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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

COMMONWEALTH OF MASSACHUSETTS, STATE OF CONNECTICUT, AND STATE OF MAINE,	)	
Plaintiffs,	)	
v.	)	Civil No. 03-CV-984 (PCD)
MARIANNE HORINKO, ACTING ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT' S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

INTRODUCTION

In this case, the States of Connecticut, Maine and Massachusetts (" Plaintiffs") ask the Court to compel the United States Environmental Protection Agency (" EPA")

to add carbon dioxide (" CO_2 ") to the list of so-called " criteria" air pollutants under section 108(a)(1) of the Clean Air Act (" CAA" or the " Act"), 42 U.S.C. § 7408(a)(1). Plaintiffs contend the Court has jurisdiction to grant this relief under the Act's citizen suit provision, 42 U.S.C. § 7604(a)(2), because, in Plaintiffs' view, EPA's duty to so list CO_2 is not " discretionary." See Complaint ¶¶ 5, 6.

In reality, however, the complex technical, legal, and policy determinations that EPA must make before deciding whether to add any substance to the list of criteria pollutants are discretionary, and are not the type of clear-cut, ministerial actions that can be compelled in a citizen suit alleging failure to perform a non-discretionary duty. EPA has not made any of these discretionary decisions for CO_2, and cannot be compelled to do so in this action. Indeed, EPA determined in a recent action that it does not have the authority to regulate CO_2 or other greenhouse gases under the CAA for purposes of addressing global climate change, including listing under CAA section 108. For these reasons, pursuant to Rule 12(b)(1), Fed. R. Civ. P., the Complaint should be dismissed for lack of subject matter jurisdiction.

STATUTORY AND REGULATORY BACKGROUND

The CAA makes " the States and the Federal Government partners in the struggle against air pollution." General Motors Corp. v. United States, 496 U.S. 530, 532 (1990). Sections 108 and 109 of the CAA authorize EPA to establish, review and revise national ambient air quality standards (" NAAQS"). Section 108(a) directs EPA to create, and revise " from time to time thereafter," a list of certain air pollutants[1] that, " in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §§ 7408(a)(1), 7408(a)(1)(A). Another prerequisite to listing is that the presence of such pollutants " in the ambient air results from numerous or diverse mobile or stationary sources." 42 U.S.C. §§ 7408(a)(1)(B). Once EPA places a pollutant on this list, it then develops air quality criteria for the pollutant. Id. § 7408(a)(2). These criteria must " accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from

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[1] The Act generally defines " air pollutant" to mean " any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g).

the presence of [a] pollutant in the ambient air . . . ." Id.

Under CAA section 109, EPA is to promulgate " primary" and " secondary" NAAQS to protect against adverse health and welfare effects for each pollutant identified under section 108, based on the air quality criteria. Id. §§ 7409(a)(1), 7409(b)(1)&(2).[2] Pursuant to these provisions, EPA has to date promulgated NAAQS for seven " criteria" pollutants -- ozone, sulfur dioxide, lead, particulate matter, carbon monoxide, hydrocarbons, and nitrogen dioxide -- that specify the maximum permissible concentrations of those pollutants in the ambient air.[3] Each State adopts control measures and other requirements necessary to implement, maintain and enforce the

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2 " Primary" standards are set at levels which, " in the judgment of the Administrator" are " requisite" to protect public health with " an adequate margin of safety;" " secondary" standards are set at levels which, " in the judgment of the Administrator," are " requisite" to protect public welfare. 42 U.S.C. § 7409(b)(1)&(2).

3 The NAAQS for hydrocarbons were later rescinded.

NAAQS for each criteria pollutant through state implementation plans (" SIPs"). 42 U.S.C. § 7410(a)(1). Each SIP or revision thereto must be submitted to the Administrator for approval. 42 U.S.C. § 7410(k).

Among the general provisions of the Act are those pertaining to citizen suits and judicial review. 42 U.S.C. §§ 7604 (citizen suits), 7607(b) (judicial review). Two general types of citizen suits are authorized under the Act – direct suits against violators of applicable emission standards and other CAA requirements, id. §§ 7604(a)(1)&(3), and suits to compel the Administrator of EPA to " perform any act or duty . . . which is not discretionary with the Administrator." Id. § 7604(a)(2). Pursuant to the last two sentences of CAA section 304(a), which were added in the 1990 CAA amendments, district courts are also granted jurisdiction to hear claims that agency action has been unreasonably delayed. See 42 U.S.C. § 7604(a) (" The district courts of the United States shall have jurisdiction to compel (consistent with [CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2)]) agency action unreasonably delayed. . . . ").[4]

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4 See also American Lung Ass'n v. Reilly, 962 F.2d 258, 262-63 (2d Cir. 1992)

Such unreasonable delay claims may, however, only be brought in a district court in the same judicial circuit in which judicial review could be obtained of the final action in question. Id.[5] The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to hear petitions for review of nationally applicable EPA regulations and other final EPA actions, while other locally or regionally applicable EPA decisions are reviewable in the courts of appeals " for the appropriate circuit." 42 U.S.C. § 7607(b)(1). Other means of obtaining judicial review of EPA regulations or other orders are expressly precluded. 42 U.S.C. § 7607(e).

(distinguishing nondiscretionary duty cases from unreasonable delay cases).

5 To the extent a party's claim is that new information justifies a revision to an existing regulation, the D.C. Circuit requires parties to first petition the agency to make the requested revision before pursuing judicial remedies. See Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 666-67 & n.20 (D.C. Cir. 1975). In this case, as noted below, neither Plaintiffs nor any other parties have filed an administrative petition with EPA seeking the addition of CO_2 to the CAA list of criteria pollutants.

LITIGATION AND FACTUAL BACKGROUND

The Complaint in this matter was filed on June 4, 2003, and generally alleges that EPA should be deemed to have violated a nondiscretionary duty to list CO_2 as a criteria air pollutant, since, according to Plaintiffs, various governmental reports, testimony, and other materials allegedly satisfy all the statutory prerequisites for such an action. Complaint ¶¶ 115-21. Plaintiffs first cite 1998 and 1999 congressional testimony by EPA's former Administrator and General Counsel, as well as a 1998 EPA legal opinion, for the proposition that CO_2 can be classified as an " air pollutant" under the Act. Id. ¶¶ 32-35. Plaintiffs also contend that a speech by former EPA Administrator Christine Todd Whitman, combined with statements made by the United States government in a report to the United Nations, should be deemed to constitute a formal " judgment" by the EPA Administrator under section 108(a)(1)(A) of the Act, 42 U.S.C. § 7408(a)(1)(A), that CO_2 emissions " cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." See Complaint ¶¶ 36-58. Plaintiffs do not contend that EPA has determined that the presence of CO_2

in the ambient air results from " numerous or diverse mobile or stationary sources," but instead simply assert this proposition as fact. Complaint ¶¶ 24, 119-21. Based on these allegations, Plaintiffs ask the Court to " [o]rder the Administrator to revise the list of air pollutants pursuant to Section 108(a)(1) of the Act, 42 U.S.C. § 7408(a)(1), to include carbon dioxide." Complaint at 31, Prayer for Relief ¶ 1.

Contrary to Plaintiffs' suggestions, EPA has not made any " judgment" or otherwise exercised its discretion to decide, for purposes of section 108(a)(1), whether CO_2 should be listed as a criteria air pollutant. Furthermore, the 1998 and 1999 EPA legal opinion and statements relied on by Plaintiffs have been withdrawn and superseded by a legal opinion issued in conjunction with a recent EPA action finding that the CAA does not authorize regulation of CO_2 (or any other greenhouse gas) for purposes of addressing global climate change, including listing under section 108. See Memorandum, R. Fabricant to M. Horinko (Aug. 28, 2003) (Attach. A hereto) (hereinafter " 2003 Fabricant Legal Opinion").[6] Therefore, Plaintiffs are simply wrong

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6 The 2003 Fabricant Legal Opinion was prepared in connection with EPA's

response to administrative petitions for rulemaking filed by the International Center For Technology Assessment (" ICTA") and other organizations, which asked EPA to regulate emissions of CO_2 and other greenhouse gases by motor vehicles under the CAA. See Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines (Aug. 28, 2003) (Attach. B hereto) (hereinafter " 2003 Motor Vehicle Rulemaking Denial"). In denying the petitions, EPA's Assistant Administrator for Air and Radiation, Jeffrey Holmstead, formally adopted the 2003 Fabricant Legal Opinion " as the position of the Agency for purposes of deciding this petition and for all other relevant purposes under the CAA." Id. at 8. Both the rulemaking denial and the 2003 Fabricant Legal Opinion expressly overruled and withdrew the prior EPA General Counsel opinion and statements, relied on by Plaintiffs here, as no longer representing the views of the agency. See 2003 Fabricant Legal Opinion at 1-2 & n.1, 10-11; 2003 Motor Vehicle Rulemaking Denial at 8. The substance of these determinations cannot be challenged in this Court. Instead, the exclusive forum for petitions for review of final EPA actions of nationwide applicability (such as the 2003 Motor Vehicle Rulemaking Denial and the findings on which that action is based) is the United States Court of Appeals for the District of Columbia Circuit, pursuant to the procedures and limitations of 42 U.S.C. § 7607(b).

when they allege that nothing but purely ministerial and nondiscretionary determinations need to be made before CO_2 is added to the CAA's list of criteria pollutants. Not only would a number of discretionary determinations need to be made by EPA even if it the agency believed it appropriate to so list CO_2, but in light of the 2003 Fabricant Legal Opinion and the 2003 Motor Vehicle Rulemaking Denial, it is clear that EPA has concluded that the CAA does not authorize regulation of CO_2 or other greenhouse gases for the purpose of addressing global climate change.

STANDARD OF REVIEW

On a motion to dismiss pursuant to Rule 12(b)(1), Fed. R. Civ. P., Plaintiffs bear the burden of proving the existence of subject matter jurisdiction. Moser v. Pollin, 294 F.3d 335, 339 (2d Cir. 2002); Luckett v. Bure, 290 F.3d 493, 496-97 (2d Cir. 2002); Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). Although a court considering a motion to dismiss must " accept as true all material factual allegations in the complaint," this does not relieve Plaintiffs of their " affirmative[]" obligation to demonstrate the existence of jurisdiction, " and that showing is not made by drawing

from the pleadings inferences favorable to the party asserting [jurisdiction]." Shipping Fin. Serv. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998); see also In re American Express Co. Shareholder Litig., 39 F.3d 395, 400-01 n.3 (2d Cir. 1994) (" [C]onclusory allegations of the legal status of the defendants' acts need not be accepted as true for the purposes of ruling on a motion to dismiss."); Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l, Ltd., 968 F.2d 196, 198 (2d Cir. 1992) (" argumentative inferences favorable to the party asserting jurisdiction should not be drawn"). The court may refer to evidence outside the pleadings in resolving the question of jurisdiction on a Rule 12(b)(1) motion. Moser, 294 F.3d at 339; Luckett, 290 F.3d at 496-97; Makarova, 201 F.3d at 113.

SUMMARY OF ARGUMENT

EPA agrees that global climate change is a serious issue that involves important questions of science and policy. As the materials cited by Plaintiffs in fact make clear, EPA and other federal agencies are devoting considerable resources to scientific studies and policy initiatives to address these complex issues.

However, this is not a case about the science of climate change or greenhouse gas emissions. Instead, it is fundamentally a case about the nature of the federal/state partnership established decades ago in the Clean Air Act. It is *EPA's* responsibility to decide what substances warrant regulation under the Act, and to decide whether and when to list these substances and establish air quality criteria and NAAQS for them – standards that are then to be achieved through implementation plans developed by individual States. The Act is designed to allow EPA the opportunity to study, weigh, and assess the various legal, public health, welfare, and other policy concerns that attend the setting of nationally-applicable CAA requirements and standards, and then to make the formal determination, in the first instance, as to whether listing of any particular substance under section 108(a) is warranted. The Act was *not* designed to allow three individual States to force on EPA – and the rest of the nation – a sweeping new regulatory regime for emissions of CO_2 simply because *they* believe such action to be warranted.

The Clean Air Act allows citizen suits to be maintained against the EPA to

compel the performance of duties that are " not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). To be nondiscretionary, the alleged duty must be " purely ministerial," such as an express statutory duty to take a specified action by a date certain. Environmental Defense Fund v. Thomas, 870 F.2d 892, 899 (2d Cir. 1989) (hereinafter " EDF v. Thomas"). Even in that situation, however, a court exercising citizen suit jurisdiction may only order EPA to take *some* action by the specified deadline, and may not direct the *substance* of the agency's decision. Id. at 899-900; see also Natural Res. Defense Council v. Thomas, 885 F.2d 1067, 1070 (2d Cir. 1989) (hereinafter " NRDC v. Thomas").

Plaintiffs' attempt to compel the listing of CO_2 as a criteria pollutant runs afoul of these restrictions on CAA citizen suit jurisdiction. Section 108(a)(1) of the Clean Air Act, 42 U.S.C. § 7408(a)(1), does not require EPA to add new substances to the list of criteria air pollutants until after EPA has, inter alia, determined whether a substance is an " air pollutant," made a " judgment" as to whether emissions of the pollutant " cause or contribute to air pollution which may reasonably be anticipated to endanger

public health and welfare," and determined that the presence of the pollutant in the ambient air results " from numerous or diverse mobile or stationary sources." In addition, revisions to the list of criteria pollutants are not required to be made at any specified date, but instead only " from time to time." Id. Applicable precedent makes clear that these determinations are inherently discretionary, both in terms of their content and their timing, and thus cannot properly be the subject of a mandatory duty citizen suit.

Nor is there support (either in the case law or in the snippets of governmental reports and statements cited by Plaintiffs) for the allegation that EPA should, by implication, be deemed to have *already made* the required threshold determinations under section 108(a)(1). Controlling Second Circuit precedent makes clear that none of the speeches, reports, and other general actions Plaintiffs cite can constitute, in whole or in part, the legal equivalent of the specific statutory findings that are a prerequisite to the addition of a substance to the list of criteria pollutants under section 108(a) of the Act. See NRDC v. Thomas, 885 F. 2d 1067, 1073-75 (2d Cir. 1989). This conclusion is

reinforced by the fact, noted above, that EPA has determined that it does not have the authority to regulate CO_2 and other greenhouse gases under the CAA for the purpose of addressing global climate change. Although the substance of this determination cannot be examined in this case, see 42 U.S.C. § 7607(b) (United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction over petitions for review of "final" EPA actions under the CAA of nationwide applicability), it is appropriate to acknowledge that EPA has made such a determination, for the limited purpose of underscoring the point that EPA has *not* conceded, or implicitly made, all the substantive findings that would be a prerequisite to listing CO_2 as a criteria pollutant, as Plaintiffs claim.

Finally, in light of EPA's recent determination that it does not have the authority to regulate CO_2 and other greenhouse gases under the CAA for the purpose of addressing global climate change, this case is now moot. Simply put, it would be impossible for the Court to grant Plaintiffs the relief they seek, because to do so would be to require EPA to take administrative action that it has determined is beyond the

limits of its authority.

For all of these reasons, and as will be discussed in more detail below, this case should be dismissed for lack of subject matter jurisdiction.[7]

ARGUMENT

I. EPA'S AUTHORITY TO REVISE THE LIST OF CRITERIA AIR POLLUTANTS UNDER SECTION 108(a)(1) OF THE ACT IS DISCRETIONARY

The CAA's mandatory duty citizen suit provision does not provide jurisdiction for

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[7] While not the focus of this motion to dismiss, we note for the record that there are other jurisdictional defects in the Complaint as well. Most obviously, Plaintiffs premise a significant part of their claim of standing on their status as parens patriae for the citizens of their respective States. Complaint ¶ 8. However, it is well-settled that with regard to claims grounded in a federal statute, " [a] State does not have standing as parens patriae to bring an action against the Federal Government." Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 610 n.16 (1982)); see also, e.g., Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 338 n.7 (1st Cir. 2000); State ex rel. Sullivan v. Lujan, 969 F.2d 877, 883 (10th Cir. 1992); Nevada v. Burford, 918 F.2d 854, 858 (9th Cir. 1990); Iowa ex rel. Miller v. Block, 771 F.2d 347, 354 (8th Cir. 1985); Pennsylvania v. Kleppe, 533 F.2d 668, 678-81 (D.C. Cir. 1976). The rationale is that with regard to federal interests (such as those at issue here), " it is the United States, and not the state, which represents [the State's citizens] as parens patriae, when such representation becomes appropriate; and to the former, and not the latter, they must look for such protective measures as flow from that status." Massachusetts v. Mellon, 262 U.S. 447, 486 (1923). The Court does not need to reach these issues, however, insofar as the jurisdictional issues addressed in this memorandum should be fully dispositive. However, should this motion to dismiss be denied, EPA reserves its right to raise this and other additional jurisdictional concerns as may be appropriate, as well as all defenses to the merits of Plaintiffs' claims.

this suit, regardless of whether the Complaint is understood to be seeking an order directing EPA to add CO_2 to the list of criteria pollutants, or merely directing EPA to make a decision whether or not to do so by a time certain. As will be explained herein, the Act grants EPA discretionary authority over both the substance and timing of revisions to the CAA list of criteria air pollutants, and does not impose on EPA the type of mandatory duties that can be compelled through a citizen suit in district court.

A. The Health and Welfare " Judgment" Referenced In CAA Section 108(a)(1)(A) is Discretionary.

EPA has *no* duty to add any particular substance to the section 108(a) list of criteria air pollutants until after it has, among other things,[8] made a " judgment" that emissions of the pollutant in question " cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §

[8] To be eligible for inclusion on the list of criteria air pollutants, the substance also must be an " air pollutant" as defined in the Act, see 42 U.S.C. §§ 7408(a)(1), 7602(g); must be present in the ambient air as a result of emissions from " numerous or diverse mobile or stationary sources," id. § 7408(a)(1)(B); and must be a pollutant for which air quality criteria will be issued. Id. § 7408(a)(1)(C). As explained below, EPA has not made any of the findings which are required if CO_2 is to be added to the

7408(a)(1)(A). Common sense and controlling Second Circuit precedent make clear that threshold regulatory determinations such as this, which require consideration of a host of technical, legal and policy issues, are discretionary, and may not be compelled through a mandatory duty citizen suit.

CAA section 108(a) list of criteria pollutants.

For example, in NRDC v. Thomas, the Second Circuit rejected a citizen suit seeking to compel EPA to add certain substances to the CAA list of hazardous air pollutants. In that case, the relevant statutory provision was section 112(a)(1) of the Act, 42 U.S.C. § 7412(a)(1) (1982), which at the time authorized EPA to regulate as a " hazardous air pollutant" any pollutant not currently subject to a NAAQS that " in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating irreversible, illness." See NRDC v. Thomas, 885 F.2d at 1070.[9] In reaching its decision, the court focused on the statutory language relying on " the *judgment* of the Administrator as to health effects," and stressed that " [i]n rendering this judgment, the Administrator must have the flexibility to analyze a great deal of information in an area which 'is on the frontiers of scientific knowledge.'" Id. at

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9 It is noteworthy that the statutory provision at issue in NRDC v. Thomas, which is quoted in the text, is very similar in relevant respects to section 108(a)(1) of the Act, the provision at issue in this case, which authorizes EPA to list, as criteria air pollutants, those pollutants " emissions of which, in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A).

1075 (emphasis in original) (citation omitted). For these reasons, the Second Circuit held that EPA's " judgment" as to what compounds should be added to the list of hazardous pollutants was discretionary, and could not be compelled through a mandatory duty citizen suit.

Most recently, in New York Public Interest Research Group v. Whitman, 321 F.3d 316 (2d Cir. 2003) (hereinafter " NYPIRG v. Whitman"), the Second Circuit considered the nature of the Administrator's duties under a CAA provision that requires EPA to issue a notice of deficiency to State air pollution permitting authorities " [w]henever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of [the Act]." Id. at 330 (quoting CAA § 502(i)(1), 42 U.S.C. § 7661a(i)(1)). In rejecting a public interest group's argument that certain admitted " implementation deficiencies" in New York's program left EPA with no choice but to issue a notice of deficiency, the court explained that " the key phrase of § 502(i)(1) is the opening one, 'Whenever the Administrator makes a determination,' and this

language grants discretion." NYPIRG v. Whitman, 321 F.3d at 330. The court went on to conclude that " [b]ecause the determination is to occur whenever the EPA makes it, the determination is necessarily discretionary." Id. at 331.

In the NAAQS context itself, the Second Circuit has stated that when the Act leaves a determination " to the 'judgment of the Administrator,' it is difficult to read it as imposing non-discretionary duties." EDF v. Thomas, 870 F. 2d at 898. Similarly, Congress' use of " [t]he words 'as may be appropriate' clearly suggest that the Administrator must exercise judgment." Id. The court thus rejected claims that the statutory directive to revise the NAAQS at five year intervals " as may be appropriate" gave rise to a nondiscretionary duty on the part of the EPA Administrator to revise the NAAQS for sulfur dioxide to address the effects of acid deposition. EDF v. Thomas, 870 F.2d at 899. The only mandatory duty created was to " make *some* formal decision whether to revise the NAAQS" at the statutorily-prescribed five year intervals. Id. at 899 (emphasis in original).

There simply is no principled basis on which to distinguish the EPA

" judgment" called for under CAA section 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A), from the other CAA judgments and determinations, discussed above, that the Second Circuit has found to be discretionary, and therefore beyond the scope of the Act's mandatory duty citizen suit provision.

B. Other Determinations Under Section 108(a)(1) Are Also Discretionary With EPA.

Under CAA section 108(a)(1), 42 U.S.C. § 7408(a)(1), a determination by the Administrator, based on his or her judgment, that a substance causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare, is not the only discretionary finding that is a prerequisite to listing a pollutant. For example, the Administrator must also determine that the substance's presence in the ambient air results from numerous or diverse mobile or stationary sources. 42 U.S.C. § 7408(a)(1)(B). This determination, like the health and welfare determination under CAA section 108(a)(1)(A), inherently requires the Administrator to apply his or her judgment to the technical and factual issues relevant to the statutory standard. Hence, this

determination also is not purely ministerial, and thus cannot be compelled by this citizen suit.

C. EPA Also Has Discretion To Decide *When* To Revise The List of Criteria Air Pollutants.

As noted above, the Second Circuit has, in some cases, allowed a CAA mandatory duty citizen suit to proceed with regard to the timing (as opposed to the substance) of a specified EPA decision. See EDF v. Thomas, 870 F.2d at 899. However, even this limited avenue of relief is available only in cases where the statute expressly sets forth a *specific* deadline for agency action. See NRDC v. Thomas, 885 F.2d at 1075 (explaining that this aspect of EDF v. Thomas was premised on the distinction " between those revision provisions . . . that include stated deadlines and those that do not, holding that revision provisions that do include stated deadlines should, as a rule, be construed as creating non-discretionary duties") (citations

omitted).

In this case, section 108(a)(1) of the Act does not require revisions on any stated deadline, but instead, merely directs EPA to revise the list of criteria pollutants " from time to time." 42 U.S.C. § 7408(a)(1). The Second Circuit has specifically held that this type of language does not give rise to a nondiscretionary duty that can be compelled in a citizen suit. See American Lung Ass'n v. Reilly, 962 F.2d 258, 263 (2d Cir. 1992) (distinguishing statutorily-prescribed " indefinite intervals, such as 'from time to time,'" from " bright-line deadlines" such as " at five-year intervals"); see also NRDC v. Thomas, 885 F.2d at 1075 (similar). Instead, where, as here, the CAA merely directs EPA to take action " from time to time," and does not specify a date-certain deadline, a party may only challenge agency inaction relating to determinations of nationwide applicability by bringing an " unreasonable delay" case in the United States District Court for the District of Columbia. See American Lung Ass'n, 962 F.2d at 263; see also 42 U.S.C. §§ 7604(a), 7607(b).[10]

[10] As discussed above, see supra at 3-4, section 304(a) of the Clean Air Act, 42

For all of the foregoing reasons, the CAA's mandatory duty citizen suit provision cannot be used to compel either the substance or the timing of revisions to the list of criteria air pollutants.

II. EPA HAS NOT MADE ANY OF THE THRESHOLD DETERMINATIONS THAT ARE A PREREQUISITE TO THE ADDITION OF CO_2 TO THE LIST OF CRITERIA AIR POLLUTANTS

EPA has simply not made any of the above-referenced threshold determinations that are required by section 108(a) of the Act, 42 U.S.C. § 7408(a). Plaintiffs do not allege (nor could they) that EPA has made any such formal section 108(a) determinations, but instead claim that the combined effect of isolated statements made

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U.S.C. § 7604(a), only allows " unreasonable delay" claims to be brought in a district court in the same judicial circuit where a petition for judicial review of the allegedly overdue agency action could be brought, once it is " final," pursuant to section 307(b) of the Act, 42 U.S.C. § 7607(b). Section 307(b) of the Act, in turn requires that petitions for review of " final" EPA actions that are " nationally applicable" may only be brought in the United States Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 7607(b). To EPA's knowledge, Plaintiffs have not sought to bring an unreasonable delay claim in the United States District Court for the District of Columbia pertaining to the listing of CO_2 as a criteria pollutant under section 108(a) of the CAA; nor have they, as a basis for such a challenge, filed an administrative petition with EPA seeking to add CO_2 to the list of criteria air pollutants. See note 5, supra.

by EPA and other federal agencies, in non-section 108(a) contexts, should *constructively* be deemed to constitute the determination referenced under CAA section 108(a)(1)(A). See Complaint ¶¶ 36-58, 118. By employing this approach, Plaintiffs apparently are trying to shoehorn this case into the mold of Natural Resources Defense Council v. Train, 545 F.2d 320 (2d Cir. 1976) (" NRDC v. Train"), where the Second Circuit upheld a district court decision in a citizen suit case requiring EPA to add lead to the list of criteria air pollutants. This strained argument should be rejected.

To begin with, decisions as significant as the expansion of the list of criteria pollutants under section 108(a) of the Act simply cannot be made by implication, as Plaintiffs suggest. At a minimum, EPA would need to make an express and specific determination, in the context of section 108(a)(1), on all the factors required to add CO_2 to the list of criteria air pollutants. This would need to be accompanied by a statement of the agency's rationale and a complete administrative record.[11] Such a formal

[11] Section 307(d)(1) of the Act, 42 U.S.C. § 7607(d)(1), lists a number of specific agency actions that must be undertaken using the special rulemaking requirements set forth in that section of the Act. While this list includes, for example, promulgation of a NAAQS (National Ambient Air Quality Standard) under section 109 of the Act, 42

determination in turn allows interested parties a fair opportunity to exercise their right under the Act to seek judicial review, see 42 U.S.C. § 7607(b) (petitions for review of " final" EPA CAA actions " of nationwide scope or effect" can be brought within 60 days only in the United States Court of Appeals for the D.C. Circuit), and allows the agency the opportunity to prepare the type of record and statement of rationale that would make such judicial review meaningful. On the other hand, were EPA simply *deemed* to have made the findings required under CAA section 108(a), however unintentionally, in the course of other proceedings, speeches, or reports, there would be little assurance that the agency decision and administrative record (if any) would reflect a thorough consideration, in the context of section 108(a)(1), of all pertinent CAA-specific legal, technical, and policy issues, and interested parties might well be

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U.S.C. § 7409, it does not include establishment of, or additions to, the list of criteria air pollutants under section 108(a) of the Act, 42 U.S.C. § 7408(a). Therefore, while EPA could choose, in its discretion, to follow the Act's rulemaking procedures for listing decisions under section 108(a), see 42 U.S.C. § 7607(d)(1)(V), it also could choose to make such a determination pursuant to informal adjudication.

deprived of a meaningful opportunity to exercise their rights to judicial review.[12]

[12] In this regard, Plaintiffs' observation that public comment was solicited on the United States' submission to the United Nations, Complaint ¶¶ 44-46 & Exhs. E&F, is inapposite, as neither that report, nor the public notice pertaining to it, was addressed to the issue raised in this case – the possible listing of CO_2 as a criteria pollutant under the Clean Air Act. Quite obviously, parties may have more or different views on, and potential objections to, the listing of CO_2 under section 108(a)(1) of the CAA than they would on a more general report to the United Nations on climate change issues. For notice to be effective, the public must understand the nature of the agency action being proposed, if indeed potential action is being proposed at all.

In NRDC v. Train, the court's decision was driven by EPA's express *concession* that lead " meets the conditions of §§ 108(a)(1)(A) and (B) [in] that it has an adverse effect on public health and welfare, and that the presence of lead in the ambient air results from numerous or diverse mobile or stationary sources." Id. at 324; compare NRDC v. Thomas, 885 F.2d at 1074 (distinguishing NRDC v. Train on the basis of these EPA concessions). The NRDC v. Train court found that once EPA had made these threshold concessions, its remaining duty to actually add lead to the list of criteria pollutants " become[s] mandatory." Id. at 328. EPA has made no such concessions here, and Plaintiffs' argument that isolated actions made outside the context of section 108(a) are the " functional equivalent" of the required threshold statutory determinations under section 108(a)(1) fails as a matter of law. See NRDC v. Thomas, 885 F.2d at 1075.[13]

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[13] Further, while we acknowledge that this Court is bound to follow applicable Second Circuit precedent, it is worth noting that certain aspects of NRDC v. Train appear questionable in light of subsequent precedent over the almost 27 years since that case was decided. For example, the Second Circuit described its rationale in NRDC v. Train as entirely " one of statutory construction," 545 F.2d at 324, but this statutory analysis, including the conclusion that CAA section 108(a)(1)(C), 42 U.S.C. §

7408(a)(1)(C), did not present a bar to the court's decision, was not conducted under the now-familiar deferential standard announced by the Supreme Court eight years later in Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984). In addition, in NRDC v. Train, the Second Circuit did not address the question of whether its decision – which compelled EPA to take a substantive final action of nationwide applicability – improperly intruded on the exclusive jurisdiction of the D.C. Circuit, a topic that came to be addressed by the D.C. Circuit more extensively in cases decided after NRDC v. Train. See, e.g., Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987). Nor did the Second Circuit address the somewhat related question of how a revision to the list of criteria pollutants could be mandated, based solely on EPA " concessions" in the course of litigation, without regard for the effect that such an order would have on the rights of interested parties to seek judicial review, a point we discuss in the text. While this Court does not need to reach any of these issues, EPA reserves its right to address them in more detail, to the extent appropriate, in any future proceedings before this Court or the Second Circuit.

Even if it were assumed, arguendo, that CO_2 could be regulated under the Act for purposes of addressing global climate change, nowhere in any of the materials cited by Plaintiffs is there any determination by EPA, pursuant to CAA section 108(a), that emissions of CO_2 in the ambient air cause or contribute to air pollution which " may reasonably be anticipated to endanger public health or welfare," or that emissions of CO_2 come from numerous or diverse mobile or stationary sources. Plaintiffs in fact cite no EPA statement from any context that CO_2 meets the criteria set forth in sections 108(a)(1), and only two of the Exhibits discussed by Plaintiffs in their Complaint -- the now-withdrawn legal opinion and statements of EPA's prior General Counsels -- directly address the possible regulation of CO_2 under the Clean Air Act at all. However, even these documents stressed that EPA has not made any determination that CO_2 emissions satisfy the criteria set forth in sections 108(a)(1) of the Act, a critical point that remains true today.[14]

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[14] The legal opinion and statements relied on by Plaintiffs, which have now been withdrawn by EPA, made clear that EPA had yet to determine that regulation of CO_2 as a criteria pollutant under section 108(a) of the Act was appropriate, even if it could more generally be considered an " air pollutant" under the Act. See Memorandum,

Jonathan Z. Cannon to Carol M. Browner, at 4-5 (" While CO_2, as an air pollutant, is within EPA's scope of authority to regulate, the Administrator has not yet determined that CO_2 meets the criteria for regulation under one or more provisions of the Act.") (Plaintiff's Exhibit A); Testimony of Gary S. Guzy, at 5-6 (referencing quoted portion of Cannon memorandum and reiterating that " That statement remains true today. EPA has not made any of the Act's threshold findings that would lead to regulation of CO_2 emissions from electric utilities or, indeed, from any source.") (Plaintiffs' Exhibit B).

As " evidence" that EPA has *constructively*, if not expressly, made the required CAA section 108(a)(1)(A) " judgment" regarding the health and welfare effects of CO_2 emissions, Plaintiffs cite portions of a speech by former EPA Administrator Christine Todd Whitman, which expresses general concern about greenhouse gas emissions and climate change, Complaint ¶ 36 & Exh. C, and portions of a report that the United States submitted to the United Nations, discussing the range of possible impacts of global warming in the United States. Id. ¶¶ 55-58.[15] However, these general materials clearly cannot take the place of the *specific* findings required by the Clean Air Act.

Even taken at face value, the cited materials were not made in the context of CAA section 108(a), and do not constitute the sort of definitive findings by the Administrator that Plaintiffs suggest. For example, the cited report to the United Nations is not even an EPA document. Instead, the report is described in its title as a communication of the " United States of America Under the United Nations Framework

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[15] It should also be noted that Plaintiffs do not even allege that EPA has made a functional equivalent of the required CAA section 108(a)(1)(B) finding that CO_2 " in the ambient air results from emissions from numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1)(B); see also Complaint ¶¶ 24, 119-21.

Convention on Climate Change," Complaint, Exh. D at 1, and as Plaintiffs themselves acknowledge, the report represented the collaborative work of " at least 12 federal agencies or departments," Complaint ¶ 47, and was issued by the State Department. Id. ¶ 43.[16] Moreover, the report emphasizes, in its opening section, the substantial uncertainties surrounding its observations:

> While current analyses are unable to predict with confidence

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[16] EPA has taken a consistent view on the lineage of the Climate Action Report. For example, on May 16, 2003, EPA denied a request for correction submitted by the Competitive Enterprise Institute to EPA under EPA's Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (" Information Quality Guidelines"), regarding the Climate Action Report, explaining that CEI's request was most appropriately presented to the State Department, not EPA. On May 21, 2003, CEI submitted a request for reconsideration, and that reconsideration request is still pending. Information on EPA's Information Quality Guidelines, CEI's request for correction, EPA's response thereto, as well as the pertinent documents, can be found on EPA's Internet website at www.epa.gov/oei/qualityguidelines.

> the timing, magnitude, or regional distribution of climate change, the best scientific information indicates that if greenhouse gas concentrations continue to increase, changes are likely to occur. The U.S. National Research Council has cautioned, however, that " because there is considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases and aerosols, current estimates of the magnitude of future warmings should be regarded as tentative and subject to future adjustments (either upward or downward)." Moreover, there is perhaps even greater uncertainty regarding the social, environmental, and economic consequences of changes in climate.

U.S. Climate Action Report 2002, at 4 (Plaintiffs' Exhibit D). Particularly in light of such important caveats about our current understanding of global climate change science and potential effects, statements in the U.S. Climate Action Report simply are not the functional equivalent of a formal and definitive " judgment" by the EPA Administrator that CO_2 emissions " cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7408(a)(1)(A), reached after considering, in the context of section 108(a), all the complex and multi-faceted information relating to global climate change.

Second Circuit precedent also makes clear that generalized reports and statements, such as those cited by Plaintiffs, simply cannot be equated with formalized findings tied expressly to the statutory provisions at issue. In NRDC v. Thomas, for example, EPA had issued notices in the Federal Register indicating, based on risk assessments and other studies, that certain pollutants were " known or probable carcinogen[s]." NRDC v. Thomas, 885 F.2d at 1069, 1071-72. In most of the notices, " EPA said that it intended to add the relevant Pollutant to the List [of hazardous air pollutants] at some unspecified time in the future, but would make a final decision whether to act upon that intention only after making further studies of emission control techniques and health risks." Id. at 1072. Plaintiff environmental groups argued that EPA's " characterization of the Pollutants as 'likely or known carcinogens' was the 'functional equivalent' of a statutory finding that they were 'hazardous air pollutants,' and therefore required immediate listing." Id. The Second Circuit flatly rejected this claim, agreeing with the district court that the dispositive factor was that EPA " resolutely maintains that it has made no final determination as to the degree of risk

posed by each of the pollutants and specifically denies that it has found any of the pollutants to be hazardous air pollutants under the terms of the statute." Id. at 1074 (quoting NRDC v. Thomas, 689 F. Supp. 246, 254 (S.D.N.Y. 1988)). Similarly, in EDF v. Thomas, the Second Circuit rejected an argument that EPA studies of the adverse effects of sulfur oxides (" SO_x"), the results of which were published in a 1982 Federal Register notice issuing revised air quality criteria for SO_x, as well as in a three-volume report in 1984 and 1985, were " the equivalent of the EPA's explicit concession in Train concerning the adverse effects of lead." EDF v. Thomas, 870 F.2d at 899.

Indeed, the record in this case presents a far *stronger* basis on which to distinguish NRDC v. Train than did the record in either EDF v. Thomas or NRDC v. Thomas. In both NRDC v. Thomas and EDF v. Thomas, the court rejected plaintiffs' " constructive determination" arguments, even though EPA itself had documented adverse effects from the pollutants in question in Federal Register notices (and other documents) directly relating to regulation of the pollutants under the very CAA provisions at issue. In this case, by contrast, the only EPA statements cited by

Plaintiffs that directly concern the possible regulation of CO_2 under the Act in fact stress that the Agency has *not* made any of the requisite threshold determinations. While other publications and statements cited by Plaintiffs do document the government's concerns about potential global climate change, they also stress the complexities and uncertainties associated with assessment of the extent and timing of any change and the health and welfare impacts that may occur.[17]

This conclusion is, of course, reinforced by EPA's recent denial of a rulemaking petition to regulate CO_2 emissions under the CAA's mobile source provisions, and the extensive analysis the agency supplied in connection with that denial, wherein EPA has stated expressly that it does not have the authority under the CAA to regulate CO_2 or other greenhouse gases for purposes of addressing global climate change. See 2003 Motor Vehicle Rulemaking Denial (Attach. B hereto); 2003 Fabricant Legal Opinion (Attach. A hereto). Although any detailed discussion of the substance of these issues is beyond the scope of this proceeding and this memorandum, see 42 U.S.C. § 7607(b)

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[17] See NRDC v. Thomas, 885 F.2d at 1074-75 (stressing that EPA was still

(United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction over petitions for review of any " final" EPA actions under the CAA of nationwide applicability), the mere fact that EPA has made these determinations clearly underscores the point that EPA has *not* conceded, or implicitly made, all the substantive findings that would be a prerequisite to listing CO_2 as a criteria pollutant, as Plaintiffs claim in this case.

If, as in the prior Second Circuit cases, a " constructive determination" cannot be deemed to arise out of formal EPA documents documenting pertinent health concerns and findings in the context of the particular CAA statutory provision at issue, then such a determination certainly cannot be deemed to arise from non-definitive statements in a government report that was not issued by EPA, and that was not intended to address CAA regulatory issues. Instead, any addition to the list of criteria pollutants can be made only after a formal and express determination, supported by a CAA-specific administrative record, that preserves interested parties' rights to a

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continuing to assess the extent of risk posed by emission of the pollutants at issue).

meaningful opportunity for judicial review.

III. IN THE ALTERNATIVE, THIS CASE IS NOW MOOT

A case is moot when it is impossible for the Court to grant any effectual relief to the prevailing party. In re Kurtzman, 194 F.3d 54, 58 (2d Cir. 1999). As discussed above, EPA has made a formal determination -- adopted as the agency's official position in the 2003 Motor Vehicle Rulemaking Denial -- that it lacks authority under the Clean Air Act to regulate CO_2 or other greenhouse gases for purposes of addressing global climate change, including action under CAA section 108. The United States Court of Appeals for the D.C. Circuit is, by statute, the exclusive forum for any challenges to this determination of nationwide applicability. 42 U.S.C. § 7607(b); see also n.6, supra. As a result, EPA's determination of its own authority must be presumed to be valid by this Court in the context of this citizen suit.[18] Therefore, at this

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[18] See, e.g., Train v. NRDC, 421 U.S. 60, 92 (1975) (regulated entity required to follow existing Clean Air Act regulations during pendency of judicial challenge to denial of variance from regulations); US West Communications, Inc. v. Jennings, 304 F.3d 950, 958 & n.2 (9th Cir. 2002) (where courts of appeals have exclusive jurisdiction to review validly-issued FCC regulations, regulations must be presumed valid by district court in related proceeding).

time, the Court clearly lacks the ability to grant the relief sought by Plaintiffs – ordering EPA to list CO_2 as a criteria air pollutant under section 108(a) of the Act, based the alleged relationship of CO_2 emissions to global climate change – since this relief would require the agency to take administrative action that exceeds its authority.

CONCLUSION

For all the foregoing reasons, the Court should dismiss the Complaint for lack of subject matter jurisdiction.

Respectfully submitted,

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Dated: August 28, 2003

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2003, I served copies of the foregoing

Memorandum in Support of Defendant' s Motion to Dismiss for Lack of Subject Matter

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ATTACHMENT A

Memorandum, R. Fabricant to M. Horinko (Aug. 28, 2003)

ATTACHMENT B

Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines (Aug. 28, 2003)