regulations on at least eight occasions under *Chevron* Step I.⁴⁰ I selected

36. See AM. LEGISLATIVE EXCH. COUNCIL, *supra* note 24.

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

38. *Id.*

39. *Id.* at 843.

40. All but one of the *Chevron* Step I underregulation cases are discussed *infra*. There is an additional *Chevron* Step I loss in which the court found the EPA was underregulating and is not discussed in this Note—*Natural Resources Defense Council v. Environmental Protection Agency*, 571 F.

this date so that this analysis includes cases from the Bush and Obama administrations, and so as to limit the total number of cases to a reasonable number for this Note.⁴¹ In addition, I added a 2007 *Chevron* Step I case, *Massachusetts v. Environmental Protection Agency*, involving the regulation of greenhouse gases under the CAA. I included this Supreme Court case due to its significance and the widespread criticism the EPA has received for its efforts to regulate pursuant to this decision. Further, the rulemaking the EPA has undertaken under the Obama administration since the decision highlights a tendency by the EPA to only partially regulate when it clearly has the authority (and obligation) to fully regulate.

The sole recent *Chevron* Step I loss, where a court found the EPA “overregulating” relative to a Congressional requirement, involved Bush administration rules (defended in court by the Obama administration) regarding concentrated animal feeding operations.⁴² Two recent *Chevron* Step I losses involving underregulation involved attempts by the Obama administration to defend regulations put in place by his Republican predecessors from attack by environmental groups and state intervenors.⁴³ In several instances, courts have harshly criticized EPA underregulation spanning decades, covering every presidential administration since the EPA was founded under Richard Nixon.⁴⁴ The cases examined show examples of the Obama Administration unsuccessfully defending the rules of the Bush and Ford Administrations against claims that the rules were insufficient. The cases also reveal the Bush Administration defending its own rules as well as Clinton Administration rules against similar charges. The EPA’s lack of success in defending itself against legal claims that it is insufficiently regulating is a bipartisan phenomenon.

This Note does not address cases where the court decided a challenge to a regulation under *Chevron* Step II. Because the Step II cases involve challenges to statutory requirements courts found ambiguous, how the EPA regulates in those circumstances is a less straightforward matter. Further research into the *Chevron* Step II cases could answer the question of whether the EPA “pushes

3d 1245 (D.C. Cir. 2009). The case serves essentially as a follow-up to an earlier *Chevron* Step I case decided by similar reasoning. In that case, EPA regulations violated the CAA by developing a regional cap-and-trade program in response to an area-specific regulatory mandate from Congress, by eliminating demonstration requirements from new source review permitting, and by eliminating 18-month limit on New Source Review exemptions. *Id.* at 1276.

41. For comparison, during the first three years of the George W. Bush administration—during which challenges to late Clinton-era EPA regulations were likely to be decided—the EPA lost only one case at *Chevron* Step I. *See* *Am. Corn Grower’s Ass’n v. EPA*, 291 F. 3d 1 (D.C. Cir. 2002). The case involved challenges to the “haze rule” brought by industry groups and environmental groups. The court held under *Chevron* Step I that the EPA exceeded its grant of authority by subjecting stationary sources to pollution control retrofitting requirements on a regional basis, as opposed to a facility-specific basis. Since the rule was vacated and remanded to the EPA, the court invoked the ripeness doctrine and did not reach the claims brought by the environmental petitioners. *Id.* at 13.

42. *See* *Nat’l Pork Producers Council v. EPA*, 635 F. 3d 738 (5th Cir. 2011).

43. *See* *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011); *see also* *Nat’l Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009).

44. *See, e.g., Nw. Envtl. Def. Ctr.*, 640 F. 3d 1063, 1073.

the envelope” when confronted with an ambiguous statutory requirement or whether the agency is more timid, as it has been in the face the sweeping mandates of the CWA and CAA. If the EPA loses numerous Step II cases because it adopts an unreasonably broad or over-reaching approach to its rulemaking, the cases could lend support to the charge that the EPA is over regulating when Congress has been less than clear about what it wants.⁴⁵ A systematic study of the Step II cases could answer this question more definitively.

Because of the more deferential standard of review, agencies usually fare much better under *Chevron* Step II than *Chevron* Step I. The EPA is no exception, losing all or at least some of the claims in all nine recent *Chevron* Step I cases. However, eight of the nine *Chevron* Step I cases the EPA lost⁴⁶ involved challenges brought by environmental groups and/or states arguing the EPA was clearly insufficiently regulating despite a Congressional mandate for more extensive regulation. Thus, contrary to popular perception, the EPA is underregulating in the vast majority of cases where EPA regulations are at variance with a clear underlying statute. The EPA has lost multiple CWA cases because it has attempted to carve out exemptions to the CWA by regulation, where Congress has mandated broad regulation. The EPA has lost multiple CAA cases on the same basis—carving out exemptions by regulation where the underlying statute forbids the exemption—or in some cases, by simply failing to act altogether in the face of a congressional mandate to act. The *Chevron* Step I case law contradicts the assertion that the EPA is overregulating.

III. THE EPA IS UNDERREGULATING PURSUANT TO THE CLEAN WATER ACT

The CWA exists to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”⁴⁷ To achieve this objective, the CWA aims to eliminate the “discharge of pollutants into the navigable waters” of the United States⁴⁸ by prohibiting the “discharge of any pollutant,”⁴⁹ which is further defined as “any addition of any pollutant to navigable waters from

45. However, at least one recent *Chevron* Step II loss by the EPA occurred because it was unreasonably underregulating in the face of an ambiguous congressional mandate. *See* *Natural Res. Def. Council v. EPA*, 526 F.3d 591 (9th Cir. 2008).

46. The one recent instance in which an appellate court found EPA was imposing regulations beyond the scope of a legislative delegation of authority (thereby “overregulating” in the parlance of its critics) occurred in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011). In that case, the court found EPA lacked authority under the Clean Water Act to regulate high density feed lots proposing to discharge, as opposed to actually discharging, under the CWA. *Id.* at 750. In addition, one recent D.C. Circuit court judge ruled EPA exceeded its authority under the Clean Water Act by entering into a detailed Memorandum of Understanding, without undertaking the procedural requirements of rulemaking, with the Corps of Engineers regarding section 404 permitting regulating discharges of dredged and fill materials into navigable waters, for which the Corps of Engineers has been designated by Congress as the primary permitting agency, although EPA has “veto” power over Corps permits. *See* *Nat’l Mining Ass’n v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011).

47. *See* 33 U.S.C. §1251(a) (2006).

48. *See id.* § 1251(a)(1).

49. *See id.* § 1311(a).

any point source.”⁵⁰ A “point source” is defined as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”⁵¹ Point sources include but are not limited to pipes, ditches, channels, and vessels.⁵² The general prohibition on discharge of pollution in section 301 is not absolute, however. Section 402 of the CWA establishes a permit system—the National Pollutant Discharge Elimination System (NPDES)—that regulates discharge of pollutants.⁵³ The effect of section 301 combined with section 402 is to prohibit discharge of pollution from a point source without a NPDES permit.⁵⁴ NPDES permits place limitations on the type and quantity of pollution that can be discharged.⁵⁵

A. *In Northwest Environmental Defense Center v. Brown, the EPA’s “Silvicultural Rule” Is Struck Down, Again, as Insufficiently Regulating a Class of Discharges of Pollution*

In *Northwest Environmental Defense Center v. Brown*, Northwest Environmental Defense Center (NEDC) sued Oregon state officials and timber companies under the citizen suit provisions of the CWA. NEDC alleged unpermitted discharge of sediment-laden rainwater runoff from drainage ditches alongside logging roads in a state forest violated the CWA. The defendants maintained no permits were necessary for such activity because of an EPA regulation treating such discharges as non-point source pollution exempt from regulation under the CWA.⁵⁶ The Ninth Circuit held that discharge of runoff became a CWA-regulated “point source” of pollution when it was channeled into “discernible, confined and discrete conveyance” in the system of ditches built to drain the logging roads, and that such activity was subject to the NPDES permitting process.⁵⁷ The court also held that the EPA clearly exceeded its authority under the CWA when it promulgated the “Silvicultural Rule,” exempting runoff from logging roads from regulation as point source pollution.⁵⁸

1. *The Discharges in Question Clearly Qualified as “Point Sources” Under the CWA*

After addressing a threshold jurisdictional question, the court reviewed the merits, applying *Chevron*.⁵⁹ The court discussed the CWA regulatory scheme

50. See *id.* § 1362(12)(A).

51. See *id.* § 1362(14).

52. See *id.*

53. See *id.* § 1342.

54. See *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003).

55. See *Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

56. See *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1067 (9th Cir. 2011).

57. *Id.* at 1070 (quoting 33 U.S.C. § 1362(14)).

58. See *id.* at 1076–77.

59. See *id.* at 1071.

including the definition of “point source” as “any discernible, confined and discrete conveyance, including . . . any pipe, ditch, [or] channel . . .”⁶⁰ As the court explains, the import of this definition is that runoff is neither inherently a point source nor a non-point source.⁶¹ The definition, and hence the status of the runoff as regulated under the CWA, turns on whether the runoff flows naturally or is diverted into a “discernible conveyance” in some manner.⁶² Despite finding the language concerning authorization of the silvicultural rule unambiguous, the court examined the legislative history of the CWA and concluded Congress intended a broad definition of “point source,” stating that “Congress intentionally passed a ‘tough law.’”⁶³ Since the case concerned runoff diverted into ditches, the court concluded it met the definition of a “point source” envisioned by Congress.⁶⁴

2. *The EPA Had Previously Underregulated Silvicultural Runoff*

The court next examined the genesis of the silvicultural rule. In 1973, shortly after passage of the CWA (then known as the Federal Water Pollution Control Act), the EPA promulgated regulations exempting several kinds of discharges from regulation, including logging road runoff, through a silvicultural exemption. An environmental group challenged this earlier version of the silvicultural rule as exceeding the scope of the EPA’s grant of Congressional authority in *Natural Resources Defense Council v. Train*.⁶⁵ The EPA defended its actions by conceding that logging road drainage ditches fell within the definition of a point source, but nonetheless such discharges were “ill-suited for inclusion in a permit program.”⁶⁶ The district court ruled the EPA exceeded its grant of authority by exempting silvicultural activities from regulation under the act. The EPA appealed the decision, and “grudgingly promulgated revised regulations” while the appeal was pending.⁶⁷ The EPA promulgated the revised version of the silvicultural rule in February 1976 after a rulemaking process.

In key respects, the revised rule was quite similar to the rule the district court invalidated. It continued to exempt from regulation silvicultural runoff, even if such runoff came from a discrete conveyance.⁶⁸ The Ninth Circuit harshly criticized the EPA’s justifications for the revised rule.⁶⁹ In 1977, the D.C. Circuit affirmed the district court’s invalidation of the original

60. *See id.* at 1070 (citing 33 U.S.C. § 1362(14)).

61. *See id.* at 1071.

62. *See id.* (citing *United States v. Earth Scis., Inc.*, 599 F.2d 368 (10th Cir. 1979)).

63. *See id.* at 1086 (citation omitted).

64. *See id.* at 1075.

65. *See* 396 F. Supp. 1393 (D.D.C. 1975).

66. *See* *Nw. Envtl. Def. Ctr. v. Brown* 640 F.3d 1063, 1074 (9th Cir. 2011).

67. *See id.*

68. *See id.* at 1076.

69. *See id.*

silvicultural rule in *Natural Resources Defense Council v. Costle*.⁷⁰ The D.C. Circuit did not address whether the revised rule also exceeded the scope of the EPA's grant of regulatory authority.⁷¹ However, the D.C. Circuit was not persuaded by the EPA's argument that regulating silvicultural runoff would "place unmanageable burdens on the EPA." The D.C. Circuit held that whatever the EPA's opinion of the burden Congress placed upon it, Congress had clearly and unambiguously placed that burden on the EPA, and the EPA did not have discretion to exempt silvicultural runoff from regulation.⁷²

The Ninth Circuit found the D.C. Circuit's reasoning persuasive. It found that "[a]lthough the D.C. Circuit did not address the revised Silvicultural Rule in its opinion, its reasoning is no less applicable to the new version of the Rule."⁷³ The Ninth Circuit pointed out the fundamental problem with the original rule remained in the 1976 version—the EPA was attempting to regulate based on the source of the pollutant, whereas the CWA clearly mandates regulation based not on source, but whether the pollutant is ultimately channeled into a "discernible, defined, and discrete conveyance."⁷⁴ The court also discussed an earlier foray into the silvicultural rule in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*.⁷⁵ While *Forsgren* did not address whether channeled silvicultural runoff qualified as a point source, in *Forsgren* the Ninth Circuit held that the EPA clearly lacked authority to alter the definition of point source supplied to the agency by Congress.⁷⁶

Like the D.C. circuit in *Train* and *Costle*, and consistent with its own reasoning in *Forsgren*, the Ninth Circuit concluded the EPA lacked the authority to exempt classes of activities from regulation through the silvicultural rule.⁷⁷

3. *The CWA 1987 Amendments Did Not Excuse the EPA's Underregulation of Silvicultural Runoff*

NEDC argued the 1987 amendments to the CWA exempted silvicultural runoff from regulation as a point source. They furthered argued that since Congress was presumably aware of the revised silvicultural rule when it passed the amendments, but did not overturn the rule, it therefore had acquiesced in the EPA's interpretation.⁷⁸ The Ninth Circuit disputed the notion that Congress was aware of the EPA's interpretation, and instead relied on Supreme Court

70. See *Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

71. See *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1077.

72. See *id.*

73. See *id.*

74. See *id.* at 1078.

75. See *id.*; see also *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002).

76. See *Forsgren*, 309 F.3d at 1190.

77. See *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1079.

78. See *id.* at 1081.

rulings that the doctrine of congressional acquiescence is to be used very sparingly.⁷⁹ The court saw no evidence in the record of congressional acquiescence.

The 1987 amendments created categories for stormwater pollution.⁸⁰ “Phase I” activities, considered the most important sources of runoff pollution, included industrial activities. “Phase II” activities would be the subject of study and possible future regulation by the EPA.⁸¹ The Ninth Circuit upheld most of the EPA’s Phase II regulations, and remanded for further proceedings in *Environmental Defense Center v. EPA*.⁸² The Ninth Circuit interpreted the 1987 amendments as requiring strict regulation of industrial discharges, and that industrial discharges were to be construed broadly.⁸³ The court concluded logging roads fit easily within the definition of industrial activity under the 1987 amendments.⁸⁴ Thus, the 1987 amendments did not create any regulatory exemption for logging road runoff.

4. *The EPA had an Unburdensome Remedy at Its Disposal, Yet Still Would Not Fully Exercise Its Regulatory Authority*

The 2003 remand in *Environmental Defense Center v. EPA* required the EPA to consider whether stormwater runoff for logging roads should be regulated as a “Phase II” activity.⁸⁵ However, the Ninth Circuit rejected suggestions by the United States that it await the results of the eight-year old remand before deciding whether the silvicultural rule was a valid exercise of the EPA’s regulatory authority.⁸⁶ The court noted that under the 1987 amendments, the EPA has the authority to issue “general permits” for categories of projects that are relatively homogeneous in nature. The court speculated that runoff from logging roads would be a good candidate for regulation through the general permit process, and would impose minimal burdens on the EPA.⁸⁷ Under this regulatory system, the EPA could issue a “NPDES General Permit” that covered logging roads in a defined geographic area. Logging road operators would then submit a notice that they intended to abide by the general permit conditions, and thus be regulated under the CWA without the need for an individual permit for every logging road, or every discrete conveyance.

The EPA on display in *NEDC v. Brown* defies the caricature of an overregulating environmental bureaucracy insensitive to the costs or administrative burdens of its regulations. *NEDC v. Brown* continues a line of

79. *See id.*

80. *See id.* at 1082–83.

81. *See id.* at 1083.

82. *See* 344 F.3d 832 (9th Cir. 2003).

83. *See Nw. Envtl. Def. Ctr.*, 640 F.3d at 1083.

84. *See id.* at 1084.

85. *See id.* at 1085.

86. *See id.*

87. *See id.* at 1087.

recent decisions in which courts have struck down attempts by the EPA to carve out regulatory exemptions from the CWA. In these cases, courts have found EPA attempts to create regulatory exemptions as clearly contrary to the regulatory mandate Congress has given the agency. In other words, the EPA has a clear history of underregulating in defiance of Congressional mandates for more regulation.

B. In National Cotton Council v. United States Environmental Protection Agency, the Court found the EPA to Be Clearly Underregulating Pesticide Discharges into Navigable Waters

National Cotton Council v. United States Environmental Protection Agency involved consolidated challenges by environmental and industry groups to an EPA regulation exempting pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) from CWA permitting requirements.⁸⁸ Environmental groups argued the EPA exceeded its regulatory authority by excluding pesticides from the definition of a CWA pollutant, and by determining residues of pesticides are non-point sources, even when the pesticides themselves qualify as point sources. The groups also challenged the decision to exempt FIFRA-compliant applications of pesticides from regulation.⁸⁹ Industry groups challenged as arbitrary and capricious the EPA's treatment of pesticides applied in accordance with FIFRA as exempt, but the exact same chemicals applied differently as nonexempt.⁹⁰ The industry challenges amounted to a claim the EPA could not link regulation of pesticides under the CWA with compliance with FIFRA.⁹¹

The EPA defended its rule by claiming the CWA was ambiguous with respect to the regulation of pesticides. The EPA claimed excess pesticides and residues could not be considered "chemical waste" regulated under the CWA, because the waste product (pesticides) could still perform its function, and therefore was not a waste product at all. The EPA also claimed pesticides and residues could not be "biological materials" regulated under the CWA because such a definition would create an anomaly whereby biological pesticides were regulated as pollutants but chemical pesticides were not.⁹² The EPA also made an alternative claim in which it conceded pesticide residue and excess pesticides were pollutants within the meaning of the CWA, and pesticides were discharged from a point source.⁹³ Nonetheless, the EPA theorized the CWA did not apply, because at the time of pesticide application, the residues and excess

88. See 553 F.3d 927, 934 (6th Cir. 2009).

89. See *id.*

90. See *id.*

91. See *id.*

92. See *id.*; see also *Application of Pesticides to Waters of the United States in Compliance With FIFRA*, 71 Fed. Reg. 68,483, 68,486 (Nov. 27, 2006) (codified at 40 C.F.R. § 122).

93. See *Nat'l Cotton Council*, 553 F.3d at 934.

pesticides were not pollutants, and the CWA only regulates discharges “that are both a pollutant, and from a point source at the time of discharge.”⁹⁴

1. *The Court Analyzed the EPA’s Rule Under Chevron and Found the EPA to Be Clearly Underregulating Pesticides*

The Sixth Circuit noted it had previously interpreted the term “pollutant” broadly in *United States v. Hamel*.⁹⁵ However, in the instant case the court saw no need to examine the breadth of the term, since it found the EPA to be underregulating in the face of an unambiguous mandate from Congress.⁹⁶ The court, while concluding a pesticide that left no residue or excess would not fall within the definition of chemical waste, found two situations in which pesticides clearly fell within the ambit of the CWA.⁹⁷ Those situations involved aerial or terrestrial application of pesticides, where at some point after application the excess or residue reached waters of the United States, and aquatic applications, where excess or residue remained directly in the water column following application.⁹⁸

Further, the court had no difficulty concluding biological pesticides fell within the meaning of “biological materials” under the CWA.⁹⁹ The conservative Sixth Circuit, whose reach the environmental petitioners had attempted to avoid for the presumably friendlier Ninth Circuit, readily concluded the EPA’s rule was contrary to a clear mandate from Congress to regulate excess pesticides and residues under the CWA.¹⁰⁰

The court also analyzed the EPA’s claim that a pesticide must be “excess” or “residue” at the time of discharge to fall within the ambit of the CWA.¹⁰¹ The court found the EPA’s explanation unpersuasive:

The EPA offers no direct support for its assertion that a pesticide must be “excess” or “residue” at the *time of discharge* if it is to be considered as discharged from a “*point source*.” This omission of authority is understandable, as none exists . . . Injecting a temporal requirement to the “discharge of a pollutant” is not only unsupported by the Act, but it is also contrary to the purpose of the permitting program . . . [T]he EPA’s interpretation ignores the directive given to it by Congress in the Clean Water Act, which is to protect water quality.¹⁰²

Thus, the conservative Sixth Circuit agreed with the environmental petitioners that the EPA improperly excluded a category of discharges from regulation

94. See *id.* at 935 (internal punctuation omitted); see also *Application of Pesticides to Waters of the United States in Compliance With FIFRA*, 71 Fed. Reg. at 68,487.

95. See 551 F.2d 107, 110 (6th Cir. 1977).

96. See *Nat’l Cotton Council*, 553 F.3d at 929–30.

97. *Id.* at 936.

98. See *id.* at 936–37.

99. See *id.* at 937.

100. See *id.* at 938.

101. See *id.* at 939.

102. See *id.*

under the CWA, and ordered the rule vacated.¹⁰³ Given the clear evidence of the EPA's underregulation under the CWA, the court did not reach the environmental petitioner's other claims under the Administrative Procedure Act, and denied the industry petitioners' challenges in total without examining the relationship between the CWA and FIFRA.¹⁰⁴

C. *In Natural Resources Defense Council v. United States Environmental Protection Agency, the Court Found the EPA to Be Underregulating Discharges from the Construction and Development Industries*

Natural Resources Defense Council v. EPA involved a suit by environmental groups, and Connecticut and New York as intervenors, seeking to compel the EPA to promulgate effluent limitation guidelines (ELGs) and new source performance standards (NSPSs) for storm water pollution discharges from the construction and development industries.¹⁰⁵ The National Association of Home Builders and Associated General Contractors of America intervened on behalf of the EPA. Again, a federal appellate court found the EPA to be underregulating in the face of a clear congressional mandate for stricter environmental regulation of an important sector of the economy.

ELGs and NSPSs are general guidelines promulgated by the EPA and govern the specific limitations in NPDES permits.¹⁰⁶ ELGs regulate existing sources of pollution through a technology-based standard.¹⁰⁷ NSPSs do the same for new sources of pollution.¹⁰⁸ Section 304(m)(1)(B) of the CWA requires that the EPA publish a list every two years in the Federal Register that identifies categories of pollution sources for which ELGs and NSPSs are lacking.¹⁰⁹ Once identified, the EPA must promulgate regulations establishing ELGs and NSPSs for the category no later than three years after publication of the list.¹¹⁰

1. *The Ninth Circuit Analyzed the Dispute Under Chevron and Found the EPA to Be Clearly Underregulating*

In 2000, the EPA published a final notice of its effluent guidelines plan that included construction activities as a proposed regulated point source category.¹¹¹ In 2006, the EPA explained that it had been mistaken to list the construction industry. Plaintiffs then sued, claiming the EPA had a non-discretionary duty to regulate construction effluent once it was listed.

103. *See id.* at 940.

104. *See id.*

105. 542 F.3d 1235 (9th Cir. 2008).

106. *See* 33 U.S.C. § 1314(b).

107. *See id.*

108. *See id.* § 1316(a)(2).

109. *See id.* § 1314(m)(1)(B).

110. *See id.* § 1314(m)(1)(C).

111. *See* *Natural Res. Def. Council v. EPA*, 542 F.3d 1235, 1239 (9th Cir. 2008); *see also* Effluent Guidelines Plan, 65 Fed. Reg. 53,008, 53,011 (Aug. 31, 2000).

After determining the district court had jurisdiction to hear the case and the plaintiffs and plaintiff-intervenors had standing, the court proceeded to the merits of the case and analyzed the EPA's regulatory inaction under *Chevron*.¹¹² The Ninth Circuit found the requirement to establish a schedule under which ELGs and NSPSs are promulgated within three years of the initial listing evinced a clear congressional intent to promulgate guidelines. The EPA's decision not to establish ELGs and NSPSs was clearly contrary to the congressional mandate.¹¹³ The court also examined the genesis of section 304(m) of the CWA, and the requirement for listing followed by setting of guidelines. The legislative history revealed clear congressional frustration with the "slow pace" of EPA action in developing ELGs and NSPSs.¹¹⁴ As to the EPA's decision to "de-list" the construction industry, the court found "Congress' desire to speed up the promulgation of ELGs and NSPSs would be completely frustrated if § 304 were [sic] viewed merely as a planning mechanism and did not require the actual promulgation of ELGs and NSPSs."¹¹⁵ The three-year delay is not for the EPA to decide whether to regulate, but how to regulate. The EPA's exclusion of the construction industry from regulation under section 304(m) of the CWA was thus contrary to a clear congressional directive for stricter regulation.¹¹⁶

D. In Northwest Environmental Advocates v. United States Environmental Protection Agency, the Court Found the EPA to Be Clearly Underregulating Ballast Water Discharges

Northwest Environmental Advocates v. EPA involved yet another instance in which a court found the EPA to be clearly improperly excluding a category of activities from regulation under the CWA.¹¹⁷ The plaintiffs, joined by six Great Lakes states as plaintiff-intervenors, challenged a long-standing rule exempting most vessel discharges from permitting requirements of the CWA.¹¹⁸ The rule exempted marine engine discharges, graywater discharges (e.g., laundry and galley wastewater), and ballast water from permitting requirements.¹¹⁹

1. Ballast Water Is a Significant Source of Pollution Despite the EPA's Lack of Regulation

Ballast water is an important mechanism for the inadvertent introduction of species into new, non-native ecosystems. "[M]ore than 10,000 marine species each day hitch rides around the globe in the ballast water of cargo

112. See *Natural Res. Def. Council v. EPA*, 542 F.3d at 1244, 1248, 1250.

113. See *id.* at 1250.

114. See *id.* at 1251 (citing S. REP. NO. 99-50, at 3 (1985)).

115. See *id.* at 1252.

116. See *id.*

117. 537 F.3d 1006 (9th Cir. 2008).

118. See *id.* at 1010.

119. See 40 C.F.R. § 122.3(a).

ships.”¹²⁰ Twenty-one billion gallons of ballast water are released in the United States each year.¹²¹ Organisms surviving the journey can wreak havoc on their adopted environments. The zebra mussel, a highly invasive pest species responsible for major environmental and economic damage in the Great Lakes region, was introduced to the Great Lakes from ballast water originating in the Caspian Sea.¹²² A strain of cholera originating in ballast water from China killed 10,000 people in Latin America in 1991, and the deadly strain was subsequently transported from Latin America to Mobile, Alabama in ballast water, although it was detected in time to prevent further deaths in the United States.¹²³ Freed from predators in their native environments, some introduced species can become invasive, leading to the decline and even endangerment of native species.¹²⁴

2. *The EPA Had Long Underregulated Ballast Water Discharges*

In the early days of the CWA, despite the danger, the EPA exempted ballast water from permitting requirements under the mistaken belief that discharge of ballast water in inland waters was not a significant source of pollution.¹²⁵ The EPA further justified the regulatory exclusion on the grounds that “exclusion of vessel wastes from the permit requirements will reduce administrative costs drastically.”¹²⁶ In 1999 Northwest Environmental Advocates (NEA) petitioned the EPA to repeal the rule on the grounds the exemption clearly exceeded EPA’s authority. The EPA failed to respond, and NEA sued eighteen months later.¹²⁷ The district court found for NEA, at which point the six Great Lakes States intervened on the side of plaintiffs, and the Shipping Industry Ballast Water Coalition intervened on the side of the EPA.¹²⁸

3. *The Regulatory Exemption for Vessel Discharge Was Clearly Contrary to a Congressional Mandate to Regulate Such Discharges*

After determining that the district court properly exercised jurisdiction, that the claims were timely, and that plaintiffs had preserved all issues for judicial challenge, the Ninth Circuit examined the merits, analyzing the case under *Chevron*. The Ninth Circuit found the EPA was clearly underregulating.¹²⁹ Calling the prohibition on unpermitted discharges of pollutants the “cornerstone” and “fundamental premise” behind the CWA, the

120. See *Nw. Envntl. Advocates*, 537 F.3d at 1012.

121. See *id.* at 1013.

122. See *id.*

123. See *id.*

124. See *id.*

125. See *id.* at 1011; see also 38 Fed. Reg. 13, 528 (May 22, 1973) (codified at 40 C.F.R. § 125).

126. See *Nw. Envntl. Advocates*, 537 F.3d at 1011.

127. See *id.* at 1013.

128. See *id.* at 1014.

129. See *id.* at 1020–21.

Ninth Circuit found the discharges at issue clearly fell within the ambit of CWA regulation.¹³⁰ The court noted the “question before us of whether the CWA authorizes the EPA’s regulatory exemptions was answered by the D.C. Circuit more than thirty years ago” in the original challenge to the silvicultural rule.¹³¹ The Ninth Circuit treated as established law that the EPA’s long-standing habit of carving out regulatory exemptions to a congressional mandate for regulation was illegal.

All that remained for the Ninth Circuit was the mechanical application of *Chevron* to the facts of the current case. The court noted “Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of § 301(a).”¹³² However, the court found further examination of the legislative history unnecessary, since the EPA’s regulation was clearly contrary to the CWA.¹³³ Brushing aside an EPA argument Congress had acquiesced in the long-standing exemption, the Ninth Circuit castigated the EPA’s lenient regulatory approach to vessel discharges: “[T]his ambitious statute is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all.”¹³⁴ The Ninth Circuit affirmed the vacation of the challenged portion of the vessel discharge rule,¹³⁵ holding once again that the EPA had not regulated as vigorously as Congress had mandated.

IV. THE EPA ALSO UNDERREGULATES UNDER THE CLEAN AIR ACT

A. *In Massachusetts v. Environmental Protection Agency, the Supreme Court Found the EPA Underregulates Greenhouse Gas Emissions*

Greenhouse gas emissions, arguably “the most pressing environmental challenge of our time,”¹³⁶ represent another difficult pollution problem in which the EPA’s regulatory solution was “not to try at all.”¹³⁷

In 1999, a group of private environmental organizations petitioned the EPA to regulate greenhouse gas emissions under section 202 of the CAA, citing a 1998 opinion for EPA counsel that the EPA had authority to regulate greenhouse gas emissions under the CAA.¹³⁸ Fifteen months later, the EPA asked for public comments on the petition.¹³⁹ The White House asked the

130. *See id.* at 1020.

131. *See id.* at 1021.

132. *See id.* at 1022 (quoting *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977)).

133. *See id.*

134. *See id.* at 1026 (quoting *Costle*, 568 F.2d at 1380).

135. *See id.*

136. *See Massachusetts v. EPA*, 549 U.S. 497, 504 (2006).

137. *See Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1026 (9th Cir. 2008).

138. *See Massachusetts v. EPA*, 549 U.S. at 510.

139. *See id.* at 511; *see also* *Control of Emissions From New and In-use Highway Vehicles and Engines*, 66 Fed. Reg. 7486, 7486–87 (Jan. 23, 2001).

National Research Council (NRC) for an opinion.¹⁴⁰ The NRC responded that human activities were causing greenhouse gases to accumulate in the atmosphere, raising surface air temperatures and subsurface sea temperatures. The NRC confirmed average temperatures rose as of 2001.¹⁴¹

The EPA denied the rulemaking petition in 2003.¹⁴² The EPA ruled it did not have authority to regulate greenhouse gas emissions, notwithstanding its 1998 opinion to the contrary.¹⁴³ The EPA also argued that, even if it had such authority, it would be unwise to regulate emissions under the circumstances because the NRC had not unequivocally stated human-induced greenhouse gas emissions were causing the observed rise in global temperatures.¹⁴⁴ Moreover, since Congress knew of the greenhouse effect when it amended the CAA in 1990, but did not include specific binding emissions limitations, the EPA concluded its general authority to regulate emissions under section 202(a)(1) of the CAA was insufficient grounds on which to propose rulemaking.¹⁴⁵ As the Court noted, “[i]n essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it.”¹⁴⁶ Thus, according to the EPA, greenhouse gases could not be “air pollutants” within the meaning of the CAA.¹⁴⁷

The petitioners, joined by Massachusetts and other states and municipalities as intervenors, brought suit in the D.C. Circuit Court of Appeals. A three judge panel issued a fractured ruling in which each judge wrote separately; but, two of the three panelists upheld the EPA decision refusing to regulate greenhouse gas emissions, with one reaching the conclusion on the basis that petitioners lacked standing.¹⁴⁸ The Supreme Court granted review, noting that, while no circuit conflict existed with respect to whether section 202(a)(1) gave the EPA authority to regulate greenhouse gas emissions, the “unusual importance of the underlying issue persuaded us to grant the writ” of certiorari.¹⁴⁹

After a lengthy analysis, and over a strongly worded dissent by four justices, the majority concluded Massachusetts (at a minimum) had standing and thus the claim was justiciable.¹⁵⁰ Once the Court resolved the threshold issue of standing, the majority concluded under *Chevron* Step I the EPA was

140. See *Massachusetts v. EPA*, 549 U.S. at 511.

141. See *id.*

142. See *id.*; see also *Control of Emissions From New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

143. See *Massachusetts v. EPA*, 549 U.S. at 511.

144. See *id.*

145. See *id.* at 512.

146. See *id.*

147. See *id.* at 513.

148. See *id.* at 514.

149. See *id.* at 506.

150. See *id.* at 516–27.

ignoring a clear congressional mandate to regulate greenhouse gases. The court pointed to section 202(a)(1) of the CAA,¹⁵¹ which provides:

[t]he Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.¹⁵²

Congress included this wording, which mandates regulation when a reasonable anticipation of endangerment to public health or welfare is anticipated, in the 1990 amendments to the CAA. The language it replaced required regulation only if the administrator determines a pollutant “endangers the public health or welfare.”¹⁵³ The Supreme Court, citing the legislative history of the 1990 amendments, interpreted this change as congressional endorsement of the holding in *Ethyl Corp. v. EPA* that “the Clean Air Act, and common sense . . . demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.”¹⁵⁴ The Court also noted “pollutant” is broadly defined as “any air pollution agent or combination of such agents, including any physical, chemical, biological, or radioactive . . . substance or matter which is emitted or otherwise enters the ambient air.”¹⁵⁵ “Welfare” is also broadly defined and includes effects on climate.¹⁵⁶

Looking at the sweeping language of the CAA, including the mandate to regulate any pollutant even in the face of less than absolute certainty of the effects, the Court applied the familiar *Chevron* analysis, concluding “[t]he statute is unambiguous.”¹⁵⁷ The repeated use of the word “any” indicated a broad congressional mandate for action.¹⁵⁸ Summing up the EPA’s legal arguments regarding the text of the statute, the Court concluded “there is no reason, much less a compelling reason, to accept the EPA’s invitation to read ambiguity into a clear statute.”¹⁵⁹

The Court then turned to the EPA’s argument that the use of the word “judgment” in section 202 allowed the EPA the discretion not to regulate greenhouse gases. The Court brusquely dismissed this rationale as “reasoning divorced from the statutory text.”¹⁶⁰ The CAA requires regulatory action when the EPA makes a judgment that harm to public welfare is reasonably anticipated.¹⁶¹ That is, “the use of the word ‘judgment’ is not a roving license

151. See 42 U.S.C. § 7521(a)(1) (2006).

152. See *Massachusetts v. EPA*, 549 U.S. at 506.

153. *Id.* at 506 n.7.

154. *Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (D.C. Cir. 1976); *Massachusetts v. EPA*, 549 U.S. at 506 n.7.

155. See *Massachusetts v. EPA*, 549 U.S. at 506; see also 42 U.S.C. § 7602(g).

156. See *Massachusetts v. EPA*, 549 U.S. at 506; see also 42 U.S.C. § 7602(h).

157. *Massachusetts v. EPA*, 549 U.S. at 529.

158. See *id.*

159. *Id.* at 531.

160. *Id.* at 532.

161. See *id.*

to ignore the statutory text.”¹⁶² If the record supports an endangerment finding, then the EPA *must* regulate greenhouse gas emissions. Rather than regulate, the Court found that the “EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate.”¹⁶³ The Court then reversed the Court of Appeals and remanded for further proceedings consistent with its opinion.¹⁶⁴

B. Administrative Proceedings After Massachusetts v. Environmental Protection Agency Show the Obama Administration Is Reluctant to Exercise Its Congressional Mandate to Fully Regulate Greenhouse Gas Emissions

In response to the holding in *Massachusetts v. EPA*, the EPA made an endangerment finding regarding CO₂ and promulgated the “Greenhouse Gas Tailoring Rule” in response.¹⁶⁵ The tailoring rule has been the subject of much commentary.¹⁶⁶ It is yet another instance where the EPA is proposing a regulatory framework considerably less rigorous than what appears to be required by Congress. Under the CAA, a source is considered a “major” source of air pollution, and thus regulated by Title V, if it emits either 100 tons per year (tpy) or 250 tpy of pollution, depending on the pollutant.¹⁶⁷

However, in the tailoring rule, the EPA proposes to regulate greenhouse gas emissions through a three-step process bearing no numerical relationship to the statutory thresholds. The first step of regulation involves regulation of sources already subject to Title V permitting for other reasons, and establishes a threshold of 75,000 tpy for regulation of greenhouse gases.¹⁶⁸ The second step involves regulating new sources with the potential to emit more than 100,000 tpy of greenhouse gases.¹⁶⁹ Step three involves additional regulation of smaller sources, although the EPA has indicated that no sources below 50,000 tpy will be regulated before 2016 at the earliest.¹⁷⁰ The EPA claims the authority to ignore the plain language of the CAA, which on its face would seem to require regulation of any source of greenhouse gases above 250 tpy at most, on the basis of the unique characteristics of greenhouse gases.¹⁷¹ Whether or not the EPA is ultimately justified in its refusal to regulate all sources of greenhouse gases above 250 tpy, it is clear the EPA is not exercising its full statutory authority to regulate under the CAA. Claims of EPA

162. *Id.* at 533.

163. *Id.*

164. *See id.* at 535.

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

166. *See, e.g.,* Meredith Wilensky, *The Tailoring Rule: Exemplifying the Vital Role of Regulatory Agencies in Environmental Protection*, 38 *ECOLOGY L.Q.* 449 (2011).

167. *See* 42 U.S.C. § 7479(1).

168. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516–23.

169. *See id.*

170. *See id.*

171. *See id.* at 31,517.

overregulation based on the regulation of greenhouse gases are thus not persuasive in light of the tailoring rule.

While *Massachusetts v. EPA* is arguably the most important recent case involving EPA underregulation of air pollution, several other recent cases demonstrate the EPA's regulatory timidity is not limited to greenhouse gas regulation.

C. *New Jersey v. Environmental Protection Agency Demonstrates the Underregulation of HAPs Continues, Despite Congress's Dramatic Revisions to the HAP Program in 1990*

The history of the Hazardous Air Pollution (HAP) program alone should give pause to anyone claiming systematic overregulation on the part of the EPA.¹⁷² Section 112 of the 1970 version of the CAA mandated that the EPA develop health-based emission standards for any air pollutant that may contribute to serious negative health effects.¹⁷³ In the first twenty years of the HAP program, the EPA listed only eight substances as HAPs. Congress found this attempt at regulation so insufficient that it took direct control of the HAP program in the 1990 CAA amendments, ordering the EPA to list 189 additional hazardous air pollutants. The amendments also repeated the CAA's original instructions to list substances if the EPA found the potential for adverse health effects.¹⁷⁴ Congress ordered the EPA to list and regulate "all categories and subcategories of major sources and area sources" of HAPs on a prioritized schedule.¹⁷⁵ It also mandated any new source of HAP meet strict performance standards to achieve emissions control equivalent to the best controlled similar source and require existing sources to achieve emission controls equal to average emission limitations of the best controlled existing 12 percent of HAP sources.¹⁷⁶ Clearly, Congress was not concerned with EPA overregulation of HAP.

*New Jersey v. EPA*¹⁷⁷ involved challenges by New Jersey and other states and environmental groups against EPA attempts to delist coal- and oil-fired electric utility steam generating units (EGUs) from regulation as sources of HAP. The case involved a concurrent challenge to an EPA regulation establishing a voluntary cap-and-trade program for coal-fired EGUs.¹⁷⁸ Several states and industry groups intervened to join the EPA.¹⁷⁹

172. See, e.g., Victor B. Flatt, *Gasping for Breath: The Administrative Flaws of Federal Hazardous Air Pollution Regulation and What We Can Learn from the States*, 34 *ECOLOGY L.Q.* 107 (2007).

173. See 42 U.S.C. § 7412 (2006).

174. See *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 633–34 (D.C. Cir. 2000); see also 42 U.S.C. §7412(g)(2)(A).

175. See 42 U.S.C. §§ 7412(c)(1), (e)(1)–(3).

176. See *id.* §§ 7412(d)(3), (3)(A).

177. See 517 F.3d 574 (D.C. Cir. 2008).

178. See *id.* at 577; see also Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) (codified at 40 C.F.R. §§ 60, 63, 72, 75).

179. See *New Jersey v. EPA*, 517 F.3d at 577.

The court first recounted the long history of “the slow pace of EPA’s regulation of HAPs” and the aspects of the 1990 CAA relevant to the case.¹⁸⁰ The court also noted Congress restricted the ability of the EPA to delist sources of HAPs, requiring the EPA to make explicit findings before delisting any source, and restricted the ability of third parties to challenge decisions adding pollutants to the list.¹⁸¹ Also, Congress mandated that the EPA study whether EGUs should be listed as sources of HAP, report the results to Congress within three years, and order regulation of the EGUs if the Administrator found such regulation “appropriate and necessary” based on the results of the study.¹⁸² Eight years later, and five years after the Congressional deadline, the EPA finally completed the mandated study.¹⁸³ In December 2000, the EPA announced regulation of EGUs was “appropriate and necessary” because EGUs comprised the largest domestic source of mercury emissions and presented significant health and environmental risks.¹⁸⁴ In 2004, the EPA proposed two alternatives to regulating mercury emissions, proposing to regulate under either section 112 or section 111. In 2005, it chose to delist EGUs under section 112 and regulate under the less stringent requirements of section 111.¹⁸⁵ The EPA determined it could delist EGUs without making findings because the original 2000 listing was not “appropriate and necessary.”¹⁸⁶

The D.C. Circuit applied the principles of *Chevron* to the case, and in a single paragraph, concluded the EPA’s delisting attempt violated the plain language of the CAA.¹⁸⁷ This result is not surprising, since the EPA conceded it never made the required findings before delisting EGUs.¹⁸⁸ The court brushed aside EPA arguments that it had discretion to change its mind on listing EGUs as HAP sources under general principles of administrative law. On the other hand, Congress “undoubtedly can limit an agency’s discretion to reverse itself, and in section 112(c)(9) Congress did just that, unambiguously limiting EPA’s discretion to remove sources, including EGUs, from the section 112(c)(1) list once they have been added to it.”¹⁸⁹

The EPA also offered the incredible defense that it had previously delisted sources without following the requirements of section 112(c)(9). The court responded that “previous statutory violations cannot excuse the one now before

180. *See id.* at 578.

181. *See id.* at 579 (citing 42 U.S.C. §§ 7412(c)(1), (c)(9), (e)(4)).

182. *See id.*; *see also* 42 U.S.C. § 7412(n)(1)(A).

183. *See New Jersey v. EPA*, 517 F.3d at 579.

184. *See id.*; *see also* 65 Fed. Reg. 79,825 (Dec. 20, 2000).

185. *See New Jersey v. EPA*, 517 F.3d at 580; *see also* Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the section 112(c) List, 70 Fed. Reg. 15,994, 16,002–08 (Mar. 29, 2005).

186. *New Jersey v. EPA*, 517 F.3d at 580.

187. *See id.* at 582.

188. *See id.*

189. *Id.* at 583.

the Court.”¹⁹⁰ The EPA also argued it would be “anomalous” to not allow it to correct its own “mistake” of listing EGUs in the first place.¹⁹¹ But the court found that “Congress was not preoccupied with what EPA considers ‘anomalous,’ but rather with the fact that EPA had failed for decades to regulate HAPs sufficiently.”¹⁹² The court vacated the delisting, and also vacated the rulemaking under section 111, as the EPA conceded that if the court found the delisting unlawful it must also find the attempt to regulate under section 111 unlawful. Thus, the court found the regulatory actions of the EPA with respect to EGUs to be insufficient to meet a congressional directive for regulation.

D. The EPA Also Underregulates HAPs from Major Pollution Sources During Periods of Startups, Shutdowns, and Malfunctions

Sierra Club v. EPA involved another challenge to EPA regulation of HAPs by an environmental group.¹⁹³ Once again, industry intervenors joined the EPA and, once again, the D.C. Circuit applied *Chevron* and found an EPA regulatory scheme to be clearly insufficient to meet congressional mandates for more vigorous regulation of pollution, albeit with a dissent.

Sierra Club v. EPA involved a challenge to a long-standing EPA exemption from regulation under section 112 of HAP emissions from major sources during periods of startup, shutdown, and malfunction (SSM). In the 1970s, the EPA determined emissions during SSM periods did not violate section 111 of the CAA.¹⁹⁴ The EPA nonetheless required that “[a]t all times, including periods of [SSM], owners and operators shall, to the extent practicable, maintain and operate any affected facility including any associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions.”¹⁹⁵ The EPA refers to this requirement as the “general duty” standard.¹⁹⁶

In 1994, the EPA extended the SSM exemption to section 112 governing HAPs, leaving only the “general duty” standard to apply during SSM periods.¹⁹⁷ However, to avoid a blanket exemption, the EPA required sources to develop a SSM plan. The EPA could require changes to this plan, and the

190. *Id.*

191. *See id.*

192. *Id.*

193. *See Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008).

194. *See id.* at 1021; *see also* Amendments to General Provisions and Copper Smelter Standards, 42 Fed. Reg. 57,125 (Nov. 1, 1977) (codified at 40 C.F.R. pt. 60).

195. 40 C.F.R. § 60.11(d) (2011).

196. *See Sierra Club v. EPA*, 551 F.3d at 1022.

197. *See id.*; *see also* National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 59 Fed. Reg. 12,408 (Mar. 16, 1994) (codified at 40 C.F.R. pts. 60, 61, & 63).

plan became incorporated by reference into the source's Title V permit.¹⁹⁸ SSM plans were also public documents.¹⁹⁹

In 2002, the EPA removed the requirement that the SSM plan be incorporated into the Title V permit, and the document was now only made public upon request.²⁰⁰ Sierra Club challenged these changes. In a settlement agreement, the EPA agreed to "modest" changes to the rule.²⁰¹ However, in 2003, the EPA adopted a final rule requiring members of the public to make a "specific and reasonable request" of the permitting authority to request the SSM plan from the source.²⁰² Sierra Club challenged the rule, as did the Natural Resources Defense Council.²⁰³ The EPA agreed to hold a new comment period and the suits were held in abeyance.²⁰⁴ In 2006, the EPA eliminated the requirements that sources implement SSM plans during SSM events and that authorities obtain a copy of the SSM plan upon request of a member of the public.²⁰⁵ Petitioners then challenged the 1994 SSM rule as well as the 2002, 2003, and 2006 revisions to the SSM rules.²⁰⁶

The court first determined the challenges were timely because the EPA had constructively reopened the SSM rulemaking process by so completely changing the regulatory regime surrounding the SSM rule.²⁰⁷ The court noted the EPA "established the SSM plan requirements precisely because the general duty was inadequate. Now EPA has removed these necessary safeguards."²⁰⁸ Turning to the merits, the court applied *Chevron* and concluded the SSM exemption clearly violated the CAA²⁰⁹ because "Congress has required that there must be continuous section 112-compliant standards. The general duty is not a section 112-compliant standard."²¹⁰ The EPA admitted as much in its brief.²¹¹ The court found that the EPA's suggestion it was acting within its reasonable discretion "belies the text, history, and structure of section 112,"

198. See *Sierra Club v. EPA*, 551 F.3d at 1022.

199. See *id.*

200. See *id.* at 1023; see also National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance With Clean Air Act Sections, Sections 112(g) and 112(j), 66 Fed. Reg. 16,318–26 (Mar. 23, 2001) (codified at 40 C.F.R. § 63).

201. See *Sierra Club v. EPA*, 551 F.3d at 1023.

202. See *id.*; see also National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance With Clean Air Act Sections, Sections 112(g) and 112(j), 68 Fed. Reg. 32,586, 32,591 (May 30, 2003) (codified at 40 C.F.R. § 63).

203. See *Sierra Club v. EPA*, 551 F.3d at 1023.

204. See *id.*

205. See *id.*; see also National Emission Standards for Hazardous Air Pollutants; General Provisions, 70 Fed. Reg. 43,992 (July 29, 2005) (codified at 40 C.F.R. §§ 63, 65); National Emission Standards for Hazardous Air Pollutants: General Provisions, 71 Fed. Reg. 20,448 (Apr. 20, 2006) (codified at 40 C.F.R. §§ 63, 65).

206. See *Sierra Club v. EPA*, 551 F.3d at 1024.

207. See *id.* at 1025.

208. See *id.*

209. See *id.* at 1027–28.

210. See *id.*

211. See *id.*

recounting the EPA's history of underregulating HAPs in the face of a clear congressional mandate to do more.²¹² The EPA had no discretion to "construe a statute in a way that completely nullifies textually applicable provisions meant to limit its discretion," so the court vacated the SSM rule.²¹³

E. The EPA Underregulates Monitoring of Clean Air Act Permits

In *Sierra Club v. Environmental Protection Agency*, the court found the EPA violated the unambiguous requirements of the CAA by attempting to prevent states from supplementing inadequate monitoring requirements in permits issued pursuant to the CAA.²¹⁴

The 1990 CAA amendments added Title V to the Act creating a national permit program requiring many stationary sources of air pollution.²¹⁵ Title V also required "[e]ach permit issued . . . shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions."²¹⁶ The EPA promulgated its "Part 70" regulations in 1992 implementing the monitoring requirement.²¹⁷ These regulations required a permitting authority to identify applicable monitoring requirements and include monitoring sufficient to determine permit compliance.²¹⁸ However, sometimes an emission standard would include a monitoring requirement that is clearly inadequate to assure compliance with a permit. One example is a standard requiring annual monitoring but a permit imposing daily emissions limits.

1. The EPA Took Inconsistent Positions on Supplemental Monitoring

In 1997, the EPA took the position in a guidance document interpreting section 70.6(a)(3)(i)(B) that state and local authorities could require supplemental monitoring in such situations. However, the EPA never subjected this guidance to rulemaking, and the D.C. Circuit vacated the guidance document on procedural grounds.²¹⁹ In 2002, the EPA proposed again to allow states to require supplemental monitoring in a rule further interpreting section 70.6(c)(1).²²⁰ The EPA also announced a sixty-day interim rule during the notice and comment period on the proposed rule.²²¹ Industry groups challenged the interim rule, and the EPA settled the litigation by agreeing to adopt a final

212. *See id.*

213. *See id.*

214. *See Sierra Club v. Env'tl. Prot. Agency*, 536 F.3d 673 (D.C. Cir. 2008).

215. *See* 42 U.S.C. §§ 7661–7661(f) (2006).

216. *Id.* § 7661(c).

217. *See Sierra Club v. EPA*, 536 F.3d at 675.

218. *See id.*; *see also* 40 C.F.R. §§ 70.6(a)(3)(i)(B), (c)(1) (2012).

219. *See Appalachian Power v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000).

220. *See Sierra Club v. EPA*, 536 F.3d at 676; *see also* Proposed Revisions To Clarify the Scope of Sufficiency Monitoring Requirements for Federal and State Operating Permits Programs, 67 Fed. Reg. 58,561 (Sept. 17, 2002) (codified at 40 C.F.R. §§ 70–71).

221. *See Sierra Club v. EPA*, 536 F.3d at 676; *see also* Revisions To Clarify the Scope of Sufficiency Monitoring Requirements for Federal and State Operating Permits Programs, 67 Fed. Reg. 58,529 (Sept. 17, 2002) (codified at 40 C.F.R. §§ 70–71).

rule prohibiting state and local permitting authorities from requiring supplemental monitoring requirements.²²² The rule became final in 2004.²²³ The D.C. Circuit vacated this rule because the EPA had not followed proper notice and comment rulemaking procedures.²²⁴ The EPA then issued notice and took comment on an identical rule.²²⁵ The EPA promulgated the final rule in December 2006²²⁶ and Sierra Club and several other environmental groups brought suit. American Petroleum Institute and several industry groups intervened on behalf of the EPA.²²⁷

2. The EPA's Attempt to Restrict Supplemental Permit Monitoring Clearly Violated the Clean Air Act

The D.C. Circuit (with one dissenter) concluded under *Chevron* that the EPA's rule violated an unambiguous congressional requirement for adequate monitoring of CAA permits. The court focused on the language in Title V requiring each permit to set forth monitoring requirements adequate to ensure compliance with permits.²²⁸ The EPA admitted in its brief that, under its 2006 rule, some permits would be issued without adequate monitoring requirements.²²⁹ However, the EPA's solution was to propose future rulemaking under section 7661(c)(b), establishing a national monitoring standard rather than allowing states and localities to correct the problem on a case-by-case basis.²³⁰ The court rejected this proposed solution as "nothing more than vague promises to act in the future."²³¹ The EPA also argued it would be "bad policy" to allow a case-by-case approach.²³² The court rejected this argument as well, noting the plain language of the CAA requires adequate monitoring of "each permit," and the EPA admitted its rule prohibiting states and localities from imposing supplemental monitoring precluded meeting this requirement in some instances.²³³ The court thus concluded the EPA rule on

222. *Sierra Club v. EPA*, 536 F.3d at 676; *see also* Proposed Settlement Agreement, Clean Air Act Petitions for Review, 68 Fed. Reg. 65,700, 65,700-01 (Nov. 21, 2003).

223. *Sierra Club v. EPA*, 536 F.3d at 676; *see also* Revisions To Clarify the Scope of Certain Monitoring Requirements for Federal and State Operating Permits Programs, 69 Fed. Reg. 3202 (Jan. 22, 2004) (codified at 40 C.F.R. §§ 70-71).

224. *See* *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005).

225. *See* Proposed Rule Interpreting the Scope of Certain Monitoring Requirements for State and Federal Operating Permits Programs, 71 Fed. Reg. 32,006 (June 2, 2006) (codified at 40 C.F.R. §§ 70-71).

226. *See* Final Rule Interpreting the Scope of Certain Monitoring Requirements for State and Federal Operating Permits Programs, 71 Fed. Reg. 75,422 (Dec. 15, 2006) (codified at 40 C.F.R. §§ 70-71).

227. *See Sierra Club v. EPA*, 536 F.3d at 677.

228. *See id.* at 678.

229. *See id.*

230. *See id.*

231. *See id.*

232. *See id.* at 679.

233. *See id.* at 680.

monitoring did not meet the standards dictated by Congress, since the EPA approach would preclude a form of regulation Congress had mandated.

CONCLUSION: CLAIMS THAT THE EPA IS OVERREGULATING DO NOT WITHSTAND SCRUTINY

Recent federal appellate cases contradict the oft-repeated claim the EPA is overregulating. When someone challenges regulations that implement unambiguous statutes, the courts are much more likely to find that EPA is underregulating than overregulating. The disconnect between the rhetoric about the EPA as an organization behaving as “an activist for whom no standard is too high, no impact too onerous, no risk too low and no science too speculative”²³⁴ and the reality of an organization that consistently errs on the side of caution, even to the point of violating a congressional command for a more activist role, is staggering. The disconnect is unfortunate, because a fact-based critique of the EPA (even from its fiercest critics) can serve a useful role in answering a fundamental question posed by complex modern environmental statutes: what level of regulation (and therefore presumably environmental protection) is appropriate, and what are the acceptable societal tradeoffs, if and when situations arise where increased environmental protection can only come about at increasing economic costs? This question is fundamentally “trans-scientific”²³⁵ in which values play a key role in answering a question expressed initially in the language of science. The answer will thus reflect our values as a society, and it is imperative that this discussion be grounded in an accurate factual record. The current rhetoric concerning the EPA is not.

234. *See Id.* at page vii.

235. *See* A. Weinberg, *Science and Transcience*, 10 MINERVA 209–23 (1972).

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