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 REPLY BRIEF OF ENVIRONMENTAL PETITIONERS

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1996 Memo	Mary D. Nichols, EPA, Areas Affected by PM-10 Natural Events (1996)
2007 Rule	Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13,560 (Mar. 20, 2007)
API	American Petroleum Institute
EPA	U.S. Environmental Protection Agency
Final Rule	Treatment of Data Influenced by Exceptional Events, 81 Fed. Reg. 68,216 (Oct. 3, 2016)
JA	Joint Appendix
NRDC	Natural Resources Defense Council
Proposed Rule	Treatment of Data Influenced by Exceptional Events, 80 Fed. Reg. 72,840 (proposed Nov. 20, 2015)
Rule	40 C.F.R. § 50.1(k)
section 319(b)	42 U.S.C. § 7619(b)
SIP	state implementation plan

SUMMARY OF ARGUMENT

EPA's definition of "natural event" in the Exceptional Events Rule (Rule) violates section 319(b) of the Clean Air Act, 42 U.S.C. § 7619(b), because it allows certain *routine human emissions*[1] to be considered part of an *exceptional natural event.* Even when reasonably controlled, the predictable pollution from recurring human activity is anything but exceptional. Yet, when those emissions, along with an unusual act of nature, jointly cause an exceedance of the Clean Air Act's national air-quality standards, the Rule allows that violation to be excused—based on the fiction that nature alone is responsible.

Congress has unambiguously foreclosed EPA's interpretation of "natural event" under the first step of the *Chevron* test. The statutory language, structure, history, and purpose plainly indicate that a "natural event" cannot have a significant anthropogenic component. But the Rule's definition of "natural event" allows precisely this; routine human emissions—of unlimited magnitude—may be considered part of a "natural event." *See* 40 C.F.R. § 50.1(k). EPA cannot cure this defect by resorting to superseded agency guidance or by claiming that the definition means something other than what the text states.

[1] This brief uses the phrase "routine human emissions" to mean emissions from the activity of "reasonably controlled" human sources, 40 C.F.R. § 50.1(k), where that activity is not "unlikely to recur at a particular location," 42 U.S.C. § 7619(b)(1)(A)(iii).

EPA's definition of "natural event" also fails under *Chevron* step two, because the agency does not reasonably explain how interpreting a "natural event" to accommodate a significant element of routine human emissions falls within the narrow range of interpretations permitted by the statutory language and context. Counsel's post hoc rationalizations cannot substitute for a reasoned agency explanation at the time of rulemaking. Those rationalizations are unreasonable, moreover, because they either mischaracterize the Rule or reveal that EPA elevated its own policy preferences over the statute's core objective of protecting public health.

ARGUMENT

EPA's interpretation of "natural event" fails under either step of the *Chevron* analysis. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). As an initial matter, Petitioners do not "misread EPA's definition to mean that emissions from reasonably controlled anthropogenic sources can *themselves* be natural events." EPA Br. 26 (emphasis added); *accord id.* at 1-2, 29-30, 36-37, 44.[2] Rather, Petitioners argue that the Rule allows certain routine human emissions to be deemed part of, attributed to, or encompassed within a "natural event" that can qualify as an "exceptional event."

[2] Where API's arguments mirror EPA's arguments, this brief cites only EPA's brief.

I. *Chevron* step one: EPA's definition of "natural event" violates the plain meaning of section 319(b), because it allows certain routine human emissions to constitute a significant part of an "exceptional event"

"Under the first step of *Chevron*, the reviewing court must first exhaust the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue. The traditional tools include examination of the statute's text, legislative history, and structure, as well as its purpose." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (citations and internal quotation marks omitted). The precise question here is whether section 319(b) allows routine human emissions to constitute a significant part of an "exceptional" "natural event." Traditional statutory analysis reveals that Congress plainly answered "no."

A. EPA's expansive definition of "natural event" contradicts section 319(b)'s ordinary use of the term "natural"

Section 319(b) defines an "exceptional event" as an event that:

> (i) affects air quality;
> (ii) is not reasonably controllable or preventable; [and]
> (iii) is an event caused by human activity that is unlikely to recur at a particular location or a *natural event* . . . .

42 U.S.C. § 7619(b)(1)(A) (emphasis added).

1. EPA ignores Congress's intent to use the ordinary meaning of "natural" in section 319(b)

Although EPA seeks deference for its definition of "natural event" on the basis that the Clean Air Act does not define that term, *see* EPA Br. 28, "the lack of

a statutory definition does not render a term ambiguous. It simply leads us to give the term its ordinary, common meaning." *Am. Fed'n of Gov't Emps., AFL-CIO v. Glickman*, 215 F.3d 7, 10 (D.C. Cir. 2000) (citation omitted); *see also Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (internal quotation marks omitted)). As relevant here, the ordinary meaning of "natural" is "of, forming a part of, or arising from nature." Pet'rs' Opening Br. 25 (quoting *Webster's Deluxe Unabridged Dictionary* (2d ed. 1979)). Consistent with this common meaning, a "natural" event must consist predominantly, if not entirely, of components arising from nature; it cannot have a significant anthropogenic element.

Disregarding this ordinary meaning, the Rule sets forth a contrary definition of "natural event" that accommodates a substantial anthropogenic component:

> 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). According to the Rule, a "natural event" has two components: an "event . . . in which human activity plays little or no direct causal role," and "its resulting emissions." *Id*. Although the definition's first sentence appears to restrict

the emissions "resulting" from an "event" to those "in which human activity plays little or no direct causal role," the second sentence eviscerates that restriction: all "anthropogenic sources that are reasonably controlled shall be considered to not play a direct role in causing emissions." *Id*. Put another way, so long as the relevant emissions come from "reasonably controlled" human sources, the Rule will deem nature, rather than man, the source of those emissions. Together, the two sentences defy the plain meaning of "natural": the emissions "resulting" from a putatively "natural" event can, in fact, be manmade.

Significantly, the Rule places no limit on the proportion or magnitude of emissions from "reasonably controlled" human sources that can be imputed to an "exceptional" "natural event." *See id.* The Rule's preamble confirms that virtually *all* of the "natural event"-related emissions that cause an air-quality violation can come from human sources:

> [W]e 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. 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.

Treatment of Data Influenced by Exceptional Events, 81 Fed. Reg. 68,216, 68,231 (Oct. 3, 2016) [hereinafter Final Rule] (emphases added and omitted) (citation omitted), JA074; *see* EPA Br. 18. Even assuming the Rule requires *some* of the

emissions attributed to a "natural event" to come from a natural source, *see* EPA Br. 21-22, that is meaningless when all but a negligible fraction of the emissions can come from human sources.

Allowing a "natural event" to incorporate a significant human-emissions component is fundamentally inconsistent with the ordinary meaning of "natural." *See* Pet'rs' Opening Br. 24-27. To give an example: despite the implementation of "reasonable" pollution controls, a group of smelters emit lead particles, forming a cloud of lead dust. Under the Rule, this lead-dust cloud borne by high-speed wind could constitute a "natural event." But it is simply not *natural* to have a cloud of smelting waste speed by.

EPA's interpretation of "natural event" defies the "presum[ption] [that Congress intended] to use words in the common, ordinary meaning absent contrary indication." *United States v. Hite*, 769 F.3d 1154, 1161 (D.C. Cir. 2014). Not only is there no contrary indication here, but the statutory context confirms that presumption; the statute expressly contrasts "natural" events with those "caused by human emissions." *See* Pet'rs' Opening Br. 26-32; *see also New York v. EPA*, 443 F.3d 880, 885-86 (D.C. Cir. 2006) ("Although . . . the meaning of 'any' can differ depending upon the statutory setting, the context of the Clean Air Act warrants no departure from the word's customary effect." (citation omitted)).

2. EPA misrepresents its "natural event" definition to reconcile it with the ordinary meaning of "natural"

EPA first attempts, through mischaracterization, to bring its definition closer to the common usage of "natural." The agency insists—for the first time in its brief—that the Rule defines "natural event" to mean simply "an event with predominantly natural causes," EPA Br. 25, or "an event in which human activity plays little or no direct causal role," *id*. at 1; *accord id.* at 15, 26, 30 & n.13, 31-32, 35, 44.

But the Rule does no such thing. Instead, the Rule unambiguously defines "natural event" to include *two* distinct elements: an "event . . . in which human activity plays little or no direct causal role" *and* "its resulting emissions." 40 C.F.R. § 50.1(k). EPA's post hoc interpretation omits the second component of the Rule's definition of "natural event": the "resulting emissions." It also ignores the definition's second sentence, which allows those emissions to come predominantly, if not entirely, from human sources.

Although EPA demands deference to its interpretation of the Rule under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), *see* EPA Br. 27-28, 30 n.12, "[d]eference is undoubtedly inappropriate" here, where the agency's characterization is "plainly erroneous or inconsistent with the regulation," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (internal quotation marks omitted); *see Drake v. FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002)

(explaining that *Auer* deference is unwarranted where the agency's reading of its regulation is not "fairly supported by the text of the regulation itself").

EPA also attempts to draw its definition closer to the ordinary meaning of "natural" by advancing a drastically narrowed interpretation in the context of high-speed winds. The agency claims that emissions "result from high-speed wind" only "when the wind causes dust to become airborne." EPA Br. 18 n.18. "In contrast, when an anthropogenic source causes dust to become airborne (by, say, releasing it into the air through a smokestack) and wind simply transports those emissions to the monitor, the emissions result from the anthropogenic source, not the wind, and the rule offers no relief." *Id.* (emphasis omitted). EPA thus claims that manmade pollutants that are *already airborne* at the time they are caught by high-speed winds cannot be considered part of an "exceptional" "natural event." In other words, EPA purports that the Rule's "natural event" definition would not encompass the vast quantities of industrial pollution that either never settle to the ground (including gaseous pollutants like carbon monoxide, nitrogen dioxide, sulfur dioxide, and ozone) or are still suspended in the air at the time they are caught up by high-speed winds (such as airborne lead and particulate matter).

EPA's characterization is at odds with the Rule, which broadly states that "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). This language

comfortably covers *all* emissions from *all* reasonably controlled anthropogenic sources, and not just dust from human-modified ground. EPA's attempt to cabin the Rule's meaning finds no textual support and must be rejected. *See Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 531-32 (2009) (rejecting agency's attempt "to limit the sweep of its regulation" through a preambular interpretation that "cannot be reconciled" with the actual text of the regulation); *Drake*, 291 F.3d at 68 (stating that *Auer* deference is available only where an agency's interpretation is "fairly supported by the text of the regulation itself").

3. EPA fails to show that Congress intended to deviate from the ordinary meaning of "natural" in section 319(b)

Unable to reconcile its definition with the ordinary meaning of "natural," EPA retreats to arguing that section 319(b)'s Interim provision, which directed EPA to continue applying the agency's 1996 PM-10 Memorandum (1996 Memo) until the Rule's effective date, proves that "Congress indicated 'natural event' could include some role for human contributions in certain circumstances." EPA Br. 29 (citing 42 U.S.C. § 7619(b)(4); Mary D. Nichols, EPA, Areas Affected by PM-10 Natural Events (1996)). Putting aside whether that guidance actually supports EPA's expansive definition of "natural," the Interim provision explicitly states that the 1996 Memo shall continue to apply "[u]ntil the effective date" of the Rule. 42 U.S.C. § 7619(b)(4). The provision thus evinces Congress's intent that the Rule supersede, not extend, the policies encompassed in the 1996 Memo.

EPA also contends that its "natural event" definition is permissible because Congress did "not prohibit" it. EPA Br. 29. But it is well established that this Court "refuse[s] . . . to presume a delegation of power merely because Congress has not expressly withheld such power." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *accord Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003).

B. EPA's "natural event" definition nullifies the strict limits that section 319(b) places on human activity

"[T]he words of the statute should be read in context, the statute's place in the overall statutory scheme should be considered, and the problem Congress sought to solve should be taken into account to determine whether Congress has foreclosed [an] agency's interpretation." *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006) (internal quotation marks omitted) (discussing *Chevron* step one analysis). Here, it is impossible to reconcile EPA's definition with the narrow limits that section 319(b) places on the kinds of human activity that can contribute to an "exceptional event." *See* Pet'rs' Opening Br. 27-32. Those limits reflect Congress's concern that air-quality violations caused by routine human emissions not be improperly imputed to "exceptional events" and thus excused—rather than prevented or penalized—to the detriment of public health. Disregarding that concern, the Rule would leave the public exposed to preventable, or at least

predictable, human pollution at levels that Congress deems unacceptable. EPA's defense of the Rule misses this point. *See* EPA Br. 36-38.

1. Section 319(b) prohibits recurring human activity from contributing to an "exceptional event"

Congress intended to bar recurring human activity from contributing to an "exceptional event." *See* Pet'rs' Opening Br. 27-32. Section 319(b) requires an "exceptional event" to be "an event caused by human activity that is *unlikely to recur at a particular location* or a natural event." 42 U.S.C. § 7619(b)(1)(A)(iii) (emphasis added). The provision thus flatly prohibits an "exceptional event" from having a basis in predictable and repetitive human activity.

By necessary implication, Congress also intended to prevent the routine emissions generated by recurring human activity from being considered part of an "exceptional event." *See Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) ("[I]f [statutory text] clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is 'silent' in the *Chevron* sense."). Because the chief, relevant way in which human activity influences air quality is through the emission of regulated pollutants, Congress unquestionably intended section 319(b)'s limits on recurring human activity to translate into corresponding limits on the emissions resulting from that activity.

Given their repetitive nature, routine human emissions are predictable, and can thus be accounted for through a state's normal pollution budgeting process. *See*

generally 42 U.S.C. § 7410 (discussing state implementation plans (SIPs), including provisions to address transboundary pollution); *cf.* Final Rule, 81 Fed. Reg. at 68,225, JA068 (recognizing that Congress intended air agencies to "compensate for the effects" of various climatological occurrences "through the development of SIPs"). Section 319(b)'s restriction on recurring human activity thus reflects Congress's intent that routine human emissions be addressed through the normal SIP process, rather than being imputed to an "exceptional event" and given a free pass.

The Rule's "natural event" definition creates a loophole that defeats Congress's carefully crafted restrictions on recurring human activity and emissions. *See* Pet'rs' Opening Br. 29-31. The definition allows the recurring activity of certain human sources to produce the emissions constituting part of a natural event—and hence contribute causally to an "exceptional event." *See* 40 C.F.R. § 50.1(k); *supra* Section I.A.1. This is the very result that Congress intended to prohibit through section 319(b)(1)(A)(iii).

EPA denies that the Rule allows this outcome. *See* EPA Br. 36-37. The agency maintains that "what is allowed to recur in the same place and still be a natural event is the *act of nature and its resulting emissions*." *Id.* at 37. But EPA's "natural event" definition plainly allows the recurring activity of human sources to generate those "resulting emissions"—so long as the human sources are

"reasonably controlled." *See* 40 C.F.R. § 50.1(k); *see, e.g.*, Final Rule, 81 Fed. Reg. at 68,258, JA101 ("[W]e consider high wind dust events as 'natural events' in cases . . . where all significant anthropogenic sources of windblown dust have been reasonably controlled.").[3] Notably, large industrial sources like power plants and refineries can generate vast amounts of pollution despite "reasonable" controls—and this pollution can cause serious health harms such as asthma attacks, bronchitis, and chronic respiratory disease. *See* Pet'rs' Opening Br. 20, 38. EPA's response fails to grapple with how the Rule's "natural event" definition renders "void or insignificant" the limits that section 319(b) otherwise imposes on recurring human activity and emissions. *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 877 (D.C. Cir. 2006) (internal quotation marks omitted).

2. Section 319(b) prohibits an "exceptional event" from being reasonably preventable

Section 319(b) also requires an "exceptional event" to be "not reasonably controllable or preventable." 42 U.S.C. § 7619(b)(1)(A)(ii); *see* Pet'rs' Opening Br. 28-30. In other words, Congress intended that an "exceptional event" be *both* "not reasonably controllable" *and* "not reasonably preventable." Insofar as a

[3] EPA states that Petitioners did not challenge its provision on "high wind dust events." *See* EPA Br. 17 n.7 (citing 40 C.F.R. § 50.14(b)(5)). Because a "high wind dust event" is a kind of "natural event," however, the infirmities in EPA's "natural event" provision extend to its "high wind dust event" provision, and the two stand or fall together.

"natural event" encompasses both an "event" and "its resulting emissions," 40 C.F.R. § 50.1(k), the overall "natural event" can be averted by preventing *either* the "event" *or* "the resulting emissions." The Rule, however, allows recurring human activity to generate the emissions component of an "exceptional" "natural event" under the sole condition that the human sources be "reasonably controlled." *See id*. This contravenes the statutory requirement that an "exceptional" "natural event" be "not reasonably preventable."[4]

EPA suggests that this is not true because a different section of the Rule, § 50.14, continues to give effect to section 319(b)'s "not reasonably preventable" requirement. *See* EPA Br. 37-38 (citing 40 C.F.R. § 50.14(b)(8)(i), (ii)). However, EPA ignores subsections of that provision that contradict its defense. *See id*. For example, "[i]n addressing . . . the *not reasonably preventable criterion*, [a] State shall not be required to provide a case-specific justification for a high wind dust event." 40 C.F.R. § 50.14(b)(5)(iv) (emphasis added). In addition, EPA "shall not require a State to provide case-specific justification to support the *not reasonably controllable or preventable criterion* for emissions-generating activity that occurs

[4] API argues that "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." API Br. 28 (emphasis added). This extreme argument is even less justifiable given section 319's clear directive that an "exceptional event" be "not reasonably controllable or preventable." 42 U.S.C. § 7619(b)(1)(A)(ii).

outside of the State's jurisdictional boundaries." *Id.* § 50.14(b)(8)(vii) (emphasis added). Invoking either of these subsections in conjunction with the Rule's "natural event" definition, a State could claim that dangerous amounts of smog blown in from out-of-state power plants by high-speed wind constitute an "exceptional event"—even if those emissions could have been reasonably prevented.

The Rule thus renders "inoperative or superfluous," *Fund for Animals*, 472 F.3d at 877 (internal quotation marks omitted), Congress's unambiguous mandate that an "exceptional event" be "not reasonably . . . preventable," 42 U.S.C. § 7619(b)(1)(A)(ii). By nullifying the limits that section 319(b) imposes on avoidable exceedances of the Clean Air Act's national health-based standards, the Rule impermissibly undermines the "coheren[ce]" of the statute's regulatory scheme. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Among other things, the Rule subverts the Clean Air Act's requirements for controlling interstate pollution. *See generally EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1595 (2014) (discussing requirement that SIPs contain adequate provisions to prevent emissions from one state from contributing to air-quality violations in another state).

C. EPA's "natural event" definition contravenes Congress's clear intent that only acts of nature that generate pollutants can qualify as an "exceptional event"

The legislative history for section 319(b) memorializes Congress's intent that an act of nature can qualify as an "exceptional event" only if it *creates* pollutants. *See Halverson v. Slater*, 129 F.3d 180, 187 n.10 (D.C. Cir. 1997) ("[W]e may consider a provision's legislative history in the first step of *Chevron* analysis to determine whether Congress' intent is clear from the plain language of the statute." (alteration in original) (internal quotation marks omitted)). EPA avoids confronting this fundamental requirement. *See* EPA Br. 8-9, 28-32.

Section 319(b) originated in a Senate bill for which there was no comparable House version. H.R. Rep. No. 109-203, at 1066 (2005) (Conf. Rep.), JA458. The accompanying Senate reports and subsequent Conference Committee report use identical language to explain the meaning of "natural event" in section 319(b). *Compare* S. Rep. 109-53, at 41 (2005), JA219, *and* S. Rep. 108-222, at 34-35 (2004), JA461-2, *with* H.R. Rep. No. 109-203, at 1066-67, JA458-9. "[The] conference committee report is the most persuasive evidence of congressional intent after [the] statutory text itself." *Holly Sugar Corp. v. Johanns*, 437 F.3d 1210, 1214 (D.C. Cir. 2006) (quoting *Moore v. Dist. of Columbia*, 907 F.2d 165, 175 (D.C. Cir. 1990) (en banc) (second alteration in original)). That report warrants even more weight here, where its complete accord with the Senate reports

reflects unanimous congressional intent regarding the meaning of "natural event" in section 319(b).

> The Conference Committee report plainly states:
>
> > Natural 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. . . . 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, JA458-9 (emphases added). Significantly, Congress recognized a material distinction between acts of nature that merely influence pollutant behavior and those that actually generate pollutants; only the latter, Congress indicated, can qualify as "exceptional events." Consistent with this binary framework, the reports provide two examples of what Congress considered to be "exceptional" "natural events": forest fires or volcanic eruptions," both of which themselves create pollutants. H.R. Rep. No. 109-203, at 1066, JA458. Employing this same framework, Congress excluded "[n]atural climatological occurrences such as stagnant air masses, high temperatures, or lack of precipitation" from the meaning of "exceptional event," insofar as those phenomena merely influence the behavior of existing pollutants. *Id.*[5]

[5] Although EPA suggests otherwise, *see* EPA Br. 34-35 & n.14, the phrase "such as" indicates that Congress did not intend the specific climatological occurrences enumerated in section 319(b)(1)(B) to constitute an exhaustive list of

The Rule's definition of "natural event" violates Congress's intended dichotomy. EPA asserts that the second sentence of its "natural event" definition applies "primarily in the case of high-speed winds." EPA Br. 2. These include high-speed winds that entrain predominantly, if not almost entirely, "reasonably controlled" human emissions. *See* Final Rule, 81 Fed. Reg. at 68,231, JA074. With respect to the anthropogenic pollutants they transport, winds, regardless of their speed, are unquestionably "climatological occurrences . . . [that] influence pollutant behavior but do not themselves create pollutants." H.R. Rep. No. 109-203, at 1066, JA458. Yet under EPA's Rule, if high-speed wind picks up coal dust from a pile on the ground, that coal dust "result[s] from" the wind, and not the adjacent coal-fired power plant. *See* EPA Br. 18 n.8. By allowing acts of nature to qualify as "exceptional events" simply because they affect pollutant behavior, EPA contravenes Congress's plain intent to limit "exceptional" "natural event[s]" to those that "generate pollutants themselves," H.R. Rep. No. 109-203, at 1066-67, JA458-9.

D. EPA's "natural event" definition contravenes the Clean Air Act's express purpose of protecting public health

Congress enacted the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the

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the climatological occurrences that do not qualify as an "exceptional event," *compare* H.R. Rep. No. 109-203, at 1066, JA458, *with* 42 U.S.C. § 7619(b)(1)(B).

productive capacity of its population." 42 U.S.C. § 7401(b)(1). "In promulgating regulations under [section 319(b)], the Administrator shall follow . . . the principle that protection of public health is the highest priority . . . ." *Id.* § 7619(b)(3)(A)(i). EPA flouts this mandate by allowing routine human pollution to be considered part of a putatively "natural" "exceptional event," with the consequence of excusing air-quality violations caused by that pollution. Although EPA claims that it heeded "Section 319(b)'s governing principle prioritizing public health," that claim is premised on the agency's false assertion that the Rule "limit[s] 'natural event' to events with predominantly natural causes." EPA Br. 30 n.13; *accord id.* at 32; *see supra* Section I.A.2.

II. *Chevron* step two: EPA's definition of "natural event" is an impermissible construction of section 319(b), because EPA fails to reasonably explain how that expansive interpretation conforms to the statutory language, context, history, and purpose

Even if the Clean Air Act "does not foreclose the [agency's] interpretation" at *Chevron* step one, "the interpretation falls outside the bounds of reasonableness" at *Chevron* step two. *Goldstein*, 451 F.3d at 880-81. "[T]he range of permissible interpretations of a statute is limited by the extent of its ambiguity," *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996), and any ambiguity here is modest. The *Chevron* step one analysis shows that EPA's definition, at a minimum, "comes close to violating" the plain meaning of section 319(b), because "[a]t best it is counterintuitive to characterize" a "natural event" as accommodating

a significant element of routine human emissions. *Goldstein*, 451 F.3d at 881; *see supra* Section I. EPA's counterintuitive definition fails at *Chevron* step two, because the agency does not reasonably explain how the definition is "a permissible construction of the statute," *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997).

A. EPA failed to reasonably explain, at the time of rulemaking, how its "natural event" definition is a permissible construction of section 319(b)

"At *Chevron* step two we defer to the agency's permissible interpretation, *but only if the agency has offered a reasoned explanation* for why it chose that interpretation." *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (emphasis added). To determine whether EPA's expansive "natural event" definition is permissible, the Court "look[s] to what the agency said at the time of the rulemaking—not to its lawyers' post hoc rationalizations." *Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015). It is thus necessary to distinguish between EPA's contemporaneous explanations for its definition and appellate counsel's post hoc justifications, *see* EPA Br. at 30-40. Here, the convoluted task of pinpointing EPA's explanations ultimately reveals that none is reasonable.

1. EPA inappropriately relied on explanations for its 2007 "natural event" definition to justify its current definition

Although EPA suggests otherwise, *see* EPA Br. 31-35, neither the Rule nor the Proposed Rule explains *why* EPA adopted its current position that a "natural event" can encompass a human-emissions component of unlimited magnitude. *See* Final Rule, 81 Fed. Reg. at 68,231-32, JA074-5; Treatment of Data Influenced by Exceptional Events, 80 Fed. Reg. 72,840, 72,854 (proposed Nov. 20, 2015) [hereinafter Proposed Rule], JA015. Rather, the agency refers to the explanations found "in the preamble to the 2007 Exceptional Events Rule." Proposed Rule, 80 Fed. Reg. at 72,854, JA015; *see* EPA, Responses to Significant Comments on the 2015 Proposed Rule Revisions to the Treatment of Data Influenced by Exceptional Events, 34 (Nov. 20, 2015) [hereinafter Responses to Comments], JA135.[6]

But EPA cannot reasonably rely on the explanations for its 2007 "natural event" definition to justify its current definition, which drastically alters the meaning of a "natural event." The 2007 definition simply said, "*Natural event* means an event in which human activity plays little or no direct causal role." Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13,560, 13,580 (Mar. 20, 2007) [hereinafter 2007 Rule], JA447. The 2007 definition thus lacked

[6] EPA also purports to rely on section 319's Interim provision as a justification for its interpretation of "natural event." *See* Responses to Comments 34, JA135. The plain language of the Interim provision, however, precludes such reliance. *See supra* Section I.A.3.

the second sentence of EPA's current definition, which radically expands the term's permissible anthropogenic component to include human emissions of unlimited magnitude. *See supra* Section I.A.1. In sharp contrast to its 2007 counterpart, the current definition allows virtually *all* the emissions attributed to a "natural event" to come from human sources. *See id.* EPA's attempt to justify its current "natural event" definition using the explanations for its 2007 definition is thus manifestly unreasonable.[7]

2. The primary explanation supporting EPA's 2007 definition conflicts with the agency's current definition

An examination of the 2007 Rule underscores this point. The preamble states, "[O]ver time, certain human activities may have had some impact on the conditions which later give rise to a 'natural' air pollution event. However, we do not believe that *small historical human contributions* should preclude an event from being deemed 'natural.'" 2007 Rule, 72 Fed. Reg. at 13,563, JA430 (emphasis added). Diverging sharply from this explanation, EPA's current

[7] API's argument that Petitioners' challenge is untimely lacks merit, because it relies on the same, faulty premise that EPA's current "natural event" definition is substantively identical to the agency's 2007 definition. *See* API Br. 12-15. Furthermore, the rulemaking record unequivocally demonstrates that EPA reopened its 2007 "natural event" definition by proposing and considering changes to that definition. *See Sierra Club v. EPA*, 551 F.3d 1019, 1024 (D.C. Cir. 2008); Proposed Rule, 80 Fed. Reg. at 72,840, 72,854, JA015; Responses to Comments 33-37, JA134-138.

definition allows a "natural event" to include a human-emissions element that is neither small nor historical.

Drawing on a House report accompanying the Clean Air Act Amendments of 1990, the 2007 Rule provides an example of a human contribution that Congress and EPA viewed as neither small nor historical: human "diversion of water" from Owens and Mono Lakes in California, leading to "dry lake beds . . . which give rise to dust storms." H.R. Rep. No. 101-490, pt. 1[8] (1990), JA468; *see* 2007 Rule, 72 Fed. Reg. at 13,564, JA431 (citing the 1990 House Report); Responses to Comments at 91, JA192 (explaining that "repeated and long-term human activity would preclude an event from being natural"). A conclusion that these "dust storms" are "anthropogenic" because of the sustained, recurring human water withdrawals, *see id.*, cannot be squared with EPA's current Rule, which allows high-speed winds carrying pollution from sustained, recurring industrial activity to qualify as a "natural event."

3. Nor can the secondary explanation for EPA's 2007 definition reasonably sustain the agency's current definition

The 2007 Rule also cites an earlier EPA rule that identifies "consisten[cy] with historical practice" as a reason to treat "an exceedance . . . as an exceptional event even though anthropogenic sources such as agriculture and mining emissions

[8] The 2007 preamble mistakenly cites the House Report number as "101-290(l)."

contribute to the exceedance." National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144, 61,216 (Oct. 17, 2006), JA422-6; *see* 2007 Rule, 72 Fed. Reg. at 13,564, JA431.

But "historical practice" is not a reasonable basis for deeming significant, routine human emissions part of a "natural event." This is particularly so here, where section 319(b) requires EPA to accord "public health"—and not tradition or convenience—"the highest priority," 42 U.S.C. § 7619(b)(3)(A)(i). Indeed, Congress expressed its intent that EPA not be bound by historical practice in promulgating the Rule, insofar as section 319(b)'s Interim provision required the sunset of previous agency guidance upon the Rule's effective date. *See id.* § 7619(b)(4).

Because the only explanations that EPA provided "at the time of the rulemaking" are unreasonable, the agency's interpretation fails at *Chevron* step two. *Council for Urological Interests*, 790 F.3d at 222. "[I]t is important to remember that if we find that an agency's stated rationale for its decision is erroneous, we cannot sustain its action on some other basis the agency did not mention." *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 798 (D.C. Cir. 2004).

B. Appellate counsel's post hoc rationalizations fail to reasonably explain how EPA's "natural event" definition is a permissible construction of section 319(b)

Even if the novel, post hoc rationalizations articulated by appellate counsel in EPA's brief can be credited at *Chevron* step two, they do not reasonably explain how the Rule's "natural event" definition "'fit[s]' with the statutory language" and context, or how it "conform[s] to statutory purposes." *Goldstein*, 451 F.3d at 881.

1. EPA misrepresents the true scope of the Rule's "natural event" definition

Rather than defend the agency's "natural event" definition for what it really is, EPA insists that the agency heeded "Section 319(b)'s governing principle prioritizing public health . . . by limiting 'natural event' to events with predominantly natural causes." EPA Br. 30 n.13; *accord id.* at 32. However, this could be true only if the agency's "natural event" definition stopped after its first sentence. *See supra* Section I.A.2. EPA's attempt to show compliance with section 319(b) is unreasonable because it is at odds with the actual language of the Rule.

For a similar reason, Judge Rogers's 2009 concurrence in the earlier *NRDC* case does not, as EPA misleadingly suggests, support the agency's current definition of "natural event." *See* EPA Br. 31-32 (quoting *NRDC v. EPA*, 559 F.3d 561, 569 (D.C. Cir. 2009) [hereinafter *NRDC*] (Rogers, J., concurring)). That opinion was based on the Court's review of EPA's 2007 Rule, which contained a significantly narrower definition of "natural event." *See supra* Section II.A.1.

Accordingly, Judge Rogers's suggestion that it would be permissible for EPA to define "natural event" to include events with "predominantly natural causes but some human contribution," *NRDC*, 559 F.3d at 569 (Rogers, J., concurring), actually undermines EPA's current "natural event" definition.

2. EPA fails to reasonably explain how the Rule's "natural event" definition serves the Clean Air Act's objectives

"A reasonable explanation of how an agency's interpretation serves the statute's objectives is the stuff of which a permissible construction is made." *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (internal quotation marks omitted). In contrast, EPA's remaining justifications for the Rule show only that the agency elevated its own policy concerns over the statute's core purpose of protecting public health.

The Rule allows the emissions component of a "natural event" to be composed almost entirely of an unlimited amount of routine (and possibly preventable) human pollution, so long as the underlying sources are "reasonably controlled." 40 C.F.R. § 50.1(k); *see supra* Sections I.A.1, II.B. To justify this central feature of its definition, EPA asserts: "States should not be punished for air-quality problems caused by natural events that are beyond their control." EPA Br. 26; *accord id.* at 1, 43-44.

This justification is unreasonable for two reasons. First, it is based on a faulty premise. The putatively "natural" events can incorporate a significant

component of routine human emissions—including those that *are* reasonably preventable, or at least addressable through corresponding emissions reductions from other sources. *See supra* Sections I.A.1, II.B. Second, an agency may not "advance its own policy objectives rather than Congress'." *NRDC v. Reilly*, 976 F.2d 36, 44 (D.C. Cir. 1992) (Silberman, J., concurring). Congress's paramount purpose in enacting the Clean Air Act was to protect public health. *See* Section I.D. EPA may not relieve states of their congressionally mandated duties to safeguard public health, based on its own notion that some of those duties constitute "punish[ment]," EPA Br. 26.

EPA also emphasizes the potential difficulty of making an "exceptional event" demonstration, claiming that the Rule has "built-in safeguards against potential abuse." EPA Br. 41; *see also id.* 10-14, 41-44. But any difficulty of making an "exceptional event" demonstration is irrelevant to whether section 319(b) allows that demonstration to be made. If anything, substantially reducing the burden that states must meet to excuse air-quality violations—as the Rule would do—is inconsistent with Congress's intent that such exclusions be "exceptional."

Equally unavailing is EPA's explanation regarding the technological difficulties of distinguishing between anthropogenic pollutants and natural pollutants. *See* EPA Br. 6, 11, 21 n.11, 39. These difficulties cannot justify the

Rule's presumption that routine human emissions influenced by an unusual act of nature are "natural" whenever they are mixed with even a tiny quantum of pollutants originating in nature. The practical consequence of this legal fiction is that violations of air-quality standards caused in part by routine human emissions are excused to the detriment of public health. "The principle that protection of public health is the highest priority," 42 U.S.C. § 7619(b)(3)(A)(i), mandates that EPA reverse its presumption.

Finally, EPA proffers that "the rule specifically directs states to protect health by, for example, notifying the public about exceedances and developing mitigation plans." EPA Br. 30 n.13; *see id.* at 13-14. Neither after-the-fact public notice nor mitigation, however, can adequately compensate for the failure to institute reasonable prevention measures. Whereas section 319(b) requires "exceptional events," and by implication, their associated emissions, to be "not reasonably preventable," the Rule would remove this requirement for routine human emissions imputed to an "exceptional" "natural event." *See supra* Section II.B. EPA fails to reasonably explain how requiring notice and mitigation, in the place of prevention, is consistent with the Clean Air Act's key purpose of protecting human health.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to vacate the Rule's definition of "natural event."[9]

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Respectfully submitted,

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[9] Petitioners do not seek to vacate the entire Rule. *See* Pet'rs' Opening Br. 47.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with Fed. R. App. P. 32(a)(5)(A) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii), because it contains 6,476 words, excluding the parts of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2017, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ John D. Walke
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