ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1413

NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al*.,

Respondents.

Petition for Review of Final Action of the
United States Environmental Protection Agency

FINAL OPENING BRIEF OF ENVIRONMENTAL PETITIONERS

John Walke
Natural Resources Defense Council
1152 15th St., NW
Suite 300
Washington, DC 20005
(202) 289-6868

Counsel for Natural Resources Defense Council

Sanjay Narayan
Sierra Club Environmental Law Program
Suite 1300
2101 Webster St.
Oakland, CA 94612
(415) 977-5769

Counsel for Sierra Club

Dated: November 14, 2017

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, *Respondents*.	Case No. 16-1413

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to the Order of December 6, 2016, Natural Resources Defense Council and Sierra Club (collectively, "Environmental Petitioners") submit this certificate as to parties, rulings, and related cases.

(A) Parties and *Amici*

(i) Parties, Intervenors, and *Amici* Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioners:

Natural Resources Defense Council and Sierra Club

Respondent:

United States Environmental Protection Agency. Also named as a respondent is Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency.

Intervenors:

The American Petroleum Institute was granted leave to intervene in this case on January 18, 2017.

(iii) *Amici* in This Case

On August 24, 2017, the National Cattlemen's Beef Association, Public Lands Council, Kansas Livestock Association, and Oklahoma Cattlemen's Association notified the Court of their intent to file a brief as amici curiae in support of Respondents.

(iv) Circuit Rule 26.1 Disclosures

See disclosure form filed separately on January 5, 2017.

(B) Rulings Under Review

Petitioners seek review of the final action taken by EPA at 81 Fed. Reg. 68,216 (Oct. 3, 2016) and entitled "Treatment of Data Influenced by Exceptional Events."

(C) Related Cases

Environmental Petitioners are not aware of any related cases.

DATED: November 14, 2017 Respectfully submitted,

/s/ John D. Walke
John D. Walke (DC #: 450508)
Attorney of Record
Natural Resources Defense Council
1152 15th Street, NW Suite 300
Washington, D.C. 20005 (202) 289-6868
jwalke@nrdc.org
Counsel for Petitioner
Natural Resources Defense Council

/wp/ Sanjay Narayan
Sanjay Narayan
Sierra Club Environmental Law Program
2101 Webster St.
Suite 1300
Oakland, CA 94612
(415) 977-5769
sanjay.narayan@sierraclub.org
Counsel for Sierra Club

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL and SIERRA CLUB, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, *Respondents*.	Case No. 16-1413

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1) and D.C. Circuit Rules 26.1 and 28(a)(1)(A), Sierra Club and Natural Resources Defense Council (collectively, "Environmental Petitioners") make the following disclosures:

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Natural Resources Defense Council

Non-Governmental Party to this Action: Natural Resources Defense Council ("NRDC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Natural Resources Defense Council is a corporation organized and existing under the laws of the State of New York. NRDC is a nonprofit membership organization of approximately 346,000 members nationwide focused on the protection of public health and the environment.

DATED: November 14, 2017 Respectfully submitted,

/s/ John D. Walke
John D. Walke (DC #: 450508)
Attorney of Record
Natural Resources Defense Council
1152 15th Street, NW Suite 300
Washington, D.C. 20005
(202) 289-6868
jwalke@nrdc.org
Counsel for Petitioner
Natural Resources Defense Council

/wp/ Sanjay Narayan
Sanjay Narayan
Sierra Club Environmental Law Program
2101 Webster St.
Suite 1300
Oakland, CA 94612
(415) 977-5769
sanjay.narayan@sierraclub.org
Counsel for Sierra Club

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

*Authorities upon which we chiefly rely are marked with an asterisk.

GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
NO_x	oxides of nitrogen
NRDC	Natural Resources Defense Council
ppm	parts per million
PM_{10}	particulate matter of 10 microns or less in diameter

JURISDICTIONAL STATEMENT

Respondents U.S. Environmental Protection Agency and Scott Pruitt, Administrator (collectively "EPA" or "the Agency") promulgated regulations governing the exclusion of event-influenced air quality data from certain regulatory decisions under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, titled "Treatment of Data Influenced by Exceptional Events." 81 Fed. Reg. 68,216 *et seq.* (Oct. 3, 2016), JA059. Pursuant to Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), this Court has jurisdiction to review that final action. Environmental Petitioners filed a timely petition for review of this action on December 2, 2016, within the statutory 60-day period.

STATUTES AND REGULATIONS

Pertinent statutory sections, regulations, and legislative history appear in a separate addendum.

STATEMENT OF ISSUES

Whether Respondent EPA contravened the Clean Air Act or acted arbitrarily by expanding the definition of "exceptional event" in violation of the statutory language found at 42 U.S.C. §7619(b).

STATEMENT OF THE CASE

I. Introduction

In section 319 of the Clean Air Act, Congress allows air pollution from "exceptional events" to violate the Clean Air Act's health-based air quality standards because qualifying events are understood to be exceptional. The Act and its legislative history make clear Congress is concerned mainly with natural events, like dust storms. Emissions from human activity may qualify as exceptional events only in very narrow circumstances, which do not include pollution from industrial plants or other human activity that recurs at particular locations.

EPA's final exceptional events rule turns this statutory design on its head. EPA's rule allows air pollution from industrial plants and recurring anthropogenic activities to be deemed natural events, if those activities and emissions play any role in the events less than 100%. Regular industrial pollution in vast amounts may qualify as a natural event and exceptional event and violate Clean Air Act health standards. EPA's rule makes these industrial air pollution health violations unexceptional. Environmental Petitioners challenge EPA's rule because it violates plain statutory language in multiple respects. Petitioners seek an order to vacate the rule and to direct EPA to issue lawful standards.

II. Statutory Background

A. National Ambient Air Quality Standards

Congress enacted the Clean Air Act Amendments of 1970 "to provide for a more effective program to improve the quality of the Nation's air." H.R. Conf. Rep. 1783, 91st Cong., 2d Sess. 1 (1970). The health-based National Ambient Air Quality Standards (NAAQS) for "criteria" air pollutants, and the obligation to attain and maintain those standards, are the foundation of the Clean Air Act. 42 U.S.C. §7410. The six "criteria" air pollutants are ozone, particulate matter, carbon monoxide, lead, sulfur dioxide and nitrogen dioxide. *Id.*§7409. The Act directs EPA to set health-based standards for these pollutants and then directs the states to devise "state implementation plans" to meet or "attain" EPA's standards by certain deadlines. *Id.* §§ 7410, 7502, 7511-7514a.

States measure their compliance with these national standards through a network of air quality monitors. EPA designates areas as either in "attainment" or "nonattainment" with national standards based on monitored air quality data. *Id.* § 7407(d)(1). States that do not meet the standards (states that are in "nonattainment") must impose more rigorous pollution control measures than states that meet the standards (are in "attainment"), including detailed measures prescribed by Congress. *Id.* § 7502.

In designing this structure in 1970, Congress emphasized the importance of establishing ambient standards to protect public health everywhere in the nation. When describing the legislation, Senator Muskie stated the goal "that all Americans in all parts of the Nation should have clean air to breathe, air that will have no adverse effects on their health." He saw it as the "responsibility of Congress" to "say that the requirements of this bill are what the health of the Nation requires, and to challenge polluters to meet them." 1 Legislative History of the Clean Air Amendments of 1970 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-18, p. 224, 227 (1974).

B. Air Quality Monitoring Data and the NAAQS

EPA evaluates air quality monitoring data to determine whether the relevant counties or localities are meeting or exceeding national health standards for the monitored air pollutants. The Clean Air Act requires that each state establish a network of monitors for NAAQS pollutants, with location and operational requirements determined by EPA. The Agency has developed policies and procedures to ensure that air quality monitors function properly and register accurate data, and to ensure that compliance determinations are based on a complete picture of air quality data. EPA calls this network the "State and Local

Air Monitoring Stations (SLAMS)" network, where "the states must provide [EPA] with an annual summary of monitoring results at each SLAMS monitor, and detailed results must be available to [EPA] upon request."[1] Within this network, National Air Monitoring Stations (NAMS) "meet more stringent monitor siting, equipment type, and quality assurance criteria." *Id.*[2]

Air quality monitors measure air pollution concentrations of the criteria air pollutants subject to national health-based air quality standards. Attainment and nonattainment with the NAAQS for a particular pollutant are determined based upon whether monitored air pollution concentrations exceed the "design value" of the applicable NAAQS standard. The "design value" is a calculation of how much air pollution is in the air, over a specified period of time, based on monitored air pollution data.

For example, for the current ground-level ozone health standard, "the primary and secondary national ambient air quality standards for [ozone] are met at

---

[1] U.S. EPA, Air Pollution Monitoring, https://www3.epa.gov/airquality/montring.html (last visited May 16, 2017).

[2] There are two additional types of air quality monitors that EPA and states employ. EPA says that:

> A third type of monitor, the Special Purpose Monitor (SPMS), is used by State and local agencies to fulfill very specific or short-term monitoring goals. The 1990 Amendments to the Clean Air Act also requires a fourth category of a monitoring station, the Photochemical Assessment Monitoring Station (PAMS), which measures ozone precursors (approximately 60 volatile hydrocarbons and carbonyl). *Id.*

an ambient air quality monitoring site when the 3-year average of the annual fourth highest daily maximum 8-hour average [ozone] concentration (*i.e.*, the design value) is less than or equal to 0.070 ppm." Thus, each monitored "exceedance" of the 0.070 ppm ozone concentration—a monitored concentration higher than 0.070 ppm of ozone—would violate the ozone NAAQS. The fourth exceedance over a three-year period would result in designation of an area as nonattainment, or redesignation of an area to a higher (more serious) nonattainment classification. *See generally* 42 U.S.C. § 7407(d) (NAAQS designations).

EPA's Exceptional Events rulemaking, and section 319 of the Clean Air Act on which it is based, exist within the context of the Act's NAAQS air quality monitoring regime. When an "exceptional event" meets all of the regulatory requirements and causes air pollution to exceed standards at a monitor, the data demonstrating that exceedance may be excluded by EPA in determining NAAQS violations. 42 U.S.C. § 7619(b)(3)(B).

C. Clean Air Act Section 319

In 2005, Congress amended Clean Air Act § 319 to require EPA to promulgate regulations "governing the review and handling of air quality monitoring data influenced by exceptional events." 42 U.S.C. § 7619(b)(2)(A), (B).[3]

Clean Air Act section 319 defines an "exceptional event" as follows:

> The term "exceptional event" means an event that —
> (i) affects air quality;
> (ii) is not reasonably controllable or preventable;
> (iii) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and
> (iv) is determined by the Administrator through the process established in the regulations … to be an exceptional event.

Id. § 7619(b)(1)(A). This plain statutory language, connected by "and," requires all four criteria and their constitutive elements to be satisfied before an exceedance of a health standard may be treated as an exceptional event. Nothing here or in any other portion of section 319 purports to grant EPA authority to create any additional exclusions to be treated as exceptional events, nor to ignore any conditions on a qualifying exceptional event.

[3] Safe Accountable Flexible Efficient-Transportation Equity Act: A Legacy for Users (SAFETEA–LU) of 2005, Pub. L. No. 109-59 (2005).

The statute also indicates what are not exceptional events. The statutory definition excludes "stagnation of air masses or meteorological inversions," "a meteorological event involving high temperatures or lack of precipitation" and "air pollution relating to source noncompliance." *Id.* § 7619(b)(1)(B). These detailed exclusions in § 7619(b)(1)(B) further indicate that Congress considered the issues carefully and decided which events should not be treated as exceptional events.

The statute sets forth certain principles and requirements that EPA must follow in promulgating regulations. First, the statute directs that "the Administrator shall follow … the principle that protection of public health is the highest priority." *Id.* § 7619(b)(3)(A)(i). The statute also specifies that "each State must take necessary measures to safeguard public health regardless of the source of the air pollution." *Id.* § 7619(b)(3)(A)(iv). Other principles require that "timely information should be provided to the public in any case in which the air quality is unhealthy," air quality data should be provided in a timely manner through a Federal database accessible to the public, and data should be screened so that events not likely to recur are represented accurately in all monitoring data and analyses. *Id.* § 7619(b)(3)(A)(ii), (iii) & (v).

Lastly, § 319 requires that regulations, "at a minimum," shall provide that the occurrence of an exceptional event "must be demonstrated by reliable, accurate data"; "a clear causal relationship must exist between the measured exceedances of a [NAAQS] and the exceptional event to demonstrate that the exceptional event caused a specific air pollution concentration at a particular air quality monitoring location"; "there is a public process for determining whether an event is exceptional"; and "there are criteria and procedures for the Governor of a State to petition the Administrator to exclude air quality monitoring data that is directly due to exceptional events from use in determinations by the Administrator with respect to exceedances or violations of the [NAAQS]." *Id.* § 7619(b)(3)(B).

Section 319 originated in the Senate bill. There was no comparable provision in the House bill. H.R. Rep. No. 109-203, at 1066 (2005) (Conf. Rep.). The legislative history for § 319 appears in the Conference Committee report. *Id.* at 1066-67. The report only discussed natural events as qualifying exceptional events. The report only discussed two congressional examples of natural events: "forest fires or volcanic eruptions." *Id.* at 1066.

The report also described *why* certain natural events would qualify as exceptional events—specifically, "events which are part of natural ecological processes, which generate pollutants themselves that cannot be controlled, qualify

as exceptional events." *Id.* at 1066-67. The report also explained what Congress did not consider to be qualifying natural events — and why: "[n]atural climatological occurrences such as stagnant air masses, high temperatures, or lack of precipitation influence pollutant behavior but do not themselves create pollutants. Thus, they are not considered exceptional events." *Id.* The Conference Committee report did not indicate in any way that human activity could be considered a natural event.

III. Regulatory Background

A. The 2007 Exceptional Events Rulemaking

On March 10, 2006, EPA proposed a rulemaking "to govern the review and handling of air quality monitoring data influenced by exceptional events," as directed by the 2005 amendment to the statute. Treatment of Data Influenced by Exceptional Events, Proposed Rule, 71 Fed. Reg. 12,592 *et seq.* (Mar. 10, 2006), JA403("the 2006 proposal"). EPA's proposed rule language adopted the statutory language of section 319 by defining an exceptional event as:

> an event that affects air quality; is not reasonably controllable or preventable; is a natural event or an event caused by human activity that is unlikely to recur at a particular location; and is determined by the Administrator in accordance with 40 CFR 50.13 to be an exceptional event; it does not include stagnation of air masses or meteorological inversions; a meteorological event involving high temperatures or lack of precipitation; or air pollution relating to source noncompliance.

Id. at 12,608/2, JA419. The 2006 proposal defined a "natural event" simply as "an event in which human activity plays little or no direct causal role." *Id.* The 2007 final rule adopted the proposed definitions of "exceptional event" and "natural event." 72 Fed. Reg. 13,560, 13,580/1-2 (March 22, 2007) JA447 ("the 2007 Rulemaking" or "2007 Rule"). The preamble to the 2007 final rule did not explain what "little or no direct causal role" meant, other than "small historical human contributions" such as "the long-term [human] diversion of water from a lake" that resulted in "high concentrations of dust from a lakebed." *Id.* at 13,563-13,564, JA430-431.

Clean Air Act section 319(b)(4), titled "Interim Provision," sets forth the congressional directive that various EPA guidance on air quality data "shall continue to apply" only "[u]ntil the effective date" of EPA's initial exceptional event regulation promulgated under 42 U.S.C. § 7619(b)(2)(B), due two years after the 2005 amendment to the Act. The effective date for the 2007 Rules was May 21, 2007. 72 Fed. Reg. at 13,560.

Petitioner NRDC challenged the 2007 Rule in this Court, contesting EPA's definition of "natural event" and other types of polluting events that the Agency had indicated in the preamble were eligible for exclusion as exceptional events

under the rule. *NRDC v. U.S. EPA*, 559 F.3d 561 (D.C. Cir. 2009); 81 Fed. Reg. 68,220/1, JA063. This Court held that EPA's purported authorization for high wind events to be treated as exceptional events in preambular text was a "legal nullity," because EPA had failed to include these authorizations in final rule text. *NRDC v. U.S. EPA*, 559 F. 3d at 565; 81 Fed. Reg. at 68,220/2, JA063. The Court held further that various other EPA examples of events deemed "exceptional" in the preamble were "hypothetical and non-specific," and thus not reviewable. *Id.* at 565 (internal citations omitted). Finally, this Court held that NRDC could not challenge the regulatory definition of "natural event" because the court concluded NRDC had failed to alert EPA officials to specific objections about the regulatory definition. *Id* at 563-4. Due to the finding that preambular language was a "legal nullity," this Court's 2009 decision held parts of the 2007 Rulemaking to be without legal effect. *Id* at 565.

B. The 2016 Exceptional Events Rulemaking

EPA undertook the 2016 rulemaking out of an acknowledgement that the 2007 Rulemaking had been a "challenging process" both for the states and the Agency. *Id.* at 68,220/2, JA063. The Agency first issued a document titled the "Interim Exceptional Events Implementation Guidance," and noted the need to undertake "a notice and comment rulemaking effort to revise the 2007 Exceptional

Events Rule." *Id.*

EPA issued the proposed rule on November 20, 2015. 80 Fed. Reg. 72,840 (Nov. 20, 2015), JA001. The Agency "proposed to revise" the 2007 Rulemaking's regulatory definition of "natural event," to include the notion of "an event and its resulting emissions and to acknowledge that natural events can recur." 81 Fed. Reg. 68,231/1, JA074. Moreover, for the first time the Agency proposed to:

> include language in the regulatory definition to clarify that anthropogenic emission sources that contribute to the event emissions (and subsequent exceedance or violation) that are reasonably controlled do not play a "direct" role in causing emissions.

Id. EPA also added the language "at the same location" to the "natural event" regulatory definition to "more clearly indicate that natural events can recur in the same area or at the same location and still be considered natural events." *Id.* Finally, the Agency included language for the very first time "for the purposes of the definition of a natural event" to "clarify that the 'direct causal' language applies to reasonably controlled anthropogenic sources when considering whether the event is natural." *Id.* (emphasis added).

Petitioners commented extensively on the proposal, noting that EPA's proposed revisions to the exceptional event regulations "violate[] the plain language of the statute." Docket No. EPA-HQ-OAR-2013-0572-0160, pg. 8,

JA234. Petitioners noted that the statute distinguished between natural events (that "do not have a human origin"), and "events caused by human activity." *Id.* Petitioners objected to including human activity and emissions in the proposed "natural event" definition, due to the clear and explicit distinction between a "natural event" and "event caused by human activity" under plain statutory language. *Id.* Petitioners objected further to the proposed "natural event" definition's inclusion of "reasonably controlled" human activity and their emissions." *Id*. Petitioners commented to the Agency that "both the statute and logic" did not allow the proposed natural event definition nor preambular gloss to be finalized, citing the statutory dichotomy between human and natural events in 42 U.S.C. §7619(b)(1)(A)(iii) and its legislative history. *Id.*

Petitioners also noted that the "distinction between 'direct' [emission-causing role] and 'indirect' that EPA attempts to draw is irrelevant," and asserted the importance of analyzing exceptional events on a case-by-case basis. *Id.* 8-9, JA234-235. The Maricopa Association of Governments commented that EPA's conflation of human activities and natural events was particularly problematic with respect to recurrence, where it is "plainly contrary to the statutory definition of a 'natural event'" to "incorporate the 'unlikely to recur' criteria, a criteria that is (sic) only applicable to events caused by human activity." Docket No. EPA-HQ-OAR-

2013-0572-0107, at 7. For these reasons, commenters told EPA that the proposed definition of "natural event" in 40 C.F.R. § 50.1(k) violated plain statutory language.

EPA responded to commenters by conceding that "Congress included both 'human activities' and natural event[s]' as separate activities within an exceptional event."[4] The Agency went on to argue that it believed its approach was "reasonable," however, because "[Congress] also required the continued use of previous guidance as an interim provision until the effective date of the 2007 Exceptional Events Rule." Response to Comments, at 34, JA135. EPA argued that "there is not always a bright line" between anthropogenic activity and a natural event. *Id.*

The Agency also responded to the component parts of its new definition, discussing "reasonable controls," "little or no direct causal role," and "the concept of recurrence." *Id.* at 33-35, JA134-136. Finally, EPA said that it had "come to realize that it may be helpful to think of an event in terms of the source of its emissions," where "if an underlying source is natural… then the ensuing event […]

[4] U.S. EPA, Responses to Significant Comments on the 2015 Proposed Rule Revisions to the Treatment of Data Influenced by Exceptional Events, Docket No. EPA-HQ-OAR-2013-0572 (November 20, 2015; 80 FR 72840), at 34, JA135 (emphasis added) (Hereinafter "Response to Comments").

could be considered a 'natural event' under the Exceptional Events Rule," citing volcanoes, wildfires, and earthquakes. 81 Fed. Reg. at 68,231/3-2/1, JA074-075.

EPA promulgated a final rule on October 3, 2016, which adopted the following definition of "natural event":

> *natural event* means an event and its resulting emissions, which may recur at the same location, in which human activity plays little or no direct causal role. For purposes of the definition of a natural event, anthropogenic sources that are reasonably controlled shall be considered to not play a direct role in causing emissions.

Id. at 68,277/1, JA114. EPA noted in the preamble to the final rule that natural events would encompass anthropogenic sources that are reasonably controlled, and such sources would not be considered to play a direct role in causing emissions "*regardless of the magnitude of emissions generated* by these reasonably controlled anthropogenic sources and *regardless of the relative contribution of these emissions*." *Id.* at 68,231, JA074. (emphasis added). Under this wholly new "natural event" scheme, EPA clarified in its preamble two situations that would not be natural events: (1) "if *all* of the event-related emissions originated from anthropogenic sources," *id.* (emphasis added); and (2) "if anthropogenic sources that contributed to the event-related emissions could have been reasonably controllable but reasonable controls were not implemented at the time of the event." *Id.*

Thus, under the 2016 Rule, if 100% of emissions ("all") that violate a health standard originated from controlled human activities, the event would not be treated as a natural event. However, if anything less than 100% of emissions ("regardless of the magnitude of emissions," "regardless of the relative contribution of these emissions") that violate a health standard originated from controlled human activities, EPA allows the violating emissions to be treated as a natural event eligible to be excluded as an exceptional event. *Id.*

In the preamble to the final 2016 Rule, EPA claimed that the 2007 Rule preamble had explained the same understanding of when a human activity "played little or no direct role" in the "natural event" definition, based on whether anthropogenic activities were "reasonably controlled at the time of the event." 81 Fed. Reg. at 68,231/1 (emphasis added) (citing 72 Fed. Reg. at 13,563-13,564). This is incorrect. The pages in the 2007 final rule preamble that EPA's 2016 rule preamble cites has no such discussion.[5] The 2007 Rule preamble described high wind events alone in this manner, 72 Fed. Reg. at 13,576/3, and the Agency characterized the preambular approach as a "final rule." *Id.* EPA subsequently

[5] *Cf.* 81 Fed. Reg. at 68,231/1, to 72. Fed. Reg. at 13,563-13,564. Instead, as noted above, EPA only offered this explanation for the meaning of "little or no direct causal role" by human activity: "*small historical* human contributions" such as "the long-term [human] diversion of water from a lake" that resulted in "high concentrations of dust from a lakebed." *Id.* at 13,563-13,564 (emphasis added).

conceded this characterization was a "drafting error" (at the oral argument concerning the 2007 Rule), and this Court declared the "high wind events section of the preamble [to be] a legal nullity." 559 F. 3d at 565.

In the preamble to the final 2016 Rule, EPA explained a motivation for adopting an expanded definition of natural event and allowing more human activity to qualify as an exceptional event: "the mechanisms in the Exceptional Events Rule provide the most regulatory flexibility in that air agencies can use these provisions *to seek relief from designation as a nonattainment area*." 81 Fed. Reg. at 68,246/1, JA089 (emphasis added).

SUMMARY OF ARGUMENT

The final exceptional events rule violates the plain language of Clean Air Act § 319 by defining "natural event" to include a direct causal role for human activities, rather than limiting natural events to occurrences in nature. The final rule violates § 319 by treating reasonably controlled human activity as a "natural event" based on the contention that the human activity does not play a direct role in causing emissions. The rule violates § 319 by ignoring and rendering irrelevant whether an event caused by human activity is preventable. Finally, the rule violates § 319 by treating as exceptional events those events caused by human activity that recur at a particular location or are likely to recur at a particular location.

STANDING

Petitioners NRDC and Sierra Club have standing to challenge EPA's exceptional events rule and associated procedural violation on behalf of its members. *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1987). Petitioners' core missions include combating excess air pollution and the resulting health and environmental harms, and advocating for stronger measures to protect and enhance air quality. *See* Gina Trujillo Decl. ¶ 4 (NRDC organizational interest), Huda Fashho Decl. ¶ 6 (Sierra Club organizational interest) (standing declarations appear in an Addendum B to this brief).

The challenged EPA decisions directly harm Petitioners' members. Petitioners' members live, work, and recreate in communities near and downwind from polluting activities for which EPA allows violations of health-based air quality standards to be ignored. *See* Decls. of Beverly Janowitz-Price, ¶¶ 2-4; Craig Volland ¶¶ 2-3; Elvera Skokan ¶¶ 2-3. Every application of EPA's rule will be one in which data showing exceedances or violations of the health-based NAAQS will be excluded. *See, e.g.*, 81 Fed. Reg. at 68,216/1, JA059. EPA, state and local officials already have applied the rule to exclude data showing exceedances and air

quality violations in communities where Petitioners' members live.[6] The challenged decisions therefore have exposed and will continue to expose Petitioner's members to harmful air pollution and the risk of serious health effects, including asthma, bronchitis, lung inflammation, chronic respiratory disease, cardiopulmonary disease and cardiovascular disease. *See*, *e.g.*, 73 Fed. Reg. 16,436, 16,440/1-43/3 (Mar. 27, 2008), JA453-456 (health effects for ozone); 71 Fed. Reg. 61,144, 61,151/2-52/1, 61,178/1-79/1 (Oct. 17, 2006), JA423-424, 425-426(health effects for particulate matter). *See* Decls. of Janowitz-Price ¶¶ 3-5; Skokan ¶ 3; Volland ¶ 3. Petitioners' members also have altered their behavior and suffered diminished aesthetic and recreational enjoyment of their surroundings as a result of air pollution in their communities. *See* Decls. of Janowitz-Price ¶ 3-5; Volland ¶¶ 3-5; Skokan ¶¶ 3-5.

These are cognizable aesthetic, recreational, and human health injuries. *See,*

---

[6] *See*, *e.g.*, Arizona Department of Environmental Quality, State of Arizona Exceptional Event Documentation for the Events of July 2nd through July 8th 2011, for the Phoenix PM10 Nonattainment Area (applying to exclude monitored PM_{10} exceedance data in Phoenix, Arizona due to windblown dust events that were the result of "natural events") *available at* https://www.epa.gov/sites/production/files/2015-05/documents/az_deq_july_2011_pm10_ee_demo_final_20120308.pdf (last visited May 17, 2017); State of Kansas Exceptional Event Demonstration Package April 6, 12, 13, and 29, 2011, JA315 (applying to exclude monitored ozone exceedance data in the Kansas City and Wichita, Kansas areas due to Flint Hills wildfires) *available at* https://www.epa.gov/sites/production/files/2015-05/documents/kdhe_exevents_final_042011.pdf; Decls. Of Janowitz-Price ¶¶ 2-4, 6; Volland ¶ 4-5; Skokan, ¶¶ 4-5.

e.g., *Laidlaw Envtl. Servs.*, 528 U.S. at 183 ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."). Petitioners' injury-in-fact is caused by EPA's unlawful actions and will be redressed by a decision vacating EPA's actions and ordering the Agency to comply with the Clean Air Act on remand.

Petitioner may therefore sue on behalf of its members because (a) its members would have standing to sue in their own right, (b) neither the claims asserted nor the requested relief require proof of individualized damages, and therefore do not require the participation of individual members, and (c) the interests Petitioner seeks to protect are germane to the organization's purposes. *Hunt*, 432 U.S. at 343; Trujillo Decl. ¶ 4; Fashho Decl. ¶ 6.

STANDARD OF REVIEW

Under *Chevron U.S.A., Inc. v. NRDC*, this Court rejects agency statutory interpretations that are either contrary to the "unambiguously expressed intent of Congress" or unreasonable. 467 U.S. 837, 842-43 (1984). The Court must "give[] effect" to congressional intent discerned using "traditional tools of statutory construction." *Id.* at 843 n.9. When "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the

unambiguously expressed intent of Congress." *Id*. at 842-43. An agency receives "no deference" on this issue. *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988).

If the statute is either "silent or ambiguous," the Court may defer to the Agency's "reasonable" interpretation provided that interpretation is consistent with the statute and supported by a detailed and reasoned explanation. *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984). Of particular relevance here, the Court construes narrowly any statutory authority to exempt regulated entities from otherwise applicable law. *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989).

Under *Chevron*, EPA's interpretation of ambiguous statutory provisions must be rejected as unreasonable, 467 U.S. at 843, if the agency has not "offered a reasoned explanation for why it chose that interpretation," *Village of Barrington, Ill. v. Surface Transp. Board*, 636 F.3d 650, 660 (D.C. Cir. 2011), or the interpretation "frustrate[s] the policy that Congress sought to implement," *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (internal quotation marks and citation

omitted).

This Court may also reverse agency action that does not directly contravene governing law if the agency acted arbitrarily and capriciously—for example, if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An agency "must cogently explain why it has exercised its discretion in a given manner" or its actions will be deemed arbitrary. *Id.* at 48. *See also Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996) (agency acted arbitrarily and capriciously when it failed to "identif[y] and explain[] the reasoned basis for its decision"). Agency actions will be held arbitrary and capricious if explanations for regulatory distinctions are "internally inconsistent," *Air Transp. Ass'n of Am. v. U.S. DOT*, 119 F.3d 38, 43 (D.C. Cir. 1997), or if the agency reached a conclusion that is "unsupported by substantial evidence." *NRDC v. Herrington*, 768 F.2d 1355, 1407 (D.C. Cir. 1985).

ARGUMENT

I. EPA UNLAWFULLY ALLOWS CERTAIN HUMAN ACTIVITY TO BE TREATED AS A NATURAL EVENT AND EXCEPTIONAL EVENT

A. EPA's Definition of "Natural Event" Contravenes the Plain Language and Structure of Section 319.

The plain language of Clean Air Act section 319 distinguishes between a "natural event" that may qualify as an "exceptional event," on one hand, and "human activity" that may be treated as an exceptional event, on the other hand, only if that activity meets statutory criteria. Section 319 defines an "exceptional event" as an "event that:

> (i) affects air quality;
> (ii) is not reasonably controllable or preventable;
> (iii) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and
> (iv) is determined by the Administrator through the process established in the regulations … to be an exceptional event.

42 U.S.C. § 7619(b)(1)(A). EPA's rule adopts the same definition of "exceptional event," 81 Fed. Reg. at 68,276/3 (to be codified at 40 C.F.R. § 50.1(j)), JA119, but then adopts the following regulatory definition of "natural event":

> *natural event* means an event and its resulting emissions, which may recur at the same location, in which human activity plays little or no direct causal role. For purposes of the definition of a natural event, anthropogenic sources that are reasonably controlled shall be considered to not play a direct role in causing emissions.

Id. at 68,277/1, JA120. EPA's "natural event" definition violates the plain language of § 319(b)(1)(A)(iii) in multiple respects, by encompassing events in which human activities play a direct causal role.

First, the plain language of the statutory term "natural event" does not include or encompass human activity. This is confirmed by dictionary definitions of "natural" and "nature": "natural" means "of, forming a part of, or arising from nature," while "nature" means "natural scenery, including the plants and animals that are a part of it." *Webster's Deluxe Unabridged* (2d. ed. 1979). In addition, the dictionary defines an "event" to be "an occurrence, especially a significant one." *Id.* The plain meaning of the phrase "natural event," in turn, reinforces these understandings by encompassing occurrences in nature, and not human-caused activities.

Similarly, the plain language of the statutory term "human activity" does not equate to or encompass a "natural event." The dictionary defines "human" to mean "of or characteristic of a person or persons." *Id.* Additionally, "activity" is defined as "the quality or state of being active; action; motion; use of energy." *Id.* The

plain language of the term "natural event" does not include human activity.

Second, section 319 creates a clear distinction between a "natural event" and an "event caused by human activity," dividing the two terms and concepts with the disjunctive conjunction, "or." 42 U.S.C. § 7619(b)(1)(A)(iii). "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Nothing in section 319 or elsewhere in the Act suggests congressional intent to give the terms connected by the disjunctive "or"—"an event caused by human activity…." or "a natural event"—the same meaning. Congress would have had no need to separately delineate "human activity" from a "natural event" in one of the four subparts of the "exceptional event" definition, if the term "natural event" were capacious enough to include human activity. "[T]he meaning of statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (citation omitted); *see also Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) ("[W]ords … are known by their companions.").

Here, the context unequivocally establishes that 'natural events' cannot be understood to include 'human activities.' Indeed, not even EPA's final rule

pretends that "an event caused by human activity" and "a natural event" are identical. EPA's contravention of plain statutory language and the disjunctive "or" is selective: if 100% of emissions ("all") that violate a health standard originated from controlled human activities, EPA does not treat the event as a natural event.[7] If less than 100% of emissions that violate a health standard originated from controlled human activities, EPA's final rule does allow the event to be treated as a natural event.[8] Moreover, even after collapsing the statutory distinction between human activity and natural events selectively, EPA makes clear there are actual natural events that it does not consider to have any human influence. *See, e.g.*, 81 Fed. Reg. at 68,232/1, JA075 ("EPA generally considers wildfires, …volcanic and seismic [] activity… to be natural events.").

The final rule violates the plain language of section 319 in other respects. Congress placed explicit conditions on human activity that may be treated as an "exceptional event": only human activity that is "unlikely to recur at a particular location" may even be considered for treatment as an exceptional event. 42 U.S.C.

[7] *See* 81 Fed. Reg. at 68,231/3, JA074 ("Additionally, the event would *not* be natural if *all* of the event-related emissions originated from anthropogenic sources.") (2nd emphasis added).
[8] *See id.* at 68,231/1, JA074 ("This is the case regardless of the magnitude of emissions generated by these reasonably controlled anthropogenic sources and regardless of the relative contribution of these emissions and emissions arising from natural sources in which human activity has no role.").

§ 7619(b)(1)(A)(iii). Human activity that is likely to recur (or that does recur) at a particular location may not even be considered for potential treatment as an exceptional event. EPA's final rule squarely contravenes this congressional restriction. It allows reasonably controlled human activity "which may recur at the same location" to be treated as a "natural event" and thereby to bypass the "unlikely to recur" restriction Congress placed on human activity. 81 Fed. Reg. at 68,277/2, JA120.

The final rule's treatment of some human activity as a natural event violates the plain language of section 319 in yet another way. Congress defined an "exceptional event" to be an event that "is not reasonably controllable or preventable." 42 U.S.C. § 7619(b)(1)(A)(ii). EPA's final rule contravenes this explicit congressional prohibition by defining a natural event to encompass human activities that "are reasonably controlled." *Id.* The final rule thus dispenses with the condition that a permissible exceptional event must not be "reasonably. . . preventable." *Id.* EPA makes clear that an acceptable exceptional event is determined by whether human activity is "reasonably controlled," not by the entirely separate condition and question, whether it was "reasonably preventable."[9]

[9] *Id.* at 68,231/2-3, JA074 ("we believe that if reasonable controls were implemented on contributing anthropogenic sources at the time of the event and if, despite these efforts and controls, an exceedance occurred, then we would consider the human activity to have played

The final rule thus invents a non-textual factor under 42 U.S.C. § 7619(b)(1)(A)*(iii)*—'reasonably controlled human activity shall be considered to not play a direct role in causing emissions'—that alters and contravenes § 7619(b)(1)(A)*(ii)*, where Congress spoke directly to the question of qualifying exceptional events: they must not be "reasonably controllable or preventable." "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (internal quotation marks and citation omitted). In the Clean Air Act, Congress requires monitored exceedances of air quality standards to count toward an area's (non)attainment status, and subsequent pollution control measures and obligations. *See*, *e.g.*, 42 U.S.C. §7502. Congress detailed narrow exclusions from that general rule with section 319 exceptional events, but there is no textual or other evidentiary basis of a contrary legislative intent to delegate authority to EPA to imply additional and different exclusions.

Under EPA's final rule, an industrial activity that is likely to recur and does

---

little or no direct causal role in causing the event-related exceedance. Rather, in those cases in which the anthropogenic source has 'little' direct causal role, we would consider the high wind and the emissions arising from the contributing natural sources (in which human activity has no role) to cause the exceedance or violation.").

recur at the same location—so long as it is "reasonably controlled"—may qualify as an exceptional event. The plain language of the Clean Air Act prohibits this: an exceptional event must be "an event caused by human activity that is unlikely to recur at a particular location." The final rule thus allows emissions caused by human activities (<100%) to violate public health standards without meeting the statutory constraints on emissions from human activity.

EPA did not and could not claim in the final rule that its natural event definition followed the plain language of the statute. EPA did not argue that human activity carried out the plain language of "natural event." EPA did not claim that human activities treated as natural events represent the type of natural events Congress specified in 42 U.S.C. § 7619(b)(1)(B)'s exclusions or section 319's legislative history.

EPA did not argue that 'reasonably controlled human activity *that may recur* at the same location' was consistent with the plain statutory language of "an event caused by human activity *that is unlikely to recur* at the same location." EPA did not identify any role for 'reasonably controlled human activity' in the plain meaning of "natural event." EPA did not argue that 'reasonably controlled human activity' was consistent with any inquiry into the plain language of whether an event was "reasonably preventable."

The Agency does not dispute that excluded events and emissions that result from human activity may be likely to recur at "a particular location." Indeed, the Agency's own regulation makes the recurrence of human activity at a particular location permissible and *expected*. 81 Fed. Reg. at 68,277/1, JA120 ("which may recur at the same location"). EPA makes clear that a human activity qualifying as a natural event turns on whether that human activity is "reasonably controlled"—not whether the activity recurs at a particular location. *Id.* at 68,231/2, JA074. This, despite that approach having no statutory basis and violating plain statutory language. Under EPA's regulation, after answering the question whether a human activity is reasonably controlled, the congressional conditions on human activity (they must be "unlikely to recur at a particular location") cease to be relevant.

EPA effectively concedes that its regulatory definition of "natural event"—and its inclusion of human activity as a natural event—contravenes the plain language of 42 U.S.C. § 7619(b)(1)(A)(iii). In its Response to Comments, EPA admitted that "Congress included both 'human activities' and 'natural event[s]' as *separate activities* within an exceptional event." Response to Comments, at 34, JA135. The final rule thus fails the first step of *Chevron*. "[T]he intent of Congress is clear," and that should be "the end of the matter." *Chevron*, 467 U.S. at 842-43.

EPA also effectively concedes that the "natural event" definition

contravenes the plain language of 42 U.S.C. § 7619(b)(1)(A)(iii) by sanctioning the recurrence of anthropogenic activity and emissions. *See, e.g.,* 81 Fed. Reg. at 68,231/2, JA074 ("an event and its resulting emissions, which may recur at the same location."). The Agency admits that Congress did not intend recurring human activity at a particular location, or even likely recurring human activity, to qualify as an exceptional event: "The concept of recurrence (*i.e.*, human activity *that is unlikely to recur at a particular location* or a natural event" (emphasis added)) applies specifically to human activities and not to natural events." Response to Comments, at 35, JA136. EPA may not evade plain statutory language and escape its own admission with a regulatory definition of "natural event" that encompasses human activity. Again, the final rule fails *Chevron* Step One. "[T]he intent of Congress is clear," and that should be "the end of the matter." *Chevron*, 467 U.S. at 842-43.

Lacking any statutory basis for the challenged elements of the natural event definition, EPA instead argues that a 1996 EPA "memorandum" justifies the Agency's approach because Congress required use of previous EPA guidance "until the effective date" of its 2007 rule. Response to Comments, at 34, JA135. EPA is referring to a policy document that discusses an entirely different part of the Clean Air Act, section 188(f). Under the plain language of 42 U.S.C. §§

7619(b)(4) and (b)(2)(B), this EPA policy document no longer applies after the May 21, 2007 effective date of the exceptional event regulation that EPA promulgated in March of 2007. 81 Fed. Reg. 68,219/3, JA062; 40 C.F.R. §50.1.

EPA concedes this, but then does not and cannot explain how a policy document from 1996 relating to a different section of the Clean Air Act—combined with the congressional directive that it cease to apply after the effective date of the initial implementing regulation—supplies EPA today with any authority to contravene plain statutory language in the ways described above. 81 Fed. Reg. at 68,220/2-3, JA063.

Ducking this dilemma, EPA instead dives into the content of the 1996 memorandum that Congress said applied only "until the effective date" of the regulation that EPA promulgated in 2007. The Agency takes away from that memorandum two points: (1) that the guidance allowed dust due to high winds to be treated as natural events when "the dust originated from anthropogenic sources controlled with best available control measures"; and (2) that "there is not always a bright line that excludes all anthropogenic activity from a "natural event." *Id.*

EPA may not seek refuge in these two arguments from an expired guidance as a justification for contravening plain statutory language from a different section of the Act section 319. First, whatever EPA believed in a 1996 guidance about

section 188(f), in section 319(b)(1)(A)(iii), Congress prescribed a bright line between "human activity that is unlikely to recur at a particular location" and "a natural event" using plain statutory language in 2005. Then in § 7619(b)(1)(A), Congress drew additional clear distinctions between human activity and natural events. 42 U.S. § 7619(b)(1)(A). That plain statutory language indicates Congress excluded human activity from the concept of a natural event.

Second, even though Congress was fully aware of the "best available control measure" concept and how EPA employed it in the 1996 guidance, Congress excluded that approach from the Act. There is no indication that Congress intended to allow the concept to qualify human activity as a natural event under section 319. The interim, expiring nature of the EPA guidance and its reference to a different provision of the Act only reinforces that statutory exclusion with clear congressional intent. 42 U.S.C. §§ 7619(b)(2)(B) & (b)(4). While EPA may believe the 1996 guidance supports its decision to contravene plain statutory language, the careful congressional approach to the superseded EPA guidance fully cuts again the Agency. "[T]he intent of Congress is clear," and that should be "the end of the matter." *Chevron*, 467 U.S. at 842-43.

The statutory design of section 319 further underscores the narrow, limited scheme Congress envisioned when it created the exceptional events provisions. *See*

Bailey, 516 U.S. at 145 (citation omitted) ("The meaning of statutory language, plain or not, depends on context."). Congress required EPA to follow five principles when promulgating exceptional event regulations. *See* 42 U.S.C. § 7619(b)(3)(A). Three of the five principles emphasize the paramount importance of public health, with the first congressional statement setting forth "the principle that protection of public health is the highest priority." *Id.* at § 7619(b)(3)(A)(i). This is entirely logical for a program that determines whether violations of public health standards for air quality will be excused without the entire architecture of Clean Air Act title I applying to those violations. The other two congressional principles address the availability and public access to monitored air pollution data. *Id.*

A further feature of the statutory structure of section 319 reinforces the unlawfulness of EPA's final rule. In 42 U.S.C. § 7619(b)(3)(B), Congress prescribed specific exclusions from the term "exceptional event." Significantly, two of those specified exclusions address natural events, *id.* § 7619(b)(3)(B)(i) & (ii), and the third relates to human activity, § 7619(b)(3)(B)(iii). Here too, Congress knows how to draw purposeful distinctions between natural events and human activity, just as Congress did in § 7619(b)(3)(A)(iii).

"Absent clear congressional delegation," EPA may not create an exemption from statutory requirements by administrative rule. *State of New York v. U.S. EPA*,

413 F.3d 3, 40-42 (D.C. Cir. 2005). "Indeed, this court has consistently struck down administrative narrowing of clear statutory mandates." *Id.* 41 (emphasis added; citation and internal quotations omitted); *see also Sierra Club v. U.S. EPA*, 294 F.3d 155, 160 (D.C. Cir. 2002) (inferring from the Clean Air Act's inclusion of certain transport-based exemptions from ozone attainment requirements "that the absence of any other exemption for the transport of ozone was deliberate"). EPA's exemption here is even more egregious than the exemption this Court struck down in *State of New York v. U. S. EPA,* because that exemption involved pollution control projects designed to *reduce* emissions. 413 F.3d at 40-41. Here, EPA is allowing violations of health-based air quality standards to be excused from Clean Air Act obligations when they result from recurring air pollution from industrial sources at the same locations.

The existence of prescribed criteria for the "exceptional event" exclusion in § 7619(b)(1)(A) and the categorical exclusions in § 7619(b)(1)(B) indicate that Congress knows how to craft exclusions when it wishes to do so. *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 193 (2005) (discussing an earlier case in which the Court "surveyed other statutes and found that 'Congress knew how to impose aiding and abetting liability when it chose to do so'") (quoting *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994))). Indeed,

Congress specified only two human activities related to exceptional events: first, the inclusion of qualifying "event[s] caused by human activity that is unlikely to recur at a particular location," 42 U.S.C. § 7619(b)(1)(A)(iii), and second, the further exclusion from these human events of "air pollution relating to source noncompliance." *Id.* § 7619(b)(1)(B). The presence of this carefully crafted regime indicates that Congress did not intend to authorize EPA to expand the universe of qualifying exceptional events to include additional and different human activities.

EPA's final rule violates the Clean Air Act and harms air quality and public health. The final rule allows violations of health-based clean air standards to be ignored—treated as excluded exceptional events—when vast amounts of criteria air pollutants from the regular, ongoing operation of industrial activities at the same location cause monitored exceedances of the health-based standards. The industrial activities need only be "reasonably controlled."

EPA's final rule allows emissions from coal-burning power plants, oil refineries, chemical plants, hazardous waste incinerators and a wide array of industrial activity to violate health-based clean air standards and be treated as exceptional events. This is very far afield from Congress's evident concern with natural events and narrowly limited human activity in section 319. EPA's final rule means unhealthy air quality will persist and evade Clean Air Act requirements that

apply when an area is in nonattainment with NAAQS, when an area should be under a higher nonattainment classification, or when an area is failing to meet requirements in an attainment area. *Id.* §§ 7410, 7502, 7511-7514a.

It is important to appreciate that very large industrial activities that EPA considers to be "reasonably controlled" and eligible "natural events" still emit vast amounts of harmful air pollution. For example, Jeffrey Energy Center in St. Mary's, Kansas, a coal-burning power plant located near two declarants in this case, has pollution control equipment installed for smog-forming nitrogen oxide (NO_x) emissions. The plant still emitted approximately 6,200 tons of NO_x per year in 2015.[10]

Other coal-burning power plants have *single* boilers at multi-boiler plants equipped with pollution controls that nonetheless emit over 9,000, 8,500, and 7,700 tons per year of NO_x emissions.[11] There are single boilers, equipped with pollution controls, at other multi-boiler coal-burning power plants that still emit over 16,000, 14,500, and 12,500 tons per year of sulfur dioxide.[12] By comparison, *all* sources, both mobile and stationary, in the entirety of the District of Columbia

[10] U.S. EPA, Clean Air Markets, Emissions Tracking Highlights, Table of Coal Unit Characteristics, 2016, *available at* https://www.epa.gov/airmarkets/clean-air-markets-emissions-tracking-highlights (last visited May 17, 2017) (providing data on Jeffrey Energy Center).
[11] *Id.* (providing data on Four Corners, New Madrid,and Coyote boiler units, respectively).
[12] *Id.* (providing data on Dolet Hills, Homer City, and Rockport boiler units, respectively.).

emit less than 10,000 tons-per-year of NO_x, and less than 800 tons-per-year of sulfur dioxide.[13]

B. The Legislative History of Section 319 Precludes the Treatment of Human Activity as a Natural Event

The legislative history for section 319 fully supports Petitioners' reading and yields no support for EPA's natural event definition. The Conference Committee report addressing § 319 described natural events as "events which are part of natural ecological processes, which generate pollutants themselves that cannot be controlled." H.R. Rep. No. 109-203, at 1066-67. The only two examples of natural events in the report are "forest fires or volcanic eruptions." *Id.* The legislative history makes no mention of human activities as they relate to natural events. Nor is there any legislative history that supports treatment of reasonably controlled human activity as a natural event, or continuing use of the EPA guidance after the "interim" period Congress specified in § 7619(b)(4).

The Conference Committee report did discuss natural events generally in a way that further undermines EPA's regulation:

> Natural climatological occurrences such as stagnant air masses, high temperatures, or lack of precipitation *influence pollutant behavior but*

[13] *See* District Department of the Environment, District of Columbia's Ambient Air Quality Trends Report, "NOx Emissions by Sector," Oct. 2015, Part 2, pg. 15, *available at* https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/AQ%20TRENDS%20Report%20for%20DDOEwebsite_finalDraft_2014Oct29.pdf (last visited May 17, 2016).

> *do not themselves create pollutants. Thus, they are not considered exceptional events.* Likewise, air pollution related to source noncompliance may not be considered an exceptional event. In contrast, events which are part of natural ecological processes, which generate pollutants themselves that cannot be controlled, qualify as exceptional events.

H.R. Rep. No. 109-203, at 1066-67 (emphasis added). The conference report thus confirms that even certain natural climatological occurrences that "influence pollutant behavior"— like industrial sources—cannot themselves be understood to be an exceptional event. Such a distinction places the Agency's definition of natural event even further from the statutory scheme that Congress designed. Interpreting "natural event" even more broadly, as EPA's final regulation does, would engulf the careful lines that Congress drew to define and narrow exceptional events.

II. IF THIS CASE WERE GOVERNED BY *CHEVRON* STEP TWO, EPA'S INTERPRETATION MUST BE REJECTED AS UNREASONABLE AND ARBITRARY

A. EPA's Interpretation is Unreasonable.

EPA identifies no statutory ambiguity to justify its "natural event" definition. The Agency may not manufacture an ambiguity from the absence of a statutory definition for "natural event," because the "lack of a statutory definition does not render a term ambiguous." *Am. Fed'n of Gov't Employees v. Glickman*,

215 F.3d 7, 10 (D.C. Cir. 2000).

Here EPA's rule allows human activities and their emissions to qualify as natural events without those activities abiding by the restrictions Congress imposed on human activities, and by contravening the plain meaning of the term 'natural event.' Accordingly, assuming *arguendo* that this statutory phrase is "ambiguous as applied to some situations," *Ass'n. of Battery Recyclers v. U.S. EPA*, 208 F.3d 1047, 1056 (D.C. Cir. 2000), it is not ambiguous as to the situation at issue here. Because EPA has offered no "strong structural or contextual evidence" for its exemption, *see U.S. Telecom Ass'n. v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004), that exemption is unreasonable under *Chevron* Step Two.

EPA argues that a 1996 Agency guidance document justifies a regulatory approach that contravenes plain statutory language. Even if the final rule does not fail *Chevron* Step One, EPA's rule cannot withstand review under *Chevron* Step Two. Under that caselaw, this Court should reject an agency interpretation that "diverges from any realistic meaning of the statute." *Com. of Mass. v. U.S. DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996) (emphasis added) (agency interpretation rejected). *Accord*, *NRDC v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (striking down interpretation under Step Two). For example, as this Court held in *U.S. Telecom Ass'n v. FCC*, "[e]ven under the deferential *Chevron* standard of review,

an agency cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term." 359 F.3d at 592. EPA has identified no such evidence here.

Indeed, EPA relies upon the 1996 guidance document to a surprising degree that cuts decisively against the Agency's position: Congress dictated that it shall not apply after the effective date of the initial exceptional event regulation. 42 U.S.C. § 7619(b)(4). Congress consciously omitted the 'best available control measure' feature that EPA now seeks to rely upon, 42 U.S.C. § 7619(b)(1), and Congress used plain statutory language that contradicts EPA's argument ("not reasonably controllable or preventable"), *id.* § 7619(b)(1)(A)(ii).

An agency's interpretation "cannot render nugatory restrictions that Congress has imposed." *AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005). Here, EPA's interpretation nullifies § 7619(b)(1)(A)(iii)'s "unlikely to recur at a particular location" language, the statutory disjunction between "human activity" and "natural event," and § 7619(b)(1)(A)(ii)'s "reasonably. . . preventable" language. It is well-established that the "range of permissible interpretations of a statute is limited by the extent of its ambiguity," and this Court will reject an agency interpretation that "diverges from any realistic meaning of the statute." *Mass. v. U.S. Dep't of Transp.*, 93 F.3d at 893.

In explaining its definition, EPA hewed closely to conclusory statements like "EPA believes the interpretation… implements the Congressional intent," without more. 81 Fed. Reg. at 68,231/1, JA074 (discussing wildfires). The Agency indicated that only if "all of the event-related emissions originated from anthropogenic sources or if anthropogenic emission sources that contributed to the event-related emissions could have been reasonably controllable but reasonable controls were not implemented at the time of the event," would the event be considered "*not* natural." *Id.* at 68,231/3, JA074 (emphasis in original).

Under *Chevron* Step Two, "[a] reasonable explanation of how an agency's interpretation serves the statute's objectives is the stuff of which a permissible construction is made; an explanation that is arbitrary, capricious, or manifestly contrary to the statute, however, is not." *Northpoint Technology v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (citation and internal quotations omitted). Here, EPA advanced no reasoned explanation for how its rule serves the statute's objectives. To the contrary, EPA admitted that "Congress included both 'human activities' and 'natural event[s]' as *separate activities* within an exceptional event." Response to Comments, 34, JA135 (emphasis added). EPA's sole explanation for its regulatory preference relies upon a 1996 guidance document that Congress made clear shall

not apply to the instant rulemaking,[14] a guidance that even EPA admits has been superseded. 81 Fed. Reg. at 68,220/1, JA063. EPA offers no explanation for these internal inconsistencies, much less a reasoned one. This inconsistency is yet another reason for rejecting EPA's interpretation. *See*, *e.g.*, *Air Transp. Assn. v. U.S. DOT*, 119 F.3d at 43 (vacating regulation: "the most serious logical problem with [the] regulation—which we simply cannot accept," is that the Agency's explanation "is internally inconsistent"). The Agency's solitary explanation thus fails to supply the reasoned explanation that this Court requires. *See Northpoint Technology v. FCC*, 412 F.3d at 151.

Monitored air pollution exceedances that comprise both natural and anthropogenic sources require an approach consistent with the Clean Air Act. Rather than throwing out the entire monitored exceedance as an "exceptional event," and undermining the regulatory structure of the NAAQS and Clean Air Act title I along with it, government officials should do what they do now—undertake an inquiry into the data on a case-by-case basis. Agencies may adjust the data, as warranted, to exclude any portion attributable to an exceptional event consistent

[14] U.S. EPA, Areas Affected by PM–10 Natural Events memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, to the EPA Regional offices, May 30, 1996, Docket No. EPA-HQ-OAR-2013-0572-0020, JA197.

with the narrow manner in which Congress defined that concept. Agencies may determine whether the remaining portions from industrial and other recurring human activities nonetheless would have caused a violation, without collapsing the concepts of human activities and natural events into one unlawful combination.

B. EPA Has Substituted Its Own Agenda for Congress's.

Even where an agency's interpretation "may be linguistically possible" for the sake of argument, that interpretation will be rejected if it "is not a permissible construction of the statute in light of its structure and purposes." *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). In particular, an agency's interpretation will fail *Chevron* Step Two where "the agency seeks to exploit the ambiguity rather than resolve it, and to advance its own policy goals rather than Congress'." *NRDC v. Reilly*, 976 F.2d 36, 44 (D.C. Cir. 1992) (Silberman, J., concurring).

Here, EPA has substituted its own agenda for Congress's. The Agency's regulation contradicts the clear separation of human activity and a natural event under plain statutory language. 42 U.S.C. §7619 (b)(1)(A)(iii). EPA concedes this: "Congress included both 'human activities' and 'natural event[s]' as *separate activities* within an exceptional event." Response to Comments, 34, JA135 (emphasis added). EPA substitutes its policy preference for the 'best available control measure' approach in the 1996 agency guidance and displaces the careful

congressional design that did not adopt this approach, either explicitly or implicitly. Worse for EPA's agenda, Congress rejected the approach by not allowing it to apply after the effective date of initial Agency regulations, May 21, 2007, *id.*, and Congress adopted language that contradicts that approach ("not reasonably controllable or preventable"). 42 U.S.C. §7619 (b)(1)(A)(ii). EPA's preferred interpretation "is not a permissible construction of the statute in light of its structure and purposes." *Tax Analysts v. IRS,* 117 F.3d at 616.

Finally, assuming *arguendo* EPA has discretion to define a natural event to include an event in which "human activity plays little or no direct causal role," the final rule is so vague, malleable and expansive as to be arbitrary and capricious. 81 Fed. Reg. at 68,231/2, JA074. The human activity deemed by EPA to constitute natural events exemplifies these defects: human activities may play *any* percentage of a direct causal role in these events less than 100%, so long as they are "reasonably controlled." *Id.* If there is *some* component that is from a "natural source," the Agency allows the anthropogenic emissions to be recast as having "little or no direct causal role," and for its pollution contributions and resulting health violations to be excluded. *Id.* The entire human activity and its emissions then would meet EPA's definition of natural event, qualifying for treatment as an exceptional event. This demonstrates that the definition's putative limitation on

human activity ("little or no direct causal role") is meaningless as implemented in the actual regulation ("emissions . . . that are reasonably controlled do not play a 'direct' role in causing emissions"), and as interpreted by EPA. *See supra* at 15-17, 28-30 (discussing EPA's treatment of NAAQS-violating anthropogenic emissions as a natural event if they are anything less than 100% of the contributing emissions).

For all of the above reasons, EPA's rule is "unreasonable" under *Chevron* Step Two as well as arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the Court should vacate the final exceptional event rule's definition of "natural event."

Dated: November 14, 2017 Respectfully submitted,

/s/ John D. Walke
John D. Walke (DC #: 450508)
Attorney of Record
Emily Davis
Natural Resources Defense Council
15th Street, NW Suite 300
Washington, D.C. 20005 (202) 289-6868
jwalke@nrdc.org
Counsel for Petitioner
Natural Resources Defense Council

__/wp/ Sanjay Narayan_____
Sanjay Narayan
Sierra Club Environmental Law Program
2101 Webster St.
Suite 1300
Oakland, CA 94612
(415) 977-5769
sanjay.narayan@sierraclub.org
Counsel for Sierra Club

CERTIFICATE REGARDING WORD LIMITATION

This brief complies with the type-volume limitation of Circuit Rule 32(a)(7)(B) because this brief contains 10,724 words (as counted by counsel's word processing system), and thus complies with the applicable word limit established by the Court.

Dated: November 14, 2017

/s/ John D. Walke
John D. Walke

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2017, I have served the foregoing **Final Opening Brief of Environmental Petitioners and Addendum** on all registered counsel through the court's electronic filing system (ECF).

/s/ John D. Walke
John D. Walke