ORAL ARGUMENT NOT YET SCHEDULED
No. 16-1413

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, *et al.*,
***Respondents*.**

On Petition for Review of Final Action of the
United States Environmental Protection Agency
81 Fed. Reg. 68,216 (Oct. 3, 2016)

BRIEF OF INTERVENOR-RESPONDENT AMERICAN PETROLEUM INSTITUTE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Intervenor-Respondent American Petroleum Institute ("API") states as follows:

A. Parties, Intervenors, and *Amici*.

Since these consolidated cases involve direct review of a final agency action, the requirement to furnish a list of parties, intervenors, and *amici curiae* that appeared below is inapplicable. These cases involve the following parties:

Petitioners:

National Resources Defense Council and Sierra Club.

Respondents:

United States Environmental Protection Agency ("EPA") and E. Scott Pruitt, Administrator of EPA.

Intervenors:

API is an Intervenor in support of Respondents.

Amici Curiae

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.

B. Ruling Under Review

This case involves a petition to review final EPA action entitled "Treatment of Data Influenced by Exceptional Events," 81 Fed. Reg. 68,216 (Oct. 3, 2016), Joint Appendix 59-125.

C. Related Cases

Intervenor-Respondent API is not aware of any related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Intervenor-Respondent American Petroleum Institute ("API") makes the following statements:

API, headquartered in the District of Columbia, is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. API's more than 625 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. API's member companies engage in all segments of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. API has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in API.

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MISCELLANEOUS

GLOSSARY OF ABBREVIATIONS, ACRONYMS, AND TERMS

Act	Clean Air Act
Agency	U.S. Environmental Protection Agency
API	American Petroleum Institute
CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
RTC	Responses to Significant Comments on the 2015 Proposed Rule Revisions to the Treatment of Data Influenced by Exceptional Events

JURISDICTION

To the extent Petitioners' brief constitutes a collateral attack on the U.S. Environmental Protection Agency's ("EPA" or "Agency") 2007 rule defining the term "natural event," this Court lacks jurisdiction to hear those arguments because they are time-barred. Clean Air Act ("CAA") § 307(b)(1), 42 U.S.C. § 7607(b)(1) (petitions for review of any final EPA action must be brought within 60 days after notice of that action appears in the Federal Register). This Court otherwise has jurisdiction under 42 U.S.C. § 7607(b)(1).

STATEMENT OF ISSUES

1. Whether Petitioners are barred by CAA § 307(b)(1) from bringing what is effectively a collateral attack on EPA's 2007 rulemaking defining the term "natural event" for purposes of implementing section 319(b) of the CAA.

2. Whether it was unlawful under section 319(b) of the CAA for EPA to define "natural event" as including events "in which human activity plays little or no direct causal role" and further explaining that "anthropogenic sources that are reasonably controlled shall be considered to not play a direct role in causing emissions."

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the addendum to Petitioners' brief and the addendum to EPA's brief.

STATEMENT OF THE CASE

EPA's brief provides a thorough history of the Agency's efforts to account for exceptional events under the CAA. To avoid duplication, this brief does not repeat that background. It is, however, important to emphasize why it is critical to recognize and effectively address data that are impacted by exceptional events and their emissions.

EPA states in its brief that the Agency has attempted to account for exceptional events since 1977. EPA Br. at 7. In fact, EPA has addressed exceptional events since at least 1971, the very beginning of the modern era of CAA implementation, when EPA first adopted requirements for preparation of state implementation plans to address the national ambient air quality standards ("NAAQS"). 36 Fed. Reg. 22,369, 22,401 (Nov. 25, 1971) ("For purposes of developing a control strategy, data derived from measurements of existing ambient levels of a pollutant may be adjusted to reflect the extent to which occasional natural or accidental phenomena, e.g., dust storms, forest fires, industrial accidents, demonstrably affected such ambient levels during the measurement period."), Joint Appendix ("JA")402. EPA followed up that statement of policy with additional guidance in 1973. EPA, Guideline Series, OAQPS No. 1.2-006, Guidelines for Evaluation of Suspect Air Quality Data (1973), JA472-88. As EPA's brief

explains, the Agency went on to revisit its exceptional events policies in 1977, 1986, and 1996. EPA Br. at 7-8.

Some of EPA's most significant past attempts to address exceptional events, including the 1996 guidance document, which, as described below, is particularly relevant to this litigation, addressed exceptional events only with respect to particulate matter, just one of the pollutants regulated under the CAA. Recognizing that this was insufficient, in 2005 Congress enacted legislation that codified EPA's authority to respond to exceptional events and expanded that authority to apply broadly to all regulated pollutants. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 6013, 119 Stat 1144, 1882-84 (2005); *see* 72 Fed. Reg. 13,560, 13,563 (Mar. 22, 2007) ("2007 Rule") ("The language of section 319 of the CAA is broad . . . . Thus, its provisions can apply to the NAAQS for any criteria pollutant."), JA430; *see also* 71 Fed. Reg. 12,592, 12,594 (Mar. 10, 2006) ("In adopting revisions to section 319, EPA believes that Congress sought to provide statutory relief to States to allow them to avoid being designated as nonattainment or to avoid continuing to be designated nonattainment as a result of exceptional events in appropriate circumstances."), JA405.

The 2005 legislation provided that an "exceptional event" is 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 promulgated under paragraph (2) to be an exceptional event.

CAA § 319(b)(1)(A), 42 U.S.C. § 7619(b)(1)(A).

EPA promulgated regulations governing the identification and treatment of monitoring data influenced by such events in 2007. 72 Fed. Reg. 13,560 (Mar. 22, 2007) JA427-48. The 2007 Rule reflected many of the policies embodied in the EPA exceptional event guidance documents that preceded it. It provided a threshold definition for the term "exceptional event" that largely tracked the text of the statute, and it set out a process by which data influenced by such events could be flagged by states and subsequently demonstrated to have caused an exceedance of a NAAQS. *Id*. at 13,568-71, JA435-38. Upon EPA approval of such a demonstration, all data for the 24-hour period impacted by an exceptional event, including data with respect to routine emissions from traditional industrial sources, would be excluded from certain regulatory determinations under the CAA so as not to penalize states for emissions beyond their control. Those regulatory determinations included determinations related to exceedances or violations of the NAAQS and determinations as to whether areas of the country are to be designated

as "nonattainment" areas, a classification with significant regulatory consequences for sources located or looking to construct in those areas. *Id.* at 13,572, JA439.

Of particular significance here, the 2007 Rule included a definition of "natural event," a term the CAA does not define, as "an event in which human activity plays little or no direct causal role to the event in question." *Id.* at 13,563, JA430. How this term is defined, which is the subject of this litigation, has significant implications for the functionality of the exceptional events rule.

States and regulated entities have long maintained that EPA's exceptional events policies, including some of those reflected in the 2007 Rule, were inadequate and failed to give effect to Congress's direction that EPA relieve states of regulatory burdens that can spring from exceptional events that are beyond state control. EPA has acknowledged some of these problems:

> Interpreting and implementing the 2007 Exceptional Events Rule has been challenging in certain respects both for the air agencies developing exceptional events demonstrations and for the EPA Regional offices reviewing and acting on these demonstrations. Since 2007, air agencies have submitted exceptional event demonstrations for a variety of pollutant and event combinations ranging from volcanic activity influencing sulfur dioxide (SO_2) and particulate matter (PM) concentrations to stratospheric ozone intrusions. Air agencies preparing demonstrations have expressed specific concerns and identified challenges associated with preparing analyses to satisfy the "but for" rule criterion, determining what controls constitute reasonable controls particularly for natural sources and for interstate

> and international transport and identifying how much documentation to include in a demonstration.

80 Fed. Reg. 72,840, 72,843 (Nov. 20, 2015) ("2015 Proposed Rule"), JA4. Similarly, a 2015 survey conducted by the Association of Air Pollution Control Agencies ("AAPCA"), reported that all of AAPCA's members had concluded that "the process to exclude exceptional events data under Section 319 of the Clean Air Act [is] overly burdensome or limited by resource/time constraints." AAPCA, Comments on the Treatment of Data Influenced by Exceptional Events, at 2 (Feb. 3, 2016), EPA-HQ-OAR-2013-0572-0148, JA250. In 2015 testimony before the U.S. House Committee on Science, Space and Technology, the Wyoming Department of Environmental Quality elaborated on these concerns, explaining that a single exceptional event demonstration would typically require 15 months of contractor-assisted work at a cost of $150,000. *See* NAAQS Implementation Coalition, Comments on EPA's Treatment of Data Influenced by Exceptional Events: Proposed Rule, at 4 n.15 (Feb. 3, 2016), EPA-HQ-OAR-2013-0572-0147, JA267; *see also* Western States Air Resources Council, Comments on Exceptional Events Rule, at 1 (Jan. 29, 2016), EPA-HQ-OAR-2013-0572-0099, JA252 (noting many longstanding concerns with EPA's 2007 Rule).

As a result of these significant burdens and other flaws in the 2007 Rule, numerous events and their associated emissions that states believed should have been excluded from regulatory considerations nevertheless formed the basis for

regulatory actions. AAPCA Comments at 2, JA250. In an effort to address these problems, EPA initiated rulemaking proceedings to revise the 2007 Rule. *See* 80 Fed. Reg. 72,840 (Nov. 20, 2015), JA1-58. EPA published the final revisions to the 2007 Rule on October 3, 2016. 81 Fed. Reg. 68,216 (Oct. 3, 2016) ("2016 Rule"), JA59-125.

The 2016 Rule, among other things, identifies enforceable control measures that constitute "reasonable controls" for exceptional event purposes, revises deadlines by which states were previously required to flag data and submit exceptional event demonstrations, and includes new requirements for developing "mitigation plans" for areas where exceptional events have been historically documented or are known to recur seasonally. *Id.* at 68,217-18, JA60-61. Although these changes are significant, none of them has been challenged. Instead, Petitioners challenge language regarding the definition of "natural event." As the 2016 Rule explains, the 2007 Rule defined a "natural event" as "an event in which human activity plays little or no direct causal role." *Id.* at 68,231, JA74. The preamble to the 2007 Rule further explained that EPA "consider[ed] human activity to have played little or no *direct* role in causing an event-related exceedance or violation if anthropogenic emission sources that contribute to the exceedance are reasonably controlled at the time of the event." *Id.* The 2016 Rule codifies that understanding in the rule text itself, adopting the following language:

> *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.

40 C.F.R. § 50.1(k), 81 Fed. Reg. at 68,277, JA120. Accordingly, under the statute and EPA's regulations, a natural event includes natural emissions directly caused by an act of nature, like emissions from a volcanic eruption. A natural event can also include emissions from an "anthropogenic source" that are caused by or incidental to the natural event. For instance, high-speed winds can cause emissions from a man-made mining site to enter the ambient air. These emissions cannot be distinguished from other emissions caused by a natural event. Thus, when emissions from an anthropogenic source mix with natural emissions caused by a natural event, the event remains categorized as natural, so long as the anthropogenic source is reasonably controlled. In this way, the existence of manmade air pollution at the time a natural event occurs will not eliminate the natural event from consideration under the exceptional events rule. Whether EPA has authority to determine that reasonably controlled anthropogenic sources do not directly cause what is otherwise a natural event or its emissions is the principle question before this Court.

In addition to the requirements that apply to designating an event as natural under the rules, the demonstration requirements of 40 C.F.R. § 50.14(c)(3), 81 Fed.

Reg. at 68,281, JA124, must also be met before data can be excluded under the exceptional events rule. Those requirements include "[a]nalyses comparing the claimed event-influenced concentration(s) to concentrations at the same monitoring site at other times to support the requirement" that States demonstrate "that the event affected air quality in such a way that there exists a clear causal relationship between the specific event and the monitored exceedance or violation." 40 C.F.R. § 50.14(c)(3)(iv)(B), (C), 81 Fed. Reg. at 68,281, JA124. In this manner, EPA's rules ensure that data are excluded only when an exceptional event, rather than routine emissions, is the actual cause of an exceedance or violation of a NAAQS.

Petitioners argue that the statute requires EPA to promulgate a very different rule. They argue that an event can be deemed natural only if the emissions associated with the event are purely natural and that only those emissions can be excluded from EPA's emission database. Pet. Br. at 44. Such an approach would be much more restrictive than any exceptional events policy EPA has previously adopted.

SUMMARY OF ARGUMENT

EPA's authority under section 319(b) of the CAA to define the term natural event is the central issue before this Court. EPA's decisions that a natural event is an event in which human activity plays little or no direct causal role and that

emissions from reasonably controlled anthropogenic sources caused or affected by acts of nature do not play a direct role in causing a natural event were first announced in EPA's 2007 Rule. The 2016 Rule did not make any substantive revisions to these policies. It merely added language that appeared in the preamble to the 2007 Rule to the regulatory text of 40 C.F.R. § 50.1(k). In these circumstances, EPA cannot be said to have reopened the definition of natural event for litigation. Any challenge to that definition should have been brought in 2007 and is untimely now. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

Even if Petitioners' challenge were timely, their arguments lack merit. Petitioners argue that the meaning of natural event is clear on the face of section 319(b) and that the definition EPA has adopted runs afoul of congressional intent. Accordingly, they claim that EPA's definition violates Step I of the framework set out in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The CAA does not define natural event, and its structure and context provide no clear direction from Congress as to how EPA must interpret that term. At least one judge of this Court concluded that the meaning of natural event in section 319(b) was ambiguous, and, if this Court reaches the merits of Petitioners' claims, it should reach the same conclusion. *NRDC v. EPA*, 559 F.3d 561, 569 (D.C. Cir. 2009) (Rogers, J., concurring in part & dissenting in part). The dictionary definitions and the various provisions of section 319(b) that Petitioners rely on do not make the meaning of

the term clear on the face of the statute. On the contrary, Petitioners' arguments show that Petitioners fundamentally misunderstand EPA's rule, routinely confusing the cause of the exceptional event (i.e., nature or human activity) with the source of any incidental emissions affected by that event (i.e., a reasonably controlled anthropogenic source). The Court should reject their *Chevron* Step I arguments.

Finally, Petitioners argue that EPA's definition of natural event is unreasonable, arbitrary, and capricious under *Chevron* Step II. Their arguments amount to little more than a review of their arguments under *Chevron* Step I, and they should be rejected. In particular, Petitioners rely on their argument that section 319(b)(4) forecloses the natural event definition adopted in a 1996 Memorandum addressing exceptional events for particulate matter. Memorandum from Mary D. Nichols, Assistant Adm'r for Air & Radiation, EPA, to Dir., Air, Pesticides & Toxics Mgmt. Div., Regions I & IV, et al., Areas Affected by PM-10 Natural Events (May 30, 1996) ("1996 Memorandum"), EPA-HQ-OAR-2013-0572-0020, JA197-212. But section 319(b)(4) does not foreclose any policy option and, if anything, suggests that Congress approved of and wished to see the 1996 Memorandum applied in a broader context. Far from offering no rationale for its natural event definition, EPA has offered a reasoned explanation consistent with its discretion under the CAA.

ARGUMENT

I. Petitioners' Claims Are Not Properly Before This Court.

Petitioners' argument that the definition of natural event is inconsistent with the requirements of the CAA is not properly before this Court. Section 307(b)(1) of the CAA requires that any petition for review of certain rules promulgated pursuant to the CAA, including the 2007 and 2016 Rules, "shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1). The challenge presented here is to policies that were established by the 2007 Rule, and it is time-barred.

As described above, the 2007 Rule defined "natural event" as "an event in which human activity plays little or no direct causal role." 72 Fed. Reg. at 13,580, JA447. The preamble to the 2007 Rule further explained that EPA understood its definition of natural event to mean that anthropogenic sources that are reasonably controlled, but that nevertheless contribute to a NAAQS exceedance otherwise caused by a natural event, will be deemed to have little or no direct causal role in that event. *Id*. at 13,563-64, JA430-31. In other words, natural events may incidentally cause or affect emissions from man-made sources so long as the man-made source itself is reasonably controlled. EPA confirmed that understanding in both its 2015 Proposed Rule and in the preamble to the 2016 Rule:

> We . . . reiterate our belief that we generally consider human activity to have played little or no direct role in causing emissions if anthropogenic emission sources that contribute to the event emissions are reasonably controlled at the time of the event.

80 Fed. Reg. at 72,844, JA5.

> In the 2007 rule preamble and the November 2015 proposal, the EPA explained that we generally consider human activity to have played little or no *direct* role in causing an event-related exceedance or violation if anthropogenic emission sources that contribute to the exceedance are reasonably controlled at the time of the event.

81 Fed. Reg. at 68,231, JA74.

The 2016 Rule did alter the regulatory text of the definition for natural event. That definition states

> *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, JA120. EPA's revision does not effect any substantive change to the elements of the natural event definition that Petitioners challenge. EPA did not expressly solicit comment on this matter in its 2015 Proposed Rule, and EPA proposed no alternative to its 2007 Rule policy. 80 Fed. Reg. at 72,854-55, JA15-16. In its 2016 Rule, EPA responded to comments that were critical of its longstanding definition by simply restating its previous rationale. 81 Fed. Reg. at

68,231, JA74 ("As we have previously stated, 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 little or no direct causal role in causing the event-related exceedance."); *compare* 72 Fed. Reg. at 13,563-64, JA430-31, *with* EPA, Responses to Significant Comments on the 2015 Proposed Rule Revisions to the Treatment of Data Influenced by Exceptional Events, at 34 (Sept. 2016), EPA-HQ-OAR-2013-0572-0191, ("RTC"), JA135 (both discussing the relevance of the 1996 Memorandum to the policy reflected in the 2007 Rule and 2016 Rule). The submission of comments on matters other than those that are actually at issue, goading an agency into a reply, does not reopen a previously settled matter. *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990). And the fact that EPA acted on other matters that affect its exceptional events policy in the 2016 Rule does not reopen all issues that touch that policy generally. *NRDC v. EPA*, 571 F.3d 1245, 1265-66 (D.C. Cir. 2009) (per curiam) (finding that EPA did not reopen the issue of offsets for pre-application emission reductions by amending other elements of the same regulation).

As a result, any challenge to this provision should have been brought in 2007, and indeed, such a challenge was made at that time. The definition of

natural event was the focus of *NRDC v. EPA*, 559 F.3d at 562-64.[1] At that time, just as now, the petitioner argued that "a 'natural event' within the meaning of § 7619 is something that occurs without the slightest human influence." *Id.* at 563. In that challenge, this Court held that the petitioner had failed to object to the definition of natural event during the comment period on the proposed rule and that the petitioner had therefore failed to preserve its argument for judicial review. *Id.* at 563-64.

Petitioners are not entitled to a second chance to litigate this issue merely because EPA made non-substantive revisions to regulatory text that embody the same policy set out in its 2007 Rule. For that reason, this Court lacks jurisdiction to hear Petitioners' challenge to the definition for natural events. *Med. Waste Inst. v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (CAA's 60-day filing deadline is "'jurisdictional'") (citation omitted).

II. The CAA Does Not Define the Term "Natural Event" and Does Not Preclude EPA from Recognizing that Many Events Are Not Entirely Free of Human Influence.

EPA's brief ably explains that Congress has not spoken to the meaning of the statutory term natural event, that the term natural is "notoriously ambiguous," and that the legislative history of section 319(b) provides no insight into the meaning of the term. EPA Br. at 28-29. For those same reasons, American

[1] The petitioner in that case is one of the Petitioners in the present case.

Petroleum Institute agrees with EPA that Petitioners have not established that Congress has unambiguously expressed its intent and eliminated EPA discretion as to these matters. *Chevron*, 467 U.S. at 842-43. Accordingly, this Court must reject Petitioners' *Chevron* Step I argument.

Petitioners are indeed correct that CAA § 319(b) distinguishes between events "caused by human activity" and "natural events." CAA § 319(b)(1)(A)(iii), 42 U.S.C. § 7619(b)(1)(A)(iii). But that is all the statute does in this regard. It provides no standards by which to determine whether an event is caused by human activity or an act of nature, and it provides no guidance as to how EPA should make that determination. In her 2009 separate opinion in *NRDC v. EPA*, which involved a challenge to EPA's 2007 definition of natural event, Judge Rogers recognized this fact, concluding that

> [t]he Clean Air Act does not define "natural event" or specify how to categorize events with predominantly natural causes but some human contribution. Because the statute leaves a gap to be filled by EPA, the statutory term is ambiguous. EPA's definition, in turn, is permissible.

559 F.3d at 569 (Rogers, J., concurring in part & dissenting in part). If the Court reaches the merits of Petitioners' claims, it should reach this same conclusion.

To support their argument, Petitioners first turn to dictionary definitions, underscoring the absence of statutory direction on these matters. The definitions they cite, moreover, tell us nothing more than the statute. For instance, the

definition of "natural" quoted in the brief—"'of, forming a part of, or arising from nature'"—simply begs the question that EPA's definition of natural event answers: at what point does an event form *a part of* or *arise from* nature when it is impossible to distinguish between purely natural and purely human components to a single event? *See* Pet. Br. at 25. EPA's rule supplies a reasonable answer in the face of statutory silence on this matter.

Neither has EPA, as Petitioners suggest, erased the difference between events caused by human activity and natural events. *Id.* at 26 (stating that the CAA does not allow these terms to be given "the same meaning"). From the face of the regulations, it is in fact clear that the terms have been given distinct and separate meanings. Natural events are those "in which human activity plays little or no direct causal role." 40 C.F.R. § 50.1(k), 81 Fed. Reg. at 68,277, JA120. Events caused by human activity are those in which human activity is the direct, primary cause. EPA has drawn a clear line between the two types of events, and the CAA does not prohibit the Agency from drawing the line where it has. Indeed, if EPA were to adopt the approach Petitioners suggest, any incidental emissions from anthropogenic sources that are caused or affected by a natural event would unreasonably be deemed to transform the natural event into one caused by human activity. Such a policy would obliterate section 319(b)'s direction that EPA appropriately account for natural events.

Next, Petitioners suggest that EPA has violated the terms of section 319(b) by promulgating a rule that allows an event to be designated as natural so long as emissions from "anthropogenic activities" constitute less than 100 percent of the emissions associated with the event. Pet. Br. at 27. They point to no specific statutory provision that would prohibit such a rule, but, more importantly, that is not what EPA's rule does. As EPA's brief states, "[r]egular industrial pollution and other human activities . . . are emphatically not natural events." EPA Br. at 29-30; 81 Fed. Reg. at 68,245-46 ("Routine emissions generated by and transported from anthropogenic sources are not exceptional events."), JA88-89. EPA's Statement of the Case explains more fully why this is so. Although the definition of natural event allows some fraction of emissions during a natural event to come from an anthropogenic *source*, there must also be emissions that are natural in origin and not caused by human activity. EPA Br. at 18 n.8. Allowing for incidental emissions from anthropogenic sources to also be affected by a natural event without fundamentally changing the character of the event is a reasonable reading of an ambiguous term. Further, as explained above, any routine industrial emissions, emissions that would be caused by human *activity*, would be accounted for through the otherwise applicable demonstration requirements of 40 C.F.R. § 50.14(c). *See also id.* at 11-12 (demonstrations must compare the

difference between historical emissions accounting for routine industrial emissions and emissions on the event day).

Petitioners argue that a number of other section 319(b) provisions preclude EPA's natural event definition. They claim that the CAA's stipulation that only human activity "that is unlikely to recur at a particular location" can constitute an exceptional event is inconsistent with EPA's natural event definition, but, again, under EPA's rule, human *activity* is not causing any natural event. Pet. Br. at 27-28. Elevated emissions, some of which must be natural and some of which may come from reasonably controlled anthropogenic sources, are caused or affected by the natural event. The human activity is a step removed.

Petitioners also argue that the natural event definition's requirement that anthropogenic sources be reasonably controlled if they are to be excluded from playing a direct causal role in a natural event runs afoul of the section 319(b)(1)(A)(ii) requirement that an exceptional event "is not reasonably controllable or preventable." Pet. Br. at 28. Specifically, they argue that the definition is unlawful because it eliminates the "preventable" prong of section 319(b)(1)(A)(ii). Petitioners are again confusing distinct issues. The "reasonably controlled" requirement of the natural event definition applies to anthropogenic *sources* that might contribute to a natural event's emissions. The section 319(b)(1)(A)(ii) "reasonably controllable or preventable" requirement applies

independently to any *event* that may be deemed an exceptional event. As EPA's brief explains, states must make the "reasonably controllable or preventable" demonstration regardless of any showing that anthropogenic sources are reasonably controlled. EPA Br. at 38; *see also* 40 C.F.R. § 50.14(c)(3)(iv)(D), 81 Fed. Reg. at 68,281, JA124 (requiring "[a] demonstration that the event was *both* not reasonably controllable and not reasonably preventable") (emphasis added).

Petitioners' arguments regarding the recurrence prong of section 319(b) are similarly misguided. The statute says that an exceptional event is either "a natural event" or "an event caused by human activity that is unlikely to recur at a particular location." CAA § 319(b)(1)(A)(iii), 42 U.S.C. § 7619(b)(1)(A)(iii). Petitioners argue that EPA's definition of natural event allows "an industrial activity that is likely to recur and does recur at the same location—so long as it is 'reasonably controlled'—[to] qualify as an exceptional event." Pet. Br. at 29. Again, events caused by human activity are not at issue under the natural event definition. Emissions from anthropogenic sources during a natural event are the issue. The recurrence prong of section 319(b) is therefore not implicated.

Petitioners next turn to section 319(b)(4) as a basis for arguing that the CAA prohibits EPA's natural event definition. That provision states that, until the effective date of any rules promulgated pursuant to section 319(b) to address exceptional events, EPA must continue to implement previously issued exceptional

event guidance, including a 1996 Memorandum issued pursuant to section 188(f) of the CAA that addressed areas affected by particulate matter natural events. CAA § 319(b)(4)(B), 42 U.S.C. § 7619(b)(4)(B). The 1996 Memorandum adopted a very similar position with respect to contributions to a natural event from anthropogenic sources (as opposed to emissions caused by human activities) to the position taken in the 2007 and 2016 Rules and was cited as a basis for both rules. 72 Fed. Reg. at 13,563-64, JA430-31; RTC at 34, JA135. The thrust of Petitioners' argument is that EPA cannot rely on the position it took with respect to these issues in 1996 because (1) the 1996 Memorandum implemented section 188(f), not section 319(b); and (2) Congress foreclosed reliance on the concepts addressed in the 1996 Memorandum in section 319(b)(4). Pet. Br. at 32. Neither argument is persuasive.

Section 188(f) predated enactment of section 319(b) but was focused on implementing a very similar exceptional events policy for particulate matter. As EPA has explained, in enacting section 319(b) in 2005, Congress intended to continue those policies and *extend* them to other pollutants. 72 Fed. Reg. at 13,563, JA430. The enactment of section 319(b)(4) confirms, rather than undermines, that understanding. Indeed, that provision affirmatively required continued application of the 1996 Memorandum until new rules had been promulgated and taken effect. Further, the five principles that Congress enacted in

section 319(b)(3) are clearly derived from the five guiding principles set forth in EPA's 1996 Memorandum. *Compare* CAA § 319(b)(3), 42 U.S.C. § 7619(b)(3) *with* 1996 Memorandum at 4-5, JA200-01. Contrary to Petitioners' argument, these facts suggest that Congress approved of those policies. And nothing in that provision or any other part of section 319 suggests the policies adopted in 1996 are disfavored or foreclosed under section 319. Indeed, if Congress had intended such a result, it would have said so expressly. It also would have likely amended or repealed section 188(f) when it enacted section 319(b). In short, the existence of section 319(b)(4) does not support Petitioners' argument that EPA's definition of natural event is inconsistent with the CAA.

Finally, Petitioners argue that the basic criteria for identifying an exceptional event provided in section 319(b)(1)(A) and the specific exclusions of three types of phenomena from the exceptional event definition contained in section 319(b)(1)(B) demonstrate that Congress created a tightly circumscribed universe of possible exceptional events that EPA has unlawfully expanded.[2] Pet. Br. at 36-37. But EPA's definition of natural event does not encompass any of the statutorily excluded events. Moreover, this argument simply ignores the ambiguity in the statutory language and the undefined term "natural event."

[2] Petitioners also reference the general principles set out in section 319(b)(3)(A) but do not explain how EPA's definition violates these provisions. Pet. Br. at 34-35.

The cases Petitioners cite in support of their argument, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (per curiam) and *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002), offer them no help. In *New York*, the court rejected an EPA rule that created an exemption for certain pollution control projects from the requirements of the CAA's new source review program. *New York*, 413 F.3d at 40-43. And in *Sierra Club*, EPA extended deadlines for compliance with the CAA's ozone standard without first reclassifying a nonattainment area, as the CAA expressly called for. In both cases, Congress spoke directly and clearly, limiting EPA discretion. Here, the opposite is true. Congress granted EPA authority to develop an exceptional events policy and left it to the Agency to define the scope of a natural event.

By repeatedly mischaracterizing EPA's definition of natural event and conflating events resulting from human activity with emissions from anthropogenic sources that are impacted by a natural event, Petitioners are in effect arguing that this Court must require EPA to impose a far more restrictive exceptional events policy. *See, e.g.*, Pet. Br. at 29, 30, 37-38. Petitioners appear to want EPA to distinguish between emissions that are purely natural and emissions that may be caused by an act of nature, like a high-speed wind event, but whose source may have had some human nexus. Under their preferred approach, only the former could be deemed a part of an exceptional event. Further, they appear to want EPA

to promulgate a rule that adjusts the emission data that EPA stores in its database to remove the influence of the exceptional event alone, rather than discarding all data for the 24-hour period affected by the event. *Id.* at 44.[3] Nothing in the statute requires EPA to adopt these policies, and EPA has explained that they are unworkable. EPA Br. at 39. Indeed, as explained above, EPA correctly determined that the 2007 Rule, in respects apart from its natural event definition, was overly burdensome and failed to give full effect to section 319(b). Petitioners' approach would require EPA to move backwards when the Agency has finally and properly acted to improve its exceptional events policies and better reflect congressional intent as expressed in section 319(b).

In sum, section 319(b) does not clearly define the term natural event and does not address how EPA should delineate between natural events and events caused by human activity. Petitioners' *Chevron* Step I arguments fail.

[3] To the extent Petitioners argue that any 24-hour period that experiences routine emissions cannot be eligible for exclusion, even if an exceptional event causes a NAAQS exceedance, their argument would render section 319(b) a nullity. Indeed, virtually every emission monitor in the country is affected by emissions caused by human activity. *See* EPA, Implementation of the 2015 Ozone NAAQS: Issues Associated with Background Ozone White Paper for Discussion at 3 (Dec. 30, 2015), EPA-HQ-OAR-2013-0572-0210, JA290.

III. EPA's Natural Event Definition is Reasonable and Entitled to Deference.

The 2016 Rule, like the 2007 Rule before it, provided ample justification—indeed, the same justification—for adopting a policy of allowing emissions from anthropogenic sources to count as emissions attributable to natural events when such emissions are caused by or incidental to an act of nature. As EPA explained in its 2015 Proposed Rule, some emissions caused by natural events, like stratospheric ozone intrusions or volcanic eruptions, have no clear connection to human activity or anthropogenic sources. 80 Fed. Reg. at 72,854, JA15. Other natural events, EPA has explained, have a connection to anthropogenic sources. High-speed wind events, which are clearly natural, can blow across emission sources that have been modified by human activity, like a drained lakebed or a road. *See* 81 Fed. Reg. at 68,257-59, JA100-02; EPA Br. at 15-19. The 2016 Rule similarly explains that wildfires can be triggered by accidental human actions or be influenced by past land management practices, but are nevertheless more appropriately considered natural events. 81 Fed. Reg. at 68,231, JA74. Further, it is not technically possible in most instances to differentiate between purely natural emissions on the day of an exceptional event and emissions that day that come from anthropogenic sources or otherwise have a connection to human activity.

EPA Br. at 5-6.[4] For those reasons, EPA has crafted a natural event definition that recognizes that emissions affected by or incidental to a natural event, even if they come from a reasonably controlled anthropogenic source, should be treated as part of the natural event and should not form a basis for reading a natural event out of existence. EPA has thus provided a well-reasoned basis for adopting its natural event definition.

Petitioners claim that EPA's rationale in support of its rule is unreasonable and that it thus fails the test set out in *Chevron* Step II. Petitioners' arguments in support of that position amount to little more than a recitation of their arguments for why the 2016 Rule contravenes the CAA. *See* Pet. Br. at 41 (EPA's interpretation contravenes the plain meaning of natural event), 42 ("Congress used plain statutory language that contradicts EPA's argument"). The arguments are no more convincing in this setting and should be rejected for the reasons described in Section II above.

Petitioners further assert that EPA's "sole explanation" for its definition of natural event is its 1996 Memorandum. *Id.* at 43. This is not true. EPA's 2007 Rule and its 2016 Rule are not premised solely upon the fact that a 1996 Memorandum exists. As described above, the 2007 Rule and the 2016 Rule both

[4] Indeed, because human activity is so pervasive, it is arguable that almost any event will have a connection to human activity. Petitioners have identified no reasonable way to identify purely natural events.

explain how the technical limitations of monitoring and source apportionment have supported and continue to support EPA's approach to attributing emissions to natural events. Petitioners go on to argue that Congress rejected the policy embodied by the 1996 Memorandum "by not allowing it to apply after the effective date of initial Agency regulations." *Id.* at 45. This is merely a reassertion of Petitioners' mistaken interpretation of section 319(b)(4). That provision does not reflect congressional intent to foreclose EPA's 1996 position that anthropogenic sources can contribute to natural event emissions without altering the fundamental character of the natural event. On the contrary, section 319(b)(4) supports the opposite conclusion: that Congress expected EPA to apply its 1996 policy more broadly to all pollutants regulated under the CAA, supporting the reasonableness of the 2007 and the 2016 Rules.

Finally, Petitioners argue that EPA's rule is "meaningless" because it does not impose more severe limits on the proportion of emissions that can come from an anthropogenic source relative to other sources. *Id.* at 46. Of course, EPA has explained why differentiating between purely natural emissions and emissions from anthropogenic sources that are caused or affected by acts of nature is not technically feasible. EPA Br. at 5-6. The argument also ignores that, independent of whether an event qualifies as natural, States must also demonstrate that the natural event caused a NAAQS exceedance or violation based, in part, on analyses

that account for routine emissions by assessing historical emission data. 40 C.F.R. § 51.14(c)(3)(iv)(C), 81 Fed. Reg. at 68,281, JA124. As such, the premise of Petitioners' argument is fundamentally flawed. Moreover, EPA could have determined that all emissions from anthropogenic sources, regardless of whether they are controlled at all, should be deemed not to cause an event that would otherwise qualify as natural simply because they are concurrent with a natural event. Instead, EPA took a much more measured approach and limited emissions that will not be deemed to have directly caused an event to those that come from reasonably controlled anthropogenic sources. There is nothing meaningless about this limitation.

EPA has provided a thorough and convincing explanation for its natural event definition. That definition differs in no substantive respect from the definition that Judge Rogers would have upheld as a reasonable exercise of EPA discretion in 2009. *NRDC v. EPA*, 559 F.3d at 569 (Rogers, J., concurring in part & dissenting in part). It should be upheld for the same reasons today.

CONCLUSION

EPA's definition of natural event has not changed since its 2007 exceptional events rule. EPA's 2016 Rule worked no substantive changes on the definition that are relevant to this litigation and did not reopen the issue. For that reason, Petitioners' challenge to the natural event definition is not properly before this

Court. Even if it were, Petitioners' arguments would be meritless. Section 319(b) of the CAA does not define natural event. The statute does not preclude the definition EPA has kept in place since its 2007 Rule, and that definition is well supported by the record. For the foregoing reasons, and those presented in EPA's brief, the petition for review should be dismissed or denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a), (f), and (g) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(1) and (e)(2)(C), I hereby certify that the foregoing final form Brief of Intervenor-Respondent American Petroleum Institute contains 6,638 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and that this brief therefore is within the word limit of 9,100 words as established by Circuit Rule 32(e)(2)(B). I also certify that this brief complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font.

/s/ *Aaron M. Flynn*
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2017, I served the foregoing final form Brief of Intervenor-Respondent American Petroleum Institute on all registered counsel in these consolidated cases through the Court's CM/ECF system.

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