

ORAL ARGUMENT SCHEDULED FOR OCTOBER 8, 2008

Nos. 07-1151 & 08-1057

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

NATURAL RESOURCES DEFENSE COUNCIL, et al.

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**ON PETITION FOR REVIEW OF FINAL ACTION BY THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

FINAL JOINT BRIEF OF INTERVENOR-RESPONDENTS

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PROTECTION AGENCY,)	
)	
Respondent.)	
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following is submitted pursuant to Circuit Rule 28(a)(1) on behalf of Intervenor-Respondents American Farm Bureau Federation, National Mining Association, and the Utility Air Regulatory Group.

A. Parties and *Amici*

All parties and intervenors appearing in this Court are listed in Petitioner's Brief. There are no *amici*.

B. Ruling under Review

The ruling under review is set forth in Respondent's Brief.

C. Related Cases

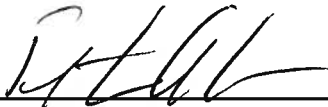
The case on review has not previously been before this Court or any other court.

Dated: August 19, 2008

Respectfully submitted,


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PROTECTION AGENCY,)	
)	
Respondent.)	
_____)	

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel for the American Farm Bureau Federation (“AFBF”), certifies that the AFBF is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF represents more than five million member families through member organizations in all 50 states and Puerto Rico. AFBF has no parent companies, and no publicly-held companies have an ownership interest in AFBF.



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PROTECTION AGENCY,)
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel for the National Mining Association (“NMA”), certifies that the NMA is an incorporated national trade association whose members include the producers of most of America’s coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public, although NMA’s individual members have done so.



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**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**)

Respondent.)

**RULE 26.1 DISCLOSURE STATEMENT
OF UTILITY AIR REGULATORY GROUP**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Intervenor-Respondent Utility Air Regulatory Group (“UARG”) files the following statement:

UARG is a not-for-profit association of individual electric generating companies and national trade associations that participate collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

Respectfully submitted,

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Dated: August 19, 2008

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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:

BACM	Best Available Control Measure
BACT	Best Available Control Technology
BDT	Best Demonstrated Technology
BMP	Best Management Practices
CAA	Clean Air Act
DOI	Department of the Interior
EPA	Environmental Protection Agency
LAER	Lowest Achievable Emission Rate
NAAQS	National Ambient Air Quality Standard
NRDC	Natural Resources Defense Council
NSPS	New Source Performance Standard
PM	Particulate Matter
PM _{2.5}	Particulate Matter with an aerodynamic diameter of 2.5 microns or less
PM ₁₀	Particulate Matter with an aerodynamic diameter of 10 microns or less
PM ₁₀ Natural Events Policy	EPA, Areas Affected by PM ₁₀ Natural Events
PSD	Prevention of Significant Deterioration

SAFE-TEA-LU

Safe, Accountable, Flexible, Efficient
Transportation Equity Act: A Legacy for
Users

SIP

State Implementation Plan

TSP

Total Suspended Particulate

UARG

Utility Air Regulatory Group

1977 Guidance

EPA, Guidelines for the Interpretation of Air
Quality Standards

JURISDICTIONAL STATEMENT

Intervenors adopt the jurisdictional statement set forth in Respondent's Brief.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are contained in the addendum to the Brief of Petitioner Natural Resources Defense Council ("NRDC").

STATEMENT OF ISSUES

1. Whether it was unlawful, under § 319(b) of the Clean Air Act ("CAA"),¹ for the U.S. Environmental Protection Agency ("EPA") to define "natural event" as including events "in which human activity plays little or no direct causal role."
2. Whether it was unlawful under § 319(b) for EPA to provide for the exclusion, on a case-by-case basis, of exceedances of national ambient air quality standards ("NAAQS") resulting from long-range "pollution transport" where the pollution transport was initiated by an exceptional event and all of the other substantive and procedural prerequisites for exclusion under the Exceptional Events Rule ("the Rule") are met.
3. Whether it was unlawful under § 319(b) for EPA to provide for the exclusion, on a case-by-case basis, of NAAQS exceedances resulting from the

¹ 42 U.S.C. § 7619(b). Hereafter, parallel citations are included only in the Table of Authorities.

long-range transport of mining and agricultural dust where the transport was initiated by an exceptional event and all of the other substantive and procedural prerequisites for exclusion under the Rule are met.

4. Whether it was unlawful under § 319(b) for EPA to provide for the exclusion, on a case-by-case basis, of NAAQS exceedances resulting from mining and agricultural dust, whether transported long-range or not, where the dust became airborne as a result of an exceptional event and all of the other substantive and procedural prerequisites for exclusion under the Rule are met.

5. Whether, by failing timely to raise it below, Petitioner waived its argument that it was unlawful under § 319(b) for EPA to provide for the exclusion, on a case-by-case basis, of NAAQS exceedances resulting from mining and agricultural dust, whether transported long-range or not, where the dust became airborne as a result of an exceptional event and all of the other substantive and procedural prerequisites for exclusion under the Rule are met.

STATEMENT OF THE CASE

Intervenors adopt the Statement of the Case set forth in Respondent's Brief. Additionally, Intervenors state the following with respect to issues of special concern to them.

I. Particulate Matter Control Authority

Regulation of particulate matter (“PM”) emissions under the CAA is of interest to a wide range of businesses in the United States, including businesses in economic sectors represented by Intervenors: mining, agriculture, and electricity generation. For example, the country has 812 surface coal mines producing more than 800 million tons of coal per year, and at any one time a typical surface mine will be actively working hundreds if not thousands of acres of uncovered land where the vegetation and topsoil have been removed to allow for mining operations.² The country’s more than two million farms consist of nearly one billion acres of agricultural land, of which about one-third is cultivated and exposed to the elements.³ All of this uncovered land and the activities performed on it create the potential for airborne dust. In addition, emissions of PM, though subject to stringent controls under the CAA, occur from operation of electric generating facilities that burn fossil fuels, including coal that is mined in this country.

PM emissions have always been closely regulated under the CAA. EPA in 1971 promulgated the first PM NAAQS, which applied broadly to all Total

² Energy Information Administration, Coal Production and Number of Mines by State, County, and Mine Type (2006), <http://www.eia.doe.gov/cneaf/coal/page/acr/table2.html>.

³ USDA, “2002 Census of Agriculture,” http://www.agcensus.usda.gov/Publications/2002/Dates_for_Ag_Census_Reports/index.asp.

Suspended Particulate (“TSP”).⁴ Based on studies showing that PM with an aerodynamic diameter greater than 10 microns in size does not present health or welfare concerns, EPA in 1987 replaced the TSP NAAQS with PM NAAQS applicable only to PM of 10 microns in size or less, or PM₁₀.⁵

In 1997, based on further studies, EPA again revised the PM NAAQS by creating separate standards for PM₁₀ and for fine particle PM equal to or less than 2.5 microns in size, or PM_{2.5}.⁶ The majority of PM_{2.5} is created by the chemical transformation in the atmosphere of gases, including sulfur dioxide and nitrogen oxides, into particulate matter, such as sulfates and nitrates. In contrast, the PM₁₀ coarse particle – that is, PM₁₀ greater than 2.5 microns – generally consists of crustal or other types of solid material.⁷ Agricultural and mining PM is overwhelmingly PM₁₀ or PM of even greater size.

EPA revised both the PM₁₀ and PM_{2.5} standards in 2006.⁸ Petitions for review of these revisions are pending before this Court.⁹

⁴ 36 Fed. Reg. 8186 (Apr. 30, 1971).

⁵ 52 Fed. Reg. 24,634 (July 1, 1987).

⁶ 62 Fed. Reg. 38,652 (July 18, 1997).

⁷ 71 Fed. Reg. 12,592, 12,602/1 (Mar. 10, 2006).

⁸ 71 Fed. Reg. 61,144 (Oct. 17, 2006).

⁹ *American Farm Bureau Federation v. EPA*, No. 06-1410 (D.C. Cir. filed Jan. 29, 2008). EPA’s 2006 revisions of its PM₁₀ standards were based, in part, on this Court’s finding that the PM₁₀ standard was confounded because it resulted in double regulation of PM_{2.5}. See *American*

As this Court is aware from its numerous decisions in this area, establishment of a NAAQS triggers a series of regulatory requirements. States submit to EPA recommendations of designations – and EPA then designates – areas that attain the NAAQS, areas in nonattainment of the NAAQS, and areas where the attainment status is unclassifiable due to the lack of sufficient ambient monitoring data representative of the area. States are then required to submit State Implementation Plans (“SIPs”) containing a suite of regulatory control measures for bringing nonattainment areas into attainment and for assuring that attainment areas remain so.¹⁰

Typically, regulation of PM emissions from stationary sources is a significant component of any SIP that addresses that pollutant. PM emissions from existing stationary sources are generally regulated by emission standards that

Trucking Ass'ns v. EPA, 175 F.3d 1027, 1054 (D.C. Cir.), *modified in part on other grounds*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd and remanded in part on other grounds sub nom. Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). As the Court found, the PM_{2.5} standard applied to all particles below 2.5 microns in size, while the PM₁₀ standard applied to all particles below 10 microns in size, including particles governed by the PM_{2.5} standard. EPA states that its 2006 PM₁₀ standards are only intended to apply to PM between 2.5 and 10 microns in size, even though EPA retained PM₁₀ as the “indicator” of these “PM_{10-2.5}” particles. 71 Fed. Reg. at 61,179-97. For convenience, this brief uses “PM₁₀” to refer to the coarse fraction PM_{10-2.5} particles that EPA says it intends to regulate through its 2006 PM₁₀ standards. Whether EPA’s 2006 PM₁₀ standard is still confounded because it double-regulates PM_{2.5} is currently under review in this Court in *American Farm Bureau Federation*, along with other issues relevant to both the PM₁₀ and PM_{2.5} standards.

¹⁰ See, e.g., *North Carolina v. EPA*, No. 05-1244, slip op. at 4-5 (D.C. Cir. July 11, 2008), CAA §§ 107-110.

States have adopted for particular source categories.¹¹ In addition, PM emissions from new and modified facilities are regulated by new source performance standards (“NSPS”) that EPA has promulgated for specified source categories and that apply uniformly throughout the country.¹²

PM emissions from stationary sources are also regulated through the Act’s major new source review programs. Under these programs, sources that emit above a certain threshold are designated as “major” sources and must obtain a permit in order to undertake new construction or, in some cases, in order to modify existing major operations. Major sources located in attainment areas are required by the Prevention of Significant Deterioration (“PSD”) program to install Best Available Control Technology (“BACT”) to limit their emissions.¹³ Major sources located in nonattainment areas are required to install control technologies to achieve the even more stringent Lowest Achievable Emission Rate (“LAER”).¹⁴

Sources that emit below the major source threshold but above a de minimis rate are subject to minor-source permitting requirements. Some states require that minor sources install BACT as a condition to permitting. At a minimum, states

¹¹ See, e.g., 9 Va. Admin. Code § 430-8190.

¹² See CAA § 111. NSPS is defined in CAA § 111(a)(1).

¹³ See CAA § 165. BACT is defined in CAA § 169(3).

¹⁴ See CAA § 173. LAER is defined in CAA § 171(3).

typically require that new sources undertake Best Management Practices (“BMP”)¹⁵ to control fugitive dust, that is, dust not emitted to the atmosphere through a stack, vent or similar conveyance.¹⁶

II. PM Control in the Mining and Agricultural Sectors

A. Mining PM Controls

In accordance with the requirements described above, PM emissions from mining activities are subject to extensive regulation by EPA. Under EPA regulations, new and modified mining equipment and facilities are generally subject to NSPS requiring emissions controls achievable by the use of best demonstrated control technologies (“BDT”).¹⁷ Emission levels even more stringent than NSPS are typically prescribed during new source review, when new equipment and facilities are constructed or when existing facilities or equipment are modified in a way that increases emissions.¹⁸

¹⁵ BMP, also referred to as “best available control measure” (“BACM”), reflects the maximum degree of PM₁₀ emissions reduction from a source as determined on a case-by-case basis considering technological and economic feasibility. 59 Fed. Reg. 41,998, 42,010 (Aug. 16, 1994).

¹⁶ See, e.g., Wyo. Rules and Regs., Dep’t of Env’tl. Quality, Air Quality Ch. 6, § 2(c)(v).

¹⁷ BDT is adequately demonstrated control technology with an achievable level of emissions determined to be an NSPS standard of performance based on a “balancing” of prescribed statutory factors in keeping with CAA § 111(a). See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981).

¹⁸ CAA § 165.

Mining PM emissions are also regulated by the U.S. Department of the Interior (“DOI”), which has promulgated regulations under the Surface Mining Control and Reclamation Act to control dust due to both wind erosion and dust created by vehicle traffic.¹⁹ A large portion of the dust from surface mining is generated as a result of haul road traffic. Consequently, DOI’s rule addresses dust caused directly by wind erosion as well as erosion-related dust resulting from haul trucks, smaller vehicles and other equipment operating outside of the mine pit using on-site roads and surfaces.²⁰

The mining industry typically uses high-efficiency control measures for the various coal processing steps. The following examples are some of the types of BACT controls used at such coal preparation facilities:²¹

<u>Preparation/Processing Source</u>	<u>Control Device or Work Practice</u>
Coal dumping	Baghouse; stilling shed; water spray
Coal storage	Silo with baghouse, passive enclosure with controlled flow transfer chute, or fogging control technology; pile with application of water and surfactant; trough barn with

¹⁹ 53 Fed. Reg. 45,190 (Nov. 8, 1988).

²⁰ See, e.g., 54 Fed. Reg. 48,870, 48,879 (Nov. 28, 1989).

²¹ See, e.g., Wyoming Dept. of Env'tl. Quality, “Natural Events Action Plan for the Coal Mines of the Powder River Basin” at 15-18 (*Best Available Control Measures*) (Oct. 2006), <http://deq.state.wy.us/aqd/NEAP%20Files/1-23-07NEAP.pdf> (“Wyoming Plan”); see also EPA, *RACT/BACT/LAER Clearinghouse*, Process Type 90.011 (“Coal Handling/Processing/Preparation/Cleaning”), <http://cfpub.epa.gov/rblc/cfm/basicSearchResult.cfm?RequestTimeout=500&CFID=1428271&CFTOKEN=58775465&jsessionid=98304ded408ecf73182d5b647a4124b4b566TR>.

	baghouse or fogging control technology; wind screen
Crushers and screens	Enclosure with water spray, passive enclosure with controlled flow transfer chute, fogging control technology or baghouse
Material conveying	Covered conveyor
Conveyor transfer points	Water spray, passive enclosure with controlled flow transfer chute, fogging control technology, cyclone or scrubber
Coal loadout	Enclosed loadout with telescoping chute; water spray

In addition to controls on emissions from processing facilities, the various dust suppression controls and practices used throughout the mining industry include the following:²²

<u>Open Dust Source</u>	<u>Control Device or Work Practice</u>
Removal of topsoil and subsoil	Application of water to surfaces to be scraped with scrapers
Coal Drilling	Use of water injection or rotoclones, dust hoods
Overburden drilling	Use of water injection or rotoclones, dust hoods

²² *Id.*

Overburden and coal blasting	Best practices design to limit number and/or area extent
Overburden and coal loading	Application of water to shot coal; best practices limit on drop height between shovel bucket and truck bed; load shot coal vs. digging coal from the coal seam face
Major haul roads	Application of water containing a dust suppressant, usually magnesium chloride for roads with sustained, long-term traffic; limit on haulage truck speed; limit on non-haulage vehicle speed
Temporary haul roads	Application of water containing a surfactant; limit on haulage truck speed; limit on non-haulage vehicle speed
Haul road repair with graders	Application of water containing a surfactant
Disturbed area subject to wind erosion	Permanent reclamation with backfill, topsoil and revegetation; temporary reclamation by temporary revegetation with rapid-establishment species; soil stabilizers
Mine access road and parking	Paving

B. Agricultural PM Controls

Like mining, agricultural PM emissions are closely regulated. By their very nature, agricultural activities generate primarily fugitive dust. Because so much land is involved in farming, wind erosion of soil can be an especially significant source of fugitive dust from agricultural fields and unpaved roads.

Given the predominance of fugitive dust, agricultural PM emissions cannot be controlled with specific “add-on” control devices for BACT. However, state and local regulations provide an assortment of agricultural work practices representative of BMP or BACM that can be found at well-controlled agricultural operations:²³

Open Dust Source - Cropland

Best Management Practice

Land Preparation/Cultivation

Alternate till
 Bed-row size and spacing
 Combined operations
 Conservation tillage (no or minimum tillage)
 Cover crops
 Equipment changes/Tech. improvements
 Fallowing land
 Mulching
 Night farming
 Time of planting
 Transplanting

Harvest

Baling/Large balers
 Combined operations
 Continuous tray
 Equipment changes/Tech. improvements
 Fallowing land
 Green chop
 Hand harvesting
 Night harvesting
 Pre-harvest soil preparation
 Shed packing

²³ See, e.g., Imperial County Air Pollution Control Dist., “Rules and Regulations,” Rule 806 (Conservation Management Practices) (Nov. 6, 2007).

	Shuttle system/larger carrier
Other	Application efficiencies Bulk materials control Grinding/Chipping/Shredding in place of burning No burning Permanent Crops Reduced pruning Soil amendments Soil incorporation Surface roughening Transgenic crops Wind barrier
Unpaved Roads and Unpaved Vehicle/Equipment Traffic Areas	Chips/Mulches Organic materials Polymers Road oil Sand Gravel Paving Restricted access Speed limits Track-out control Water Wind barrier

III. EPA's Treatment of Exceptional Events

From the inception of the NAAQS program, EPA recognized that special treatment of air quality data is needed where an exceptional event causes a NAAQS exceedance. Despite sources' emissions being well-controlled by the use of "best" available control technology, "best" demonstrated technology, and "best" management practices, such as those described above, an unusual or uncontrollable

event may act upon those emissions – or that event may generate new, additional emissions – in such a way that a NAAQS exceedance results. Although these events are, by definition, generally short-lived and atypical, the sanction for the resulting NAAQS exceedance – through, for example, redesignation of an area from attainment to nonattainment, or the initial designation of an area as nonattainment for a new or revised NAAQS – could be severe and lengthy in duration. At the same time, requiring businesses to try to control their emissions to compensate for the effects of exceptional events in order to prevent NAAQS exceedances could impose high costs for very little gain. In any event, in some circumstances, requiring such controls could be effectively impossible. A reasonable exceptional events policy is particularly important to the mining and agricultural sectors given the extent of their outdoor dirt-moving operations, because high-wind events, particularly in the arid West, may make mining or agricultural dust airborne no matter what efforts are made to control that dust.²⁴

Accordingly, as discussed in more detail below, during the nearly forty-year history of the NAAQS program, EPA has always recognized the need, in reviewing and handling air quality monitoring data showing exceedances of the

²⁴ As stated by this Court, “EPA’s regulation of fugitive emissions has been of special concern to the mining and forestry industries which contend, without serious opposition, that they are incapable of meeting the strict limitations on the emission of particulate matter set by the PSD provisions” of the CAA, *Alabama Power Co. v. Costle*, 636 F.2d 323, 369 (D.C. Cir. 1979), a fact that remains true today for the CAA’s NAAQS provisions absent a reasonable exceptional events policy.

NAAQS, to exclude exceedances caused by exceptional events, subject to carefully defined limits. Moreover, EPA has consistently recognized that an exceptional events policy should apply not only to nonanthropogenic sources of pollution (*e.g.*, volcanoes) but to anthropogenic dust sources (*e.g.*, mines and agriculture) affected by a natural event (*e.g.*, unusually high winds).

In developing an exceptional events policy, EPA has been careful not to allow affected sources' emissions to be uncontrolled during periods of exceptional events. EPA has consistently refused to exclude exceedances where the emissions causing the exceedance were produced by an anthropogenic source, as where dust from mine or farm operations was made airborne by an unusual high-wind event, unless the source was in full compliance with its control requirements, such as those described above. Moreover, EPA has refused to exclude exceedances unless the exceedance was shown to be directly caused by the exceptional event, as where a pattern of NAAQS compliance was interrupted at the time of the exceptional event. Additionally, EPA required states to mitigate the effects of the exceptional event.²⁵

Although EPA in its brief states that it first developed exceptional events policies in 1977, in fact EPA addressed the special circumstances associated with

²⁵ See discussion immediately following.

exceptional events when it first adopted requirements for SIP preparation, adoption and submittal in 1971. EPA stated that:

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.²⁶

In 1973, EPA issued guidance discussing the formal procedure for evaluating ambient monitoring values. The guidance stated that, where a NAAQS violation is identified, there should be a follow-on “process for checking the identified values as received to see if ... they in fact reflect some peculiar or infrequent phenomenon in the ambient air.”²⁷

EPA issued an Exceptional Events guidance in 1977 that recognized it was unreasonable to try to impose sufficient emission control measures to prevent an uncontrollable and atypical event from causing a NAAQS exceedance.²⁸ As EPA explained, “[t]he rationale underlying this policy is the concept of ‘reasonableness’

²⁶ 36 Fed. Reg. 22,369, 22,401 (Nov. 25, 1971).

²⁷ EPA, Guideline No. 1.2-006, *Guidelines for Evaluation of Suspect Air Quality Data* (1973) at 2, JA181.

²⁸ EPA, Guideline No. 1.2-008, *Guidelines for the Interpretation of Air Quality Standards* (1977) (“1977 Guidance”), JA197-216.

in control strategy development, in that strategies based on such unusual conditions would clearly be unreasonable.”²⁹

The 1977 Guidance made clear, however, that where the NAAQS exceedance was caused by emissions from an anthropogenic source affected by an exceptional event, the exceedance would not be excluded unless the source was subject to control. As EPA stated:

Detailed information establishing that violations are due to uncontrollable natural sources may be used in determining the feasibility of modifying control strategies. In general, reasonably available control technology would be expected for all existing sources and best available technology for new sources impacting the non-attainment monitor.³⁰

EPA revisited its exceptional events policy in 1986, 1987, and 1996. In 1986, EPA adopted what became known as its Exceptional Events Policy, which applied to, among other things, high winds.³¹ In 1987, when EPA first adopted the PM₁₀ NAAQS, EPA recognized the need for special treatment of PM₁₀ data affected by exceptional events by including in its regulations a procedure for excluding such data from NAAQS compliance reviews in appropriate

²⁹ EPA, EPA-450/2-77-023, VIII-13, *Control Strategy Preparation Manual for Particulate Matter*, (1977), JA330.

³⁰ 1977 Guidance at 17, Issue 9, JA214.

³¹ EPA, *Guideline on the Identification and Use of Air Quality Data Affected by Exceptional Events* (1986), JA344-383.

circumstances and subject to proper procedure.³² In 1997, when EPA first adopted PM_{2.5} NAAQS, EPA similarly provided for special treatment of PM_{2.5} data affected by exceptional events.³³

EPA in 1996 issued additional guidance for PM₁₀, known as the PM₁₀ Natural Events Policy, in response to Congress' enactment of CAA § 188(f).³⁴ As did the previous guidance, this guidance specifically applied EPA's policy to the action of high winds on both anthropogenic and nonanthropogenic dust:

Ambient PM-10 concentrations due to dust raised by unusually high winds will be treated as due to uncontrollable natural events under the following conditions: (1) the dust originated from nonanthropogenic sources, or (2) *the dust originated from anthropogenic sources controlled with [BACM]*.³⁵

As did the previous exceptional events guidance documents, the PM₁₀ Natural Events Policy stated that NAAQS exceedances caused by exceptional events would not be excluded unless a "clear causal relationship" existed between the source and the exceedance.³⁶ Moreover, states were required to follow specific

³² See 52 Fed. Reg. at 24,667 (promulgating 40 C.F.R. pt. 50, App. K, § 2.4).

³³ 40 C.F.R. pt. 50, App. N, § 1(b).

³⁴ See EPA, *Areas Affected by PM-10 Natural Events* (1996) at 3-4, JA399-400.

³⁵ *Id.* at 7, JA403 (emphasis supplied). In a footnote, EPA noted that "BACM for PM-10 are techniques that achieve the maximum degree of emissions reduction from a source as determined on a case-by-case basis considering technological and economic feasibility." *Id.* (citing 59 Fed. Reg. 42,010 (Aug. 16, 1994)); see also *id.* at 9, JA405 (discussing high winds).

³⁶ *Id.* at 10, JA406.

procedures to document such a causal relationship³⁷ and to mitigate or eliminate any air pollution effect of such events.³⁸

IV. Section 319(b) and the Rules at Issue

In 2005, in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, or SAFE-TEA-LU,³⁹ Congress amended CAA § 319 to specifically authorize EPA and the States to exclude NAAQS exceedances caused by exceptional events. The SAFE-TEA-LU amendment, which added CAA § 319(b), directed EPA to promulgate regulations governing the treatment of air quality data affected by “exceptional events” as defined in the statute. Under the statute, the regulations must be consistent with five “principles” that are very similar to the five guiding principles set forth in EPA’s 1996 PM₁₀ Natural Events Policy.⁴⁰ The statute also imposed four minimum requirements the regulations must meet, including the requirement of a “clear causal relationship.”⁴¹

³⁷ *Id.* at 10-11, JA406-07.

³⁸ *Id.* at 7-10, 12, JA403-06.

³⁹ Pub. L. No. 109-59, § 6013(a), 119 Stat. 1883-84 (2005).

⁴⁰ Compare CAA § 319(b)(3)(A) with PM₁₀ Natural Events Policy at 4-5, JA400-JA401.

⁴¹ CAA § 319(b)(3)(B).

EPA proposed regulations implementing CAA § 319(b) in March 2006.⁴² Both the mining and agricultural sectors submitted comments on the proposal on the issue of blowing dust, believing that EPA's proposed policy did not go far enough in exercising authority in CAA § 319(b) to provide for exclusion of data influenced by uncontrollable exceptional events, particularly exceptional wind events. Among other things, mining and agricultural commenters asked that wind events excludable as exceptional natural events not be limited to unusually high-wind events, but should include any wind events causing a PM₁₀ NAAQS exceedance despite the use of BACT and BMP.⁴³

EPA promulgated the Exceptional Events Rule on March 22, 2007.⁴⁴ The Rule is described in EPA's Brief.⁴⁵ EPA rejected many of the recommendations made by agricultural and mining commenters. For example, although EPA continued its policy of excluding NAAQS exceedances caused by anthropogenic dust made airborne by high-wind events, it disagreed with the mining and agricultural industries' recommendation as to qualifying wind events. According

⁴² *The Treatment of Data Influenced by Exceptional Events; Proposed Rule*, 71 Fed. Reg. 12,592 (Mar. 10, 2006).

⁴³ Comments of the National Mining Association at 4-5 (May 25, 2006), JA615-16; Comments of the National Cattlemen's Beef Association at 4 (May 25, 2006), JA607.

⁴⁴ *Treatment of Data Influenced by Exceptional Events; Final Rule*, 72 Fed. Reg. 13,560 (Mar. 22, 2007).

⁴⁵ Resp. Br. at 15-17.

to EPA, to qualify as an exceptional event, the wind event must be “unusually high for the affected area during the time period that the event occurred.”⁴⁶

Moreover, EPA rejected comments by intervenor Utility Air Regulatory Group (“UARG”) objecting to EPA’s proposed requirement that “a state seeking to have ambient monitoring data excluded as caused by an exceptional event demonstrate ‘that exceedances or violations of applicable standards would not have occurred but for the influence of exceptional events.’”⁴⁷ Despite UARG’s comment that this but for causation test was neither appropriate nor required by § 319(b), and could be unduly burdensome and even impractical,⁴⁸ EPA retained the test in the final rule. This meant, EPA explained, that

to the extent that it is possible to determine that the resulting air quality concentrations and appropriate design values for an area would be above the level of the standards even without the influence of the exceptional event, the air quality data for the day(s) in question should not be excluded.⁴⁹

EPA also continued its exceptional events policy of refusing to exclude NAAQS exceedances unless (a) a public process was followed for “flagging” and justifying the exclusion of air quality data affected by exceptional events; (b) the

⁴⁶ 72 Fed. Reg. at 13,566/1.

⁴⁷ Comments of the Utility Air Regulatory Group at 4 (quoting 71 Fed. Reg. at 12,599/2) (May 25, 2006), JA686.

⁴⁸ *Id.* at 4-5, JA686-87.

⁴⁹ 72 Fed. Reg. at 13,570/2.

anthropogenic source of emissions made airborne by a high-wind event was well-controlled; and (c) the state adopted appropriate measures to mitigate the effect of the exceptional event.⁵⁰

STANDARD OF REVIEW

This brief adopts the statement of the standard of review in EPA's Brief (at 24-25).

SUMMARY OF ARGUMENT

Petitioner's challenge to the Rule's definition of "natural event" is waived because no objection to that definition – which appeared in the proposed rule precisely as it was promulgated in the final – was registered during the rulemaking. In any event, that challenge would fail on the merits because the statute does not establish the dichotomy Petitioner argues is mandated between natural and human events; an event may have both natural and, secondarily, human origins and is not thereby disqualified from exclusion under § 319(b) of the CAA.

EPA acted consistently with CAA § 319(b) in concluding that NAAQS exceedances can be excluded on a case-by-case basis to the extent they are caused by transported anthropogenic pollution. Petitioner's argument to the contrary is based on the false premise that EPA will allow exclusion of NAAQS exceedances to the extent they are caused by transported anthropogenic pollution regardless of

⁵⁰ *Id.* at 13,576-77; 40 C.F.R. §§ 50.14(c), 51.930.

whether or not the pollution became airborne in the first place as a result of a qualifying exceptional event. In promulgating the Rule, EPA clearly explained that transported anthropogenic pollution may be excluded only if “all of the criteria and requirements related to exceptional events are met as defined in this rule.”⁵¹ For this reason, and as EPA explained, the Rule applies to transported anthropogenic pollution only if a qualifying exceptional event caused the pollution to become airborne. In this limited circumstance, EPA is fully justified under CAA § 319(b) in excluding NAAQS exceedances caused by transported anthropogenic pollution.

For the same reason, EPA is fully justified under CAA § 319(b) in excluding NAAQS exceedances caused by transported PM originating at mining and agricultural operations where “all of the criteria and requirements related to exceptional events are met.” Petitioner’s argument to the contrary proceeds from the same false premise that EPA would authorize NAAQS exceedance exclusions regardless of whether the mining and agricultural PM was made airborne by an exceptional event.

Petitioner’s argument that EPA can never (regardless of pollution transport) exclude NAAQS exceedances caused by mining and agricultural dust made airborne by a qualifying high wind event is waived because no party timely raised

⁵¹ 72 Fed. Reg. at 13,564/3.

it below. Even if not waived, the argument must fail because CAA § 319(b) plainly authorizes EPA, in a proper case and subject to substantive and procedural limitations, to exclude NAAQS exceedances resulting from a “natural event,” which includes unusually high winds. EPA has always excluded mining and agricultural dust, and other emissions from recurring human activity, during periods of exceptionally high winds under its long-standing exceptional events policies. Neither the language of CAA § 319(b) nor any other evidence suggests that Congress intended to change that policy.

ARGUMENT

I. Petitioner’s Argument that EPA Could Not Lawfully Define “Natural Event” as Including Events that May Have a Limited Human Component Is Waived and in any Case Is Meritless.

Petitioner challenges EPA’s definition of “natural event” in the rule as including events “in which human activity plays little or no direct causal role.”⁵² Intervenors join EPA in arguing that that challenge is waived⁵³ and is, in any event, meritless.⁵⁴

That challenge rests on a mistaken and legally unsupportable premise: that EPA’s “interpretation of the statutory term ‘natural event’ is an unlawful departure

⁵² *Id.* at 13,580 (promulgating 40 C.F.R. § 50.1(k)).

⁵³ Resp. Br. at 28-30.

⁵⁴ *Id.* at 30-35.

from the clear language of the statute” because, according to Petitioner, § 319(b) “identifies a dichotomy whereby events are either ‘natural’ or ‘caused by human activity.’”⁵⁵ Petitioner thus would have this Court impose a requirement that, to be “exceptional,” a given event must be *exclusively* either (1) “natural” – meaning, in Petitioner’s view, an event unconnected with any human activity – *or* (2) “caused by human activity.” In other words, Petitioner’s purported “dichotomy” would dictate that, to be excludable under § 319(b), a given event may not have both natural and human origins.

But such a requirement is grounded neither in logic – a given event plainly may have varied causes – nor in the “language of the statute.”⁵⁶ The definitional language in § 319(b)(1)(A)(iii) cannot be read to *mandate*⁵⁷ a rule that an event that is ultimately and primarily of natural origin but that has a limited human causal component is automatically beyond the scope of the events that are excludable, even if § 319(b)’s other substantive and procedural criteria are met. Thus, for example, where emissions from volcanic activity mix with volcanic ash re-

⁵⁵ NRDC Pet. for Reconsideration at 5-6 (quoting CAA § 319(b)(1)(A)(iii)), JA696-697; *see* Pet’r Br. at 18 (arguing that “EPA’s definition must be vacated for expanding the term ‘natural event’ to encompass human activities that stand in direct contrast to natural events”).

⁵⁶ NRDC Pet. for Reconsideration at 5, JA696.

⁵⁷ Even if Petitioner’s preferred interpretation of § 319(b)(1)(A)(iii) could be deemed consistent with the statute and otherwise reasonable (which it cannot), that would, of course, not be sufficient to override EPA’s different, but also statutorily sound and reasonable, interpretation. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.11 (1984); Resp. Br. at 31-35.

entrained in the atmosphere by clean-up activities in response to an eruption, EPA is not compelled to disallow exclusion of the resulting data merely because the airborne emissions, while principally natural in origin, are partly traceable to human activity.⁵⁸

II. EPA Properly Concluded that NAAQS Exceedances Can Be Excluded on a Case-by-Case Basis to the Extent They Are Caused by Transported Anthropogenic Pollution, the Pollution Transport Was Initiated by an Exceptional Event, and the Rule’s Other Criteria Are Met.

A. Petitioner’s Argument that EPA’s Pollution Transport Example Contradicts the Statute Must Be Rejected Because that Argument Is Based on a Fundamental Mischaracterization of the Example.

In the final Rule’s preamble, EPA listed examples of possible situations in which it might exclude a NAAQS exceedance as resulting from an exceptional event. One such example is an “Exceedance[] Due to Transported Pollution.” EPA stated that it would exclude an exceedance caused by pollution transport provided that “all of the criteria and requirements related to exceptional events are met as defined in this rule.”⁵⁹ Because of this proviso, an exceedance resulting from transported pollution may be excluded only where the originating event causing the pollution to become airborne was “not reasonably controllable or preventable,” and the originating event must be a “natural event” or “an event

⁵⁸ See Resp. Br. at 54-57 (refuting Petitioner’s challenge to EPA’s treatment of data from clean-up activities associated with natural disasters, such as volcanic eruptions, earthquakes, cyclonic storms, and the like).

⁵⁹ 72 Fed. Reg. at 13,564/3.

caused by human activity that is unlikely to recur at a particular location.”⁶⁰

Additionally, the exceedance will not be excluded unless the state shows a “clear causal relationship” between the exceptional event and the exceedance⁶¹ under the public procedure required by 40 C.F.R. § 50.14(c). Given these constraints, only a limited subset of all NAAQS exceedances resulting from transported pollution may be excluded under the Rule.

Petitioner maintains that the transported pollution example is at odds with the statute, but its argument wholly mischaracterizes that example. According to Petitioner, EPA’s example could be read as meaning that NAAQS exceedances may be excluded if they are caused by pollution transport “alone” or “per se,” regardless of whether the event causing the initial emission of the pollutant was exceptional.⁶² Thus, according to Petitioner, under the pollution transport example, “heavy air pollution from industrial sources” would be excluded simply because the pollution registers on a monitor downwind rather than on a nearby monitor.⁶³

⁶⁰ 40 C.F.R. § 50.1(j).

⁶¹ *Id.* § 50.14(a)(2).

⁶² Pet’r Br. at 28, 29.

⁶³ *Id.* at 23.

Petitioner's reading, however, is flat wrong, as EPA points out in its brief.⁶⁴ The Rule makes clear that the originating event for the pollution must qualify as an "exceptional event" under the regulatory definition, after applying the numerous procedural and substantive requirements mandated by the Rule.⁶⁵ For instance, the pollution must have become airborne in the first place as a direct result of a qualifying high-wind event or other exceptional event. Hence, pollution transport "alone" or "per se" is not an exceptional event under the rule. Although Petitioner introduces its argument by stating that it is "confus[ed]" as to the meaning of EPA's long-range transport example and makes its argument "out of caution,"⁶⁶ EPA's example is not confusing at all. The first sentence of the example plainly explains that exceedances caused by transport may be excluded only if the other criteria for application of the Rule are met, meaning that the initiating event must itself qualify as exceptional under the statute.⁶⁷

⁶⁴ Resp. Br. at 41-43.

⁶⁵ 72 Fed. Reg. at 13,564/3; *see* Resp. Br. at 41-42.

⁶⁶ Pet'r Br. at 22.

⁶⁷ 72 Fed. Reg. at 13,564/3.

B. The Mining and Agricultural Emissions Sub-Example of the Pollution Transport Example Is a Reasonable Application of EPA’s Exceptional Events Authority.

The final Rule’s regulatory preamble, in its discussion of “Exceedances Due to Transported Pollution,” lists several sub-examples of the pollution transport example. One sub-example is “data affected by emissions from mining and agricultural activities when such emissions are subjected to long-range transport, and the criteria and requirements related to an exceptional event are met as defined in this rule.”⁶⁸

Petitioner argues that this sub-example violates the statute, but Petitioner’s arguments are based on the same misreading of the pollution transport example discussed above.⁶⁹ Petitioner ignores the fact that NAAQS exceedances caused by transported mining and agricultural emissions cannot be excluded unless the emissions become airborne as a result of an exceptional event, such as unusually high winds. Thus, Petitioner’s tobacco barn analogy⁷⁰ misses the point. NAAQS exceedances caused by “regular and recurring”⁷¹ tobacco barn emissions may not be excluded under the Rule precisely because they are “regular and recurring” and

⁶⁸ *Id.* at 13,564/3-13,565/1.

⁶⁹ Pet’r Br. at 28-33.

⁷⁰ *Id.* at 30-31.

⁷¹ *Id.*

not the result of an exceptional event. NAAQS exceedances caused by “regular and recurring” mining and agricultural emissions are likewise ineligible for exclusion under the Rule. In both cases, an exclusion could be granted only if the originating event qualified as exceptional under the Rule’s substantive and procedural criteria.

Because of Petitioner’s misunderstanding of the pollution transport example, and its concomitant misunderstanding of the mining and agricultural sub-example, it is presumably unaware of how unusual it would be for mining and agricultural emissions to qualify under the pollution transport example. Long range transport is typically caused by persistent, high winds in the upper levels of the atmosphere. However, mining and agricultural emissions are, on the whole, relatively large, heavy crustal particles that deposit out of the air fairly quickly after their release since they are emitted so close to ground level.⁷² Consequently, under stable atmospheric conditions with normal winds, significant amounts of crustal material produced by mining or agricultural activity are not carried high enough into the atmosphere to be transported long distance. Indeed, the EPA pollution transport regulations to which Petitioner refers relate not to PM₁₀ but to PM_{2.5}, whose precursors are predominantly gaseous, and to ozone, also produced from gases;

⁷² See, e.g., 54 Fed. Reg. at 48,873 (noting “the limited distance from [surface coal mines] that ambient impacts occur”).

both PM_{2.5} and ozone, as well as their precursors, can be transported downwind for long distances in certain circumstances.⁷³ Nevertheless, even downwind NAAQS exceedances resulting from ozone and PM_{2.5} transport would not be excludable under the Rule in the absence of an initiating exceptional event.

In sum, contrary to Petitioner's argument, the mining and agricultural emissions transport sub-example is subject to the full array of requirements in the Rule and is entirely consistent with the statute.

III. Petitioner's Argument that Mining and Agricultural Emissions Can Never Be Excluded Is Legally Flawed and Contradicts Petitioner's Own Comments Below.

A. Introduction

Under the guise of attacking the mining and agricultural emissions transport sub-example, Petitioner makes the sweeping argument that a NAAQS exceedance caused by either mining or agricultural dust can never be excluded under the Rule, even if the dust that caused the downwind exceedance was made airborne by an exceptional event such as unusually high winds. Although Petitioner makes this argument in the context of its argument concerning pollution transport related to mining and agricultural emissions, the argument, beginning on page 28 of Petitioner's brief, plainly extends beyond long-range transport and applies to any

⁷³ Pet'r Br. at 24 (citing EPA transport-oriented regulations addressing PM_{2.5} and ozone).

mining or agricultural dust regardless of how it became airborne or whether it was transported any significant distance.

According to Petitioner, mining and agricultural activities can *never* qualify under the Rule because such activities are “not only likely to recur at a particular location, they in fact do recur at the same locations as a matter of ordinary business practice and conduct.”⁷⁴ Thus, Petitioner maintains that NAAQS exceedances caused by mining and agricultural dust cannot be excluded even when that dust is made airborne by a high-wind event. According to Petitioner, “[t]he presence of high winds, even if a permissible exceptional event..., cannot make anthropogenic pollution ‘natural.’ High winds cannot anoint mining and agricultural activities as permissible exceptional events.”⁷⁵

Petitioner’s argument on this point reaches well beyond mining and agriculture. The implication of the argument is that if any enterprise – home construction, for example – involves activities that expose dirt to the air, any downwind NAAQS exceedances that may result if the dirt becomes airborne due to an exceptional event, such as a windstorm or even a tornado, would remain nonexcludable notwithstanding that exceptional event’s causative role.

⁷⁴ *Id.* at 29-30.

⁷⁵ *Id.* at 32.

B. Petitioner’s Argument Is Waived Because It Was Not Made in the Rulemaking.

EPA plainly stated in its proposed regulation that, in accordance with its nearly forty-year history of exceptional events policy, the Rule would apply to PM having an anthropogenic origin, provided that (a) such PM demonstrably caused a NAAQS exceedance as a result of a high-wind event; (b) the source was reasonably well-controlled; and (c) the state undertook reasonable mitigation measures. In its discussion of high-wind events in the proposed rule’s preamble, EPA stated that:

[w]here high wind events result in exceedances or violations of PM_{2.5} standards, we are proposing that they will be treated as natural events pursuant to this proposed rule if there is a clear causal relationship demonstrated between the exceedances measured and the high wind event in question, and if *anthropogenic activities which contribute to PM_{2.5} emissions in conjunction with the high wind event* are reasonably well controlled.”⁷⁶

EPA made the same statement with respect to PM₁₀, noting that “States would be expected to control emissions from *contributing anthropogenic sources* as appropriate.”⁷⁷

⁷⁶ 71 Fed. Reg. at 12,605/3 (emphasis supplied).

⁷⁷ *Id.* at 12,605/3-12,606/1 (emphasis supplied); *see also id.* at 12,602/1-2 (discussing “Special Considerations Relevant to Proposed Standards for PM_{10-2.5}”).

Thus, in discussing application of the proposed Exceptional Events Rule to high-wind events, EPA did not distinguish between PM generated by recurring human activity, such as agriculture and mining, and PM generated by non-recurring human activity. In accordance with its long-standing exceptional events policy, EPA proposed to exclude NAAQS exceedances caused by the action of high wind on dust from *any* anthropogenic source, so long as the source was well-controlled and the Rule's other requirements were met.

In contrast to its argument here, Petitioner's comments on the proposed rule did not object to EPA's assertion of authority to exclude exceedances caused by PM from all (recurring and non-recurring) human activity where the PM was made airborne by an exceptional event such as high wind. Petitioner's comments included a separate section discussing the nature of a high-wind event that could appropriately qualify as an exceptional event.⁷⁸ But neither that section nor any other part of Petitioner's comments – nor any other party's comments – contested EPA's authority to exclude emissions from recurring human sources during high-wind events so long as those events were in fact exceptional, the emitting sources were well-controlled, and appropriate mitigation was implemented. Petitioner did

⁷⁸ NRDC Comments at 9, JA639.

not assert the position it advances here until it filed its petition for reconsideration.⁷⁹

Petitioner appears to suggest (at 33-38) that it had no reason to know during the rulemaking that EPA intended to include within the Rule's scope recurring anthropogenic activities, such as mining and agriculture, affected by exceptional events, and that it first learned of EPA's intent to do so when EPA included the transported mining and agriculture PM sub-example in the final regulatory preamble. Any such suggestion is baseless. In fact, the discussion of high-wind events in Petitioner's comments cited EPA's PM₁₀ Natural Events Policy as support for its position.⁸⁰ Petitioner thus was fully aware of EPA's pre-existing exceptional events policy allowing exclusion of exceedances resulting from "(1) the dust originat[ing] from nonanthropogenic sources" and "(2) the dust originat[ing] from anthropogenic sources controlled with BACM."⁸¹

Petitioner must also have been aware that EPA had consistently applied this policy to both recurring human activity, including mining and agriculture, and non-

⁷⁹ NRDC Pet. for Reconsideration at 1-2 (May 21, 2007) ("Pursuant to the unambiguous language of amended Clean Air Act section 319, under no circumstance may emissions from mining and agricultural activities be considered an exceptional event, whether or not 'subjected to long-range transport.'"), JA692-693.

⁸⁰ NRDC Comments at 9, JA639.

⁸¹ PM₁₀ Natural Events Policy at 7, JA403.

recurring human activity. For instance, pursuant to the PM₁₀ Natural Events Policy, and in an open, public process, the State of Wyoming had adopted a Natural Events Action Plan applicable to coal mine emissions in the Powder River Basin of Wyoming, the area of the country with, by far, the largest expanse of surface coal mines.⁸² Moreover, other parties in the rulemaking below, including environmental interest parties, understood that the proposed rule, like the PM₁₀ Natural Events Policy, applied to mining and agriculture.⁸³ Yet neither Petitioner nor any other commenter objected to continuation of this policy in the Rule. Indeed, Petitioner went so far as to say in comments that the PM₁₀ Natural Events Policy is “substantially reflected in [CAA] § 319,”⁸⁴ which effectively concedes EPA’s statutory authority to apply the Rule, as it had the Policy, to all sources of well-controlled anthropogenic emissions affected by a high-wind event.

⁸² Wyoming Plan at 15-18.

⁸³ Comments of Environmental Defense and the American Lung Association at 3 (May 25, 2007), JA596 (citing application of PM₁₀ Natural Events Policy to anthropogenic sources controlled with BACM during high-wind events); *id.* at 2 (recommending that Exceptional Events Rule should define high-wind events to require “Best Available Control Measures are in place at contributing anthropogenic sources, *including agriculture and mining sources of PM₁₀.2,3*” emphasis supplied). Indeed, Petitioner itself commented “that ‘high wind’ events that involve re-entrainment of dust from anthropogenic sources may *only* be considered ‘exceptional events’ *if* the State can affirmatively demonstrate that the anthropogenic sources were implementing BACM at the time of the wind event.” NRDC Comments at 6n.2, JA636 (underlining supplied, italics in original).

⁸⁴ NRDC Comments at 9, JA639.

In sum, in light of EPA's history of including in its exceptional events policy all well-controlled anthropogenic emissions – including mining and agricultural emissions – made airborne during high-wind events, and in light of the plain regulatory preamble language proposing to continue this policy, any argument that Petitioner could have been surprised that the final rule included well-controlled mining and agricultural emissions during qualifying high-wind events would lack credibility. Because no comments were submitted objecting to EPA's proposed treatment of this issue, Petitioner may not advance its objections here for the first time.⁸⁵

C. Petitioner's Argument Is Legally Flawed, Contradicts Forty Years of EPA's Application of Exceptional Events Policy and Would, if Accepted, Result in Unworkable Standards.

For the mining and agricultural industries, at least, Petitioner's position that anthropogenic dust can never come within the Exceptional Events Rule would, if adopted into law, impose requirements that could not be met. By its nature, mining and agricultural activity exposes a very great deal of open dirt to the elements. Under all but the exceptional circumstances incorporated in EPA's Exceptional Events Rule and prior policies, mining and agriculture are responsible under the CAA for NAAQS exceedances caused by dust blowing off their lands.

⁸⁵ CAA § 307(d)(7)(B); *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 871 (D.C. Cir. 1996); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1172, 1174-76 (D.C. Cir. 1980).

Accordingly, as stated above, mining and agriculture must routinely utilize BACT and BMP PM₁₀ controls and practices. By definition, these controls and practices are the “best” available. Even using these controls and practices, however, on occasion, as a result of high winds, PM₁₀ may blow off mining and agricultural land in sufficient amounts to cause a NAAQS exceedance. Again, by definition, these events are unusual and “not reasonably controllable or preventable.”⁸⁶ As EPA stated, an exceptional events exclusion will typically apply where a pattern of sustained NAAQS compliance is interrupted by an exceedance coinciding with an exceptional event.⁸⁷

No practical technology exists to prevent these infrequent occurrences in the mining and agricultural sectors, particularly in the arid West. In theory, mining and agriculture could erect thousands of miles of heavy-duty, very tall wind screens to prevent dust from moving off-property during exceptional wind events. The expense involved would be prohibitive, however, and the benefit achieved would be non-existent or extremely small.

Fortunately, CAA § 319(b) does not require controls of this nature nor has EPA ever applied its exceptional events policy in such a restrictive fashion. CAA § 319(b), in language the Exceptional Events Rule repeats word-for-word, requires

⁸⁶ CAA § 319(b)(1)(A)(ii).

⁸⁷ 71 Fed. Reg. at 12,602/1-2.

that the exceptional event be natural or caused by human activity that is unlikely to recur at a particular location.⁸⁸ High-wind events meet the former definition – they are natural. Petitioner’s argument misses the mark by confusing the nature of the exceptional event. According to Petitioner, EPA defines “mining and agricultural activities as permissible exceptional events.”⁸⁹ That is incorrect and based on Petitioner’s misconception that the Rule somehow excuses any mining or agricultural emissions no matter how they became airborne. Contrary to Petitioner’s view, however, under the Rule, the exceptional event is the unusually high winds, not the mining or agricultural activity, and NAAQS exceedances due to emissions from the mining or agricultural activity are excludable only by virtue of the occurrence of that exceptional event.

Enactment of CAA § 319(b) occurred against a backdrop of a history of EPA exceptional events policy allowing exclusion of NAAQS exceedances caused by mining and agricultural PM₁₀ emissions that are amplified by high winds. Congress must therefore have understood, when it enacted its definition of “exceptional events,” that EPA for many years had interpreted that phrase as applying to high winds blowing PM₁₀ from both anthropogenic and non-

⁸⁸ CAA § 319(b)(1)(A)(iii); 40 C.F.R. § 50.1(j).

⁸⁹ Pet’r Br. at 32.

anthropogenic sources.⁹⁰ Indeed, no other policy would make sense, as no useful purpose would be served by trying to distinguish dust received at a monitor following a high-wind event based on whether, for instance, the dust was generated from an agricultural field or from non-agricultural open land across the road.

In the absence of a clear signal from Congress that it intended a different interpretation of that language – and intended thereby to give rise to the momentous results that would flow from the policy Petitioner urges – the pre-existing interpretation must control.⁹¹ Certainly nothing in the legislative history of SAFE-TEA-LU – no hearings, committee reports or anything else – even hints that Congress was so concerned with the effects of mining and agricultural PM made airborne by infrequent high-wind events that it intended to reverse past policy and mandate controls that these sectors cannot meet. To the contrary, Congress plainly intended to continue EPA’s pre-existing exceptional events policy, as is evidenced by the fact that the five regulatory principles set forth in the

⁹⁰ *Traynor v. Turnage*, 485 U.S. 535, 546 (1988) (superseded by statute on other grounds) (finding it appropriate to assume that Congress was aware of the Veterans’ Administration’s interpretation of the term “willful misconduct” at the time it enacted a statute using the same term, and that Congress intended the term to receive the same meaning that it received under previously enacted statutes and regulations).

⁹¹ *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-56 (2000) (where Congress enacts specific statutes against the backdrop of a consistently held agency position on the same topic, the statutes “effectively ratif[y]” the agency’s position); *see also, e.g., Edelman v. Lynchburg Coll.*, 535 U.S. 106, 117-118 (2002) (by amending the Civil Rights Act without questioning the EEOC’s relation-back regulation, which was considered during passage of the amendment, Congress “suggest[ed] its consent” to the Commission’s regulatory interpretation of the statutory term “charge” as allowing verification of the charge after the expiration period).

statute reflect so closely the 1996 PM₁₀ Natural Events Policy.⁹² Moreover, the Conference Report on CAA § 319(b) explicitly recognized that the guiding principles under that new provision retained EPA's long-standing policy:

EPA is directed to follow principles in promulgating regulations under this section. These principles reflect the requirements of the current Clean Air Act and do not establish new requirements for States or EPA to meet. Instead, these are principles that EPA must follow when promulgating regulations under this section.⁹³

For all of these reasons, EPA properly interpreted CAA § 319(b) as allowing it to continue its historic practice of excluding NAAQS exceedances resulting from mining and agricultural PM₁₀ made airborne by high-wind events. Intervenor believe that, for purposes of applying the *Chevron* step-one test, CAA § 319(b), on its face and in light of traditional statutory construction principles, authorizes EPA to exclude NAAQS exceedances caused by anthropogenic dust made airborne by a high-wind event, because high wind is a natural event.⁹⁴ But even if § 319(b) were ambiguous on this point, EPA's interpretation is reasonable and therefore entitled to deference under *Chevron* step two. At a minimum, EPA permissibly interpreted the statute as allowing it to exclude exceedances that are infrequent, would not

⁹² Compare CAA § 319(b)(3)(A) with PM₁₀ Natural Events Policy at 4-5, JA400-401.

⁹³ H.R. Rep. No. 109-203, at 1067, reprinted in 2005 U.S.C.C.A.N. 452, 699.

⁹⁴ *Chevron*, 467 U.S. at 842-43.

occur but for an exceptional natural event, and cannot be prevented through the use of “best” available controls and practices. In contrast, the interpretation offered by Petitioner imputes an intent to Congress that is not reflected in the words or background of the statute or in its legislative history and that would be wholly unworkable.⁹⁵ In sum, the Rule as applied to agricultural and mining operations should be affirmed.

CONCLUSION

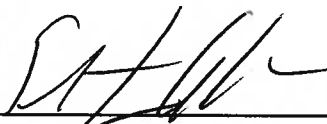
For the foregoing reasons, and those stated in EPA’s brief, the Court should deny the petitions for review.

Dated: August 19, 2008

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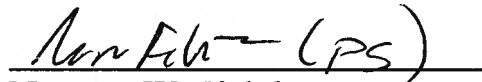
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⁹⁵ *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 673 (1988) (Congress should not be presumed to direct an agency “to impose restrictions that [are] somehow calculated to serve [an] unattainable goal”).

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32(a)(3)(C), I certify that the foregoing Final Joint Brief of Intervenor-Respondents is 8,703 words, including headings, footnotes and quotations, and therefore is within the 8,750-word limit for this brief set forth in the Court's August 31, 2007 Order.



Peter Glaser

CERTIFICATE OF SERVICE

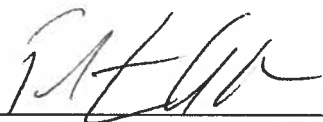
I hereby certify that on the date below I caused the foregoing FINAL BRIEF OF INTERVENOR-RESPONDENTS to be delivered by hand to the U.S. Court of Appeals for the District of Columbia Circuit and served by U.S. Mail on the following counsel of record:

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