ORAL ARGUMENT HEARD ON DECEMBER 10, 2018

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

No. 16-1158

SIERRA CLUB,
Petitioner,

v.

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

PETITION FOR REVIEW OF FINAL ADMINISTRATIVE ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR REHEARING EN BANC

DATED: July 15, 2019

Tosh Sagar
Seth L. Johnson
David S. Baron
Earthjustice
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500
tsagar@earthjustice.org
sjohnson@earthjustice.org
dbaron@earthjustice.org

Counsel for Sierra Club

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Act	Clean Air Act
Br.	Opening Brief of Sierra Club
EPA	Respondents U.S. Environmental Protection Agency and Andrew R. Wheeler, Administrator[1]
Reply Br.	Reply Brief of Sierra Club

[1] Andrew R. Wheeler is automatically substituted for his predecessor pursuant to Fed. R. App. P. 43(c)(2).

RULE 35(B) STATEMENT

Although this case was undisputedly filed within 60 days of publication of the challenged rulemaking, the Panel, *sua sponte*, erroneously held the Clean Air Act's ("Act's") 60-day filing deadline in 42 U.S.C. § 7607(b)(1) is jurisdictional, and the petition for review was an untimely challenge to an earlier rulemaking. Slip Op. 4. The Panel holding conflicts with binding precedents, under which the filing deadline is presumptively a non-jurisdictional, claim-processing rule unless a court finds a clear congressional statement to the contrary. *See, e.g.*, *Owens v. Republic of Sudan*, 864 F.3d 751, 802 (D.C. Cir. 2017). Rather than seeking—much less finding—a clear statement in the Act to overcome this presumption, the Panel relied entirely on outdated dicta to hold the Act's filing deadline jurisdictional. Slip Op. 4.

Under these binding precedents, "[f]iling deadlines, such as the [60]-day filing deadline at issue here, are quintessential claim-processing rules," and therefore, non-jurisdictional. *See Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *also U.S. v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) ("most time bars are nonjurisdictional"). Indeed, this Court has held non-jurisdictional several filing deadlines materially indistinguishable from this one. *E.g.*, *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1134 (D.C. Cir. 2015) (holding non-jurisdictional

deadline for filing petition for review in Court of Appeals); *Avia Dynamics v. FAA*, 641 F.3d 515, 519 (D.C. Cir. 2011) (same).

Furthermore, the Panel's decision directly conflicts with a Seventh Circuit decision correctly applying Supreme Court precedent to hold the Act's filing deadline non-jurisdictional. *Clean Water Action Council v. EPA*, 765 F.3d 749, 752 (7th Cir. 2014) (Easterbrook, J.); *but see Utah v. EPA*, 765 F.3d 1257 (10th Cir. 2014) (misapplying precedent to reach the opposite holding).[1] And it is inconsistent with recent precedents of the Supreme Court, this Court, and other Circuits that properly analyzed and held non-jurisdictional various requirements of § 7607. *E.g.*, *EPA v. EME Homer City Generation*, 572 U.S. 489, 512 (2014).

As the Act's filing deadline is non-jurisdictional, the Panel erred in raising and deciding the timeliness issue *sua sponte*. *Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1108 (D.C. Cir. 2019). This error creates the very harms the Supreme Court has sought to prevent: wasting judicial resources; and "disturbingly disarm[ing]" Petitioner by dismissing its claims based on an issue EPA never raised and without opportunity for briefing. *See Sebelius v. Auburn Reg'l Med.*

[1] *See infra* pp.13-17 (cataloging numerous errors in *Utah*).

Ctr., 568 U.S. 145, 153 (2013). Left uncorrected, this error similarly threatens future litigants.

Therefore, rehearing and reversal is necessary to secure uniformity in this Court's decisions. FRAP 35(a)(1). This proceeding also presents a question of exceptional importance, FRAP 35(a)(2), (b)(1)(B): it conflicts with the Seventh Circuit's authoritative decision in *Clean Water Action*, and undermines the Supreme Court's repeated efforts "to bring some discipline to the use of th[e] term [jurisdictional]." *Henderson*, 562 U.S. at 435; *see* Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 Geo. Wash. L. Rev. 1008, 1028-29 (1991) (jurisdictional and justiciability issues are of "exceptional importance").

BACKGROUND

Under the Act and its implementing regulations, states must measure the actual level of certain pollutants in the ambient air by operating networks of air monitoring stations. *See* Br. 9-14 [#1751074]. EPA must approve the network's initial configuration, including, e.g., the number of monitors and their location. *Id.* 13-14. And if a state subsequently proposes changes to its monitors, like moving them, EPA must approve the proposal before the state may implement it. *Id.* 14.

Such changes are of great importance to the public, including Petitioner and its members. Data from these monitors are used to generate real-time alerts

regarding local air quality; in turn, Petitioner's members, particularly those with serious health issues, rely on such alerts to make basic life decisions, like whether it is safe to go outside. Br. 10-11; Reply Br. 6-7 [#1751075]. Thus, a state's decision about where to place even a single monitor can determine whether members receive accurate information necessary to safeguard their health. Additionally, under the Act, the level of statutory protection against certain common air pollutants depends on air quality data these monitors collect. Br. 10-11. Thus, where a monitor is placed and how it is operated can allow unhealthy levels of air pollution to go undetected, without triggering legal requirements to clean the air up.

In 2016, EPA promulgated a regulation significantly weakening the requirements for how the public provides input when a state proposes changes to its monitoring network. Whereas the prior version of the regulations, promulgated in 2006, had required EPA to provide the public with an opportunity to comment before EPA took action on a state's proposal (subject to a limited exception), JA0328 (promulgating 40 C.F.R. § 58.10(a)) ("2006 Rule),[2] the new 2016 Rule eliminated any requirement that EPA ever take comment, shifting the

[2] Under that exception, if a state voluntarily solicited and responded to comments on its proposal and, subsequently, did not alter the proposal, EPA could forego providing a public comment opportunity. JA0074.

responsibility for taking and responding to comments from EPA to the states, JA0074 (promulgating new 40 C.F.R. § 58.10(a)). But the 2016 Rule does not mandate that states provide "reasonable notice and public hearing" as the Act requires, 42 U.S.C. § 7410(a)(2), (*l*), instead allowing states to forgo notice and only requiring a state to respond to comments as it deems "appropriate," JA0074. Thus, the 2016 Rule waived important avenues for people to be heard on changes that affect their lives.

Petitioner filed a petition for review of the 2016 Rule within 60 days of its publication in the Federal Register. *Compare* Petition [#1615635] (filed May 27, 2016), *with* JA0042 (published March 28, 2016). Petitioner argued that the 2016 Rule's provisions governing public input were unlawful and arbitrary because: (1) EPA waived Clean-Air-Act-mandated opportunities, at the state and federal levels, for the public to provide input on those changes; and (2) even if the Act does not mandate such opportunities for public input, the Administrative Procedure Act independently requires EPA to undertake notice and comment rulemaking before acting on the state proposal. Br. 24-26, 32-53.

Although the Panel recognized EPA had never argued the petition was untimely at any point in the litigation, the Panel *sua sponte* dismissed it as an untimely challenge to the 2006 Rule. Slip Op. 4 (Panel "raise[d] [timeliness]

ourselves"). In doing so, the Panel held, without analysis, that the Act's filing deadline is jurisdictional, relying exclusively on similar statements from prior panel decisions. *See id.*

ARGUMENT

I. REHEARING IS WARRANTED BECAUSE THE PANEL'S HOLDING IS INCONSISTENT WITH BINDING AND AUTHORITATIVE PRECEDENT

The Panel ignored settled precedent, which requires courts to look for a clear statement that a filing deadline is jurisdictional, instead relying exclusively on dicta from outdated cases that are inconsistent with numerous recent decisions in which this Court has faithfully applied the clear statement requirement.

In *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Supreme Court established a "presumption" that statutory filing deadlines are non-jurisdictional. *Owens*, 864 F.3d at 802 (citing *Kontrick*, 540 U.S. at 455)). This presumption can only be overcome if Congress has "clearly stated" that it intends the filing deadline be jurisdictional. *Wong*, 135 S. Ct. at 1632 (cleaned up); *Owens*, 864 F.3d at 802. To determine whether Congress has made the necessary clear statement, a court must "examine the text, context, and relevant historical treatment of the provision at issue." *Musacchio v. U.S.*, 136 S. Ct. 709, 716-17 (2016) (cleaned up). These "traditional tools of statutory construction must plainly show that Congress imbued

a procedural bar with jurisdictional consequences." *Wong*, 135 S. Ct. at 1632 (emphasis added).

1. Contrary to these binding precedents, the Panel failed to conduct the analysis demanded by *Kontrick*: the Panel did not begin with the presumption against jurisdictional effect, nor did it attempt to find the clear statement needed to overcome that presumption. Slip Op. 4-7. Instead, the Panel simply cited to dicta from prior decisions that also failed to conduct the *Kontrick* analysis. *Id.* 4.

2. The decisions relied on by the Panel cannot establish that the Act's filing deadline is jurisdictional: they do not explain why the deadline is jurisdictional, let alone conduct the analysis demanded by *Kontrick*. *See Clean Water Action*, 765 F.3d at 752 (tracing the origins of the precedents the Panel relied on). The Panel relied, without analysis, on *Medical Waste Institute v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011), Slip Op. 4,[3] which in turn relied on a conclusory statement in *Motor & Equipment Manufacturers Association v. Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998). "And so the chain of citations goes, until we reach *Natural Resources Defense Council* [*v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981)]," which reasoned that "time limits are beneficial, so they must be jurisdictional." *Clean*

[3] The Panel also cited *Sierra Club v. EPA*, 895 F.3d 1, 16 (D.C. Cir. 2018), but that decision relies exclusively on *Medical Waste Institute* in stating that the Act's filing deadline is jurisdictional.

Water Action, 765 F.3d at 752. But, as the Seventh Circuit explained, such reasoning "d[oes] not survive *Kontrick*" and its progeny. *Id.* This Court has similarly described such decisions as "unpersuasive" because they were decided before the presumption against jurisdictional effect was "fully articulated," and did not engage in the *Kontrick* analysis. *Owens*, 864 F.3d at 802.

Additionally, in prior cases where this Court has stated that § 7607(b)(1)'s filing deadline is "jurisdictional," the qualifier "jurisdictional" was dicta because EPA raised timeliness objections, and the question of whether timeliness could be forfeited was not at issue. *E.g.*, *Medical Waste Inst.*, 645 F.3d at 422, 427; *Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 459-60; *Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 191 (D.C. Cir. 2014). The Court may therefore have been using the term "jurisdiction" in the "less than meticulous" way that has led the Supreme Court to seek "to bring some discipline to the use of the term 'jurisdiction.'" *See Auburn*, 568 U.S. at 153 (cleaned up). The Panel erred in relying on such "drive-by jurisdictional rulings," which have "no precedential effect." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006).

3. The Panel's holding cannot be reconciled with numerous decisions of the Supreme Court and this Court that apply *Kontrick*: "[t]ime and again, [the Court] ha[s] described filing deadlines as quintessential claim-processing rules," which

are non-jurisdictional. *Wong*, 135 S. Ct. at 1632 (cleaned up); *see, e.g.*, *Maalouf*, 923 F.3d at 1108 ("most statutes of limitations are not jurisdictional"); *Republican State Comm.*, 799 F.3d at 1134 (holding non-jurisdictional a deadline for filing petition for review in Court of Appeals); *Avia*, 641 F.3d at 519 (same); *Owens*, 864 F.3d at 802 (similar); *Menominee Indian Tribe of Wisconsin v. U.S.*, 614 F.3d 519, 523 (D.C. Cir. 2010) (similar).

Nor can the Panel's decision be squared with the numerous decisions in this Court, and others, holding various requirements of § 7607 non-jurisdictional. *See Dalton Trucking v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015) (holding non-jurisdictional § 7607(b)(1)'s venue provisions); *Texas v. EPA*, 829 F.3d 405, 418 (5th Cir. 2016) (same); *Homer City*, 572 U.S. at 512 (holding non-jurisdictional § 7607(d)(7)(B)'s exhaustion requirement).

4. The Panel's holding also conflicts with the Seventh Circuit's correct application of *Kontrick* in *Clean Water Action*, holding the Act's filing deadline non-jurisdictional. 765 F.3d at 751-52. Indeed, the only contrary decision misapplied the *Kontrick* framework and is directly contrary to subsequent precedents of the Supreme Court and this Court. *See infra* pp.13-17 (describing flaws in the Tenth Circuit's decision in *Utah*, 765 F.3d 1257).

5. Because the Panel failed to follow binding precedent, under which the Act's filing deadline is non-jurisdictional, rehearing is necessary under FRAP 35(a) to: secure uniformity in the decisions of this Court; address the conflict with the Seventh Circuit's holding; and effectuate the Supreme Court's repeated efforts "[t]o ward off profligate use of the term 'jurisdiction,'" *see Auburn*, 568 U.S. at 153.

II. THE ACT'S FILING DEADLINE IS A NON-JURISDICTIONAL CLAIM-PROCESSING RULE UNDER *KONTRICK* AND ITS PROGENY

Examination of the filing deadline's text, context, and historical treatment by the Supreme Court confirms the absence of a clear congressional statement that the deadline is jurisdictional. Therefore, the Government waived (or, at least, forfeited) the timeliness argument by failing to raise it at any point in this litigation, and the Court erred in deciding the issue *sua sponte*. *See CTS Corp. v. EPA*, 759 F.3d 52, 60 (D.C. Cir. 2014) (argument is "waived" when not raised in party's initial brief); FRAP 28(a)(8), (b) (requiring respondent to raise arguments in its brief); *Maalouf*, 923 F.3d at 1108 (court erred in deciding, *sua sponte*, non-jurisdictional timeliness argument).[4]

[4] This is not one of those "exceptional cases"—involving a habeas corpus petition or implicating *res judicata*—in which a court may raise timeliness *sua sponte*. *Maalouf*, 923 F.3d at 1110-11 (cleaned up).

1. The Act's text does not supply the necessary clear statement. The text of the filing deadline "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [] courts."[5] *Wong*, 135 S. Ct. at 1632 (cleaned up); *see also Clean Water Action*, 765 F.3d at 751-52 (holding non-jurisdictional the Act's filing deadline because it "does not mention jurisdiction"); *Huerta v. Ducote*, 792 F.3d 144, 151 (D.C. Cir. 2015) (similar). The text "does not define a federal court's jurisdiction over [Clean Air Act] claims generally, address its authority to hear untimely suits, or in any way cabin its usual equitable powers." *Wong*, 135 S. Ct. at 1632; *Owens*, 864 F.3d at 801-02 (holding non-jurisdictional a time limit lacking reference to the "'court's power' to hear a case").

Instead, as with other non-jurisdictional provisions of § 7607, the filing deadline speaks only "only to a party's procedural obligations." *Homer City*, 572 U.S. at 512 (emphasis added) (addressing § 7607(d)(7)(B)); *Texas*, 829 F.3d at 418 & n.15 (holding non-jurisdictional the venue provision in § 7607(b)(1) because it is "framed…as an instruction to petitioners" (emphasis added)).

So too here: the Act's filing deadline is a mandatory instruction to would-be-petitioners—it is framed in the passive voice, in which the actor is a would-be

[5] It states, in relevant part: "Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register…." 42 U.S.C. § 7607(b)(1).

petitioner—not a court. *Compare* 42 U.S.C. § 7607(b)(1) ("Any petition for review under this subsection shall be filed within sixty days" (emphasis added)), *with id.* ("A petition for review…may be filed only in the United States Court of Appeals for the District of Columbia." (emphasis added)), *and id.* § 7607(d)(7)(B) ("Only an objection to a rule or procedure which was raised with reasonable specificity…may be raised during judicial review" (emphasis added)). Thus, just as the venue provisions—instructing would-be petitioners where to file a petition—are not jurisdictional, so too the filing deadline—instructing them when to file a petition—is not jurisdictional. *See Texas*, 829 F.3d at 418; *also Dalton Trucking*, 808 F.3d at 879.

Indeed, the text is materially indistinguishable from other filing deadlines this Court held non-jurisdictional. *E.g.*, *Avia*, 641 F.3d at 518-19 & n.3 (filing deadline stating: "The petition must be filed not later than 60 days after the order is issued."); *Republican State Comm.*, 799 F.3d at 1134 (addressing 15 U.S.C. § 80b-13(a)'s filing deadline, stating "party aggrieved by an order…may obtain a review of such order…by filing" petition for review in Court of Appeals "within sixty days after entry of such order"); *see Henderson*, 562 U.S. at 438.

Although the Tenth Circuit ruled the opposite, its textual analysis is foreclosed by Supreme Court and D.C. Circuit precedent. First, the Tenth Circuit

erroneously concluded that the term "shall" in § 7607(b)(1) was "jurisdictional terminology." *Utah*, 765 F.3d at 1259. But it is well-established "shall" is not a jurisdictional word, and is of "no consequence" in the jurisdictional analysis. *Wong*, 135 S. Ct. at 1632-33 (holding non-jurisdictional a statute stating that a claim "shall be forever barred unless [timely filed]" (cleaned up)).[6] Thus, contra *Utah*, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional." *Id.* at 1632.

Second, the Tenth Circuit erred in summarily concluding that the phrase "petition for review" has the same jurisdictional significance as "notice of appeal." *Utah*, 765 F.3d at 1259. But the Supreme Court has made clear that deadlines for "notice[s] of appeal" are jurisdictional because they govern the "transfer" of jurisdiction between Article III courts, and therefore, differ from other filing deadlines. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 20 & n.9 (2017) (unless "a time prescription govern[s] the transfer of adjudicatory authority from one Article III court to another [and] appears in a statute…[it] fits within the claim-processing category" and is subject to the clear-statement requirement). Accordingly, this Court has held non-jurisdictional a deadline to file

[6] *Accord, e.g.*, *Musacchio*, 136 S. Ct. at 717; *Henderson*, 562 U.S. at 439; *Menominee*, 614 F.3d at 524.

a "petition" for review in the Court of Appeals, which did not involve the transfer of jurisdiction between Article III courts. *See Republican State Comm'n*, 799 F.3d at 1134. The Tenth Circuit's contrary conclusion regarding the Act's filing deadline thus conflicts with binding precedent of the Supreme Court and this Court.

Thus, here, "[t]he plain text alone is enough to render the [Act's filing deadline] nonjurisdictional." *Owens*, 864 F.3d at 802.

2. The context does not supply the clear statement necessary to render the Act's filing deadline jurisdictional.

Although prior decisions say § 7607(b)(1) confers on the Courts of Appeals subject matter jurisdiction over certain Clean Air Act cases, *see Dalton Trucking*, 808 F.3d at 879, that does not make the Act's filing deadline (also in § 7607(b)(1)) jurisdictional. "A requirement [the court] would otherwise classify as nonjurisdictional…does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Auburn*, 568 U.S. at 155; *Myers v. Comm'r of Internal Revenue Serv.*, No. 18-1003, 2019 WL 2750850, at *9 (D.C. Cir. July 2, 2019) (filing deadline is not jurisdictional "simply because the filing deadline is given in the same breath as the grant of jurisdiction" (cleaned up)).

Accordingly, this Court takes a line-by-line approach, under which the clause or sentence that contains a filing deadline must also "include[s] words linking the time period for filing to the grant of jurisdiction." *Myers*, 2019 WL 2750850, at *8; *see, e.g.*, *id.* at *7-8 (analyzing each "clause" of statutory provision in holding filing deadline non-jurisdictional); *Avia*, 641 F.3d at 518-19 (analyzing each "sentence"). Under this approach, this Court held non-jurisdictional a filing deadline, even though it was located in a statutory subsection, titled "jurisdiction," that also conferred subject matter jurisdiction on the Courts of Appeals. *Republican State Comm.*, 799 F.3d at 1134. The Court also followed that approach with the very provision at issue here, § 7607(b)(1), concluding that its venue requirements are non-jurisdictional, even though it found the provision confers subject matter jurisdiction on the Courts of Appeals. *Dalton Trucking*, 808 F.3d at 879; *accord Texas*, 829 F.3d at 418.

Applying that line-by-line approach here, there are no words "linking" the Act's filing deadline to any jurisdictional grant. *Myers*, 2019 WL 2750850, at *8. Thus, just as context does not render the venue provisions in § 7607(b)(1) jurisdictional, it does not render the filing deadline in § 7607(b)(1) jurisdictional.

The Tenth Circuit's analysis of statutory context is directly contrary to this Court's line-by-line approach. The Tenth Circuit reasoned that because

§ 7607(b)(1) has some jurisdictional import, the filing deadline is also necessarily jurisdictional. *Utah*, 765 F.3d at 1260. But that reasoning is foreclosed by *Dalton Trucking*, along with numerous other binding precedents. *E.g.*, *Myers*, 2019 WL 2750850, at *9; *Republican State Comm.*, 799 F.3d at 1134. Indeed, this Court rejected the proposition that a filing deadline must be jurisdictional if it "condition[s] waivers of the U.S. Government's sovereign immunity," *Owens*, 864 F.3d at 803-04 (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94-96 (1990); *Wong*, 135 S. Ct. at 1636), the very reasoning the Tenth Circuit adopted. *Utah*, 765 F.3d at 1260.

3. Historical treatment of the Act's filing deadline does not render it jurisdictional, because there is not "a long line of Supreme Court decisions left undisturbed by Congress attach[ing] a jurisdictional label to the prescription." *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849 (2019) (cleaned up); *see also Wong*, 135 S. Ct. at 1636 (a prior "definitive earlier interpretation" by the Supreme Court may render a provision jurisdictional, but only for reasons of "*stare decisis*"). The Supreme Court has never held the filing deadline is jurisdictional, *see Harrison v. PPG Indus.*, 446 U.S. 578, 584 (1980) (not addressing jurisdictional import of § 7607(b)(1)'s filing deadline), resolving the historical inquiry.

And even if the historical treatment of the Act's filing deadline in the Courts of Appeals were relevant, that history is inconclusive. First, there is a split among the Courts of Appeals; the other circuits to address the question reached opposing holdings. *Compare Clean Water Action*, 765 F.3d at 751-52, *with Utah*, 765 F.3d at 1259-62. Second, decisions predating the circuit split did not squarely address whether the Act's filing deadline is jurisdictional. *See supra* p.8 (this Court's prior statements regarding the jurisdictional import of the deadline are dicta).

4. The Tenth Circuit also impermissibly looked to legislative history, *Utah*, 765 F.3d at 1260, which cannot supply the necessary clear statement. *See U.S. v. Nordic Vill.*, 503 U.S. 30, 37 (1992) ("legislative history has no bearing" in clear statement analysis); Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 Wm. & Mary L. Rev. 2027, 2051 & n.150, 2068-69 (2015) (courts look to text, not legislative history, to determine whether provision is jurisdictional); *Wong*, 135 S. Ct. at 1633 (rejecting use of legislative history in determining whether filing deadline is jurisdictional). Even if relevant, the legislative history the Tenth Circuit cited—one statement from one committee report, where the rest of the legislative history is silent—is too "slender [a] reed" to provide the required clear statement. *Chamber of Commerce v.*

Whiting, 563 U.S. 582, 599 (2011) (cleaned up) (declining to rely on single committee report where other reports were silent).

5. Finally, *stare decisis* does not counsel against reversal, because the Panel relied exclusively on dicta to support its holding. *See supra* p.8. But even if *stare decisis* were implicated, here, each of the five, independent bases for reversal is met. *U.S. v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (en banc) (*e.g.*, "development of the law, through…the growth of judicial doctrine…, necessitates a shift in the Court's position" (cleaned up)); *see also Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (suggesting reconsidering prior panel statements that the Act's exhaustion requirement is jurisdictional in a case where the issue was squarely presented).

CONCLUSION

Rehearing and reversal are warranted.

DATED: July 15, 2019

/s/ Tosh Sagar
Tosh Sagar
Seth L. Johnson
David S. Baron
Earthjustice
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500
tsagar@earthjustice.org
sjohnson@earthjustice.org
dbaron@earthjustice.org

Counsel for Sierra Club

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies that, in accordance with the Federal Rules of Appellate Procedure 32(g)(1) and 35(b)(2)(A), the foregoing **Petition for Rehearing En Banc** contains 3,834 words, as counted by counsel's word processing system, and thus complies with the 3,900-word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2016** using **size 14 Times New Roman** font.

DATED: July 15, 2019

/s/ Tosh Sagar
Tosh Sagar

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2019, I have served the foregoing **Petition for Rehearing En Banc** on all registered counsel through the Court's electronic filing system (ECF).

/s/ Tosh Sagar
Tosh Sagar

IN THE UNITED STATES COURT OF APPEALS
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ADDENDUM TO PETITION FOR REHEARING *EN BANC*

DATED: July 15, 2019

Tosh Sagar
Seth L. Johnson
David S. Baron
Earthjustice
1625 Massachusetts Ave., N.W.
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500
tsagar@earthjustice.org
sjohnson@earthjustice.org
dbaron@earthjustice.org

Counsel for Sierra Club

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 10, 2018 Decided May 31, 2019

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SIERRA CLUB,
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v.

ENVIRONMENTAL PROTECTION AGENCY AND ANDREW WHEELER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

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

Tosh Sagar argued the cause for petitioner. With him on the briefs were *Seth L. Johnson* and *David S. Baron*.

Phillip R. Dupré, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were *Jeffrey H. Wood*, Acting Assistant Attorney General, *Jonathan D. Brightbill*, Deputy Assistant Attorney General, and *Jonathan Skinner-Thompson*, Counsel, U.S. Environmental Protection Agency.

Before: GRIFFITH and WILKINS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

WILLIAMS, *Senior Circuit Judge*: To implement the Clean Air Act, the Environmental Protection Agency oversees state procedures for creating and running air monitoring networks. In 2016, EPA adopted a rule, Revisions to Ambient Monitoring Quality Assurance and Other Requirements, 81 Fed. Reg. 17,248 (Mar. 28, 2016) ("Final Rule"), modifying its regulations on the subject, specifically Part 58 of Title 40 of the Code of Federal Regulations. The amendments (1) tightened procedures for state changes to annual monitoring network plans, (2) authorized limited reductions in required sampling frequency, and (3) proposed revisions to certain quality assurance requirements related to monitoring for Prevention of Significant Deterioration.

Sierra Club raises three objections. Resting on EPA's language in the preamble to the rule, it attacks the divergence between EPA's procedures for reviewing SIPs and annual monitoring network plans—a divergence embodied in a 2006 EPA regulation that has long since passed the deadline for seeking judicial review. It challenges (on the merits) the new authority on sampling frequency reductions. And it sees a fatal procedural defect in the quality assurance adjustments in the form of EPA's statement—plainly and concededly mistaken—that no commenter had criticized the changes.

For the reasons below, however, we find that Sierra Club (1) is barred from seeking review of the claimed legal requirement that monitoring plans be assessed under the same procedures as SIPs because the new rule and EPA's preamble

did no more than echo a prior EPA regulation, (2) lacks standing to attack the sampling frequency changes, and (3) has made no showing that the asserted non-response on quality assurance issues manifested any failure to consider factors relevant to the changes. Thus we dismiss the first two claims and deny the third.

* * *

The Clean Air Act, 42 U.S.C. §§ 7401–7671q, establishes a comprehensive system for regulating and improving the nation's air quality, divvying up responsibility between the federal government and the states.

First, EPA identifies air pollutants that endanger public health or welfare, and sets National Ambient Air Quality Standards, or NAAQS, that specify the maximum permissible concentration of those pollutants in the ambient air. 42 U.S.C. §§ 7408–09. Then, subject to EPA approval, states adopt State Implementation Plans, or SIPs, *id.* § 7410(a)(1), which are to bring areas into attainment with the NAAQS (if they are not already), see *id.* § 7502(a)(2)(A), and to "prevent significant deterioration of air quality," *id.* § 7471.

To make performance of these functions possible, EPA "promulgate[s] regulations establishing an air quality monitoring system throughout the United States." 42 U.S.C. § 7619(a). Those regulations, among other things, require states to submit an "annual monitoring network plan" that documents "the establishment and maintenance of an air quality surveillance system that consists of a network of" state or local air monitoring stations. 40 C.F.R. § 58.10(a)(1).

We now turn to Sierra Club's three challenges to EPA's recent revisions to its monitoring regulations.

* * *

First and foremost, Sierra Club attacks EPA's revised regulation governing the review and approval of annual monitoring network plans, 40 C.F.R. § 58.10(a), on the ground that it violates Sierra Club's reading of the Clean Air Act. Because the act, in Sierra Club's view, renders a state's "monitoring network plan . . . part of a SIP," such plans must be subjected to the review procedures applicable to SIPs. Sierra Club Br. 24.

But no later than 2006 EPA's regulations pursued the non-SIP path. See Revisions to Ambient Air Monitoring Regulations, 71 Fed. Reg. 61,236 (Oct. 17, 2006). A decade later, Sierra Club cannot force EPA back up the trail. The Clean Air Act requires that petitions for review be filed "within sixty days" of a challenged action appearing in the Federal Register. 42 U.S.C. § 7607(b)(1). Accordingly (absent EPA's reopening the issue), Sierra Club's time for challenging EPA's adoption of a non-SIP approach to reviewing annual monitoring network plans has passed. And because the issue is jurisdictional, *Sierra Club v. EPA*, 895 F.3d 1, 16 (D.C. Cir. 2018), we must raise it ourselves, see, e.g., *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012), and dismiss the petition, *Medical Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011).

EPA's decision to place annual monitoring network plans outside the SIP-review process was evident. For example, while the statute requires *EPA* approval of *SIP revisions* to be preceded by notice and an opportunity for comment, see 42 U.S.C. § 7607(d)(1)(B), (3), (4)(B)(i), (5), (6)(B); see also Sierra Club Br. 8, the 2006 rulemaking provided that, for certain *monitoring plans*, "the Regional Administrator is *not* required to provide a separate opportunity for comment," 40

C.F.R. § 58.10(a)(2) (2007) (emphasis added); see also 71 Fed. Reg. at 61,248/1.

The 2006 rulemaking also embodied the same disconnect between *state* processes for formulating monitoring plans and for formulating SIPs—at least under Sierra Club's reading of the statute. Sierra Club complains that the current provision on the subject is unlawful because it diverges from the statutory requirement applicable to SIP submissions—namely, that states act only after providing "reasonable notice and public hearings," 42 U.S.C. § 7410(a)(1), (a)(2), (*l*). See Sierra Club Br. 37. But EPA created that divergence no later than the 2006 rulemaking, which similarly fell short of that standard, demanding only that a monitoring "plan must be made available for public inspection." 40 C.F.R. § 58.10(a)(1) (2007).

Thus, by at least 2006 EPA had necessarily concluded that annual monitoring network plans were *not* components of a SIP.

In the rulemaking currently under review EPA simply continued the same approach. In 2014 it proposed two modest revisions to 40 C.F.R. § 58.10(a). See Revisions to Ambient Monitoring Quality Assurance and Other Requirements, 79 Fed. Reg. 54,356, 54,359/1–2 (Sept. 11, 2014) ("Proposed Rule"). The proposal gave no indication that EPA intended to address the relationship between annual monitoring network plans and SIPs, or the requirements applicable to SIPs, which are addressed (in great detail) elsewhere, see 40 C.F.R. pt. 51 (concerning the "Requirements for Preparation, Adoption, and Submittal of [SIPs]"). In proposing and adopting these tweaks, EPA never purported to close the gap in review procedures between the two types of plans. Rather, it maintained (with

slight edits) the non-SIP approach it adopted, at the latest, in 2006.

Accordingly, if Sierra Club disagreed with EPA's disjuncture between monitoring plans and SIPs, it should have raised its objection at the conclusion of the 2006 rulemaking, "within sixty days of EPA's first use of the [non-SIP-style] approach." *Medical Waste Inst.*, 645 F.3d at 427; see also, e.g., *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989) (holding that the time for filing a petition started when "EPA first set out its understanding" of its authority).

In an effort to tie the monitoring-plan-is-really-a-SIP issue to the 2016 rulemaking, Sierra Club points to a single statement EPA made in the preamble to the Final Rule:

> [S]ection 110(a)(2)(B) [of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(B),] simply requires that monitoring agencies have the legal authority to implement 40 CFR part 58 [concerning monitoring network plans]; it does not treat annual monitoring network plans . . . as "integral parts" of a SIP subject to public participation whenever such network plans are established or modified.

Final Rule, 81 Fed. Reg. at 17,251/3.

But far from indicating that EPA intended to reconsider the separation of monitoring plans and SIPs, this statement merely responded (quite briefly) to a comment lodged by Sierra Club's counsel, Earthjustice, in an attempt to reopen the issue. See Earthjustice & American Lung Association Comments, EPA-HQ-OAR-2013-0619-0034, at 2 (Nov. 10, 2014) ("Earthjustice Comments"), J.A. 96. Petitioners, however, cannot "comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that

the agency had re-opened the issue." *United Transp. Union-Ill. Legislative Bd. v. Surface Transp. Bd.*, 132 F.3d 71, 76 (D.C. Cir. 1998) (quoting *Massachusetts v. ICC*, 893 F.2d 1368, 1372 (D.C. Cir. 1990)).

Of course, Sierra Club's submissions might be read as an invitation to EPA to reopen that issue, but agencies are free to decline such invitations. Given "the entire context of the rulemaking," it is clear that EPA declined and did not reopen consideration of the SIP-monitoring-plan divide. *Am. Road & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1115 (D.C. Cir. 2009) (citation omitted). In sum, EPA's rejection of Sierra Club's extraneous comment did not give Sierra Club the right to challenge longstanding aspects of EPA's regulations that the agency did not open for reconsideration. (We take no position on the merits of Sierra Club's view that monitoring plans are a subset of SIPs, nor on whether Sierra Club may challenge EPA's refusal to adopt SIP-style-review procedures in another context, such as in a petition for rulemaking.)

* * *

Sierra Club next challenges EPA's decision to permit Regional Administrators to give case-by-case approval to reductions in the minimum required sampling frequency of monitoring for fine particulate matter. Known as $PM_{2.5}$, fine particulate matter consists of airborne particles that are 2.5 micrometers in diameter or smaller—less than one-thirtieth the thickness of human hair. Air Quality Designations and Classifications for the Fine Particles (PM2.5) National Ambient Air Quality Standards, 70 Fed. Reg. 944, 945/2 (Jan. 5, 2005).

Under prior regulations, certain air monitoring stations that track $PM_{2.5}$ were required to operate on at least a 1-in-3

day sampling frequency. Proposed Rule, 79 Fed. Reg. at 54,360/2; see 40 C.F.R. § 58.12(d) (2015). On this, there is no immediate change.

Rather, EPA's revisions created the possibility of exceptions—enabling possible reductions from 1-in-3 days to 1-in-6 days (or for seasonal sampling). EPA sought to address the sort of situation where a particular monitor was "highly unlikely" to record an otherwise undetected violation of the $PM_{2.5}$ NAAQS. Final Rule, 81 Fed. Reg. at 17,254/1. One example it noted was a monitor located in an area with "very low $PM_{2.5}$ concentrations relative to the NAAQS." *Id*. Another was a monitor in an urban environment surrounded by a superabundance of other monitors, all with higher readings. *Id*. Accordingly, EPA reasoned that in such instances the 1-in-3 sampling frequency might be unnecessary. *Id*.

To counteract the possibility of excessive redundancy, EPA gave Regional Administrators a cautiously hedged authority to approve state requests to reduce specific monitors' sampling frequency to 1-in-6 days or to seasonal sampling. 40 C.F.R. § 58.12(d)(1)(ii) (2018). Under the rule, the Regional Administrator must first conduct a case-by-case analysis, considering factors "including but not limited to the historical $PM_{2.5}$ data quality assessments" and the location of other $PM_{2.5}$ monitors. *Id*. He must also "determine[] that the reduction in sampling frequency will not compromise data needed for implementation of the NAAQS." *Id*. Only then may approval be granted.

Sierra Club, nevertheless, finds much to fear. Even with an EPA gatekeeper, it says, a reduction in mandatory sampling frequency "creates an increased risk that excessive daily $PM_{2.5}$ levels will go undetected." Earthjustice Comments at 4, J.A.

98. Sierra Clubs claims that EPA arbitrarily failed to consider this risk increase.

But our jurisdiction to consider the issue requires that Sierra Club establish its standing. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Here, it appears to assert only associational standing. See Sierra Club Br. 31; Sierra Club Reply Br. 25–26. In this context, it must demonstrate, not merely allege, that there is a "substantial probability" that one of its members will suffer an injury if the court does not take action, i.e., prevent EPA from allowing regional administrators to consider reductions in sampling frequency. *Sierra Club v. EPA*, 754 F.3d 995, 1001 (D.C. Cir. 2014) (quoting *Natural Resources Defense Council v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006)). This demonstration must be made "by affidavit or other evidence." *Sierra Club*, 292 F.3d at 899 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Sierra Club has failed to make the requisite showing.

For a Sierra Club member to face an increased risk of harm, the following conditions would have to be fulfilled. (1) A state must request a reduction in sampling frequency; (2) the request must concern a monitor near one of Sierra Club's members; (3) the request must be approved by the Regional Administrator; (4) there must be a likelihood that a spike in $PM_{2.5}$ levels near that monitor will occur at a time when the monitor would have been sampling but for the approved reduction; (5) and conditions must be such that no nearby monitor would pick up the spike.

To suggest even a minimally credible possibility of the above occurring, Sierra Club identifies three monitors that are (i) eligible for a reduction in sampling and (ii) placed near a Sierra Club member. One is in Texas (Houston); two are in Oregon (Oakridge and Klamath Falls). Sierra Club Reply Br.

26; see Joshua Berman Decl. ¶¶ 34–38 (Mar. 16, 2018). But is Texas or Oregon likely to request *any* reductions in sampling frequency? Courts are generally "hesitant" to base standing on a chain of events that "'depends on the unfettered choices made by independent actors not before the courts,'" *R.J. Reynolds Tobacco Co. v. FDA*, 810 F.3d 827, 831 (D.C. Cir. 2016) (quoting *Lujan*, 504 U.S. at 562), such as state regulators, see, e.g., *Masias v. EPA*, 906 F.3d 1069, 1074 (D.C. Cir. 2018); *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 50 (D.C. Cir. 2016); *Miami Bldg. & Constr. Trades Council v. Secretary of Defense*, 493 F.3d 201, 205–06 (D.C. Cir. 2007). In any case, even if Texas or Oregon were likely to request reductions, how likely is it that they would do so for monitors at the sites identified by Sierra Club as near specific members, to wit, sites 482011039, 410350004, or 410392013? Berman Decl. ¶¶ 35–37.

Sierra Club seeks to fill this gap in state motivation by pointing out that "states . . . lobbied for these changes to save money." Sierra Club Reply Br. 26–27. The inference may be sound—for states that lobbied. But Sierra Club fails to point us to any evidence that Texas or Oregon was among the unspecified states that did so. See *id*. at 27 (citing Final Rule, 81 Fed. Reg. at 17,254/2, which simply states that all comments, save one, were supportive of the rule change); Berman Decl. ¶ 33 (same). And we need not scour the administrative record ourselves. See, e.g., *Masias*, 906 F.3d at 1080 (citing Fed. R. App. P. 28(a)(8)(A)). In any event, nothing suggests that the monitors at the three numbered sites are prime candidates for reduction, whatever Texas's or Oregon's general plans may be. Cf. *Sierra Club v. EPA*, 755 F.3d 968, 974 (D.C. Cir. 2014) (finding standing where EPA, effectively reinforcing petitioners' assertions, pointed to specific refineries near Sierra Club's members that were "expected to take advantage" of the rule).

Further, the eligible monitors appear to be located at rather low-risk sites. In 2016, not one of them recorded a violation of the 24-hour $PM_{2.5}$ NAAQS—or even came particularly close to doing so. See Berman Decl. ¶¶ 31, 35–37. Nor did any come within even 10% of an annual $PM_{2.5}$ NAAQS violation—for three reporting periods in a row. See Berman Decl. ¶¶ 31–32, 35–37. Far from it. As the table below indicates, the monitors have consistently—year after year—fallen well below the $PM_{2.5}$ annual NAAQS.

Monitor Location	Design Value* Years	Monitor's Design Value* ($\mu g/m^3$)	Annual NAAQS ($\mu g/m^3$)	**% Diff.****
482011039 (Houston, TX)	2012-14	9.6	12.0	***- 20%***
	2013-15	9.6	12.0	***- 20%***
	2014-16	9.2	12.0	***- 23%***
410350004 (Klamath Falls, OR)	2012-14	10.2	12.0	***- 15%***
	2013-15	10.0	12.0	***- 17%***
	2014-16	8.3	12.0	***- 31%***
410392013 (Oakridge, OR)	2012-14	9.2	12.0	***- 23%***
	2013-15	9.6	12.0	***- 20%***
	2014-16	8.5	12.0	***- 29%***

* "Design values" are "the 3-year average NAAQS metrics that are compared to the NAAQS levels to determine when a monitoring site meets or does not meet the NAAQS . . . ." The table references the annual NAAQS—the "3-year average of $PM_{2.5}$ annual mean mass concentrations for each eligible monitoring site." 40 C.F.R. pt. 50, app. N(1.0)(c).

** "The national primary ambient air quality standard[] for $PM_{2.5}$ [is] 12.0 micrograms per cubic meter ($\mu g/m^3$) annual arithmetic mean concentration . . . ." 40 C.F.R. § 50.18(a); see also *id*. pt. 50, app. N(4.4). The "% Diff." is the difference between the design value calculated using the monitor's data and the national standard, divided by the national standard. For the underlying data, see Berman Decl. ¶¶ 31, 35–37.

Sierra Club identifies no reason to believe that an abrupt reversal in $PM_{2.5}$ fortunes near these sites is likely, much less "certainly impending." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 15 (D.C. Cir. 2011) (quoting *Am. Chem. Council v. Dep't of Transp.*, 468 F.3d 810, 819 (D.C. Cir. 2006)).

Finally, Sierra Club does nothing to build into its theory of harm the analytical exercise that the Regional Administrator must undertake before granting approval, such as determining whether "continuous $PM_{2.5}$ monitors" exist nearby, and whether an unexpected spike in fine particulate matter would really have registered at one of the sites (had it been kept at 1-in-3) and yet evaded all other monitors. Final Rule, 81 Fed. Reg. at 17,254/1; see also 40 C.F.R. § 58.12(d)(1)(ii).

At bottom, Sierra Club's claim to standing "stacks speculation upon hypothetical upon speculation." *Kansas Corp. Comm'n v. FERC*, 881 F.3d 924, 931 (D.C. Cir. 2018) (quoting *N.Y. Regional Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011)). In these circumstances, Sierra Club has failed to establish standing. Accordingly, the portion of the petition for review challenging EPA's revisions of minimum sampling frequency is dismissed.

* * *

Finally, Sierra Club protests adjustments EPA made to four quality assurance requirements for Prevention of Significant Deterioration, or PSD, air monitoring. See Sierra Club Br. 55–56 & n.18; see also Final Rule, 81 Fed. Reg. at 17,271–75. As the name implies, PSD monitoring is designed to evaluate whether new or significantly modified sources of pollution will bring about significant deteriorations in air quality.

Until adoption of the Final Rule, the quality assurance requirements for PSD monitoring had generally been the same as the requirements for monitoring used to measure compliance with the NAAQS. Final Rule, 81 Fed. Reg. at 17,271/1. Compare 40 C.F.R. pt. 58, app. A (NAAQS), with 40 C.F.R. pt. 58, app. B (PSD). In 2014, however, EPA proposed some revisions relating to PSD monitoring. See Proposed Rule, 79 Fed. Reg. at 54,369–72.

Earthjustice (Sierra Club's counsel here) and the American Lung Association jointly objected to that proposal, saying that EPA should apply the same requirements to the PSD monitors as it does to monitors ensuring NAAQS compliance. The protest identified four specific ways in which the rule would make the PSD quality assurance requirements weaker than those for the NAAQS, and argued that such relaxations were wrong, primarily because PSD monitoring was "required for the purpose of determining whether the proposed facility will cause or contribut[e] to exceedances of . . . NAAQS." Earthjustice Comments at 8, J.A. 102; see also Sierra Club Br. 57. EPA overlooked this comment. As the agency now admits, in discussing the Final Rule it inaccurately stated that it had received only favorable comments on its proposed changes. See EPA Br. 49–50; see also, e.g., Final Rule, 81 Fed. Reg. at 17,271/3.

Sierra Club argues that EPA could not meaningfully have "respond[ed] to significant points raised by the public," as EPA must, as it failed even to recognize that anyone made adverse comments. Sierra Club Br. 58 (quoting *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 11 (D.C. Cir. 2011)).

But a "failure to respond to comments is significant *only insofar as* it demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Sierra Club*

v. EPA, 353 F.3d 976, 986 (D.C. Cir. 2004) (Roberts, J.) (emphasis added) (quoting *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984)). The principle, of course, applies whether EPA expressly acknowledged Earthjustice's comment or not. Here EPA plainly addressed the factors that the comment had said must be considered. See generally Final Rule, 81 Fed. Reg. at 17,271–75.

Take Sierra Club's first example—"waiving implementation of the National Performance Evaluation Program ('NPEP')." Sierra Club Br. 55 n.18. EPA in fact addressed the substance of Earthjustice's NAAQS-requirements-must-meet-PSD-requirements concern in this context, saying that NPEP requirements could not be waived "if a PSD reviewing authority intended to use PSD data for any official comparison to the NAAQS beyond" some limited PSD uses. Final Rule, 81 Fed. Reg. at 17,271/2. And it explained, in detail, why PSD monitoring otherwise needed more "flexibility." *Id*. For instance, because PSD monitoring is shorter term (usually a year or less), it may, EPA elaborated, "be more difficult" to arrange the specialized equipment, personnel, and relationships that would be needed to implement the NPEP. *Id*. at 17,271/1–2. This "explanation makes it evident that [EPA] did consider the relevant factors." *Sierra Club*, 353 F.3d at 986.

The same is true for each of the remaining changes to which Earthjustice objected. Compare Sierra Club Br. 55–56 & n.18, with Final Rule, 81 Fed. Reg. at 17,271–75. As detailed in the table below, for each of the changes identified by Sierra Club, EPA explained why it was altering the PSD requirements (relative to the NAAQS requirements):

Changes described in Sierra Club Br. 55–56 n.18	**Excerpt from EPA's Explanation of each change**
"(2) [E]liminating lead quality assurance requirements for collocated sampling and lead performance evaluation procedures for non-source oriented NCore sites."	"Since PSD does not implement NCore sites, the EPA proposed to eliminate the [lead] [quality assurance] language specific to non-source oriented NCore sites from PSD while retaining the PSD [quality assurance] requirements for routine [lead] monitoring." 81 Fed. Reg. at 17,272/1.
"(3) [R]elaxing data quality objectives for PSD monitoring organizations."	"Realizing that PSD monitoring may have different monitoring objectives, the EPA proposed to . . . allow decisions on [data quality objectives] to be determined through consultation between the appropriate PSD reviewing authority and PSD monitoring organization." 81 Fed. Reg. at 17,272/3.
"(4) [W]aiving the concentration validity threshold for implementation of the PM2.5 performance evaluation in the last quarter of PSD monitoring."	"Due to the relatively short-term nature of most PSD monitoring, the likelihood of measuring low concentrations in many areas attaining the $PM_{2.5}$ standard and the time required to weigh filters collected in performance evaluations, a PSD monitoring organization[] . . . [may waive the] threshold for validity of performance evaluations conducted in the last quarter of monitoring . . . ." 81 Fed. Reg. at 17,275/1.

To be sure, all these explanations may, as a substantive matter, suffer from some infirmity that renders them inadequate. But Sierra Club has not raised that argument, much less developed it. Rather, it steadfastly maintains that EPA "cannot identify *any* consideration" of Earthjustice's concerns, Sierra Club Reply Br. 30, a claim that is transparently mistaken.

* * *

For the foregoing reasons, the petition for review is dismissed in part and denied in part.

So ordered.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 35(c) and 28(a)(1)(A), Petitioner Sierra Club submits this certificate as to parties, rulings, and related cases.

(A) Parties and *Amici*

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

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

(ii) Parties to This Case

Petitioner:

The petitioner in the above-captioned case is Sierra Club.

Respondents:

The respondents in the above-captioned case are the United States Environmental Protection Agency ("EPA") and Andrew Wheeler, in his official capacity as Administrator of the EPA.

Intervenors:

None at present.

(iii) *Amici* in This Case

None at present.

(iv) Circuit Rule 26.1 Disclosures

See Petitioner's disclosure form filed herein.

(B) Rulings Under Review

Petitioner seeks review of the final action taken by EPA at 81 Fed. Reg. 17,248 (Mar. 28, 2016) and entitled "Revisions to Ambient Monitoring Quality Assurance and Other Requirements."

(C) Related Cases

Petitioner is not aware of any related cases.

/s/ Tosh Sagar

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Sierra Club makes the following disclosures:

Sierra Club

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

Parent Corporations: None.

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

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

/s/ Tosh Sagar