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.

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

FINAL BRIEF OF *AMICI CURIAE* NATIONAL CATTLEMEN'S BEEF ASSOCIATION, PUBLIC LANDS COUNCIL, KANSAS LIVESTOCK ASSOCIATION, AND OKLAHOMA CATTLEMEN'S ASSOCIATION IN SUPPORT OF RESPONDENTS

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and Circuit Rule 26.1(a), the National Cattlemen's Beef Association, Public Lands Council, Kansas Livestock Association, and Oklahoma Cattlemen's Association make the following disclosures:

National Cattlemen's Beef Association

Nongovernmental Corporate Party to this Action: National Cattlemen's Beef Association.

Parent Companies: None.

Publicly-held Company With 10% or Greater Ownership Interest: None.

Entity's General Nature and Purpose: The National Cattlemen's Beef Association is a Delaware non-profit corporation organized to advance the cattle industry, whose members include cattle producers.

Public Lands Council

Nongovernmental Corporate Party to this Action: Public Lands Council.

Parent Companies: None.

Publicly-held Company With 10% or Greater Ownership Interest: None.

Entity's General Nature and Purpose: Public Lands Council is a Colorado non-profit corporation organized to promote ranchers dependent on public lands, whose members include cattle, sheep, and grasslands associations.

Kansas Livestock Association

Nongovernmental Corporate Party to this Action: Kansas Livestock Association.

Parent Companies: None.

Publicly-held Company With 10% or Greater Ownership Interest: None.

Entity's General Nature and Purpose: The Kansas Livestock Association is a Kansas not-for-profit corporation organized to promote the livestock industry. The Kansas Livestock Association's members are involved in all segments of the livestock industry.

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Oklahoma Cattlemen's Association

Nongovernmental Corporate Party to this Action: Oklahoma Cattlemen's Association, Inc.

Parent Companies: None.

Publicly-held Company With 10% or Greater Ownership Interest: None.

Entity's General Nature and Purpose: The Oklahoma Cattlemen's Association is an Oklahoma domestic not-for-profit corporation organized to promote the livestock industry, whose members include Oklahoma ranchers.

DATED: November 14, 2017 Respectfully submitted,

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Parties and *Amici*: Petitioners in this case are the Natural Resources Defense Council and the Sierra Club.

Respondents are the U.S. Environmental Protection Agency ("EPA") and EPA Administrator, Scott Pruitt.

On January 18, 2017, the Court granted the American Petroleum Institute's Motion for Leave to Intervene on behalf of respondents.

Amici Curiae are the National Cattlemen's Beef Association, the Public Lands Council, the Kansas Livestock Association, and the Oklahoma Cattlemen's Association (collectively "*Amici Curiae*"). Pursuant to Fed. R. App. P. 29(a)(2) and Circuit Rule 29(b), all parties have consented to participation by *Amici Curiae* and the filing of this brief in support of respondents.

B. Rulings under Review: Petitioners seek review of a final agency action by EPA in the form of rulemaking published at 81 Fed. Reg. 68,216 (Oct. 3, 2016) entitled Treatment of Data Influenced by Exceptional Events.

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C. Related Cases: This case has not previously been before this Court or any other court. Counsel is not aware of any related cases involving substantially the same parties and the same or similar issues pending before this or any other court.

DATED: November 14, 2017 Respectfully submitted,

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GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

EPA	Environmental Protection Agency
Exceptional Events Demonstration	Process by which Environmental Protection Agency determines if event meets statutory definition of "exceptional event" under 42 U.S.C. § 7619
Exceptional Events Rule	Treatment of Data Influenced by Exceptional Events, 81 Fed. Reg. 68,216 (Oct. 3, 2016)
JA	Joint Appendix
Op. Br.	Opening Brief of Environmental Petitioners
Section 319(b)	42 U.S.C. § 7619(b)
U.S.	United States

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), all applicable statutes and regulations are contained in the separately bound Addendum to the Brief for Petitioners filed May 19, 2017, and EPA's Statutory Addendum filed August 31, 2017.

I. STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE.

Amici curiae have direct interests in this Petition for Review. The 2016 Exceptional Events Rule being challenged clarifies the requirements for an "exceptional event" under section 319(b) of the Clean Air Act, 42 U.S.C. § 7619(b) and streamlines the process for when emissions data from natural events, prescribed burns, and other events may be excluded from use in determinations of exceedances by the U.S. Environmental Protection Agency ("EPA"). If a state adequately demonstrates that an exceptional event has caused an exceedance or violation of National Ambient Air Quality Standards, then that data can be excluded from regulatory determinations such as nonattainment designations.

On September 16, 2016, the EPA finalized revisions to the 2007 Exceptional Events Rule to address issues raised by stakeholders and to increase efficiency of the demonstration process. Petitioners' Opening Brief submitted on May 19, 2017, purports to narrowly challenge the definition of "natural event." Yet, petitioners broadly seek to vacate the entire rule and directly challenge the prescribed fire provisions.

Prescribed burning is an extremely important process and management tool used for maintaining and enhancing grasslands, forests, and range across the U.S. *Amici's* members rely on prescribed burning to manage landscapes, reduce the risk of large wildfires, recycle nutrients, control woody plants and invasive herbaceous

weeds, improve poor quality forage, increase plant growth, and restore and enhance wildlife habitat. These benefits have long been recognized by the EPA as vital management tools, and they have been explicit policies underlying the rule since its initial promulgation.

The National Cattlemen's Beef Association is the largest and oldest national trade association of member U.S. cattle producers, representing more than 30,000 direct members and more than 175,000 cattle producers and feeders through its state affiliates. The National Cattlemen's Beef Association works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions.

The Public Lands Council represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. The Public Lands Council is a nonprofit organization. Its members consist of state and national cattle, sheep, and grasslands associations. The Public Lands Council works to maintain a stable business environment for public lands ranchers in the West where roughly half the land is federally owned and many operations have, for generations, depended on public lands for forage.

The Kansas Livestock Association is a trade organization representing the business interests of its nearly 5,400 members and the state's multi-billion-dollar livestock industry at both the state and federal levels. Members of the Kansas

Livestock Association are involved in all segments of the livestock industry, including cow-calf production, cattle feeding, swine, dairy, and sheep. The Kansas Livestock Association works to advance its members' common interests and enhance their ability to meet consumer demand.

The Oklahoma Cattlemen's Association is a member led and driven trade organization with a vision to be the leadership that serves, strengthens and advocates for the Oklahoma cattle industry. The Oklahoma Cattlemen's Association represents about 5,000 Oklahoma ranching families. The Oklahoma Cattlemen's Association exists to defend the beef cattle industry at the federal and state levels and in the media.

Amici represent producers throughout the U.S., located in states that experience high wind events, and in which fire-dependent ecosystems are an essential part of the landscape. Ranchers are often responsible for managing these areas and take their responsibility to maintain healthy and vibrant ecosystems seriously. Many of *Amici's* members rely on prescribed fires that are essential to maintaining healthy pastures, rangeland, grasslands, and prairies that may, on occasion, lead to higher than normal concentrations of air pollutants. *Amici* are directly concerned about how the EPA addresses monitored concentrations of air pollutants affected by high wind and prescribed fire events.

Petitioners' brief is unclear as to exactly what relief they are seeking and which portions of the 2016 rule they are challenging. They assert to challenge only the definition of "natural event." However, petitioners make broad arguments citing prescribed fire as a source of injury to their members, and misuse prescribed fire events as irrelevant evidence in support of their argument. While petitioners ask to vacate only the definition of "natural event," they repeatedly and simultaneously request the Court to vacate the entire rule.

In this case, *Amici* are concerned that the outcome of the Petition will directly affect how the Exceptional Events Rule is applied, particularly to emissions from prescribed fire, and impact *Amici's* members and their ability to use prescribed fire to manage vast areas of land nationwide.

Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to this filing.

II. STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS.

Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned counsel for *Amici Curiae* authored this brief. *Amici* contributed money that funded only the limited direct costs of preparing and submitting the brief. Otherwise, all legal fees related to the drafting and filing the brief were *pro bono* by the Western Resources Legal Center, a nonprofit legal educational organization that teaches practical skills to law students interested in representing natural resource-dependent entities. No other person contributed money to fund preparation or submission of this brief.

III. SUMMARY OF ARGUMENT.

Under the 2016 Exceptional Events Rule, two types of events potentially qualify as an exceptional event: emissions from human activity or a natural event. 42 U.S.C. § 7619(b)(1)(A). Petitioners argue that the EPA is "collapsing the concepts of human activities and natural events into one unlawful combination" by improperly expanding the scope of "natural events." Op. Br. at 44. Petitioners claim that the 2016 rule is unlawful because it defines "natural event" to include emissions from human activity. Petitioners misread the new rule and ignore key requirements that states must meet to demonstrate causation. In the case of a demonstration based on a "natural event," human activity must play "little or no direct causal role." The new definition of "natural event" provides:

> 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.

AR Doc. No. 1 (81 Fed. Reg. 68,216, 68,277 (Oct. 3, 2016) (to be codified at 40 C.F.R. § 50.1(k))); [JA 120].

Petitioners argue that the definition violates the Clean Air Act because it allows exceptional events to encompass emissions from events where human activity plays a *direct causal role.*

Petitioners' argument is confusing and misinterprets the rule. Their argument ignores the plain text and context of the definition and disregards that a "natural event" submitted as part of an Exceptional Events Demonstration must, as a critical determination by EPA, meet all statutory requirements to be considered an "exceptional event" in the first place.

To qualify as an "exceptional event" under Section 319(b), the event must meet the following requirements:

> Under the Clean Air Act, the term "exceptional event" means an event that —
>
> (i) affects air quality;
>
> (ii) is not reasonably controllable or preventable;
>
> (iii) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and
>
> (iv) is determined by the Administrator [through an Exceptional Events Demonstration process] to be an exceptional event.

42 U.S.C. § 7619(b)(1)(A). The "exceptional event" requirements under the 2016 Exceptional Events Rule (to codified at 40 C.F.R. § 50.1(j)) are identical to this statute.

Under a proper analysis, the elements for an "exceptional event" and the identical regulatory text in 40 C.F.R. § 50.1(j) knock out the foundation of petitioners' argument. Their argument fails because the very definition challenged

make clears that *human activity must have little or no causal role* in an exceptional event based on a "natural event." Thus, the statute, the 2016 Exceptional Events Rule, and very text of the definition challenged all undermine petitioners' interpretation of the rule.

Petitioners further confuse the analysis by broadly attacking prescribed fire as an example of injury to their members, and as support for why the "natural event" definition is allegedly flawed. However, the prescribed fire Exceptional Events Demonstration they cite from Kansas in 2011 was submitted to EPA as an event caused by "human activity," not a "natural event" applying the new definition. Thus, petitioners not only advance an unreasonable interpretation, they make irrelevant references to prescribed fire Exceptional Events Demonstrations that having nothing to do with the new "natural event" definition.

As a final inconsistency, petitioners ask to vacate only the "natural event" definition, yet they broadly argue that the entire rule should be vacated. The Petition for Review should be denied.

IV. ARGUMENT.

A. History of The Exceptional Events Rule.

1. The 2007 rule.

In 2005, the Clean Air Act was amended to provide statutory authority for the exclusion of emissions data in specific situations. 42 U.S.C. § 7619. To

implement the amendment, the EPA promulgated the first Exceptional Events Rule in 2007. AR Doc. No. 22 (72 Fed. Reg. 13,560 (Mar. 22, 2007) ("2007 rule")); [JA 427]. The 2007 rule established requirements for identifying, evaluating, interpreting, and using air quality monitoring data affected by "exceptional events," and provided a process by which air quality data from those exceptional events could be excluded from regulatory decisions and actions. *Id.* at 13,562; 42 U.S.C. § 7619(b)(3)(B). Exceptional events include two types of events: "natural events" such as wildfires, earthquakes, volcanos, and dust generated by high wind., 40 C.F.R. § 50.1(j), and "human activity" such as prescribed fire. 40 C.F.R. § 50.1(k).

To qualify an exceptional event, a state air pollution agency identifies potential event-related exceedances, flags data, and submits an Exceptional Events Demonstration package to the EPA after public notice and comment. 42 U.S.C. § 7619(b)(3)(B). The EPA reviews and either agrees to exclude the data, or disagrees and the data may be used in the EPA's regulatory determinations. *Id.*

The 2007 requirements for preparing Exceptional Events Demonstrations were extremely technical and challenging, often requiring data that was unavailable to state and local air agencies. AR Doc. No. 2 (80 Fed. Reg. 72,840, 72,843 (Nov. 20, 2015)); [JA 004]. The evidence required for Exceptional Events Demonstrations also varied widely by EPA region. *Id.* The 2007 rule was difficult

in practice and lacked certain generally applicable guidance. *Id.* at 72,844; AR Doc. No. 86 (EPA-HQ-OAR-2015-0229-0072 at 6); [JA 351]. For example, in addition to being extremely costly and time consuming for states to prepare Exceptional Events Demonstrations, it was difficult for EPA regions to predetermine how much evidence and analysis for demonstrations was necessary. *Id.* [JA 351]. The "text and preamble left room for interpretation." *Id.*

2. The 2016 revisions.

To overcome these challenges, the EPA amended the rule in 2016 and clarified the requirements for Exceptional Events Demonstrations. The 2016 revisions streamline the process for Exceptional Events Demonstrations and will be codified at 40 C.F.R. §§ 50.1, 50.14, and 51.930. AR Doc. No. 1 (81 Fed. Reg. 68,216, 68,216 (Oct. 3, 2016)); [JA 059].[1] Among other changes, the revisions: (1) more clearly define the scope of the Exceptional Events Rule in identifying what types of events may qualify; (2) clarify the analyses, content, and organization for Exceptional Events Demonstrations; (3) rely on air quality controls in a state, federal or tribal implementation plan; and (4) revise language to align with statutory language in the Clean Air Act. *Id.* at 68,224-25; [JA 067-068].

[1] The revisions are important in light of new National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,291 (Oct. 26, 2015), particularly for western states, where wildfires and background ozone are significant contributors to monitored ozone concentrations.

As noted above, emissions from prescribed fire can qualify under the Exceptional Event Rule's "human activity" provisions. 40 C.F.R. §§ 50.1(j), (m). The EPA has long-recognized the importance of prescribed fire as a land management tool. In its 1998 Interim Air Quality Policy on Wildland and Prescribed Fires, U.S. EPA. (Apr. 23, 1998), the EPA explained that federal, state, local, tribal and private land owners use prescribed fire on wildland to achieve "resource benefits, to correct the undesirable conditions created by past wildfire suppression management strategies and to reduce the risk of catastrophic wildfires." AR Doc. No. 1 (81 Fed. Reg. 68,216, 68,250 (Oct. 3, 2016)); [JA 093].

The rule encompasses exceptional events based on "human activity" from prescribed fires, as well as emissions from a "natural event," and makes clear that an Exceptional Events Demonstration must address *all of the statutory elements* to show that the event qualifies as an exceptional event under 42 U.S.C. § 7619(b)(1)(A). AR Doc. No. 1 (81 Fed. Reg. 68,216, 68,217); [JA 060]. The rule incorporates the three core statutory elements under 42 U.S.C. §7619(b)(1)(A) of the Clean Air Act: (1) The event affected air quality in a way that there exists a clear causal relationship between the specific event and the monitored exceedance, (2) the event was not reasonably controllable or preventable, and (3) the event was caused by human activity that is unlikely to recur at a particular location, or was a natural event. 40 C.F.R. § 50.1(j).

In addition to revising the definition of "exceptional event" to more clearly identify the types of regulatory actions to which the rule applies, the rule clarifies the definition of "natural event" to mean an event and its resulting emissions "in which human activity plays little or *no direct causal role*." *Id.* § 50.1(k) (emphasis added). The rule also defines "prescribed fire," *id.* § 50.1(m), "wildfire," *id.* § 50.1(n), and "wildland." *Id.* § 50.1(o).[2]

B. The EPA's Construction of 42 U.S.C. § 7619 Defining "Natural Events" is Reasonable.

Amici only briefly address the merits of petitioners' statutory construction argument. The Petition for Review should be denied because the new definition falls squarely within the EPA's statutory authority.

Petitioners contend that the "natural events" definition is unlawful for three reasons. First, petitioners assert that a natural event cannot include "direct human

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[2] The 2016 rule also removes language known as the "but for" criterion. The 2007 rule required evidence that "there would have been no exceedance . . . but for the event." AR Doc. No. 2 (80 Fed. Reg. 72,840, 72,848 (Nov. 20, 2015)); [JA 009]. This criterion was interpreted as needing strict quantitative analysis of the estimated air quality impact from the event, which, in practice, was difficult to determine with certainty. AR Doc. No. 1 (81 Fed. Reg. 68,216, 68,227 (Oct. 3, 2016)); [JA 070]. Instead, the 2016 ERR retains the statutory requirement that data requested to be excluded is "directly due to the exceptional events." *Id.* at 68,226-27; [JA 069-070]. Using a weight of the evidence approach, the 2016 Exceptional Events Rule requires that all demonstrations show a "clear causal relationship" between the event and its "resulting emissions" and "the monitored exceedance[s] or violation[s]." *Id.* at 68,227; [JA 070]. This meets the core statutory requirement of requiring a "clear causal relationship" between the exceedance and the exceptional event. 42 U.S.C. § 7619(b)(3)(B)(ii).

causes of emissions." Op. Br. at 18. This argument fails, however, because the very definition of "natural event" means an event where human activity plays "little or *no direct causal role*." 40 C.F.R. § 50.1(k); AR Doc. 1 (81 Fed. Reg. 68,216, 68,231 (Oct. 3, 2016)); [JA 074]. Stating in the definition that "human activity" can *influence* an exceptional event and still qualify as a "natural event" where the human activity plays "little or no direct causal role" is entirely consistent with 42 U.S.C. § 7619(b)(1)(A), which requires a "clear causal relationship." In adopting the 2016 revisions, the EPA explains that "in those cases in which the anthropogenic source has 'little' direct causal role, *we would consider the high wind and the emissions arising from the contributing natural sources* (in which human activity has no role) *to cause the exceedance* or violation." AR Doc. No. 1 (81 Fed. Reg. 68,216, 68,231 (Oct. 3, 2016)); [JA 074] (emphases added).

Amici's members are ranchers who participate in permitted prescribed burning practices. Although emissions from lawfully ignited prescribed fire may *influence* emissions from a natural event, the prescribed fire itself does not constitute a natural event under the Exceptional Events Rule. Through prescribed burning practices, *Amici's* members minimize damage done by wildfires, and manage acreage.

To maintain and preserve ecological integrity, prescribed fire used as a lawful, controlled "human activity" is a necessary management tool across many

landscapes. Both plant and animal species depend on the positive effects of prescribed fire to control woody plants and other undesirable species. Wildlife benefit from prescribed burns to enhance habitat. Land managers burn to control vegetation. And ranchers recognize that prescribed burning can benefit cattle weight and the conditions of their pastures. But the new 2016 Exceptional Events Rule is not designed to allow emissions from prescribed burns to somehow qualify as exceptional events under the new definition of "natural events." Intentionally ignited prescribed burning is a "human activity," and the Exceptional Events Rule makes that point clearly.

Determining causation of emissions is the goal of an Exceptional Events Demonstration under both the statute, 42 U.S.C. § 7619(b)(3)(B)(ii), and the 2016 Exceptional Events Rule. *Id.* at 68,231, 68,258-59; [JA 101-02]. Here, the EPA has reasonably construed the Clean Air Act in determining whether an exceptional event qualifies as a "natural event" or is the result of "human activity." Causation is key. Under 42 U.S.C. § 7619(b)(3)(B)(ii), all Exceptional Events Demonstrations must show a "*clear causal relationship*" between the measured exceedance and the event "to demonstrate that the exceptional event *caused*" the exceedance. (emphases added). This is exactly what is required under 42 U.S.C. § 7619(b)(3)(B)(ii), and the new definition of "natural event" does not change that

requirement. Thus, the EPA has "stayed within the bounds of its statutory authority." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2439 (2014).

Second, petitioners argue that the definition of "natural event" ignores whether an event caused by human activity is "preventable." Op. Br. at 18. Yet, petitioners ignore that all "exceptional events" must be demonstrated as "not reasonably controllable *or preventable*" under the statutory and regulatory requirements of an "exceptional event." 42 U.S.C. § 7619(b)(1)(A); 40 C.F.R. § 50.1(j). Petitioners' analysis of the definition in isolation ignores the text in the context of the overall Clean Air Act.

Interpreting the definition of "natural event" in isolation is unreasonable. Statutory interpretation must account for both "the specific context in which . . . language is used" and "the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The EPA is entitled to interpret the definition flexibly in light of the overall regulatory requirements for establishing Exceptional Events Demonstrations – "not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984). Because all Exceptional Events Demonstrations must meet the core requirements of 42 U.S.C. § 7619(b)(1)(A), including that the event was "not reasonably controllable *or preventable*," petitioners' argument lacks merit. *Am. Corn*

Growers Ass'n v. EPA, 291 F.3d 1, 10 (D.C. Cir. 2002) (regulatory goal "is an eminently reasonable elucidation of the statute"); *accord* 40 C.F.R. § 50.1(j) (event must be "not reasonably controllable or preventable" to qualify).

Finally, petitioners argue that the definition of "natural event" unlawfully includes human activities that "recur at a particular location or are likely to recur at a particular location." Op. Br. at 18. This argument is also flawed. Section 7619(b)(1)(A) and 40 C.F.R. § 50.1(j), which define an "exceptional event," envision two types of potentially qualifying events: "human activity unlikely to recur at a particular location," or "natural events." Natural events do not contain the "recur" element. A natural event "*may recur* at the same location." 40 C.F.R. § 50.1(k) (emphasis added). Only where "human activity" is the basis for an Exceptional Events Demonstration must it be "*unlikely to recur* at a particular location." *Id*. § 50.1(j) (emphasis added). Thus, petitioners' interpretation should be rejected.

C. Petitioners Purport to Narrowly Challenge the "Natural Event" Definition but Disingenuously Seek to Vacate the Entire Rule.

Petitioners ask the Court to "vacate the final exceptional event rule's definition of 'natural event.'" Op. Br. at 47.[3] Although petitioners purport to

[3] Under the 2016 Exceptional Events Rule,

> "Natural event" means an event and its resulting emissions, which may recur at the same location, in which human activity plays little or

narrowly challenge this definition, *see* Op. Br. at 1, 14-15, their brief and standing declarations broadly attack lawful prescribed burns and seek to vacate the entire rule. *Id.* at 2, 21 ("Petitioners' injuries are "caused by EPA's unlawful actions and will be redressed by a decision *vacating EPA's actions*."). Petitioners cannot have it both ways. Their request for relief is inconsistent and overbroad.

Petitioners ignore that "natural events" and "human activity" such as prescribed fire are analyzed under *distinct* regulatory provisions. *Compare* 40 C.F.R. § 50.1(j), *with id.* § 50.1(m). Under the guise of a narrow challenge, petitioners broadly attack prescribed burns as a source of their injuries, instead of Exceptional Events Demonstrations submitted to qualify emissions from "natural events." Petitioners explain that the EPA has already "*applied the rule to exclude data* showing exceedances and air quality violations in communities where [p]etitioners' members live." Op. Br. at 19 (emphasis added). To support this statement, petitioners point to Kansas' 2011 Exceptional Event Demonstration Package as an example of why the definition of "natural events" is flawed. *Id.* However, that Exceptional Events Demonstration was not submitted as a natural

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> 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).

event. Petitioners' use of the 2011 Kansas Exceptional Events Demonstration is irrelevant to its complaint about the new Exceptional Events Rule.

The Kansas demonstration sought to exclude four days of prescribed fire in April 2011 in the tallgrass prairie of Flint Hills in eastern Kansas and northeast Oklahoma that transported downwind. AR Doc. No. 285 (EPA-HQ-OAR-2015-0229-0021 at 1-9 to 1-13, 3-1); [JA 336-40; JA 343]. The 2011 Exceptional Events Demonstration sought to exclude data caused by "human activity" from prescribed fire in the Flint Hills region under the former 2007 Exceptional Events Rule. *Id.* at 1-3, 1-8 to 1-9; [JA 330; JA 335-36] (authority to exclude data from prescribed fire caused by "human activity" is distinct from "natural event"). Citing this 2011 Exceptional Events Demonstration is misleading and does not support petitioners' statutory construction argument.

Petitioners also submit standing declarations complaining about lawful prescribed fire events to support their challenge to the "natural events" definition. Craig Volland testifies that prescribed burning "as a result of human-caused burning of grasslands in the Kansas Flint Hills is routinely claimed as "exceptional events." Vollard Decl. ¶ 4. He argues that prescribed burning occurs too frequently and is "hardly an exception." *Id.* Vollard concludes that "[w]ere EPA to remove or alter the [Exceptional Events Rule], Kansas would likely have to take stronger steps to reduce [emissions] from intensive grassland burning . . . ." *Id.*

¶ 6. Similarly, Hudo Fashho calculates the number of Sierra Club's individual members residing in several Kansas counties, a state she complains has claimed "exceptional events excuse violations." Fashho Decl. ¶ 8.

This testimony and argument is inappropriate because it criticizes *prescribed fire* ignited by human activity.[4] By statute and rule, "prescribed fire" is distinct from an event analyzed as a "natural event." Both 42 U.S.C. §7619(b)(1)(A) and 40 C.F.R. § 50.1(j) explicitly distinguish between events that potentially qualify. Petitioners' blur this distinction and misread the rule as allowing emissions from "human activity" to qualify as "natural events." Nor do petitioners' references to prescribed fire events provide interpretive guidance into the proper construction of "natural event" under 40 C.F.R. § 50.1(k). Petitioners simply complain about emissions from prescribed burns generally, which are irrelevant to the new definition of "natural events."[5]

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[4] Kansas' 2011 demonstration package submitted under 40 C.F.R. § 50.14(b)(3) relates to prescribed fire. AR Doc. No. 285 (EPA-HQ-OAR-2015-0229-0021); [JA 315]. Petitioners' arguments regarding prescribed burning are off point for any discussion about the lawfulness of the 2016 "natural event" definition under 40 C.F.R. § 50.1(k).

[5] In commenting on the proposed rule, the Kansas Livestock Association advocated that the EPA should "allow certain prescribed fires to qualify as natural events." AR Doc. No. 239 (EPA-HQ-OAR-2013-0572-0153 at 5 (Comment submitted by Aaron M. Popelka, Vice President of Legal and Governmental Affairs, Kansas Livestock Association); [JA 286]. In response, the EPA stated that it disagreed because prescribed fires were the result of "human activity," not "natural events." The EPA explained, "We clearly state in Section IV.F.2.b of the

D. Prescribed Fire Provides Key Ecological Benefits in Natural Ecosystems.

The National Emissions Inventory is a comprehensive, nationwide estimate of air emissions detailed by the EPA. In 2011, the National Emissions Inventory reported an estimated 24.6 million acres burned from prescribed and wildfires, about half estimated to be from prescribed fires and half wildfires.[6] AR Doc. No. 290 (HPA-HQ-OAR-2015-0229-0026 at 331 & Figure 5-2); [JA 349]. Prescribed fire is an extremely important process and management tool used throughout the U.S. on federal, state, private and tribal lands. The EPA noted in the 2007 Exceptional Events Rule that "prescribed fire may meet the statutory criteria defined in [42 U.S.C. § 7619] of 'affect[ing] air quality,' being 'unlikely to recur at a particular location' and 'not reasonably controllable or preventable' . . . on a

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preamble to the final rule that prescribed fires are events caused by human activity and, therefore, to be considered an exceptional event, every prescribed fire demonstration must address the 'human activity unlikely to recur at a particular location' criterion." AR Doc. No. 121 (EPA-HQ-OAR-2013-0572-0191 at 36); [JA 137].

[6] "Event sources" consisting of prescribed fire emissions are calculated using satellite detection "combined with fire models and activity data provide by State, Local, and Tribal air agencies or forestry agencies." AR Doc. No. 342 (EPA-HQ-OAR-2015-0229-0126 at 2); [JA 353].

case-by-case basis."[7] AR Doc. No. 22 (72 Fed. Reg. 13,560, 13,566 (March 22, 2007)); [JA 433].

In the West, there are more wildfires compared to the East, where most of the burning is from prescribed fire. AR Doc. 290 (HPA-HQ-OAR-2015-0229-0026 at 330); [JA 348]. Texas, Oklahoma, Georgia, and Kansas have among the highest total acres burned from prescribed fire. *Id.*; [JA 348]. Unlike most wildfires, "prescribed fires likely have lower amounts of emissions on a per-acre basis due to lower burn temperatures than wildfires; prescribed fires have less smoldering than wildfires." *Id*. at 331; [JA 349].

Prescribed fire is a carefully-planned process and land-management tool used throughout the nation for key ecological and human benefits. Prescribed fire lessens the impacts of wildfire risk and intensity by minimizing fuel loads in areas vulnerable to fire. AR Doc. No. 1 (81 Fed. Reg. 68,216, 68,248-49 & n.67); [JA 091-092]. In addition to being used to manage unsafe conditions of heavy fuel loads created by past wildfire suppression, the EPA recognizes that prescribed fire is extremely beneficial. "Fire plays a critical role in restoring resilient ecological

[7] "[P]rescribed fire" is defined under the 2016 rule as "any fire intentionally ignited by management actions in accordance with applicable laws, policies, and regulations to meet specific land or resource management objectives." 40 C.F.R. § 50.1(m). Emissions from prescribed fire due to "human activity" can qualify as exceptional events under 40 C.F.R. § 50.1(j).

conditions in our wildlands." *Id.* at 68,223; [JA 066]. Prescribed fire can "influence the occurrence, severity, behavior and effects of catastrophic wildfires and benefit the plant and animal species that depend upon natural fires for propagation, habitat restoration and reproduction, as well as a myriad of ecosystem functions (e.g., carbon sequestration, maintenance of water supply systems and endangered species habitat maintenance)." *Id.* at 68,250 & n.68; [JA 093].

The benefits of prescribed burns in protecting ecosystems is particularly evident in the Kansas prairie regions like the tallgrass areas of the Flint Hills, as well as mixed grass prairie regions of the Smokey Hills and Red Hills. These predominately private-owned, unique areas vary widely from the vast, mostly federal-controlled land in the western U.S. AR Doc. No. 239 (EPA-HQ-OAR-2013-0572-0153 at 1); [JA 282]. The Flint Hills are the last remaining contiguous expanse of the native tallgrass prairie in the U.S. *Id.* Tallgrass prairie once stretched across 170 million acres, from Canada to Texas and Kansas to Kentucky. AR Doc. No. 285 (EPA-HQ-OAR-2015-0229-0021 at 3-1); [JA 343]. Today, only about four percent of the original tallgrass prairie region remains in North America, and over two-thirds of that number is in the Flint Hills. *Id.*; AR Doc. No. 239 (EPA-HQ-OAR-2013-0572-0153 at 1-2); [JA 282-83]. The area is dominated by open expanses of tall, warm-season grasses and perennial, herbaceous forbs. *Id.* at 2; [JA 283]. Due to rainfall amounts that exceed mixed or short grass prairie

regions, fire is an essential component to maintain the natural habitat of the Flint Hills. *Id.*; [JA 283]. Frequent fire events keep woody species at bay and allow the perennial warm season grasses to flourish. *Id.*; [JA 283].

Unlike areas in the western U.S. where vast unsettled expanses are owned by the federal government, most of the Flint Hills have been settled and are in private ownership. *Id.* at 2; [JA 283]. The region is dominated by sparsely populated rural areas, but is traversed by country roads, fences, and the occasional farmstead. Small towns also dot the landscape. *Id.*; [JA 283]. Despite the settled nature of the Flint Hills, much of the open landscape maintains its native characteristics. *Id.*; [JA 283]. While bison have been replaced by cattle, grazing coupled with routine use of prescribed fire helps the ecosystem function as it did prior to human intervention.[8] *Id.*; [JA 283].

Ranchers in the Flint Hills have become adept at mimicking the native burn frequency, setting fire to vast swaths of the Flint Hills every spring during March and April to recreate what nature once managed on its own. *Id.*; [JA 283]. While

[8] Estimates of historical burn frequencies vary, with some having the tallgrass prairie burn every year, to some as infrequent as once every five years. AR Doc. No. 239 (EPA-HQ-OAR-2013-0572-0153 at 2); [JA 283]. Burn frequency is difficult to describe because it can vary greatly from year-to-year depending on conditions like the previous year's rainfall. *Id.*; [JA 283]. Even if an average burn interval of three years is assumed, that means that prior to European settlement, almost 60 million acres of prairie would burn annually, compared to the 6.8 million remaining total acres of tallgrass prairie. *Id.*; [JA 283].

the fires are contained, the scheduling of prescribed burns are sensitive to numerous changing conditions. Fires can only proceed when conditions are optimal. *Id.*; [JA 283]. Too much moisture, too dry conditions, and a wrong wind direction can prevent safe use of fire. *Id.*; [JA 283]. Availability of labor on a given day also plays a factor in determining when a fire can be set. *Id.*; [JA 283]. Neighboring ranches often band together to conduct burns on adjacent properties to ensure better management and containment of the fire. *Id.*; [JA 283]. Furthermore, fire must be set prior to substantial greening of the perennial grass, but simultaneous with the budding of invasive woody species. *Id.*; [JA 283]. The confluence of these many factors leads to a historic culture of prescribed fire that could be adversely effected by a heavy-handed regulatory approach, leading to diminution of the already severely diminished tallgrass prairie region. *Id.*; [JA 283].

Given the national importance of prescribed fire, petitioners' attack on prescribed fire is overbroad if they are truly focusing on the definition of "natural event." Criticizing the Exceptional Events Rule's prescribed burn authority is unrelated to petitioners' challenge. "The [Clean Air Act] at 319(b)(1)(A)(iii) clearly intends to distinguish between 'human activities' and 'natural event[s]' within the definition of an exceptional event." AR Doc. No. 121 (EPA-HQ-OAR-2013-0572-0191 at 81); [JA 182]. "We do not think it is reasonable to consider a

prescribed fire a natural event given the degree of human planning and preparation involved, even if prescribed fire plays some of the roles of natural wildfire." *Id.*; [JA 182].

The Court should reject petitioners' back-handed attack on the Exceptional Event Rule's prescribed fire authority.

V. CONCLUSION.

For the reasons set forth above, the Petition for Review seeking to vacate EPA's final rule entitled Treatment of Data Influenced by Exceptional Events, 81 Fed. Reg. 68,216 (Oct. 3, 2016) should be denied.

DATED: November 14, 2017 Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), Fed. R. App. P. 32(a)(7), and Circuit Rule 32(e)(3) because this brief contains less than 6,500 words, and thus complies with the applicable word limit established by the Court. This brief contains 6,097 words (as counted by attorney's word-processing software), exclusive of the Certificate required by Circuit Rule 28(a)(1) and the items listed in Fed. R. App. P. 32(f).

DATED: November 14, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2017, I served the foregoing FINAL BRIEF OF *AMICI CURIAE* NATIONAL CATTLEMEN'S BEEF ASSOCIATION, PUBLIC LANDS COUNCIL, KANSAS LIVESTOCK ASSOCIATION, AND OKLAHOMA CATTLEMEN'S ASSOCIATION IN SUPPORT OF RESPONDENTS on all parties and registered counsel through the court's electronic filing system (ECF).

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