



## REGULATION OF GHGs AS TOXIC SUBSTANCES? THAT'S NOT HOW TSCA WORKS.

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On June 16, 2022, Climate Science, Awareness and Solutions and Climate Protection and Restoration Initiative petitioned EPA to determine under the Toxic Substances Control Act (TSCA) “that the continuing manufacture, ... use and disposal of” “greenhouse gas (GHG) emissions, fossil fuels, and fossil fuel emissions” present an unreasonable risk of injury to health and the environment. The petitioners state that their requested determination will force EPA to undertake rulemaking under TSCA to phase out the production and atmospheric disposal of GHG emissions and to require “responsible parties” to remove and sequester GHGs or pay into a carbon abatement fund. There are procedural defects in the petition that we briefly discuss below, but we focus primarily on how the petition attempts to use TSCA in a manner that Congress never intended—to regulate GHG emissions from mobile and stationary sources, which is most properly done under the Clean Air Act (CAA).

Regarding the petition’s procedural defects, petitions under TSCA can only request rulemaking, such as a rule regulating the manufacture of a substance. 15 U.S.C. § 2620(a). The petition at issue does not request a rule. It is not a petition to ban fossil fuels and GHGs; it only requests a determination that these substances cause unreasonable risks. This determination is not a rule but, rather, a scientific finding. The petitioners note that their requested determination “will require EPA to initiate a rulemaking process, but” they also acknowledge that they are not specifying any rule. The petitioners cannot request a risk determination separate from specific rulemaking.

Even if persons could petition EPA for a risk determination, the petitioners’ requested determination is unclear. The petition seeks a determination that “the full gamut [of] fossil fuels and their associated emissions (including GHG emissions), as well as other GHG sources” cause unreasonable risks. The petitioners do not identify the specific substances that allegedly pose risks. Under TSCA, EPA must “determine whether **a chemical substance** presents an unreasonable risk of injury,” and the Agency cannot analyze an undefined category of substances.

If EPA were to find unreasonable risks, the petitioners believe that EPA must phase out the manufacture of fossil fuels and GHGs and atmospheric releases of GHGs. They also believe that EPA must, by rule, compel “responsible parties” to either remove previously emitted GHGs from the air or else pay “into an Atmospheric Carbon Abatement Fund.” TSCA was not intended to address GHG emissions, which are most appropriately addressed by the CAA. Moreover, TSCA is not suited for addressing previously released GHGs.

### **Congress Intended for TSCA to Address Commercial Distribution of Chemical Substances, not Incidentally Created Byproducts that are not Used for Commercial Purposes**

TSCA was not designed to regulate GHGs produced incidentally as a byproduct of fossil fuel use (combustion, to convert chemical energy into mechanical energy). TSCA was and is intended primarily to regulate the manufacture, processing, and distribution of chemical substances for **commercial purposes**,

and these activities usually exclude the incidental creation and disposal of byproducts like GHGs that have no separate commercial purpose. TSCA's primary restrictions apply to persons who "manufacture or process" chemical substances. *See, e.g.*, 15 U.S.C. § 2604(a). However, Congress defined "manufacture" and "process" to "mean manufacturing or processing for commercial purposes." 15 U.S.C. §§ 2604(i)(1), 2607(f). As a result, byproducts that "are not used for commercial purposes" or are only "dispose[d] of ... as a waste" are typically exempt from TSCA requirements. *See, e.g.*, 40 C.F.R. § 720.30(g)(2), (h)(2). Congress designed TSCA to focus on commercial chemical substances, not waste byproducts.

If EPA were to agree with the petitioners and ban GHGs under TSCA, it would present a major shift in TSCA's scope and would face significant hurdles in court. Consistent with the "major questions" doctrine, such a shift would require EPA to "point to 'clear congressional authorization' for the power it claims," not "merely [a] plausible textual basis." *West Virginia v. EPA*, No. 20-1530, slip op. at 19 (S. Ct. June 30, 2022). In *West Virginia v. EPA*, the U.S. Supreme Court concluded that EPA's Clean Power Plan presented a "major question" and was beyond the Agency's authority because "EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority,'" and "the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." Slip op. at 20. Were EPA to now view TSCA so expansively as to ban GHGs emitted from fossil fuel combustion (a regulatory approach that Congress itself has declined to enact), it would equate to a "transformative expansion" of TSCA. This expansion would be a "highly consequential power beyond what Congress could reasonably be understood to have granted" EPA under TSCA. *Id.*

To argue that GHG regulation under TSCA would not be an expansion of the statute, the petitioners point to EPA's regulation of CFCs in aerosol products, to curb ozone depletion. This example is unavailing—the CFCs were purposefully included in the aerosol products, as distributed in commerce. The CFCs were not byproducts generated by consumers' end-use of products, as with GHGs. TSCA was conceived and is used to regulate substances in commerce, not waste byproducts, and the expansion of TSCA to GHGs would be inappropriate.

### **GHGs are Most Appropriately Regulated under the CAA**

The petitioners seek to shoehorn GHG regulation into TSCA despite the existence of a much more appropriate statute—the CAA. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S. Supreme Court held that the CAA "authorizes EPA to regulate greenhouse gas emissions," and *West Virginia v. EPA* affirmed and did not remove EPA's authority. The petitioners admit that GHGs should be regulated under the CAA; they urge EPA to grant earlier petitions to regulate GHG emissions under the CAA. The CAA is the most appropriate and obvious pathway for EPA to regulate GHGs.

Section 9 of TSCA specifically addresses situations in which another EPA-administered Federal law is better suited to address specific concerns. TSCA states that if risks from a chemical substance "could be eliminated or reduced to a sufficient extent by" EPA action under another Federal law, then EPA "shall use" its authority under the other law to address the risks. 15 U.S.C. § 2608(b)(1). Risks associated with GHGs could be regulated under the CAA, and section 9 of TSCA suggests that TSCA regulation of the same risk is improper.

The petitioners' example of previous TSCA regulation of CFCs shows that regulation of substances affecting the atmosphere should be regulated under the CAA, not TSCA. EPA proposed the regulation of CFCs under TSCA *before* Congress had adopted the 1977 CAA Amendments. When Congress finally adopted the CAA Amendments, it explicitly stated that the CAA did not affect EPA's ability to adopt rules "under the Toxic Substances Control Act," "notwithstanding section 9(b) of" TSCA, *so long as the rule was proposed before enactment of the CAA Amendments and related to "ozone in the stratosphere."* This narrow exemption from section 9 of TSCA would not have applied to GHGs and is no longer available. Thus, unlike in the case of TSCA regulation of CFCs, EPA cannot regulate GHGs under TSCA if the Agency can sufficiently limit harm by implementing regulations under the CAA. Therefore, EPA should use its authority under the CAA, not TSCA.

## TSCA Cannot Address Existing GHGs

EPA cannot use TSCA to compel emitters to remove from the atmosphere previously emitted GHGs, or to “pay into an Atmospheric Carbon Abatement Fund.” As EPA explained in 2015, in response to a similar TSCA petition, EPA has limited authority under section 6(a)(7)(C) of TSCA “to address past harms,” but that authority “is intended to address chemical substances and mixtures that move in the stream of commerce, not air pollution that is a byproduct of industrial and other activity on a global scale.” Section 6(a)(7)(C) permits EPA to require manufacturers “to repurchase or replace chemical substances,” but “the authority to require replacement or repurchase of a chemical substance” from “distinct person or persons” “does not include the authority to require extraction from the environment of widely dispersed chemicals.”

The petitioners point to section 6(a)(7)(A) of TSCA, which allows EPA to require manufacturers “to give notice of” unreasonable risks “to distributors in commerce” and to other persons possessing “or exposed to such substance.” It does not authorize EPA to impose any take-back obligation. Similarly, EPA’s authority to prohibit methods of disposal of a substance does not relate to cleanup of previously emitted substances. 15 U.S.C. § 2605(a)(6)(A).

To the extent that the petitioners propose a fund into which responsible parties must pay, the creation of any such fund would be beyond EPA’s present power and authority under TSCA. TSCA specifies that EPA may only collect fees “sufficient and not more than reasonably necessary to defray the cost” of administering test rules, reviewing new use notices, and conducting risk evaluations, as well as the cost of data and document management. 15 U.S.C. § 2625(b)(1). EPA cannot charge a fee for collecting previously emitted substances. Moreover, Congress only authorized EPA to implement one fund under TSCA, namely, the TSCA Service Fee Fund, which can only pay for the above-described tasks. 15 U.S.C. § 2625(b)(3). In sum, EPA cannot presently create a GHG removal fund under TSCA.

In sum, regardless of whether EPA should act on GHGs or what action EPA should take, TSCA is not the right statute to use, among the Federal laws that EPA administers. The petitioners’ attempt to shoehorn climate action into TSCA does not match the intended purposes of the law.