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Attn: Docket ID No. EPA-HQ-OAR-2013-0572: Treatment of Data Influenced by Exceptional Events: Proposed Rule

To Whom It May Concern:

The Natural Resources Defense Council, Sierra Club, and Comite Civico Del Valle, Inc. ("environmental groups") appreciate the opportunity to comment on the Environmental Protection Agency's (EPA's) "Treatment of Data Influenced by Exceptional Events: Proposed Rule," 80 Fed. Reg. 72,840 *et seq.* (Nov. 20, 2015)("Exceptional Events Proposal").

The health-based National Ambient Air Quality Standards (NAAQS), and the obligation to attain and maintain those standards, are the very foundation of the Clean Air Act. 42 U.S.C. §110. In recognition of this, when Section 319 of the Clean Air Act (CAA) was amended by the Safe Accountable Flexible Efficient-Transportation Equity Act: A Legacy for Users (SAFE-TEA-LU) of 2005, Congress required EPA to adhere to the principle that "protection of public health is the highest priority." 42 U.S.C. §7419(b)(3)(A). Accordingly, EPA must construe any exclusion of air quality data directly due to "exceptional events" narrowly with respect to NAAQS exceedances or violations, in order to adhere to the highest prioritization of public health and preserve the foundational role of the NAAQS under the CAA.

Congress added section 319(b) to the Clean Air Act in 2005, and since that time, certain aspects of EPA's 2007 implementing regulations have been confusing and problematic for all stakeholders. EPA states that it "proposes to return to the core statutory elements and implicit concepts of CAA section 319(b)" in this rulemaking, and to the extent that the Agency has in fact proposed such approaches, we applaud them. 80 Fed. Reg. at 72,843. However, as detailed in our comments, certain aspects of the proposal do not hew to the statutory mandate of 319(b) nor the congressional intent behind that provision. We urge EPA to set clear and narrow regulations relating to exceptional events, since overly lax exceptional events policies have a corrosive effect on the NAAQS, undermining the Clean Air Act and national public health protections for all Americans.

I. Statutory Authority and Background

Section 319(b) of the Clean Air Act defines an exceptional event as one that:

(i) affects air quality;
(ii) is not reasonably controllable or preventable;
(iii) is an event caused by human activity that is unlikely to recur at a particular location or a natural event; and
(iv) is determined by the Administrator through the process established in the regulations promulgated under paragraph (2) to be an exceptional event.

42 U.S.C. §7619(b)(1)(A).

The statute goes on to note five guiding principles when determining if a monitored value should qualify as an exceptional event. The Administrator is directed to abide by the following five principles in determining what may constitute an exceptional event:

(i) the principle that protection of public health is the highest priority;
(ii) the principle that timely information should be provided to the public in any case in which the air quality is unhealthy;
(iii) the principle that all ambient air quality data should be included in a timely manner, an appropriate Federal air quality database that is accessible to the public;
(iv) the principle that each State must take necessary measures to safeguard public health regardless of the source of the air pollution; and
(v) the principle that air quality data should be carefully screened to ensure that events not likely to recur are represented accurately in all monitoring data and analyses.

42 U.S.C. §7619(b)(3)(A).

The statute makes clear that the Administrator "shall follow" the above principles.

II. Definition of Exceptional Event

In its proposal, EPA makes a number of revisions to its regulatory definition of "exceptional event." As outlined below, environmental groups object to several aspects of this proposed regulatory change.

a. "But for" Element

EPA proposes to "rely more directly on the statutory requirement" of section 319(b)(3)(B)(ii) by removing the requirement in implementing regulations that there "would have been no exceedance or violation but for the event." 40 C.F.R. 50.14(c)(3)(iv)(D); 80 Fed. Reg. at 72,850. EPA notes that this regulation was, in 2007, derived from section

319(b)(3)(B)(ii)'s "clear causal relationship" requirement, and section 319(b)(3)(B)(iv)'s requirement that the data is "directly due to the exceptional event."[1] This proposed change is arbitrary and capricious and violates the plain language of the statute.

The Agency notes that since the 2007 rulemaking, states have complained that the "but for" provision essentially required a time- and labor- intensive quantitative analysis to show that a particular event qualified as an exceptional event. 80 Fed. Reg. at 72,850. In response to these complaints, EPA in the Exceptional Events Proposal proposes to remove the "but for" language and focus on the "clear causal relationship" criteria using a "weight of evidence" approach. *Id*. Specifically, EPA notes that "in their submittals, air agencies [will] demonstrate by the weight of evidence in the record that the event caused the specific air pollution concentration at issue." *Id.*

EPA should retain the "but for" language in its current regulations to continue to require a showing that there "would have been no exceedance or violation but for the event." 40 C.F.R. 50.14(c)(3)(iv)(D). As EPA recognized correctly in its 2007 rulemaking, the "but for" test is "designed to meet the statutory requirements of a "causal connection" and "directly due."[2] *Both* parts of this statutory requirement are critical, where

> Section 319 [] state[s] that "a *clear causal relationship* must exist between the measured exceedances of a national ambient air quality standard and the exceptional event to demonstrate that the exceptional event caused a specific air pollution concentration at a particular air quality monitoring location." In addition, section 319 *requires* that criteria and procedures must be developed to exclude air quality monitoring data that are "*directly due*" to an exceptional event. Accordingly, EPA is requiring that to exclude any data affected by an exceptional event, states must demonstrate that the exceedance or violation would not have occurred but for the event (emphasis added).[3]

In contrast, today's proposal ignores one half of this two-part statutory requirement. The instant proposal eliminates the "directly due" statutory requirement in the operative features of required exceptional event demonstrations. Though the Agency acknowledges that section 319(b)(3(B)(iv)'s "directly due" statutory language makes up part of the "but for" element of the regulations, it disappears from the proposal after its first mention. 80 Fed. Reg. at 72,850.

The proposal's elimination of the "but for" language, the absence of the "directly due" statutory requirement in the actual operation of exceptional event demonstrations, and the

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1 U.S. EPA, "Responses to Significant Comments on the 2006 Proposed Rule on the Treatment of Data Influenced by Exceptional Events," Docket No. EPA-HQ-OAR-2005-0159, pgs. 51, 52, 53 (March 2007) (Hereinafter "RTC").
2 *Id.*
3 *Id.* at 52.

substitution of inadequate and incomplete language in the exceptional event definition (merely requiring a "clear causal relationship") make clear that EPA is failing to carry out a crucial statutory element of exceptional event demonstrations. This confirms the unlawfulness of the proposal, and why EPA may not eliminate the "but for" requirement and language in its implementing regulations. The Agency must give this statutory language import in its regulations.

Even if the Agency decides to delete the specific "but for" words from its regulations, contrary to our comments, EPA may not abandon or evade the statutory obligation to continue to include the "but for" concept in order to carry out both the "clear causal relationship" and "directly due" statutory requirements that comprise the elements of a "but for" showing. 42 U.S.C. § 7619(b)(3)(B)(ii); 42 U.S.C. § 7619(b)(3)(B)(iv) The Agency may not choose to ignore clear statutory requirements simply to ease states' claimed regulatory burdens.

Just as EPA's responses in 2007 indicate, the Agency itself acknowledges that the statute requires these two components, and in today's Exceptional Events Proposal EPA has made no showing to indicate that is no longer the case. The proposal is unlawful and arbitrary and capricious by failing to adequately explain the agency's abandonment of its longstanding legal interpretation that the dual "clear causal relationship" and "directly due" statutory language necessitate "but for" demonstrations to be considered lawful exceptional events. As such, the Agency must make clear that both the "clear causal relationship" and "directly due" elements are required of a state attempting to make an exceptional events showing, as it would be unlawful to fail to require both components.

b. Weight of Evidence

EPA also proposes, both with respect to the "but for" element and the "clear causal relationship" element, to rely on weight of evidence demonstrations. 80 Fed. Reg. at 72,850. Environmental groups have some concerns regarding weight of evidence (WOE) demonstrations. Weight of evidence demonstrations have been used in other contexts under the Act. In particular, they have been used to show SIP attainment demonstrations, and these experiences speak to fundamental problems with such an approach.

"Traditional" WOE determinations are fraught with uncertainty, and have often led to litigation, EPA SIP disapproval, or both. This method can waste limited state resources and may impede achievement of emissions reductions. For example, in *Sierra Club v. EPA,* 356 F.3d 296 (D.C. Cir. 2004), the Washington, D.C. metro area resorted to a weight of evidence approach when initial modeling results indicated that the measures in the SIP would not bring the area into attainment. Similarly, after modeling emissions reductions, the City of New York "applied weight of the evidence analysis to adjust the high test results" when it "[r]ecogniz[ed] that these results were too high." *Environmental Defense v. EPA*, 369 F.3d 193, 198 (2d Cir. 2004). In that

case, the environmental petitioner challenged the use of WOE, saying it did "not merely supplement the model, but rather displace[d] it." *Id.* at 200. The court upheld these WOE determinations, but noted that "the demonstration may not abandon the model altogether." *Id.* at 204.

Though the agency prevailed on several issues in these two cases, the cases nonetheless indicate the limits of a weight of evidence approach. EPA's frequent disapproval of SIPs that use the weight of evidence approach also shows skepticism on the part of the agency with respect to this method. For example, EPA disapproved the Baltimore SIP, noting that "the weight of evidence analysis that Maryland uses to support the attainment demonstration does not provide [] sufficient evidence that Baltimore will attain the NAAQS by the June 2010 deadline." Approval and Promulgation of Air Quality Implementation Plans; Maryland; Attainment Demonstration for the Baltimore 8-Hour Ozone Moderate Nonattainment Area, 74 Fed. Reg. 21, 594 (May 8, 2009). *See also BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir, 2003) (business and environmental groups challenging Houston SIP and noting EPA assertion of modeling as "principle component of WOE designation"); Approval and Promulgation of Air Quality Implementation Plans; Delaware; Attainment Demonstration for the Philadelphia-Wilmington-Atlantic City Moderate 8-Hour Ozone Nonattainment Area, 74 Fed. Reg. 21, 599 (May 8, 2009) (disapproving SIP based on WOE analysis).

The inherent complexities of exceptional events demonstrations may provide exactly the wrong circumstances in which to use EPA's less precise WOE pathway for determining qualification as an exceptional event. As will be further discussed below, EPA should ensure that WOE will not lead to incorrectly granted exceptional events, undermining both the states' and EPA's goal of achievement of safe and health-protective air quality.

c. "Affects Air Quality"

EPA proposes to subsume the "affects air quality" element of the statutory test into the "clear causal relationship" element. 80 Fed. Reg. at 72,850; 40 CFR §50.1(j). EPA states that "after carefully considering Congress' intent and air agencies' and the EPA's experience in implementing" the 2007 Exceptional Events Rule, the agency has determined that requiring the two is redundant. *Id.* In justifying combining these two elements, EPA notes the reduction of administrative burdens on air agencies, and how a reduced regulatory burden will result in simpler and shorter demonstrations that will be easier for the public to understand. *Id.* at 72,851. While those goals may themselves be laudable, the Agency cannot escape the plain language of the statute – these are two separate requirements. *See* 42 U.S.C. §7619(b)(1)(A)(i) & 42 U.S.C. §7619(b)(3)(B)(ii). EPA may not combine these two requirements into one in the regulations. Statutory requirements are just that - Congressionally mandated requirements that the agency must follow, whether or not it believes them to be redundant.

d. "Historical Fluctuations"

EPA further proposes to revise its regulatory definition by removing the term ''historical fluctuations'' and replacing it with text referring to a comparison to historical concentration data. 80 Fed. Reg. at 72,851; 40 CFR 50.14(c)(3)(iv)(C). Specifically, EPA proposes to rewrite 40 CFR 50.14(c)(3)(iv)(C) to remove language requiring that the state provide evidence that the "event is associated with a measured concentration in excess of normal historical fluctuations, including background," and changes the language to require comparing the claimed event-influenced concentrations "at the same monitoring site at other times consistent with Table 3." 80 Fed. Reg. at 72,863. The Agency notes that this is in effect a "completeness requirement within the 'clear causal relationship' criterion." *Id.*

Table 3 requires a seasonal analysis and a percentile rank of the data compared to either annual or seasonal data. EPA specifically disposed with the requirement of percentile thresholds in the 2007 rulemaking, noting that "some extreme concentrations may be associated with various emission sources and atmospheric conditions which are unrelated to a causal connection to the claimed exceptional event" and that "the proposed approaches of setting percentile thresholds based on the historical levels of non-flagged days *could have potentially allowed more days to be eligible for data exclusion.*"[4] The Agency does not discuss what has changed in the current proposal to alleviate these concerns about data over-exclusivity. It is precisely this concern – that more poor air quality days will be excluded from a state's data – that threatens to swallow the statutory aims of section 319. EPA must keep in mind the directives of the statute and maintain the "historical fluctuations" language in its regulations.

In its proposal, the agency argues that a number of parts of the regulatory phrase quoted above are unclear and have led to "misinterpretation." 80 Fed. Reg. at 72,851. It asserts vagueness in the terms "in excess," "fluctuations," and "including background." *Id.* Just because a regulatory requirement may require a state to do a more nuanced or case-by-case analysis does not render a phrase unclear. For example, EPA asserts that "background" concentrations are irrelevant for purposes of exceptional events demonstrations. 80 Fed. Reg. at 72,851. EPA justifies this statement by saying that the event monitor and monitors used to reflect background may represent a "different mixture of emissions sources, which could lead to misinterpretation." *Id.* We disagree with the agency's approach here. Parsing exceptional events data is a fact-specific and individualized inquiry which may be complex in certain situations. Nonetheless, the challenging nature of a demonstration is not an excuse to weaken clean air protections through weakened regulatory language. The agency has done nothing to show how these changes will maintain air quality or prevent more data exclusions than the previous version of the regulations. As such, EPA should maintain the "historical fluctuations" language currently in the statute, and decline to adopt the proposed changes here.

4 RTC, pgs. 48 and 51 (emphasis added).

III. Types of Ambient Concentration Data

EPA proposes to limit the regulatory application of section 319(b) to five types of regulatory actions:

- An action to designate or redesignate an area as attainment, unclassifiable/attainment, nonattainment or unclassifiable for a particular NAAQS. Such designations rely on a violation at a monitoring site in or near the area being designated.
- The assignment or re-assignment of a classification category (marginal, moderate, serious, etc.) to a nonattainment area to the extent this is based on a comparison of its ‘‘design value’’ to the established framework for such classifications.
- A determination regarding whether a nonattainment area has actually attained a NAAQS by its CAA deadline.
- A determination that an area has had only one exceedance in the year prior to its deadline and thus qualifies for a 1-year attainment date extension, if applicable.
- A finding of SIP inadequacy leading to a SIP call to the extent the finding hinges on a determination that the area is violating a NAAQS.

80 Fed. Reg. at 72,853.

For these actions, both the procedural and substantive requirements of the Exceptional Events Rule must be met.

Importantly, EPA notes that this does *not* mean that “EPA would never agree to exclude or agree to exclude event-affected data from other types of regulatory determinations.” *Id.* As outlined throughout these comments, there are a number of both substantive and procedural problems with EPA’s regulations in their proposed form that undermine the stringency of exceptional events demonstration requirements. As such, with respect to these five regulatory actions listed above, and potentially with respect to others, EPA must align its regulations to the statutory requirements of section 319 in order to ensure that only data contemplated by the statute for exclusion is in fact excluded. Moreover, EPA may not exclude or agree to exclude event-affected data from other types of regulatory determinations without first undertaking notice-and-comment rulemaking to alert the public to what regulatory determinations beyond these five are being considered, and to take comment on the lawfulness and appropriateness of extension beyond these five types.

IV. Natural Event

EPA proposes to revise its definition of “natural event” to “clarify that anthropogenic emissions sources that contribute to the event emissions that are reasonably controlled do not

play a 'direct role' in causing emissions." *Id.* at 72,854. Under this formulation, an "event with a mix of natural emissions and reasonably controlled human-affected emission sources may be considered a natural event."

Environmental groups take issue with this revision, as we did its previous iteration in the 2007 rulemaking. The statute clearly and explicitly distinguishes between "natural event[s]" (events that do not have a human origin) and "events caused by human activity." A natural event is one that is not the result of human activity. 42 U.S.C. §7619(b)(1)(A)(iii). For example, the Legislative History identifies *only* lists forest fires and volcanic eruptions as examples of natural events.[5] As such, the statute creates a dichotomy whereby events are either "natural" or "caused by human activity." 42 U.S.C. §7619(b)(1)(A). Both the statute and logic do not permit an event to be both natural *and* "caused by human activity" – a natural event must have no human activity component at all.

The distinction between "direct" and "indirect" that EPA attempts to draw is irrelevant. Just as an "event resulting from *only* reasonably controlled human affected emissions may not be considered a natural event," the same is true for an "event with a mix of natural emissions and reasonably controlled human-affected emission sources." 80 Fed. Reg. at 72,854. Disappointingly, the Agency proposes that the latter of these two examples may be considered a natural event. As such, EPA's proposed revision to 40 CFR 50.1(k) violates the plain language of the statute.

V. Technical Criteria

a. Human Activity Unlikely to Recur at a Particular Location or a Natural Event

EPA proposes to define "unlikely to recur" using a three year time window keyed to air quality control regions (AQCR). 80 Fed. Reg. at 72,855-6. Specifically, if an event occurs in the AQCR and has not occurred in the three year period before that, it will generally be considered to meet the definition of "unlikely to recur." *Id.* The second event within that window will be similarly defined as unlikely to recur. Only a third event in the same time window will not be considered to meet the "unlikely to recur at a particular location" prong, and would not qualify as an exceptional event. This tracks the interim high winds guidance in which EPA identified non-recurring events as being less than one event per year in a given area.

The Agency proposes this three year window as guidance, and we urge that this instruction not be formalized in the regulations. While in practice, this three year time window

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5 S. REP. No. 109-53, Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2005 (April 6, 2005); *See Also* H.R. REP. No. 109-203, P.L. 109-59, Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2005 **(**July 28, 2005); S. Rep 108-222 (Jan. 9, 2004).

may prove instructive to states, it is critically important that each exceptional event demonstration be assessed on a case-by-case basis, as required by the 2007 rulemaking and the terms of the statute itself. 80 Fed. Reg. at 72,855. As EPA itself noted in the 2007 rulemaking, recurrence is event-specific, and should be assessed on a case-by-case basis – broad generalizations across types of exceptional events demonstrations do not lend themselves to a one-size-fits all time window for the "unlikely to recur" criteria.

b. Not Reasonably Controllable or Preventable

EPA proposes a number of changes to the regulatory definition of "not reasonably controllable or preventable." The "not reasonably controllable or preventable" requirement contains two directives. 42 U.S.C. § 7619(b)(1)(A)(ii). The plain language of this condition requires both that an exceedance or violation not be "reasonably controllable or preventable" at the time of the incident, but also that an exceedance or violation not be "reasonably controllable or preventable" with the adoption of future reasonable controls. "Controllable" is forward-looking language by its plain meaning. It is not, as EPA's proposal suggests unlawfully elsewhere, backward-looking by examining only what measures may have been approved into a SIP 5 years earlier or even longer. See *infra*, SIP discussion.

As an organizing principle, we stress the importance of the 2007 rulemaking's preamble, which noted that the agency believed that "'not reasonably controllable or preventable' [] determinations will necessarily be dependent on specific facts and circumstances that cannot be prescribed by rule," in declining to finalize more specific regulations with respect to this criteria.[6] It is critical that the Agency continue this approach and not attempt to undermine the importance of unique facts and circumstances to each exceptional events demonstration.

First and most troubling of the Agency's proposals with respect to this element is the suggestion that "event-related emissions that originate outside of the boundaries of the state …are generally 'not reasonably controllable or preventable' even if no party has made any effort to control them." 80 Fed. Reg. at 72,857; 40 CFR §50.14(b)(7)(v). For these types of emissions, the agency would require "no case-specific justification" for an exceptional events showing of 'not reasonably controllable or preventable.' EPA asserts that such a requirement would be "unreasonable" and not intended by Congress. *Id.* at 72,858.

This proposal violates the plain language of section 319 and is arbitrary and capricious. As EPA itself acknowledges, "[t]he statutory language of section 319 defines an exceptional [] event [as one] that affects air quality, is not reasonably preventable or controllable, and is an

6 U.S. EPA, Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13,560, 13564 (March 22, 2007).

anthropogenic event that is unlikely to recur at a particular location or a natural event."[7] Emissions-generating activities cannot meet the requirements of the "not reasonably preventable or controllable" prong simply by virtue of being transported from out of state. The Proposal violates the statute by dispensing with both the "not reasonably controllable or preventable" statutory condition, as well as even the most basic inquiry or evaluation into whether a NAAQS violation/exceedance is in fact "reasonably controllable or preventable."

Transport by normal meteorological means does not "create" pollution (the standard that Congress has implicitly established for natural events), nor are the weather patterns that cause transport in any respect unusual or "exceptional." Accordingly, transport is not a "source" of pollution at all, but merely an ordinary mechanism by which pollution from a variety of actual emissions sources travel. These sources include, among other things, regulated industrial facilities, power plants, and motor vehicles. Significantly, these typical sources of pollution transport are not activities that would qualify as "exceptional events" under section 319. 42 U.S.C. § 7619(b)(1). They are predominantly recurring emissions events from anthropogenic sources that can be reasonably controlled or prevented.

As these examples suggest, pollution transport may originate from air emissions associated with source noncompliance. 42 U.S.C. § 7619(b)(1)(B)(iii). The statute explicitly excludes these types of emissions from qualification as an exceptional event. *Id.* The Proposal further violates the statute, accordingly, by ignoring and dispensing with any inquiry into whether out-of-state, transported emissions associated with source noncompliance did contribute to a NAAQS exceedance/violation. Proposed 40 CFR §50.14(b)(7)(v), at 80 Fed. Reg. 72,896. Further, often transported pollution cannot be directly and accurately attributed to an individual emissions source at all - or cannot be accurately apportioned among originating sources. Where it is impossible to meet the affirmative obligation to demonstrate that a specific monitored exceedance is the direct result of a specific qualifying exceptional event, the exceedance cannot be permissibly excluded under section 319.

EPA's proposal violates the statute and is arbitrary and capricious in its treatment of transported air pollution from outside state boundaries. The Agency proposes that for

> significant out-of-state anthropogenic sources in the case of a mixed natural/anthropogenic event that the submitting state wishes to have treated as a natural event on the grounds that all significant anthropogenic sources were reasonably controlled…the downwind state is not required to demonstrate that the anthropogenic sources in the upwind state were reasonably controlled for those sources to be considered to not have directly caused the event.

80 Fed. Reg. at 72,865/2.

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7 RTC, pg 39.

As this passage clearly shows, and as the Proposal repeats elsewhere, EPA illegally substitutes the concept of whether anthropogenic sources were "reasonably controlled" for the statutory requirement that emissions not be "reasonably controllable or preventable." *Compare* 80 Fed. Reg. at 72,854, 72,856; proposed regulations 40 CFR 50.1(k), 50.14(b)(5)(ii) with 42 U.S.C. §7619(b)(1)(A)(ii).

This aspect of the Proposal violates the statutory requirement that exceptional events must not be "reasonably controllable or preventable" by eliminating any need to make this required showing for emissions originating outside the borders of the affected downwind state. The statute does not recognize this distinction that EPA manufactures here—whether emissions are reasonably controllable or preventable in a downwind state, versus in an upwind state or elsewhere. The plain language of the statute says that exceptional events must not be "reasonably controllable or preventable" wherever they occur, including in upwind states. 42 U.S.C. §7619(b)(1)(A)(ii). Thus, the Proposal violates the statute and is arbitrary and capricious by purporting to eliminate the requirement and demonstration that exceedances/violations in downwind states must be shown to be "not reasonably controllable or preventable" in upwind states or wherever those emissions originate.

Consider the following example. If the state of Connecticut experiences high ozone readings due to one or more upwind state's anthropogenic emissions, and those emissions cause or contribute to NAAQS exceedances/violations in Connecticut, the Proposal violates the statute and is arbitrary and capricious by suggesting that it doesn't matter how bad emissions from those anthropogenic sources are, or how much they contribute to the high ozone levels in Connecticut, if Connecticut can identify a natural event elsewhere that contributed in some way to those high ozone levels. This outcome violates the "clear causal relationship," 42 U.S.C. §7619(b)(3)(B)(ii), "directly due," 42 U.S.C. §7619(b)(3)(B)(iv), and "not reasonably controllable or preventable," 42 U.S.C. §7619(b)(1)(A)(ii), language in the Act. It further violates the requirement that the state "must take necessary measures to safeguard public health regardless of the source of the air pollution." 42 U.S.C. §7619(b)(3)(A)(iv). By promising that "the downwind state is not required to demonstrate that the anthropogenic sources in the upwind state were reasonably controlled for those sources to be considered to not have directly caused the event," the Proposal skirts required demonstrations and violates the aforementioned statutory requirements.

Consider further the example of three consecutive days of NAAQS ozone exceedances/violations in Connecticut registering 72 parts per billion due to transported emissions from upwind, anthropogenic sources like Midwestern power plants. The evidence plainly shows the exceedances on Days 1 and 3 are due to an ongoing episode of high anthropogenic emissions from upwind states. EPA's Proposal suggests that if on the second day of these exceedances/violations, Connecticut can identify a natural event that contributes 1 ppb

to the monitored exceedance of 72 ppb, creating a "mixed natural/anthropogenic event" (80 Fed. Reg. at 72,865), then Connecticut "is not required to demonstrate that the anthropogenic sources in the upwind state were reasonably controlled for those sources to be considered to not have directly caused the event." With the evidence showing that high anthropogenic emissions from upwind states caused the exceedances/violations by themselves, there is not a "clear causal relationship" between the natural event and the exceedance/violation. In the language of the current regulations, the natural event is not the "but for" cause of the exceedance/violation on Day 2. Nor may Connecticut be excused from demonstrating that the high anthropogenic emissions from the upwind states were not "reasonably controllable or preventable." By purporting to grant permission to avoid these required demonstrations, the Proposal violates the "clear causal relationship," 42 U.S.C. §7619(b)(3)(B)(ii), "directly due," 42 U.S.C. §7619(b)(3)(B)(iv), "not reasonably controllable or preventable," 42 U.S.C. §7619(b)(1)(A)(ii), and "must take necessary measures … regardless of the source" 42 U.S.C. §7619(b)(3)(A)(iv) language in the Act, and is arbitrary and capricious.

As discussed elsewhere in these comments, this aspect of the Proposal violates the statutory requirements that "a *clear causal relationship* must exist between the measured exceedances of a national ambient air quality standard and the exceptional event" and must be "directly due" to the exceptional event. 42 U.S.C. §7619(b)(3)(B)(ii); 42 U.S.C. §7619(b)(3)(B)(iv). The Proposal violates the Act by failing to require either crucial showing with respect to a "mixed/natural anthropogenic event" originating outside a downwind state's borders. Without these dual showings, EPA may not allow exceedances/violations resulting from such "mixed/natural anthropogenic events" to be treated as valid exceptional events.

Although the Proposal suggests elsewhere that EPA will examine each demonstration on a "case-by-case" basis, 80 Fed. Reg. 72,860/1, the just-quoted preamble passage says that "a downwind state is *not required to demonstrate* that the anthropogenic sources in the upwind state were reasonably controlled for those sources to be considered to not have directly caused the event." *Id.*at 72,865/2. To the extent that EPA's proposed revisions to the exceptional events rule purport to allow exclusion of monitoring data, based on pollution transport, without specifically requiring the State to demonstrate that the originating source of the pollution was a qualifying exceptional event in all the respects just discussed, the Proposal violates the Act and is arbitrary and capricious.

In addition, both sections 110 and 126 of the Act make clear that it is arbitrary and unlawful to allow anthropogenic emissions from out-of-state to be considered "not controllable or preventable" without undertaking a case-by-case inquiry to determine whether those emissions sources are in fact "reasonably controllable or preventable" using existing state and federal interstate transport controls, or not-yet-adopted state or federal interstate transport controls in the upwind states. 42 U.S.C. § 7410(k)(5), § 7426. The Agency makes note of these

statutory provisions in its proposal but merely says that they believe they do not "address natural sources of emissions." 80 Fed. Reg. at 72,866. That is beside the point and not relevant to the agency's obligation to give full meaning to section 319 of the Act, as well as sections 110 and 126. Section 110 and 126 interstate transport programs exist to help control anthropogenic emissions from upwind states that cause or contribute to exceedances/violations of the NAAQS in downwind states. The existence of these programs indicates that such anthropogenic emissions are controllable to help eliminate or reduce the frequency of such exceedances/violations, *even if* and, indeed, *precisely because* an upwind state's SIP is not sufficiently controlling its own anthropogenic sources' emissions to prevent those emissions from causing or contributing to exceedances/violations in one or more downwind states. This is true both for an outdated NAAQS for which an area is currently designated (such as the 2008 ozone NAAQS), as well as an adopted NAAQS for which an areas has not yet been designated (such as the 2015 ozone NAAQS).

The Proposal's cursory statements acknowledging the existence of other provisions in the Clean Air Act do nothing to explain why the Agency is justified in violating the statute and greatly weakening the exceptional events provisions.

The statute gives EPA an affirmative duty to demonstrate that any monitored exceedance that is excluded results directly from a qualifying event, and interstate transport of air pollution does not de facto satisfy this duty. Moreover, EPA has itself made note time and again of the highly cost-effective emissions reductions available from upwind sources in its Cross-State Air Pollution Rule (CSAPR). EPA reveals the extent to which its proposed changes undermine the entire Exceptional Events regime, acknowledging that the proposal, and its 2007 predecessor regulations, "often provide the most regulatory flexibility in that air agencies can use these provisions to seek relief from designation of an area as nonattainment." 80 Fed. Reg, at 72,866. Simply stated, the current exceptional events regulations, were they to be severely weakened, have great potential to undermine NAAQS attainment and nonattainment decisions. As such, the agency has focused its deregulatory efforts at section 319 and its corresponding regulations.

Pollution transport may qualify as an exceptional event if, and only if, its origin is a source that independently qualifies as an exceptional event under section 319—that is, an event that is either a qualifying natural event (such as a forest fire or a volcanic eruption) or emissions from human activity that are unlikely to recur at a particular location, not reasonably controllable or preventable; *and* not the result of air pollution from source noncompliance. 42 U.S.C. §7619(b)(1)(A); 42 U.S.C. §7619(b)(1)(B). There must be a clear causal relationship between the event and the exceedance/violation, the exceedance/violation must be "directly due" to the event, and there must be clear, record-based evidence available for public review meeting all of these demonstrations. 42 U.S.C. §7619(b)(3)(B). Finally, when reviewing any demonstrations from a

state, EPA must be guided by the Congressional principle "that protection of public health is the highest priority." 42 U.S.C. §7619(b)(3)(A).

c. SIP Approvals

EPA errs further in its revisions to the "not reasonably controllable or preventable" criteria as it relates to EPA-approved SIPs in non-attainment and maintenance areas. 80 Fed. Reg. at 72,859. EPA proposes to codify in rule language unlawful, arbitrary and capricious provisions that would impose an arbitrary 5-year timeline for reasonableness of controls under certain State Implementation Plan (SIP) scenarios. *Id.* Compounding that unlawfulness, EPA proposes to do so in the form of a "non-rebuttable presumption." Tying exceptional events requirements to SIP requirements by its terms sets up an arbitrary comparison. NAAQS violations that result with SIP control measures in place tell one nothing about whether individual air quality exceedances were reasonably controllable or preventable according to the language of section 319(b).

EPA's Proposal unlawfully eliminates the statutory requirement that exceptional events must not be "reasonably controllable or preventable" with an altogether different, weaker and inconsistent condition—"that enforceable control measures implemented in accordance with an attainment or maintenance SIP, approved by the EPA within 5 years of the date of a demonstration submittal, that address the event-related pollutant and all sources necessary to fulfill the requirements of the CAA for the SIP to be reasonable controls with respect to all anthropogenic sources that have or may have contributed to event-related emissions." 80 Fed. Reg. at 72,843/3.

Indeed, for the very same reasons that EPA disclaims the appropriateness or acceptability of deferring to EPA-approved SIPs in attainment, unclassifiable/attainment or unclassifiable areas, 80 Fed. Reg. at 72860, it is equally unlawful, arbitrary and capricious to allow non-rebuttable presumptions that SIP controls are sufficient in nonattainment and maintenance areas during a 5-year window, Nonattainment and maintenance area SIPs:

(1) "do not involve a robust assessment of needed measures to prevent or control the effects of particular types of events" (80 Fed. Reg. at 72,860/1);

(2) do not necessarily or reasonably address all events of importance that may occur and contribute to exceedances/violations that a state might wish to claim was caused by an exceptional event;

(3) there is no requirement in the Act or EPA's governing regulations or guidance that requires states to develop or submit "reasonable controls" in nonattainment or maintenance SIPs for all emissions sources that may contribute to future NAAQS. In this respect, nonattainment and maintenance SIPs are the same as infrastructure SIPs, in not requiring any demonstration "that the controls on particular sources are 'reasonable.'" 80 Fed. Reg. at 72,859/1; and

(4) Also like infrastructure SIPs, EPA-approved nonattainment and maintenance SIPs "do not necessarily constitute a robust assessment of those controls that are reasonable to have in place to address air quality impacts from particular types of events that may become the focus of exceptional events demonstrations" *Id.*

Thus, EPA's proffered reasons for treating maintenance/nonattainment SIPs differently from attainment, unclassifiable/attainment or unclassifiable SIPs for purposes of exceptional event demonstrations are internally contradictory and arbitrary and capricious. The Proposal does not and cannot identify material, non-arbitrary differences between these two categories of EPA-approved SIPs concerning whether exceedances/violations are "reasonably controllable or preventable," and crucially with respect to specific controls to address air quality impacts from particular types of events that may become the focus of exceptional events demonstrations. The Proposal skirts these questions and showings altogether, and simply asserts that EPA-approved SIPs in nonattainment and maintenance areas are fundamentally different with respect to these key questions and reasons.

Worse, EPA reveals in the very language of the Proposal that it realizes a 5-year window or, indeed, any reliance upon an approved SIP is arbitrary and capricious. The Proposal notes wanly that

> [a]s noted earlier, deference to the measures in an EPA-approved SIP is *not always appropriate* because EPA approval at some time in the past does not necessarily mean that (1) the control measures in a current SIP address all event-relevant sources of current importance, (2) the control measures that were considered by the air agency and the EPA at the time the EPA last approved the SIP are the same measures that were known and available at the time of a more recent event, or (3) that conditions in the area have not changed in a way that would affect the approvability of the same SIP if it newly needed the EPA's approval.

80 Fed. Reg. 72,859/3 (emphasis added).

This highly revealing passage, with its "not always appropriate" language, gives up the ghost, because all of the listed reasons are reasons why it is not appropriate to rely upon EPA-approved SIPs for nonattainment and maintenance areas. Indeed, such reliance is unlawful, arbitrary and capricious. All three reasons are notably disconnected from any period of time—that is, there is no evidence in the administrative record demonstrating that these concerns and objections become any less salient in a period of time shorter than 5 years. Again, there is *nothing* in the Act or EPA's governing regulations that require nonattainment or maintenance SIPs to ensure that "the control measures in a current SIP address all event-relevant sources of current importance." 80 Fed. Reg. at 72,859.

One reason for this is because the relevant SIP provisions in the statute and regulations pre-dated the 2005 amendment to section 319 addressing exceptional events. Another reason is that section 319's "reasonably controllable or preventable" requirement does not have a corresponding counterpart in the SIP requirements of the Act or EPA regulations with respect to any or all event-related sources of emissions. Nonattainment or maintenance SIPs require no showing of "reasonable control," only that the totality of control measures and other emission reduction tools in a submitted SIP are collectively adequate to attain or maintain the relevant NAAQS over what may be a very long time period before an area attains that NAAQS. And that brings one to the fundamental impropriety of relying upon SIPs that do not necessarily address event-related emissions sources with reasonable controls: exceptional events necessarily occur after SIPs have been approved, and congressional concern in section 319 was with whether the event was "reasonably controllable or preventable" when it occurs, as well as in the future based upon the forward-looking language of "controllable." SIPs by definition are static until revised, and reliance upon approved-SIPs is impermissibly backward-looking and static as well, illegally skirting altogether the statutory condition that exceedances/violations must not be reasonably controllable or preventable.

Environmental groups do support certain aspects of the "not reasonably controllable or preventable" criteria. Specifically, we think it appropriate that EPA extended these criteria to both human-caused and natural events. 80 Fed. Reg. 72,857. Further, we applaud the agency for recognizing that clean-up activities following natural events must reasonably control their emissions. *Id.* However, we would emphasize that these types of clean-up emissions are specifically precluded from qualifying as an exceptional event (see further discussion below, section VI, a). Clean-up emissions are specifically *likely* to recur, day after day in fact, until the clean-up is complete. It would defy logic - and section 319(b)(iii) – to characterize activities that occur day in and day out as unlikely to recur. Moreover, the activities involved in disaster clean-up are activities that are routinely subject to emission control requirements in other contexts. That is, these activities are not only "controllable" but *in fact controlled* in numerous real-world situations. Lastly, clean-up related emissions events are in many cases preventable (*e.g.*, emissions from burning of disaster debris can be prevented by instituting aggressive recycling programs, etc.).

VI. Treatment of Certain Events

a. In General

In its proposal, EPA reiterates that

> [a]s we stated in the preamble to the 2007 Exceptional Events Rule, we maintain that air quality data affected by the following event types are among those that could meet the

> definition of an exceptional event and qualify for data exclusion provided all requirements of the rule are met: (1) Chemical spills and industrial accidents, (2) structural fires, (3) terrorist attacks, (4) volcanic and seismic activities, (5) natural disasters and associated cleanup and (6) fireworks.

80 Fed. Reg. at 72,864.

As stated in our comments to the 2007 rule, certain of these events by their very terms are unlikely or unable to meet the statutory requirements of section 319. To the extent that they do not or cannot, we oppose their consideration as exceptional events. We reiterate our comments from the 2007 rulemaking and restate them in relevant part here.

As noted above, under no circumstance can the clean-up associated with a natural disaster itself be considered a "natural event." EPA's suggestion to the contrary flies in the face of the plain statutory language. The statute clearly and explicitly distinguishes between "natural event[s]" (events that do not have a human origin) and "events caused by human activity." A natural event is one that is not the result of human activity. Emissions from clean-up activities (such as debris burning, operation of diesel equipment, and demolition activities) are clearly events caused by human activity, and may not be classified as "exceptional events" unless they meet each of the requirements of section 319 for qualifying anthropogenic events. In short, the activities themselves that are responsible for the emissions (and possible violations of the NAAQS) are of human origin, and by definition *not* natural events. The fact that a natural event precipitates the need for human activity cannot and does not transform the human activity itself into a natural event. Thus, the Act clearly precludes EPA from identifying emissions from clean-up activities as "natural events" that qualify as exceptional events.

Clean-up activities also are not human activities that can qualify as exceptional events. In order to qualify as such, emissions from clean-up activities would have to be "unlikely to recur at a particular location" and "not reasonably controllable or preventable" - emission from disaster clean up are *neither* (see discussion above).

Similarly, Firework displays cannot meet the statutory requirements of an exceptional events demonstration. First, they are not natural events. They are clearly human activities, and are entirely unrelated to the occurrence of any natural event. EPA makes no attempt to argue otherwise in the proposed rule, no could it do so. Similarly, firework displays are not qualifying human activities. In order to qualify as such, firework display would have to be "unlikely to recur at a particular location" and "not reasonably controllable or preventable." Clearly, by their very nature, firework displays recur at regular intervals (typically on an annual basis for displays connected with cultural events such as the 4h of July). Additionally, such displays, and their emissions, are neither unpreventable nor uncontrollable. Indeed, EPA makes no attempt to even

argue that fireworks displays should be recognized as human activities that qualify for exclusion under the criteria enumerated by section 319(b)(1)(A).

b. Wildfires

Fires, both natural and prescribed burns, account for a large portion of direct $PM_{2.5}$ emissions nationally. 80 Fed. Reg. 72,866. As such, it is critical that EPA carefully assess each exceptional events demonstration related to fires on a case by case basis, and vigilantly ensure that the statutory requirements of section 319 are met.

c. High Wind Dust Events

EPA includes in its proposal the portion of the 2007 rule found to be a "legal nullity," with some revisions. *NRDC v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009). We repeat our objections from the 2007 rulemaking here. In order to exclude data related to high wind events, a State must be required to demonstrate first that winds exceed some specifically identifiable value that reflects an "exceptional" value for that area (e .g., some areas of the country have consistently higher wind speed than others, so "high" wind may mean something different as a threshold matter in different areas of the country). Secondly, States should be required to demonstrate that winds (whatever the local threshold for "high winds") were sufficient to overcome the mandatory mitigation measures demanded by section 319. Thus, a "high wind event" exists only where the wind is both "high wind" and sufficiently high to cause a monitored violation even in light of the implementation of whatever measures are "necessary" to protect public health (meaning, at minimum BACM). The Agency has attempted to address this high winds threshold issue in requiring a high wind threshold of 25 miles per hour unless that threshold is contradicted by evidence in the record. 80 Fed. Reg. at 72,878.

The agency incorporates into its high wind provisions the 5-year non-rebuttable presumption that following approval of an attainment or maintenance plan SIP, control measures in the SIP satisfy the "reasonably controllable or preventable" criteria. *Id.* at 72,878-879.We repeat our objections to this 5 year approach discussed above, and discuss further concerns in the high wind context here. EPA provides an example that would satisfy its proposed requirements where the state would show that

> EPA had approved the SIP within 5 years of the event and because the SIP measures and other measures specific to the pollutant and at least some anthropogenic emission sources that contributed to the event were implemented, the agency has satisfied the not reasonably controllable or preventable criteria.

Id. at 72,879.

Though EPA acknowledges that the event may not be attributable to source noncompliance and that the demonstration must satisfy technical and procedural elements, it nonetheless acknowledges that it would concur with an agency's request to exclude such data. Rather than attempting to make generalizations and automatic approval pathways based on the status of a state's SIP, EPA must examine each demonstration on a case-by-case basis to ensure that the requirements of the statute are being met.

VII. Data Flagging

a. Aggregation

EPA proposes to allow, for NAAQS with averaging periods both shorter and longer than 24 hours, "events occurring on different days may be aggregated for the purpose of determining whether their collective effect has caused an exceedance or violation." 80 Fed. Reg. 72,882. 40 CFR 50.14(b)(6). We oppose this approach, as it would allow multiple monitored exceedences to be lumped together for purposes of excluding them from NAAQS attainment decisions. This is not the aim of the exceptional events provisions of section 319, and such a revision would have dire consequences for air quality. This is unlawful, arbitrary and capricious.

Moreover, finalizing a proposed "approved for one NAAQS approved for all NAAQs for the same pollutant," 80 Fed. Reg. at 72,882, would have similarly stark consequences for air quality. Creating pathways for easier exceptional events approvals when such approvals violate the statute undermines the ability of Americans to rely on air quality pronouncements generally. If a state can "attain" the NAAQS simply by excluding all unfavorable data, the NAAQS themselves no longer have relevance, and people are less able to make informed decisions about their health.

VIII. Timelines and Communication with States

EPA solicits comments on the revised schedule for exceptional events flagging and documentation. These proposed extensions seem reasonable to the extent that they will not delay designations for attainment and nonattainment. With that said, there is no reason to provide an extended deadline for exceptional events that purportedly exceeded current NAAQS levels.

a. Public Input

In a number of places in the proposal, e.g., 80 Fed. Reg. at 72,896, EPA discusses communication between the states and EPA and the role of the public in providing comments on exceptional event demonstrations. It is imperative that any "communications and planning status" be done in a way that is transparent for the public and subject to public input. The agency states that it

> [p]roposes to consider communications and planning status when assessing the status of reasonable controls and proposes to do this through guidance. The EPA solicits comment on methods to definitively identify the status of communications and planning efforts (*e.g.*, formal correspondence or other documentation, timelines for responding) and whether this approach would be more appropriately addressed through rule language.

80 Fed. Reg. at 72,861.

Increased communication between states and EPA is a positive improvement to the rule as long as it is documented, is transparent for the public, and occurs in conjunction with sufficient opportunity for public comment. The streamlining requirements the agency proposes, 80 Fed. Reg. at 72,887-8, seem largely appropriate, but we urge the agency to err on the side of more and lengthier opportunity for public comment where possible. It is a guiding principle of section 319 that "timely information should be provided to the public in any case in which the air quality is unhealthy," and EPA must keep this principle in mind with respect to the public's right to participate in exceptional events demonstrations. 42 U.S.C. §7619(b)(3)(A)(ii)-(iii).

b. Mitigation Plans

Section 319(b)(3)(A) makes plain that "[i]n promulgating regulations under this section, the Administrator *shall* follow" . . . "the principle that each State *must* take necessary measures to safeguard public health regardless of the source of air pollution." (emphases added) . This obligation is especially critical because it makes clear that mitigation or even preventative measures *"necessary"* to safeguard public health must be taken regardless of the source of air pollution. This applies regardless of the originating source of the air pollution, anthropogenic or natural, including all exceptional events that qualify for air quality monitoring data exclusions. Not only is this an independent source of legal authority, contrary to the suggestions in the proposal, but it is an affirmative legal obligation upon the Administrator and States to require "necessary measures to safeguard public health regardless of the source of air pollution." 42 U.S.C. §7619(b)(3)(A)(iv). As we noted in our 2007 comments, which we incorporate by reference here, the statute imposes a clear and mandatory duty to undertake mitigation plans. EPA both in 2007 and here fails to require these plans, and in so doing, violates the plain language of the statute.

Though the statute makes clear that the Administrator "shall follow" the principles of section 319(b)(3)(A), to the extent that Congress arguably intended to vest the Administrator with any discretion concerning application of these principles, Congress chose the word "should" in describing three of the five principles but - critically - not the first or fourth . The first makes clear that "protection of public health is the highest priority." The fourth, concerning the legal obligation placed upon States to take "necessary measures to safeguard public health regardless of the source of air pollution" says that States "must" do so rather than that they "should." Thus, the Administrator has must adopt regulations that require such State mitigation or preventative

measures, whenever an event is determined to be exceptional, regardless of the source of air pollution - anthropogenic or non-anthropogenic, domestic or international.

In the proposal, EPA takes comment on requiring certain states to develop mitigation plans. 80 Fed. Reg. at 72,890. As noted above, we believe that the statute requires mitigation plans for all areas, so to the extent EPA requires them for any areas, we support them. The components of public notification, study, and periodic review are important, and it is important that EPA review and approve these plans both for procedural and substantive compliance. *Id.* at 72,891.

State mitigation authorities and obligations must encompass *all* sources of air pollution contributing to exceedances or violations of a NAAQS, whether pollution from the natural events (recurring or nonrecurring); pollution from anthropogenic sources interacting with a natural event (recurring or nonrecurring); or all other anthropogenic sources contributing to pollution concentrations in that air shed. In other words, consistent with the Congressional principle that protection of public health is the highest priority, Congress required States to take all measures necessary to protect the public regardless of whether the measures target the exceptional event (directly or indirectly) or other unrelated contributing pollution sources. Any mitigation option selected by EPA must be SIP-approved in order to effectuate Congressional intent in Section 319(b)(3)(A) mandating necessary state mitigation measures.

IX. Conclusion

EPA's proposal violates the plain language of the Clean Air Act's section 319 exceptional event provisions in a number of ways, and is arbitrary and capricious, as discussed above. In crafting implementing regulations for this section of the Act, EPA must keep in mind the Congressional mandate that "protection of public health is the highest priority." In failing to meet this and numerous other congressional directives, EPA's proposal puts the health of all Americans at risk. Relaxing statutory requirements for exceptional event demonstrations, as the Agency has done here, is not only illegal, as detailed above, but it has a corrosive effect on national air quality standards. Were the contents of this proposal finalized, more Americans would potentially have both more exposure to dirty air, and even less transparency about how safe their air is to breathe. EPA must comply with section 319 of the Clean Air Act and in so doing should reject the illegal proposals discussed above.

Sincerely,

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