One-Step Forward: The D.C. Circuit Provides Clarity to the Incremental Approach to Rulemaking

Cory Lewis
Boston College Law School, cory.lewis@bc.edu

Recommended Citation
ONE-STEP FORWARD: THE D.C. CIRCUIT PROVIDES CLARITY TO THE INCREMENTAL APPROACH TO RULEMAKING

CORY LEWIS

Abstract: In 2011, EPA issued the Deferral Rule, excusing generators of biogenic b-CO$_2$—emitted from the combustion of biological materials—from Clean Air Act (CAA) regulations for three years. Citing the need to study b-CO$_2$, EPA invoked three legal doctrines to justify the rule: the de minimus, one-step-at-a-time, and administrative necessity doctrines. This Comment addresses Center for Biological Diversity v. Environmental Protection Agency, where the Center for Biological Diversity challenged the Deferral Rule in the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit vacated the rule. Although the court did not decide the issue of statutory authority, it dismissed EPA’s legal justifications as incompetently invoked. Focusing on the one-step-at-a-time doctrine, the decision clarifies that although incremental rulemaking might be justified, it must be in furtherance of congressional intent, which, in this case, was to regulate all CO$_2$—biogenic or otherwise—under the CAA. The D.C. Circuit’s decision is a decisive victory for the environment.

INTRODUCTION

Planet Earth is getting warmer. During the past century, Earth’s average temperature has risen 1.4°F, and at the current pace, the temperature could increase by as much as 11°F during the next century—the results could be catastrophic. National scientific authorities concur that climate change is happening, and that humans are contributing to it. The primary cause of climate change is the emission of greenhouse gases (GHG). Eighty-four percent of the

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2013–2014. The author would like to thank Amal Bala, Brian Reilly, Kevin Gerarde, and fellow staff writer Natalia Cabrera for their continued guidance and support throughout the Comment-writing process.


2 Id.


GHG emitted by the United States is carbon dioxide (CO$_2$). In fact, CO$_2$ is the primary GHG pollutant. Although most CO$_2$ emissions are a result of fossil fuel combustion, biological material combustion and decomposition also emits a significant amount of CO$_2$, referred to by EPA as biogenic carbon dioxide (b-CO$_2$).

EPA is tasked with protecting human health and the environment. One of EPA’s current primary functions is to monitor and regulate the climate-change-causing emissions of GHGs from American industry. To achieve this mission, EPA implements and enforces rules and regulations in response to congressional laws. One such law, the Clean Air Act (CAA), requires EPA to regulate any air pollutant it determines “may reasonably be anticipated to endanger public health or welfare.” Following the Supreme Court decision in *Massachusetts v. Environmental Protection Agency*, EPA recognized CO$_2$ as such an air pollutant.

Unlike fossil fuel emissions, b-CO$_2$ emissions occur both naturally and anthropogenically. Although the effect of CO$_2$ on the atmosphere occurs regardless of its source, the amount of naturally emitted b-CO$_2$—from the decomposition of organic materials—is subsequently sequestered back out of the atmosphere by newly grown plants. On July 20, 2011, “citing its ongoing
efforts to understand the unique characteristics of \([b-\text{CO}_2]\),” EPA issued the Deferral Rule, which exempted \(b-\text{CO}_2\) sources from regulation at Step 2 of the Tailoring Rule for a three-year period.\(^{17}\)

On April 7, 2011, the Center for Biological Diversity (CBD) and several other environmental groups filed a petition to the U.S. Court of Appeals for the D.C. Circuit challenging the Deferral Rule.\(^{18}\) CBD argued that EPA had presented no legitimate or sufficient legal justification that granted it the authority to pass the rule.\(^{19}\) Upon review, the D.C. Circuit in *Center for Biological Diversity v. Environmental Protection Agency* vacated the Deferral Rule.\(^{20}\) In a narrow holding, the court found that each of the three administrative law doctrines that EPA attempted to use as justification for the Deferral Rule was insufficient.\(^{21}\)

This Comment argues that the D.C. Circuit correctly limited its decision to a holding on the legal doctrines that EPA used to justify the Deferral Rule, in the rule’s actual record.\(^{22}\) The court’s careful review of the case law informing the one-step-at-a-time (“one-step”) doctrine—which EPA invoked as its primary justification—in particular, caught a disqualifying error in EPA’s attempted use.\(^{23}\) In so doing, the court recognized and refined a pragmatic regulatory tool that might have beneficial environmental impacts in the future.\(^{24}\) It also limited EPA’s ability to diverge from a statutory directive without justification.\(^{25}\) The court could have further refined the one-step doctrine, however, by requiring EPA to address the potential deviations from congressional intent that might result from an incremental approach.\(^{26}\)

---

\(^{16}\) *Ctr. for Biological Diversity*, 722 F.3d at 406.

\(^{17}\) *See Deferral for \(CO_2\) Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs*, 76 Fed. Reg. 43,490, 43,493 (July 20, 2011) [hereinafter Deferral Rule]; *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) [hereinafter Tailoring Rule]. Step 1 of the Tailoring Rule applies PSD and Title V programs to “anyway sources,” subject to programs because of conventional pollutant emissions; Step 2 applies to sources with the potential to emit specified amount of GHGs. *Ctr. for Biological Diversity*, 722 F.3d at 406.

\(^{18}\) *Final Opening Brief of Petitioners at 1, Ctr. for Biological Diversity*, 722 F.3d 404 (No. 11-1101). The D.C. Circuit has exclusive jurisdiction over petitions for review of EPA's final actions. 42 U.S.C. § 7607(b)(1).

\(^{19}\) *Final Opening Brief of Petitioners, supra* note 18, at 1–2.

\(^{20}\) *Ctr. for Biological Diversity*, 722 F.3d at 412.

\(^{21}\) *Id.* at 409–12.

\(^{22}\) *See infra* notes 116–132 and accompanying text.

\(^{23}\) *See infra* notes 103–113 and accompanying text.

\(^{24}\) *See infra* notes 133–141 and accompanying text.

\(^{25}\) *See infra* notes 133–141 and accompanying text.

\(^{26}\) *See infra* note 129 and accompanying text.
I. FACTS AND PROCEDURAL HISTORY

The Deferral Rule was the most recent regulation of GHGs in “a cascading series of [GHG]-related rules and regulations,” which resulted from the Supreme Court’s holding in *Massachusetts* that EPA was required to regulate GHGs under the CAA. The CAA requires EPA to regulate any air pollutant that it determines “may reasonably be anticipated to endanger public health or welfare.” In response to *Massachusetts*, EPA published an endangerment finding that defined CO₂ as a GHG that causes air pollution. As such, EPA is now required to regulate all CO₂ emitters under the Prevention of Significant Deterioration of Air Quality (PSD) and Title V permitting programs.

On May 7, 2010, the Tailpipe Rule acknowledged that stationary GHG emitters were required to submit to the PSD and Title V permitting programs. On April 2, 2010, the Timing Rule concluded that major stationary GHG emitters came under the purview of those programs as well. Finally, on June 3, 2010, the Tailoring Rule recognized that immediate implementation of the previous two rules would overwhelm the abilities of permitting authorities, and thus staggered the applicability of the PSD and Title V programs over two years. When EPA issued the Tailoring Rule, it declined to take a final position on whether to exempt b-CO₂ emissions. As such, all qualifying CO₂ emitters, including b-CO₂ emitters, were required to obtain PSD and Title V permits.

On July 15, 2010, EPA issued a Call for Information seeking technical and scientific information to evaluate options for treating b-CO₂ sources dif-

---

27 549 U.S. at 529–30.
29 42 U.S.C. § 7521(a)(1) (2006). Once EPA determines that a certain pollutant triggers the requirement, the pollutant must be regulated under the PSD and Title V permitting programs. *See Coal. for Responsible Regulation*, 684 F.3d at 144.
31 *Ctr. for Biological Diversity*, 722 F.3d at 404.
32 *Coal. for Responsible Regulation*, 684 F.3d at 115; *see Tailpipe Rule*, 75 Fed. Reg. at 25,326.
33 42 U.S.C. § 7479(1) (2006). The CAA defines a major emitting facility as any stationary source that emits, or has the potential to emit, certain specified amounts of any air pollutant. *Id.*
34 Timing Rule, 75 Fed. Reg. at 17,007.
35 *See Tailoring Rule*, 75 Fed. Reg. at 31,516; *see also Coal. for Responsible Regulation*, 684 F.3d at 113–14 (rejecting a challenge to the Tailoring Rule on standing grounds).
36 Tailoring Rule, 75 Fed. Reg. at 31,590–91 (despite acknowledging that “biomass or biogenic fuels and feedstocks could play [a role] in reducing anthropogenic GHG emissions”).
37 *See id.* at 31,591.
ferently at Step 2\textsuperscript{38} of the Tailoring Rule.\textsuperscript{39} Then, on March 21, 2011, EPA issued the Proposed Deferral Rule, seeking further comment on whether it should defer regulation of b-CO$_2$ for a three-year period to gain a better understanding of its unique characteristics.\textsuperscript{40} Finally, on July 20, 2011, EPA issued the Deferral Rule, which postponed regulation of b-CO$_2$ sources at Step 2 for three years.\textsuperscript{41}

In the Deferral Rule, EPA amended the regulatory definition of GHG to exclude b-CO$_2$.\textsuperscript{42} It also inserted a sunset provision (SP), which limited the Deferral Rule to three years.\textsuperscript{43} According to the SP, in absence of a prior EPA rule permanently exempting b-CO$_2$ sources from the PSD and Title V programs, all b-CO$_2$ sources would again be required to conform at Step 2.\textsuperscript{44} Despite the SP, the Deferral Rule had potentially permanent effects.\textsuperscript{45} Exempted b-CO$_2$ sources that were constructed during the deferral period would only have to obtain PSD and Title V permits if they undertook modification projects after the period ended in 2014.\textsuperscript{46}

On April 7, 2011, CBD filed a Petition for Review before the D.C. Circuit—which has exclusive jurisdiction over the issue\textsuperscript{47}—challenging the Deferral Rule.\textsuperscript{48} In its final opening brief, filed on July 24, 2012, CBD argued that because EPA regulates CO$_2$ as a GHG, the CAA requires it to regulate b-CO$_2$ under the PSD and Title V programs.\textsuperscript{49} It further contended that because there is no express permission in the CAA for EPA to diverge from that instruction, the Deferral Rule was invoked in excess of statutory authority.\textsuperscript{50} On July 23, 2012, EPA filed a final reply brief that defended the legality of the Deferral

\textsuperscript{38} Id. at 31,516.
\textsuperscript{39} See Call for Information, 75 Fed. Reg. 41,173, 41,174 (July 15, 2010); Tailoring Rule, 75 Fed. Reg. at 31,516 (applying PSD and Title V permitting programs to sources with the potential to emit specified amounts of GHGs).
\textsuperscript{40} Proposed Deferral Rule, 76 Fed. Reg. at 15,251, 15,259 (mentioning that the amount of CO$_2$ released from biogenic sources is sequestered by new plants, which results in no addition of CO$_2$, as opposed to CO$_2$ released anthropogenically, which is reabsorbed over millennia and leads to a long carbon “debt” period).
\textsuperscript{42} Deferral Rule, 76 Fed. Reg. at 43,493; see Ctr. for Biological Diversity, 722 F.3d at 407. The Endangerment Finding brings CO$_2$ under the guise of the CAA-covered GHGs, without differentiating CO$_2$ based on its source. 74 Fed. Reg. at 66,499.
\textsuperscript{43} Deferral Rule, 76 Fed. Reg. at 43,499; Ctr. for Biological Diversity, 722 F.3d at 407.
\textsuperscript{44} See Deferral Rule, 76 Fed. Reg. at 43,499; Ctr. for Biological Diversity, 722 F.3d at 407.
\textsuperscript{45} See Deferral Rule, 76 Fed. Reg. at 43,499; Ctr. for Biological Diversity, 722 F.3d at 407.
\textsuperscript{46} See Deferral Rule, 76 Fed. Reg. at 43,499; Ctr. for Biological Diversity, 722 F.3d at 407.
\textsuperscript{48} Final Opening Brief of Petitioners, supra note 18, at 1.
\textsuperscript{49} Id. at 18; see Endangerment Finding, 74 Fed. Reg. at 66,499.
\textsuperscript{50} Final Opening Brief of Petitioners, supra note 18, at 58.
Rule. EPA countered that it was justified in treating b-CO$_2$ differently because of its unique, unforeseen characteristics. EPA also reiterated the three administrative law doctrines it invoked in the Deferral Rule: the *de minimus* doctrine, the one-step-at-a-time (“one-step”) doctrine, and the administrative necessity doctrine. It then invoked a fourth doctrine—the absurd results doctrine—in its brief. EPA relied most heavily on the one-step doctrine, which grants administrative agencies the ability to incrementally implement a congressional order.

In *Center for Biological Diversity v. Environmental Protection Agency*, the D.C. Circuit vacated the Deferral Rule. Before considering the merits, the court determined that because there was a “purely legal and sufficiently final” issue fit for judicial decision, and that withholding a decision would cause the parties to suffer hardship, the case was ripe for review. On the merits, the court rejected the new rationale that EPA discussed in its brief. Citing the Supreme Court decision in *SEC v. Chenery Corp.*, the D.C. Circuit held that the Deferral Rule must be adjudicated on the basis of the substantive legal doctrines articulated by EPA as justifications for the rule, in the rule’s official rec-

---

51 Final Brief of Respondents at 22–23, *Ctr. for Biological Diversity*, 722 F.3d 404 (No. 11-1336).
52 See id. at 40.
53 Id. at 35. The *de minimus* doctrine enables agencies to grant regulatory exemptions when the regulation creates a significant burden on the regulated, or the agency itself, but has limited or miniscule benefit. See *Alabama Power Co. v. Costle*, 636 F.2d 323, 360–61 (D.C. Cir. 1979). In EPA’s brief, the agency conceded that the *de minimus* doctrine could be used only for permanent exemptions and was thus inapplicable to the temporary Deferral Rule. Final Brief of Respondents, *supra* note 51, at 35.
54 Final Brief of Respondents, *supra* note 51, at 22–23. The administrative necessity doctrine permits an agency to diverge from a congressional order when the agency is able to show that attainment of the congressional objective would otherwise be impossible. See *Sierra Club v. Envtl. Prot. Agency*, 719 F.2d 436, 463 (D.C. Cir. 1983).
55 *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). The absurd results doctrine enables agencies to construe a statute in a way that would not produce an absurd result. *Id.* EPA argued that because b-CO$_2$ emissions may not only pose no danger to public health and welfare, but potentially benefit the public as a carbon sink, it would be contrary to a goal of the CAA, namely combating climate change, and thus absurd to adopt a rule that could counteract a net positive environmental effect. See Final Brief of Respondents, *supra* note 51, at 59.
57 See id. at 36–40.
58 722 F.3d at 412.
59 Id. at 408.
60 Id. (finding the general lack of knowledge of how many b-CO$_2$ sources were constructed at the time of the decision, and an inability to predict how many more might be constructed by end of the deferral period, as sufficient to conclude that the potential for excessive CO$_2$ emissions presented a possible hardship).
61 Id. (citing *In re Aiken County*, 645 F.3d 428, 434 (D.C. Cir. 2011) to explain the prudential ripeness doctrine).
62 Id. at 409.
63 318 U.S. 80, 87 (1943).
ord. The D.C. Circuit also rejected EPA’s invocation of the absurd results doctrine as post hoc.

The D.C. Circuit held that EPA failed to properly use each of the doctrines it invoked. It first agreed with EPA’s own admission that the de minimus doctrine was inapplicable because it may only be used to justify permanent exemptions. It next found that EPA’s use of the one-step doctrine was arbitrary and capricious, as EPA articulated neither the stated goal of the CAA in regulating CO₂, nor how a temporary exemption of b-CO₂ sources was a step toward that goal. Finally, the court held that EPA’s use of the administrative necessity doctrine was arbitrary and capricious because EPA failed to adopt “the narrowest feasible exemption.”

Finding no legal justification, the D.C. Circuit vacated the Deferral Rule. The court, however, intentionally withheld a decision on the question of “whether the agency has authority under the [CAA] to permanently exempt [b-CO₂] sources from the PSD permitting program.” That query remains purposefully unanswered. Further, the court withheld a decision on whether EPA

---

64 Ctr. for Biological Diversity, 722 F.3d at 409.
65 See id. at 411–12 (citing Ne. Md. Waste Disposal Auth. v. Envtl. Prot. Agency, 358 F.3d 936, 949 (D.C. Cir. 2004)); see also Mova Pharmaceuticals Corp., 140 F.3d at 1068 (finding that EPA may not invoke the absurd results doctrine when EPA does not square its use of the doctrine with congressional intent). The decision in Northeast Maryland Waste Disposal imposes a fundamental obligation on EPA to set forth reasons for its actions. 358 F.3d at 949. The D.C. Circuit cited to Northeast Maryland Waste Disposal in the present case to demonstrate that EPA’s reliance on the absurd results doctrine justification that it used for the Tailoring Rule—which was legitimate, but in furtherance of a different objective than the Deferral Rule—to then justify the Deferral Rule, leads to a failure of EPA’s obligation to set forth reasons for its actions. See Ctr. for Biological Diversity, 722 F.3d at 409; Ne. Md. Waste Disposal, 358 F.3d at 949.
66 See Ctr. for Biological Diversity, 722 F.3d at 409–12.
67 See id. at 409 (due to the sunset provision, the Deferral Rule was not a permanent exemption).
68 Id. at 409–10.
69 See Ctr. for Biological Diversity, 722 F.3d at 410–11; Sierra Club, 719 F.2d at 463. Reliance on the administrative necessity doctrine requires an agency to adopt the narrowest feasible exemption, and the court found here that EPA had arbitrarily and capriciously rejected a proposed middle-ground option represented in the Deferral Rule. See Deferral Rule, 76 Fed. Reg. at 43,496 (proposing that EPA require b-CO₂ sources to obtain PSD and Title V permits, but only if the emitter neglected to self-regulate and thus failed to make an effort to account for the net carbon cycle impact that it was having). EPA’s obligation, according to the court, was not necessarily to adopt the middle-ground option, but to at least provide an explanation for why it rejected an option that would have reduced emissions from b-CO₂ sources, where the Deferral Rule would have permanently exempted them. See Ctr. for Biological Diversity, 722 F.3d at 411 (citing Sierra Club, 719 F.2d at 464, which imposed a duty to explore such alternatives).
70 See Ctr. for Biological Diversity, 722 F.3d at 412.
71 Id. Instead of addressing that question, the court held merely that if, hypothetically, EPA were allowed to implement incrementally, it still would have failed. Id.
72 See id. (building on the same notion from note 71—that EPA failed to use the one-step doctrine properly—but making no decision on the sufficiency of the doctrine’s use if it were invoked competently).
would be justified in deferring regulation pursuant to any of the doctrines it invoked, had it invoked any of them properly.73

II. LEGAL BACKGROUND

The one-step-at-a-time (“one-step”) doctrine authorizes administrative agencies to incrementally promulgate regulations and rules based on congressional orders.74 In 1984, in National Association of Broadcasters v. FCC—the first case to identify the doctrine—the U.S. Court of Appeals for the D.C. Circuit held that there is no precise circumstance under which an agency may defer the implementation of a congressional order, but provided two requirements to guide subsequent adjudications of the one-step doctrine.75

First, an agency must make “some estimation, based upon evolving economic and technological conditions, as to the nature and magnitude of the problem it will have to confront when it comes to resolve the postponed issue.”76 The estimation must be “plausible and flow from the factual record compiled,” and if so, a reviewing court will defer to the agency’s judgment.77 Second, the court must consider whether it was reasonable in light of the congressional goal for the agency to have deferred implementation of its regulation.78 Within that consideration, the court instructed that a “background of rapid technical and social change,” and the practical reversibility of the agency’s decision—should it prove to be wrong—most easily justify a deferral.79 Conversely, the court held that a deferral is least justifiable if there is an apparent potential for error in the agency’s predictive judgment, for it to cause “catastrophic effects on the public welfare,” or when it would likely render efforts to attain the congressional goal to be “systematically defective.”80

In the D.C. Circuit’s 1989 decision in City of Las Vegas v. Lujan, the court further articulated the one-step doctrine established in National Association of Broadcasters in its consideration of a decision made by the Secretary of the

73 See id.; Nat’l Ass’n of Broadcasters v. FCC, 740 F.2d 1190, 1210 (D.C. Cir. 1984) (finding that the circumstances under which an administrative agency may defer regulation are incapable of being captured in a single doctrine).
75 Nat’l Ass’n of Broadcasters, 740 F.2d at 1210.
76 Id.
77 Id.
78 Id. at 1211.
79 Id.
80 Id.; see also Natural Res. Def. Council, Inc. v. U.S. Nuclear Reg. Comm’n, 547 F.2d 633, 658 (D.C. Cir. 1976) (holding that EPA is forbidden from making “reckless decisions to mortgage the future for the present . . .”).
Interior regarding the Endangered Species Act (ESA). The court held that agencies “have great discretion to treat a problem partially,” and that as long as each incremental step is a step toward achieving a solution to the problem identified by Congress, it would not strike down the ruling. Further, the court held that whether or not an agency should have deferred action is not at issue. Rather, the only necessary inquiry is whether the agency was cognizant of the desired outcome, and was, in its judgment, attempting to achieve that outcome. Thus, the court held that an agency will be justified in addressing a problem incrementally as long as it complies with the National Association of Broadcasters test, articulates what it believes to be statutorily required, and then articulates how it intends to achieve that goal incrementally. Absent such articulations, the court held that there would be no basis for determining whether the agency’s action was a step in the congressionally ordered direction.

In the D.C. Circuit’s 1998 decision in Grand Canyon Air Tour Coalition v. FAA, the court placed further emphasis on the articulation of the statutory goal requirement set forth in Lujan, while considering whether the Federal Aviation Administration (FAA) was justified in using a three-step plan to restore the natural quiet in the Grand Canyon. The court emphasized that when an agency invokes the one-step doctrine, it must articulate the statutory goal it is tasked with achieving, and then demonstrate how an incremental approach would achieve that goal. If the agency sufficiently demonstrates that a deferral is still in line with Congress’s stated goal, and further, has proven that the decision to take an incremental approach was reasonable, the court “will take the government at its word.” The court also articulated that it would be arbitrary and capricious to use the one-step doctrine to ignore a congressional goal without any explanation, or to reject a congressional goal without citing any authority to do so.

See 891 F.2d at 935 (finding that the listing of the Mojave Desert Tortoise, but not the Arizona Sonoran Tortoise, as an endangered species under the ESA to be an acceptable use of the one-step doctrine).

Id.

Id.

See id.

See id.

See id.

See id.

See 154 F.3d 455, 478 (D.C. Cir. 1998); Lujan, 891 F.2d at 935. The petitioners sued because aircraft noise from sightseeing tours disrupted the natural quiet of the Grand Canyon. Grand Canyon Air Tour Coal., 154 F.3d at 478.

See Grand Canyon Air Tour Coal., 154 F.3d at 478; Lujan, 891 F.2d at 935.

Grand Canyon Air Tour Coal., 154 F.3d at 478; see Lujan, 891 F.2d at 935 (holding that agencies must demonstrate sufficient reasonableness in deciding to use an incremental approach).

See Grand Canyon Air Tour Coal., 154 F.3d at 477.
Most recently, the 2007 Supreme Court decision in *Massachusetts v. Environmental Protection Agency*, while not directly addressing the one-step doctrine, articulated a broad principle that has direct bearing on the doctrine’s use. The Court held that agencies have broad discretion to choose how to best distribute and use their limited resources and personnel to carry out their delegated responsibilities. It did not, however, make any suggestion that agencies could fundamentally diverge from congressional orders.

### III. Analysis

In *Center for Biological Diversity v. Environmental Protection Agency*, the U.S. Court of Appeals for the D.C. Circuit vacated EPA’s Deferral Rule. The court held that the Deferral Rule could not be justified by any of the administrative law doctrines EPA invoked and focused its analysis most heavily on EPA’s arbitrary and capricious use of the one-step-at-a-time (“one-step”) doctrine. The court found first that EPA had failed to identify what it believed that compliance with the Clean Air Act (CAA)-mandated regulation of biogenic carbon dioxide (b-CO₂) meant, and further, that EPA failed to proffer an interpretation of the CAA that would have enabled it to treat a b-CO₂ source differently from any other carbon dioxide (CO₂) source. It thus rejected EPA’s invocation of the one-step doctrine as insufficient, though it withheld a decision on whether EPA had the statutory authority to invoke the doctrine to diverge from the CAA.

The court held that EPA failed to comply with the most basic procedural requirements of the one-step doctrine. It found that EPA failed to offer any interpretation of the CAA that would allow the agency to defer regulation of b-CO₂ as a kind of greenhouse gas (GHG) different from anthropogenic CO₂.

---

92 *Id.*
93 *See id.*
94 722 F.3d 404, 412 (D.C. Cir. 2013); *see Deferral Rule, 76 Fed. Reg. 43,490, 43,492 (July 20, 2011).*
95 *See Ctr. for Biological Diversity, 722 F.3d at 409–12 (citing Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 478 (D.C. Cir. 1998)), which set a standard for whether an agency’s use of the one-step doctrine is arbitrary and capricious).*
96 *Id.* at 409–10; *see Deferral Rule, 76 Fed. Reg. at 43,497–99.*
97 *Ctr. for Biological Diversity, 722 F.3d at 409.*
98 *Id.* at 410 (citing *Grand Canyon Air Tour Coal.*, 154 F.3d at 477; City of Las Vegas v. Lujan, 891 F.2d 927, 935 (D.C. Cir. 1989); Nat’l Ass’n of Broadcasters v. FCC, 740 F.2d 1190, 1210 (D.C. Cir. 1984)). As *Lujan* established, EPA was required at a minimum to articulate what it believed the CAA required regarding b-CO₂ emissions regulations, and how it believed the Deferral Rule would operate in furtherance of that goal. 891 F.2d at 935; *see also Nat’l Ass’n of Broadcasters, 740 F.2d at 1210 (holding there is no precise test for invoking the one-step doctrine).*
99 *Ctr. for Biological Diversity, 722 F.3d at 410 (finding no explanation for why scientific uncertainty grants statutory authority to diverge from an order to regulate all CO₂).*
The court even offered a hypothetical to demonstrate the difference between what EPA did, and what was required.\textsuperscript{100} As such, the court held, “we simply have no idea what EPA believes constitutes ‘full compliance’ with the statute . . . the Deferral Rule is one step towards . . . what?”\textsuperscript{101}

The D.C. Circuit had only reviewed the one-step doctrine three times prior to \textit{Center for Biological Diversity}.\textsuperscript{102} Since first recognizing an agency’s ability to incrementally implement a congressional order despite the lack of necessity to do so,\textsuperscript{103} the D.C. Circuit has maintained that the one-step is a pragmatic doctrine.\textsuperscript{104} It was conceived of primarily to enable agencies to maintain flexibility in the face of economic and technological evolutions, which would have made literal implementation of a congressional order less robust, though not impossible.\textsuperscript{105} While the court has generally offered expansive deference to agencies using the one-step doctrine,\textsuperscript{106} it drew a hard line in \textit{Grand Canyon Air Tour Coalition}—prohibiting agencies from ignoring congressional intent without explanation or justification.\textsuperscript{107}

In each prior case, the D.C. Circuit held that regardless of whether it agreed with the particular agency, the agency had properly articulated its statutory orders, and sufficiently demonstrated why the approach was still a step toward achieving the goal.\textsuperscript{108} By contrast, the court in \textit{Center for Biological Diversity} held that EPA not only made no mention of the congressional purpose of the CAA, but also attempted to use an explanation of the scientific un-

\begin{flushright}
\textsuperscript{100} \textit{Id.} (finding that if the Deferral Rule interpreted the CAA as requiring permits only for b-CO\textsubscript{2} sources with an adverse impact on the carbon cycle, EPA would have articulated a reason for why it did not have to regulate all b-CO\textsubscript{2} sources, but that EPA did no such thing).
\end{flushright}

\begin{flushright}
\textsuperscript{101} \textit{Id.}
\end{flushright}

\begin{flushright}
\textsuperscript{102} See \textit{Grand Canyon Air Tour Coal.}, 154 F.3d at 477; \textit{Lujan}, 891 F.2d at 935; \textit{Nat’l Ass’n of Broadcasters}, 740 F.2d at 1210.
\end{flushright}

\begin{flushright}
\textsuperscript{103} See \textit{Sierra Club}, 719 F.2d at 463 (finding that when an incremental approach is necessary, agencies can invoke the administrative necessity doctrine). Thus, if there is a necessity, agencies would not have to rely on the one-step doctrine to regulate incrementally. See \textit{id}.
\end{flushright}

\begin{flushright}
\textsuperscript{104} See \textit{Ctr. for Biological Diversity}, 722 F.3d at 410; \textit{Nat’l Ass’n of Broadcasters}, 740 F.2d at 1210; see \textit{Grand Canyon Air Tour Coal.}, 154 F.3d at 477; \textit{Lujan}, 891 F.2d at 935.
\end{flushright}

\begin{flushright}
\textsuperscript{105} See \textit{Nat’l Ass’n of Broadcasters}, 740 F.2d at 1210 (holding that the administrative necessity doctrine is applicable only where it would be impossible to achieve the congressional goal without incremental implementation).
\end{flushright}

\begin{flushright}
\textsuperscript{106} See \textit{Ctr. for Biological Diversity}, 722 F.3d at 410; \textit{Grand Canyon Air Tour Coal.}, 154 F.3d at 478; \textit{Lujan}, 891 F.2d at 935; \textit{Nat’l Ass’n of Broadcasters}, 740 F.2d at 1210.
\end{flushright}

\begin{flushright}
\textsuperscript{107} See 154 F.3d at 477.
\end{flushright}

\begin{flushright}
\textsuperscript{108} See \textit{Grand Canyon Air Tour Coal.}, 154 F.3d at 477 (finding that the FAA recognized the congressional goal and articulated a sufficient incremental plan to achieve it); \textit{Lujan}, 891 F.2d at 935 (finding that the Secretary of the Interior articulated a statutory order of Endangered Species Act and acted sufficiently in furtherance of that goal); \textit{Nat’l Ass’n of Broadcasters}, 740 F.2d at 1211 (finding that the FCC properly articulated the congressional goal and acted reasonably in postponing regulation against an evolving technological background).
\end{flushright}
certainties of b-CO$_2$ to disguise its inability to explain how the Deferral Rule could be a step toward its unstated goal.

The finding that EPA’s use of the one-step doctrine was arbitrary and capricious is a victory for the environment. By vacating the Deferral Rule, the D.C. Circuit achieved two critical results. First, by coalescing the various components of the one-step doctrine into a clear rule, and by naming it, the court acknowledged it as a valuable, practical, and pragmatic tool, which EPA can now use to protect the environment. Henceforth, EPA need not rely solely on administrative necessity to justify piecemeal implementation of congressional orders. Second, the court defined what the one-step doctrine is not—namely a lame-duck regulatory grant for agencies to defy congressional orders. Had it gotten bogged down in the Deferral Rule’s detailed explanation of the uncertainty surrounding b-CO$_2$, the court might have missed the fundamental flaw in EPA’s invocation of the one-step doctrine. It thus avoided granting EPA the power to defy Congress.

The D.C. Circuit’s articulation of the one-step doctrine is an important step toward clarifying a previously amorphous and uncertain regulatory tool. The court could, however, have made the requirements more robust, in order to ensure the doctrine’s proper use. This Comment proposes that agencies should be required to comply with the following test: (1) state what the statute requires and what Congress intended by requiring it; (2) justify both the rationale and logic behind a decision to diverge from the requirement; (3) explain how each potential incremental step still works to achieve Congress’s intended result; and finally, this Comment suggests a new requirement—to address all ways in which an incremental approach could undermine con-

---

109 See Ctr. for Biological Diversity, 722 F.3d at 410.
110 See id. at 409–10.
111 See id. at 409–12.
112 See id. at 410; Grand Canyon Air Tour Coal., 154 F.3d at 477; Lujan, 891 F.2d at 935; Nat’l Ass’n of Broadcasters, 740 F.2d at 1210.
113 See Ctr. for Biological Diversity, 722 F.3d at 410; Sierra Club, 719 F.2d at 463–64.
114 See Ctr. for Biological Diversity, 722 F.3d at 410. Had the court allowed EPA’s attempted use, agencies in the future could cite to the present case as an inferential grant of allowance to divert from congressional orders without articulating why. See id.
115 See id.
116 See id.
117 See id. at 410–12; Grand Canyon Air Tour Coal., 154 F.3d at 477; Lujan, 891 F.2d at 935; Nat’l Ass’n of Broadcasters, 740 F.2d at 1210.
118 See Ctr. for Biological Diversity, 722 F.3d at 410.
119 See id. The first three prongs of the test are based on articulated requirements of three previous cases, whereas the fourth prong is based on a coalescing effect of the present case. See id.
120 See Nat’l Ass’n of Broadcasters, 740 F.2d at 1211 (this requirement already exists).
121 See Lujan, 891 F.2d at 935 (this requirement is a more demanding take on Lujan).
122 See Grand Canyon Air Tour Coal., 154 F.3d at 477.
gressional intent, and how to avoid such a result. The D.C. Circuit should consider adding the fourth prong in a future case, to ensure the exclusively progressive capacity of the one-step doctrine.

The one-step doctrine is a “pragmatic one.” It is sensible that agencies should be able to interpret congressional intent in light of the real-world situations and influences related to that intent. Further, agencies should not be limited to implementing statutory orders incrementally only where failing to do so would render the goal impossible. Thus, the one-step doctrine now enables agencies to achieve congressional goals in the most efficient and viable ways possible. As the doctrine did for the FAA, the Secretary of the Interior, and the FCC in their respective mediums, the one-step doctrine should enable EPA to achieve robust environmental benefits. But as the court has now clearly stated, the one-step doctrine is a tool meant to further congressional intent—not circumvent it. To prevent the potential for abuse, the Court presciently placed bright-line restrictions on its application. Where before, agencies could rely on the lack of clarity regarding the one-step doctrine to sidestep a congressional order, now even the substantial grant of deference to agency judgment will not permit disguised rulemakings meant to circumvent statutory orders.

---

123 See Ctr. for Biological Diversity, 722 F.3d at 409–12; Grand Canyon Air Tour Coal., 154 F.3d at 477; Lujan, 891 F.2d at 935; Nat’l Ass’n of Broadcasters, 740 F.2d at 1210. The first three steps of the suggested test, taken from the case law, are reactionary articulations of the doctrine based on uses by the FAA, Secretary of the Interior, and FCC. Grand Canyon Air Tour Coal., 154 F.3d at 477; Lujan, 891 F.2d at 935; Nat’l Ass’n of Broadcasters, 740 F.2d at 1210. The fourth step is a reaction to what EPA attempted to do in the present case and is based on the court’s response upon discovering EPA’s mistaken usage. See Ctr. for Biological Diversity, 722 F.3d at 410, 412.

124 See Ctr. for Biological Diversity, 722 F.3d at 410, 412. The court struck down EPA’s use of the one-step doctrine and articulated the doctrine more clearly with a goal of making it more useful to achieve congressional intent, without allowing it to be useful for ignoring congressional intent. Id.

125 Id. at 410; Nat’l Ass’n of Broadcasters, 740 F.2d at 1210.

126 See Ctr. for Biological Diversity, 722 F.3d at 410; Nat’l Ass’n of Broadcasters, 740 F.2d at 1210.

127 See Ctr. for Biological Diversity, 722 F.3d at 410; Nat’l Ass’n of Broadcasters, 740 F.2d at 1210. But see Sierra Club, 719 F.2d at 463–64 (holding that agencies are limited to implementing statutory orders incrementally only where a failure to do so would render the goal impossible).

128 See Ctr. for Biological Diversity, 722 F.3d at 410. The court limited use of the one-step doctrine to circumstances where an agency is not expressly or implicitly prohibited from diverging from a statutory order, which will be judged on a case-by-case basis. Id.

129 See id.; Grand Canyon Air Tour Coal., 154 F.3d at 477; Lujan, 891 F.2d at 935; Nat’l Ass’n of Broadcasters, 740 F.2d at 1210.

130 Ctr. for Biological Diversity, 722 F.3d at 410; see Grand Canyon Air Tour Coal., 154 F.3d at 477.

131 Ctr. for Biological Diversity, 722 F.3d at 410; see Grand Canyon Air Tour Coal., 154 F.3d at 477.

132 See Ctr. for Biological Diversity, 722 F.3d at 410; Lujan, 891 F.2d at 935.
CONCLUSION

In Center for Biological Diversity v. Environmental Protection Agency, the U.S. Court of Appeals for the D.C. Circuit acknowledged the one-step-at-a-time doctrine as a legitimate environmental protection tool for EPA to use. By clarifying an agency’s ability to regulate incrementally, the court identified the circumstances under which the doctrine is appropriately invoked, but also clarified that it is not a method for circumventing congressional intent. This holding provides important judicial guidance regarding the application of a potentially useful environmental doctrine. The court’s decision is a victory for the environment. No longer will EPA, or any other agency, be able to obfuscate its primary reasons for incremental action in an attempt to avoid a congressional order that it does not agree with, does not wish to implement, or that it is being pressured to deflect.