ORAL ARGUMENT NOT SCHEDULED

No. 15-1166 (and consolidated cases)

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

WALTER COKE, INC., *et al.*,

Petitioners,

v.

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

Respondents.

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

BRIEF OF ENVIRONMENTAL INTERVENORS

Andrea Issod
Joshua D. Smith
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5544
andrea.issod@sierraclub.org
joshua.smith@sierraclub.org

Counsel for Sierra Club, Citizens for Environmental Justice, and People Against Neighborhood Industrial Contamination

Seth L. Johnson
James S. Pew
Earthjustice
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036
(202) 667-4500
sjohnson@earthjustice.org
jpew@earthjustice.org

Counsel for Sierra Club

Additional counsel listed on following page

August 29, 2016

Patton Dycus
Environmental Integrity Project
1000 Vermont Avenue, NW
Suite 1100
Washington, DC 20005
(202) 296-8800
pdycus@environmentalintegrity.org

Counsel for Environmental Integrity Project

John Walke
Emily Davis
Natural Resources Defense Council
1152 15th Street, NW
Suite 300
Washington, DC 20005
(202) 289-2406
jwalke@nrdc.org

Counsel for Natural Resources Defense Council

Paul Cort
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
(415) 217-2000
pcort@earthjustice.org

Counsel for Sierra Club

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Environmental Intervenors Sierra Club, Citizens for Environmental Justice, People Against Neighborhood Industrial Contamination, Natural Resources Defense Council, and Environmental Integrity Project state as follows:

A. Parties and Amici.

The Brief for Industry Petitioners correctly lists all parties and amici in this case except it mistakenly refers to Environmental Intervenors as Movant-Intervenors for Respondents. This Court granted Environmental Intervenors' motion to intervene on October 27, 2015.

B. Rulings Under Review.

References to the ruling at issue appear in the Brief for Industry Petitioners.

C. Related Cases.

Environmental Intervenors are not aware of any related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, Environmental Intervenors Sierra Club, Citizens for Environmental Justice, People Against Neighborhood Industrial Contamination, Natural Resources Defense Council, and Environmental Integrity Project provide the following corporate disclosure statement.

Environmental Intervenors Sierra Club, Natural Resources Defense Council, and Environmental Integrity Project are not-for-profit organizations focused on protection of the environment and conservation of natural resources.

Environmental Intervenors Citizens for Environmental Justice and People Against Neighborhood Industrial Contamination are not-for-profit community advocacy groups focused on achieving environmental, social, and economic justice.

The above-named Environmental Intervenors do not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

DATED: August 29, 2016

Respectfully submitted,

/s/Andrea Issod
Andrea Issod
Joshua D. Smith
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5544
andrea.issod@sierraclub.org
joshua.smith@sierraclub.org

Counsel for Sierra Club, Citizens for Environmental Justice, and People Against Neighborhood Industrial Contamination

/s/Patton Dycus (w/permission)
Patton Dycus
Environmental Integrity Project
1000 Vermont Avenue, NW
Suite 1100
Washington, DC 20005
(202) 296-8800
pdycus@environmentalintegrity.org

Counsel for Environmental Integrity Project

/s/Seth L. Johnson (w/permission)
Seth L. Johnson
James S. Pew
Earthjustice
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036
(202) 667-4500
sjohnson@earthjustice.org
jpew@earthjustice.org

/s/Paul Cort (w/permission)
Paul Cort
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
(415) 217-2000
pcort@earthjustice.org

Counsel for Sierra Club

/s/John Walke (w/permission)
John Walke
Emily Davis
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 289-2406
jwalke@nrdc.org

Counsel for Natural Resources Defense Council

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

RULE 26.1 DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

GLOSSARY OF ABBREVIATIONS xiii

STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE 1

I. STATUTORY BACKGROUND 3

A. The Clean Air Act and the National Ambient Air Quality Standards 3

B. The Clean Air Act's Framework for Achieving the NAAQS. 4

II. FACTUAL BACKGROUND 7

A. SSM Events Have Severe Impacts on Communities. 7

B. SSM Events Cause NAAQS Exceedances and Other Air Quality Problems. 13

C. Public Health and Air Quality Problems Exist Even in Areas Attaining the NAAQS. 14

D. Industrial Facilities Can Reduce SSM Events. 16

E. The Difficulties of Citizen Enforcement of the Clean Air Act. 17

F. History of EPA's SSM SIP Call Rule. 21

SUMMARY OF THE ARGUMENT 22

ARGUMENT 26

I. The Called SSM Provisions Violate the Unambiguous Requirements of the Clean Air Act. 26

A. SSM Exemptions and Director's Discretion Provisions Violate the Act's Requirements. 26

B. Vague General Duty Provisions Are Unlawful Because they Are Not Legally or Practically Enforceable. 29

C. The Act Unambiguously Bars Affirmative Defenses Against Remedies for Violations of Emission Standards. 33

1. The Logic of *NRDC* Confirms That Affirmative Defenses Are Illegal. 33

2. The Text of the Act Unambiguously Prohibits Affirmative Defenses for SSM Events. 36

3. Petitioners' Attempts to Dodge the Clear Text and Case Law Are Meritless. 40

a. Section 7410 Does Not Authorize Affirmative Defenses Against Civil Penalties. 41

b. *Luminant v. EPA* Does Not Preclude EPA's SIP Call. 45

c. One of the Texas Petitioners Has, in Fact, Relied on SSM Affirmative Defense Provisions to Limit Federal Court Authority to Remedy Clean Air Act Violations. 47

II. EPA Properly Exercised Its Authority to Issue a SIP Call for the Unlawful SIP Provisions. 51

CONCLUSION 58

CERTIFICATE OF COMPLIANCE 60

CERTIFICATE OF SERVICE 61

TABLE OF AUTHORITIES

CASES

Am. Petroleum Inst. v. EPA, 52 F.3d 1113 (D.C. Cir. 1995).....47

Appalachian Power Co. v. EPA, 249 F.3d 1032 (D.C. Cir. 2001).....54

Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000).....40

Arizona Pub. Serv. Co. v. EPA, 562 F.3d 1116 (10th Cir. 2009).....57

Chevron USA Inc. v. NRDC, 467 U.S. 837 (1984)..... 38, 46

City of Arlington v. FCC, 133 S. Ct. 1863 (2013)..... 36, 38

City of Ashtabula v. Norfolk S. Corp., 633 F. Supp. 2d 519 (N.D. Ohio 2009).....33

Coal. Against Columbus Ctr. v. City of New York, 967 F.2d 764 (2d Cir. 1992) ...30

Comm. for a Better Arvin v. EPA, 786 F.3d 1169 (9th Cir. 2015).....36

Env't Texas Citizen Lobby v. ExxonMobil Corp,
824 F.3d 507 (5th Cir. 2016)..... 18, 19

Ethyl Corp. v. EPA, 51 F.3d 1053 (D.C. Cir. 1995).....47

Freeman v. Cincinnati Gas & Electric Co., 2005 WL 2837466,
2005 U.S. Dist. LEXIS 42525 (S.D. Ohio Oct. 27, 2005).....32

Fried v. Hinson, 78 F.3d 688 (D.C. Cir. 1996).....35

Friends of the Earth v. EPA, 446 F.3d 140 (D.C. Cir. 2006).....47

Helter v. AK Steel Corporation, No. C-1-96-527,
1997 U.S. Dist. LEXIS 9852 (S.D. Ohio Mar. 31, 1997).....33

Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994).....42

Lopez v. Gonzalez, 549 U.S. 47 (2006).....28

Luminant Generation Co. v. EPA,
714 F.3d 841 (5th Cir. 2013) 35, 40, 45, 46, 47

McEvoy v. IEI Barge Servs., Inc., 622 F.3d 671 (7th Cir. 2010).....32

Michigan Dep't of Envtl. Quality v. EPA, 230 F.3d 181 (6th Cir. 2000).....57

Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001) 37

Montana Sulfur v. EPA, 666 F.3d 1174 (9th Cir. 2012).....57

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005).....46

New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008) 40

NRDC v. EPA, 489 F.3d 1364 (D.C. Cir. 2007).....42

**NRDC v. EPA*,
749 F.3d 1055 (D.C. Cir. 2014)..... 18, 22, 33, 34, 35, 36, 38, 42, 44, 45, 46

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,
478 U.S. 546 (1986).....17

Petit v. U.S. Dep't of Educ., 675 F.3d 769 (D.C. Cir. 2012) 46

Rwy. Labor Executives' Ass'n v. Nat'l Mediation Bd.,
29 F.3d 655 (D.C. Cir. 1994) 46

Satterfield v. J.M. Huber Corp., 888 F. Supp. 1561 (N.D. Ga. 1994).....31

Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) 46

Sierra Club v. Energy Future Holding Corp., No. 12-cv-108-WSS,
2014 WL 2153913 (W.D. Tex. Mar. 28, 2014)..... 47, 48, 49, 50

**Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008)..... 26, 29

Sierra Club v. Georgia Power Co., 443 F.3d 1346 (11th Cir. 2006) 21

South Coast Air Quality Management District v. EPA,
472 F.3d 882 (D.C. Cir. 2006) 55

Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.,
207 F.3d 789 (5th Cir. 2000) 18

Train v NRDC, 421 U.S. 60 (1975) 5, 54

Train v. NRDC, 510 F.2d 692 (D.C. Cir. 1975) 30

U.S. Magnesium, LLC v. EPA, 690 F.3d 1157 (10th Cir. 2012) 52

U.S. Sugar Corp. v. EPA, 2016 WL 4056404,
No. 11-1108 (D.C. Cir. July 29, 2016) 27, 31, 34

Union Electric Co. v EPA, 427 U.S. 246 (1976) 54, 56

United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012) 46

Virginia v. EPA, 108 F.3d 1397 (D.C. Cir. 1997) 54

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 43

STATUTES

42 U.S.C. § 7401 4

42 U.S.C. § 7401(b)(1)..... 3, 40

42 U.S.C. § 7407(d)(1).....4

42 U.S.C. § 7407(d)(3)(E) 57

42 U.S.C. § 7409 4

42 U.S.C. § 7409(b)(2).....4

*Authorities upon which we chiefly rely are marked with asterisks.

42 U.S.C. § 7410(a) 5

42 U.S.C. § 7410(a)(1).....7

42 U.S.C. § 7410(a)(2)(A) 5, 26

42 U.S.C. § 7410(a)(2)(C) 5

42 U.S.C. § 7410(a)(2)(D)(i)(I) 6

42 U.S.C. § 7410(a)(2)(I).....57

42 U.S.C. § 7410(c)(1).....7

42 U.S.C. § 7410(k) 5

42 U.S.C. § 7410(k)(3).....6

42 U.S.C. § 7410(k)(5)..... 51, 52, 58

42 U.S.C. § 7410(*l*) 6, 57, 58

42 U.S.C. § 7413(b) 6

42 U.S.C. § 7413(e)(1)..... 6, 34, 36, 38, 43, 44

42 U.S.C. §§ 7470-7479 58

42 U.S.C. § 7491 58

42 U.S.C. §§ 7501-7515 5

42 U.S.C. § 7502(b)(3) (1989).....56

42 U.S.C. § 7502(c) 5

42 U.S.C. § 7511a(b)(1)(A) 56

42 U.S.C. § 7511a(b)(2).....56

42 U.S.C. § 7511a(b)(3) 56

42 U.S.C. § 7511a(b)(4) 56

42 U.S.C. § 7511a(b)(5) 56

42 U.S.C. § 7511a(c)(2)(C) 56

42 U.S.C. § 7511a(c)(3) 56

42 U.S.C. § 7511a(c)(4) 56

42 U.S.C. § 7511a(d) 56

42 U.S.C. § 7511a(e)(3) 56

42 U.S.C. § 7511a(f) 56

42 U.S.C. § 7512a(a)(6) 56

42 U.S.C. § 7512a(b)(2) 56

42 U.S.C. § 7512a(b)(3) 56

42 U.S.C. § 7513a(e) 56

42 U.S.C. § 7602(e) 6

42 U.S.C. § 7602(k) 5, 26, 28, 42

42 U.S.C. § 7602(q) 28

42 U.S.C. § 7604(a) 6, 30, 34, 36, 38, 43, 46

42 U.S.C. § 7604(a)(1) 28, 33, 38

42 U.S.C. § 7604(a)(1)(A) 36

42 U.S.C. § 7604(f) 6, 28, 30, 34, 36, 38, 43

CODE OF FEDERAL REGULATIONS

40 C.F.R. § 51.112 5

40 C.F.R. Part 50.....2

FEDERAL REGISTER

75 Fed. Reg. 35,520 (June 22, 2010) 4, 15, 16

75 Fed. Reg. 6,474 (Feb. 9, 2010) 4

77 Fed. Reg. 42,368 (July 18, 2012).....41

78 Fed. Reg. 12,460 (Feb. 22, 2013) 20

79 Fed. Reg. 53,008 (Sept. 5, 2014) 14

79 Fed. Reg. 55,920 (Sept. 17, 2014) 20, 22, 35

80 Fed. Reg. 33,840 (June 12, 2015) 3, 8, 17, 21, 22, 27, 33, 35, 51, 53

80 Fed. Reg. 75,178 (Dec. 1, 2015) 16

LEGISLATIVE HISTORY

H.R. Rep. No. 95-294 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077..... 26, 27

S. Rep. No. 101-228 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385..... 39, 55

S. Rep. No. 91-1196, 91st Cong., 2d Sess. (Sept. 17, 1970) 30, 31

DICTIONARIES

Black's Law Dictionary 1597 (4th ed. 1951) 52

Webster's Seventh New Collegiate Dictionary 275 (1971) 42

STATE REGULATIONS

30 Tex. Admin. Code § 101.222(a) 39

30 Tex. Admin. Code § 101.222(b)-(e) 39

Ohio SIP, O.A.C. § 3745-15-06.....32

Ohio SIP, O.A.C. § 3745-15-07.....32

OTHER AUTHORITIES

Britney J. McCoy, Paul S. Fischbeck, & David Gerard, *How Big is Big? How Often is Often? Characterizing Texas Petroleum Refining Upset Air Emissions*, Atmospheric Environment 44 (2010) 4230 13

Jim Hecker, The Difficulty of Citizen Enforcement of the Clean Air Act, 10 Widener L. Rev. 303 (2004) 17, 18

GLOSSARY OF ABBREVIATIONS

ABC	American Bottom Conservancy
CAA or Act	Clean Air Act, 42 U.S.C. §§ 7401-7671q
EIP	Environmental Integrity Project
EPA	United States Environmental Protection Agency
ppb	parts per billion
NAAQS	National Ambient Air Quality Standard
NOx	Nitrogen oxides
SIP	State Implementation Plan
SO2	Sulfur dioxide
SSM	Startup, shutdown and malfunction
SSM SIP Call	"State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction." 80 Fed. Reg. 33,840 (June 12, 2015)
VOC	Volatile organic compounds

STATUTES AND REGULATIONS

Except for those in the Addendum, all applicable statutes and regulations are contained in the Initial Briefs for Respondent EPA, Industry Petitioners, State Petitioners, and Texas Petitioners.

STATEMENT OF THE CASE

Industrial facilities, such as refineries and power plants, release large bursts of harmful air pollution over short periods of time during startup, shutdown, and malfunction (SSM) events. Releases during these events often far exceed emissions from normal operations because pollution controls are bypassed and pollution is vented directly to the air or excess gas is burned by a flare creating other air pollutants. For example, ExxonMobil's Baton Rouge chemical plant vented nearly 30,000 pounds of the carcinogen benzene over a few short hours in 2012 because of a leaking valve. Environmental Integrity Project (EIP) and Louisiana Bucket Brigade Comment at 2 (JA____).[1] Shell's Deer Park refinery and petrochemical complex in Houston reported more than 46 tons of toxic emissions in 2013, almost all from a single event where a valve was left open for 15 days. EIP and University of Texas School of Law's Envtl. Clinic Comment (EIP Suppl. Comment) at 3 &

[1] Citing Letter from ExxonMobil Chemical, to Louisiana Dep't of Envtl. Quality, Unauthorized Discharge Report, State Police Incident # 12-03755 (June 20, 2012), *at* http://www.cec.org/sites/default/files/submissions/2011_2015/17676_app_d_-_6-14-12_benzene_incident_report.pdf.

n.5 (JA____).[2] SSM events can also release staggering amounts of pollutants subject to national ambient air quality standards.[3] *E.g.*, Concerned Citizens Around Murphy Comment at 2 (JA____) (describing 2011 refinery upset event releasing 165,000 pounds of sulfur dioxide); Citizens for Envtl. Justice Comment, Attach. 1 at 2-5 (JA____-__) (detailing reported releases from Texas refineries).

Malfunctions are often accompanied by shutdowns and startups, and all of these events occur far too frequently at some facilities. In one year, 3,421 incidents of malfunctions (and some maintenance) events occurred at 679 industrial sites in Texas,[4] and EPA has found that the average electric generating unit experiences between 9 and 10 startup events per year, with many having over 100.[5] These are not isolated occurrences, but routine events for many facilities.

SSM events create very high concentrations of pollution in areas adjacent to the plants, causing severe and disproportionate impacts to communities that tend to

---

[2] Citing TCEQ Emission Event Database for 2009-13, at Incident 178612 on Jan. 27, 2013 (JA____-__); Deer Park Emission Event Report (JA____-__).

[3] EPA has adopted national ambient air quality standards for particulate matter, ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead. 40 C.F.R. Part 50.

[4] EIP and Environment Texas, *Breakdowns in Air Quality: Air Pollution from Industrial Malfunctions and Maintenance in Texas*, April 27, 2016, *at* http://environmentalintegrity.org/wp-content/uploads/Breakdowns-in-Air-Quality.pdf.

[5] Assessment of startup period at coal-fired electric generating units – Revised, US EPA, Office of Air and Radiation (Nov. 2014), *at* https://www3.epa.gov/airtoxics/utility/matsssfinalruletsd110414.pdf.

be economically and socially disadvantaged. Personal stories detailing the devastating impacts are detailed below by community representatives, which include members and representatives of Sierra Club, Citizens for Environmental Justice, People Against Neighborhood Industrial Contamination (PANIC), Natural Resources Defense Council (NRDC), and Environmental Integrity Project (Environmental Intervenors).

Because many state implementation plans—the judicially enforceable, state-created, federally approved plans for satisfying many Clean Air Act requirements—contain unlawful exemptions and affirmative defense provisions, states have allowed large polluters to violate Clean Air Act emission limitations and pollute surrounding communities during SSM events with impunity. To rectify this longstanding problem, EPA took the action at issue in this case, 80 Fed. Reg. 33,840 (June 12, 2015), that requires states to eliminate these unlawful provisions. EPA's action was not only reasonable, it was compelled under the Clean Air Act.

I. STATUTORY BACKGROUND

A. The Clean Air Act and the National Ambient Air Quality Standards.

The Clean Air Act's central purpose is to protect public health and welfare. 42 U.S.C. § 7401(b)(1). A key driver for achieving the Act's public health goal is the requirement that all areas in the country comply with primary (health-based)

national ambient air quality standards (NAAQS), which reflect the maximum permissible levels of common pollutants in the ambient air. *Id.* §§ 7401, 7409.[6] As scientific evidence has mounted linking short bursts of air pollution with severe health impacts, EPA has set more stringent standards for some pollutants on an hourly basis. *See, e.g.*, 75 Fed. Reg. 35,520 (June 22, 2010) (citing evidence linking short-term sulfur dioxide exposure to bronchoconstriction and increased asthma symptoms, as well as increased emergency room visits and hospital admissions for respiratory illnesses to establish a new one-hour standard (averaged over three years) of 75 ppb); 75 Fed. Reg. 6,474 (Feb. 9, 2010) (establishing a one-hour (averaged over three years) standard for nitrogen oxides at 100 ppb after many studies established connections between short-term exposure and adverse respiratory effects).

B. The Clean Air Act's Framework for Achieving the NAAQS.

Once EPA establishes a NAAQS, the Act provides a detailed framework for how states must attain—and remain in—compliance with it. Shortly after it promulgates a NAAQS, EPA must designate regions of each state as either violating the NAAQS (nonattainment areas) or meeting the NAAQS (attainment areas). 42 U.S.C. § 7407(d)(1); *see also* EPA Br. at 5-9. Subject to EPA approval,

[6] EPA must also promulgate secondary standards to protect against adverse welfare effects. *Id.* § 7409(b)(2).

states are responsible for developing state implementation plans (SIPs) and adopting the enforceable source-specific emission limitations and air quality rules necessary for compliance with the NAAQS and other Clean Air Act requirements, including protection of scenic views in many of America's most treasured public lands. 42 U.S.C. § 7410(a), (k).

SIPs must include enforceable "emission limitations," *id.* §§ 7410(a)(2)(A), (a)(2)(C), 7602(k), which must apply on a "continuous basis." *Id*. § 7602(k). In attainment areas, states must adopt continuous emission limitations to maintain compliance with the NAAQS. Mem. to Docket EPA-HQ-OAR-2012-0322 (Feb. 4, 2013) (Legal Memo) at 14 n.41 (JA____) (citing § 7410(a)(2)(A) & (C); 40 C.F.R. § 51.112; *Train v NRDC*, 421 U.S. 60, 78-79 (1975)). In nonattainment areas, SIPs must include comprehensive emission inventories, and a program that assures reasonable further progress toward attainment of ambient air quality standards. *See, e.g.*, 42 U.S.C. § 7502(c); *see id.* §§ 7501-7515. In all areas, SIPs must prevent industrial sources, like power plants and refineries, from emitting pollutants that significantly contribute to nonattainment in or interfere with maintenance by another state. *Id.* § 7410(a)(2)(D)(i)(I). Thus, SIPs and the emission limitations they contain are integral to the fundamental statutory purpose of protecting public health.

Recognizing the key role emission limits play in assuring compliance with the NAAQS and other Clean Air Act requirements, Congress authorized both EPA and citizens (including state and local governments) to enforce them judicially. 42 U.S.C. §§ 7413(b) (authorizing EPA to file suit in district court against polluters who violate "any requirement or prohibition of an applicable implementation plan"), 7604(a) (authorizing "any person" to file suit in district court against polluters who violate "an emission standard or limitation under this chapter"); *see also id.* §§ 7602(e) (defining "person"), 7604(f) (for purposes of § 7604, defining "emission standard or limitation under this chapter"). Congress gave courts "jurisdiction" to impose an injunction or assess penalties for violations, *see* 42 U.S.C. §§ 7413(b), 7604(a); *see also id.* § 7604(f). Congress further specified a list of factors courts must consider, including "the seriousness of the violation" and "the violator's full compliance history," in determining the amount of any civil penalties to assess for any violation. *Id.* § 7413(e)(1).

Congress gave EPA a critical oversight role under section 7410 to approve, disapprove, revise, or correct SIPs. States must submit SIPs to EPA for review and approval, *id.* § 7410(a)(1), and EPA must review SIPs for consistency with the Act's requirements. *Id.* § 7410(k)(3). When a SIP submission does not meet the applicable requirements, EPA must disapprove it. *Id.* § 7410(*l*). The Act also mandates that EPA promulgate its own plan, a federal implementation plan (FIP),

when a state has failed to submit a required SIP to the Agency, failed to submit a complete SIP, or where EPA disapproves a SIP. *Id.* § 7410(c)(1).

The Act also requires EPA to ensure existing SIPs comply with the Act. Section 7410(k)(5) requires EPA to issue a "SIP Call" directing a state to revise its SIP whenever EPA finds the SIP is "substantially inadequate" "to comply with any requirement of" the Act.

II. FACTUAL BACKGROUND

A. SSM Events Have Severe Impacts on Communities.

High concentrations of pollution emitted during SSM events pose a significant threat to public health and deteriorate the quality of life in surrounding communities. Though SSM emissions in many states are not reported, *see* Legal Memo at 23 (JA____) & Envtl. Coal. Comment at 38 n.163 (JA____),[7] in a recent five-year period, Texas industrial sources reported nearly 130,000 tons of sulfur dioxide (SO2), smog-forming volatile organic compounds (VOC), and nitrogen

[7] Citing to a Louisiana Bucket Brigade report finding that over 20 percent of refinery accident reports contain no information about what caused the accident, what was released, how much, and what will be done to prevent future reoccurrences. Common Ground IV at 1, *at* http://labucketbrigade.org/sites/default/files/Common%20Ground%204_1.pdf. JA____.

oxides (NOx) during upset events. EIP Suppl. Comment at 2-3 (JA____-__).[8] Some facilities report roughly two events per week. *See id.* at 3 (JA____).[9]

These frequent large-pollution events cause heartbreaking impacts on fenceline communities, which are often low-income and communities of color. Envtl. Justice Leadership Forum on Climate Change Comment at 1 (JA____) ("The daily proliferation of pollution from multiple sources...reduce the places we work, play and pray into 'unsafe and unhealthy' spaces that we unfortunately have to live in with no recourse."); *see also* JA____-__, ____-__, ____-__, ____-__, ____-__; (comments from environmental justice communities from Alabama, Louisiana, Tennessee, and Arkansas in support of rule).

Personal stories recounting the real-world consequences of SSM events are well-documented in the rulemaking record. Envtl. Coal. Comment at 28-35 (JA____-__); Envtl. Coal. Suppl. Comment at 13-15 (JA____-__); *see* EPA Br. 18; 80 Fed. Reg. at 33,850 & n.21 ("the results of automatic and discretionary exemptions in SIP provisions, and of other provisions that interfere with effective enforcement of SIPs, are real-world consequences that adversely affect public

[8] Citing Letter from E. Schaeffer, Executive Director, EIP, to A. Elkins, Inspector General, U.S. EPA, Re: Emission Events in Texas and Enforcement of the Clean Air Act (May 15, 2014) at 2 (JA____-__).

[9] Citing Emission Event Reports for Tilden Gas Plant, Waha Gas Plant, Keystone Gas Plant, and Goldsmith Gas Plant (JA____-__); Letter from Schaeffer to Elkins, Re: Clean Air Act Enforcement of Excess Emissions and the Affirmative Defense (Apr. 23, 2013) at 2-3 (JA____-__).

health."); *e.g.* Fischer-Bassett Block Club Comment at 1 (JA____) ("We live eight streets over from Marathon Petroleum Refinery. Any time there is an emission release, most residents of my community feel the impact. We are primarily senior citizens."); Concerned Citizens Around Murphy Comment at 1 (JA____) (St. Bernard parish neighborhood around refineries reports detrimental effects from flaring events including "high pitched tones from the added steaming, rumbling and roaring jet-engine type noises from the flares, and the adverse health effects of heavy, strong petroleum or gaseous sulfur odors from the emissions, and the resultant headaches, coughing, burning eyes and nasal passages, sore throat, and negative quality of life."); J. Dalier Comment (JA____) ("My residence [in St. Bernard Parish] is constantly being bombarded with SO2 [sulfur dioxide] and H2S [hydrogen sulfide] emissions….The mortar on my residence has sever [sic] deterioration and the aluminum gutters/facia has black staining which cannot be removed. So one can only imagine what it's doing to your health????"); M. Mclaughlin Comment at 1 (JA____) (describing Tonawanda Coke Company illegally releasing benzene for years near Grand Island New York neighborhood that has "felt the ill effects of this pollution with an alarming increase in cancer and asthma rates"); *see also* Envtl. Movant's Mot. to Intervene at 9-13 and accompanying declarations.

In the predominantly Latino Manchester neighborhood of Houston, Texas, flaring events from refineries and chemical plants cause unbearable odors and leave neighbors with terrible headaches, burning sensations in the nose and throat, soot on the roof and cars and sometimes even cracked walls and windows. Envtl. Coal. Suppl. Comment at 13-14 (JA____-__), Decl. of Yudith Nieto (JA____-__); *see also* Suppl. Hr'g Tr. at 23:17 - 23:20 (JA____) ("people are getting sick, and we are one of the highest numbers of uninsured peoples in these communities which are low-income, communities of color, and disenfranchised"). Similarly, a neighborhood representative from Port Arthur, Texas testified at a public hearing on EPA's proposal:

> Almost on a monthly basis we smell the odors of sulfur, benzene, hydrogen sulfide, sulfuric acid, and many times we don't even know how we're being impacted. It's one thing to understand the impact of benzene. We know it's a known carcinogen. But what about the cumulative impact? How is that impacting my children? How is this impacting my grandkids? How is this impacting my neighbor?

Suppl. Hr'g Tr. at 20:23-21:5 (JA____-__); *see also* Decl. of Hilton Kelly (JA____-__).

In the economically-disadvantaged African-American community of Fairmount in Birmingham, Alabama, excess pollution events from the 100-year old Walter Coke facility are a continuing problem, including for members of PANIC. Envtl. Coal. Comment at 28-31 (JA____-__). Residents routinely notice huge

plumes of pollution coming from the facility, and must frequently wash the soot off their houses and cars, and limit their time enjoying their backyards and porches. *Id.*, Decls. of Charlie Powell, Eunice Webb, and Bobby Hogan (JA____-__, ____-__, ____-__; *see also* GASP Comment (JA____-__). Community members believe that the pollution has caused or exacerbated many health problems in the area, and many have suffered financial losses from plummeting property values over the years. *Id.*

In a predominantly African-American, low-income community in Shreveport, Louisiana, long-time residents have watched a local refinery grow from half a block to twelve blocks. Envtl. Coal. Comment at 33-35 (JA____-__), Decl. of Velma White at ¶ 3 (JA____). Records show a long and troubling history of SSM problems, for example, from 2005 to 2012, a total of 320,869 pounds of unpermitted excess air pollution was released into the community during SSM events. Envtl. Coal. Comment at 34 (JA____).[10] Residents describe physical reactions to the constant flaring events that can last for days, including burning sensations in the nose and throat and nausea, and they are concerned about the myriad of health problems in the community that include skin problems,

[10] Citing Louisiana Bucket Brigade, *Air Emissions - Calumet Lubricants 8 (1214)*, updated link *at* http://www.louisianarefineryaccidentdatabase.org/emission_list.php.

respiratory illness, and cancer. *Id*. at 34-35 (JA____-__); Decl. of Velma White at ¶ 7, ¶ 10 (JA____, ____).

In the 48217 zip code in Detroit, Michigan, the most polluted zip code in the country, one-quarter of the residents live below the poverty line, and cancer and death rates are significantly higher than the rest of the state. Envtl. Coal. Comment at 31-33 (JA____-__). Community members complain that persistent flaring events from nearby refineries disrupt sleep, cause breathing trouble, coat properties in soot, and prevent enjoyment of property and life in general. *Id*.; Decls. of Regina Woodard-Smith and Sherry Griswold (JA____-__, ____-__). One resident used to host barbeques with her family at the house, but she is unable to do that anymore since the smell from the flaring events is overwhelming. Decl. of Regina Woodard-Smith at ¶ 4 (JA____). Another community member of 21 years remembers when flaring events have caused ceiling tiles to fall. Decl. of Sherry Griswold at ¶ 7 (JA____). Two representatives from this Detroit community attended EPA's hearing on the rule. One, who is an asthma educator, testified:

> We know exposure to environmental toxins in a very short period of time, such as five minutes exposure to SO2, sulfur dioxide, can have a significant impact on human health, causing aggravation of asthma and other respiratory illnesses. Unfortunately for our community, we are exposed 24/7 because we live, we work, we play, we worship in our communities. There's only so much I can do as an asthma educator. There's only so many windows that I can close and I can adjust so many events in the environmental walk-through.

Suppl. Hr'g Tr. at 26:21-27:7 (JA____-__). Another community member testified:

> April 2013, we in the community of 48217 experienced a catastrophic event when Marathon [refinery] had an explosion. It rocked the community to its core. The fear of what we were and are going to continuously be exposed to is always constantly on our mind.

Suppl. Hr'g Tr. at 31:21-31:25 (JA____).

B. SSM Events Cause NAAQS Exceedances and Other Air Quality Problems.

Large pollution releases during SSM events, like the ones documented and described above by community members, cause or contribute to poor air quality and exceedances of the ambient air quality standards. Legal Memo at 23 (JA____). For example, a 2010 scientific study found that upset emissions from Texas refineries are large and frequent enough to cause exceedances of short-term NAAQS. Citizens for Envtl. Justice Comment at Attach. 1 at 8 (JA____).[11] Ample evidence shows that upset emissions from individual sources in the Houston area have caused or contributed to ozone exceedances, *id*. at 8-9 n.10 (JA____-__), that refinery emissions have been found to have a significant impact on PM2.5 and regional haze events, *id.* at 9 n.11 (JA____), and air quality modeling of planned startup and shutdown events at a proposed coal-to-gas facility shows violations of the one-hour SO2 NAAQs would occur. Envtl. Coal. Comment at 40 n.169

[11] Citing Britney J. McCoy, Paul S. Fischbeck, & David Gerard, *How Big is Big? How Often is Often? Characterizing Texas Petroleum Refining Upset Air Emissions*, Atmospheric Environment 44 (2010) 4230, 4235.

(JA____), Sierra Club, NRDC Comments on Draft Construction Permit, I.D. No. 021060ACB, for the Proposed Taylorville Energy Center (JA____-__).

C. Public Health and Air Quality Problems Exist Even in Areas Attaining the NAAQS.

Though an attainment or nonattainment designation is a useful marker, an attainment designation does not definitively depict an area's current air quality. For example, EPA has declined to redesignate areas to nonattainment status when air quality deteriorates. *E.g.*, 79 Fed. Reg. 53,008 (Sept. 5, 2014) (denying Sierra Club petition for redesignation of 57 areas as nonattainment for ozone).

Air quality monitoring networks typically vary by state and also have many flaws that allow areas with high pollution levels to escape formal nonattainment designation. The national air monitoring system is limited and haphazard, with some regions having no monitors at all.[12] Monitoring data is scarce in many places because costly air monitors are often not located near major pollution sources. For example, there are no certified ambient air monitors around the four-unit 2,000-megawatt coal-fired Colstrip power plant, the largest source of sulfur dioxide and nitrogen oxide emissions in the state of Montana. Montana Envtl. Information Center Comment (May 13, 2013) at 1 (JA____). Moreover, wind direction changes

[12] *E.g.*, Ambient Air Monitoring Network Assessment Guidance, EPA-454/D-07-001 (Feb. 2007) at 1-2, *at* https://www3.epa.gov/ttnamti1/files/ambient/pm25/datamang/network-assessment-guidance.pdf.

but monitors are sparse and fixed in location. As a result, not all excess emission events are carried to a particular monitoring station. Concerned Citizens around Murphy Comment at 2 (JA____). Thus, air quality monitors often do not accurately reflect the high pollution levels that communities breathe.

Because of problems with the sulfur dioxide monitoring network, EPA indicated that it expected to largely rely on modeling instead of monitoring as the primary methodology for determining attainment in areas with large point sources. 75 Fed. Reg. 35,520, 35,370, 35,551, 35,570. EPA has also noted that "even if monitoring does not show a violation," that absence of data is not determinative of attainment status absent modeling, and that, particularly for larger sources, monitoring in general is "less appropriate, more expensive, and slower to establish." *Id.* at 35,551, 35,570.

Even if NAAQS monitoring were perfect (which it is not), compliance with the NAAQS still leaves room for harmful levels of other air pollution. The NAAQS do not directly target hazardous air pollutants, for example, which are particularly dangerous and which may be released and harm community members without affecting NAAQS compliance at all. EPA recently recognized that certain "non-routine" SSM events cause significant additional cancer and acute threats due to the hazardous air pollutant impacts alone. 80 Fed. Reg. 75,178, 75,187/2-3 (Dec. 1, 2015).

D. Industrial Facilities Can Reduce SSM Events.

Adding to the anger and frustration over the community impacts of these constant releases is the fact that they are avoidable. SSM events are not about technological limitations; they are about investment choices. Recent settlements of citizen suit actions in Texas show that industrial sources can reduce their emissions during startup, shutdown and maintenance and can reduce the frequency of malfunctions. For example, consent decrees with Shell for excess emissions at its Deer Park facility and with Chevron Phillips for emissions violations at its Cedar Bayou facility resulted in requirements for 80-85 percent reductions in emissions due to upsets. EIP Suppl. Comment at 1 and Comment Exs. 1-2 (JA____, ____-__, ____-__); *see also* Citizens for Envtl. Justice Comment, at Attach. 1 at 6-7 (JA____-__) (describing two citizen suit settlements with Texas refineries that included equipment upgrades, enhanced monitoring, penalties and funding for mitigation projects); *see also* W. Freese Comment (JA____) (dirtiest cement plant in North America required to reduce emissions by installing new equipment under consent decree). In enacting the Clean Air Act's citizen suit provision, Congress intended for the threat of enforcement actions, including penalties for violations of emission limits, to serve as an incentive for industries to invest in the maintenance, management, and technologies needed to reduce emissions during all periods of operation, including startup, shutdown and maintenance and to prevent

malfunctions. In practice, however, exemptions and affirmative defenses for violations of emission limits during SSM events have created a perverse disincentive to the proper maintenance of sources and the development of control strategies that are more effective at reducing emissions during SSM events. 80 Fed. Reg. at 33,874.

E. The Difficulties of Citizen Enforcement of the Clean Air Act.

Though Congress intended the Act's citizen suit provision "specifically to encourage 'citizen participation in the enforcement of standards and regulations established under this Act,'" *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (citation omitted), the Clean Air Act is notoriously difficult to enforce. *See, e.g.*, Jim Hecker, The Difficulty of Citizen Enforcement of the Clean Air Act, 10 Widener L. Rev. 303 (2004) (describing in detail author's experience litigating five citizen suits between 1995 and 2004) (Hecker article). Citizen suits under the Act often involve complex technical issues that require many hours of expert and attorney time. *Id*. at 310. SSM exemptions, director discretion provisions, affirmative defenses and vague general duty provisions in SIPs make enforcement even more difficult and expensive. *Id*.; *see, e.g.*, *Env't Texas Citizen Lobby v. ExxonMobil Corp,* 824 F.3d 507 (5th Cir. 2016) (overturning district court decision declining to order any relief after 13-day bench

trial regarding 13,000 days of self-reported violations at Baytown industrial complex).

The Hecker article describes the challenges of litigating a citizen suit case where defendants claimed SSM defenses to 15,000 hours of violations of hydrogen sulfide and sulfur dioxide emission limits (amounting to 1,600 tons of excess pollution) at the Crown refinery in Texas. Hecker article at 307, n.37 (citing *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 791 (5th Cir. 2000)). To evaluate the refinery's defense that emissions during SSM events were not violations, the plaintiffs had to flesh out the vague standards of "whether Crown followed good operation and maintenance practices, whether its violations were avoidable, and whether the monitoring results were representative of actual emissions" by examining hundreds of thousands of pages of evidence and conducting highly technical discussions with process and chemical engineering experts. Hecker article at 308-10. Mr. Hecker explained in a related declaration that "the difficulty of rebutting Crown's SSM defense was a major factor in plaintiffs' decision to settle with Crown," which he estimated saved an additional million dollars in costs and fees to take the case to trial. Decl. of James M. Hecker at ¶ 13; Brief of Petitioners (NRDC Br.) 216, *NRDC v. EPA*, 749 F.3d 1055 (No. 10-1371). Considering the case took about 5000 hours of attorney time, Hecker Decl. ¶ 14, Mr. Hecker concluded that "the factual complexity inherent in a

dispute over whether violations are infrequent and unavoidable, and could have been prevented through acceptable operating and maintenance practices makes it very difficult to bring a Clean Air Act citizen suit in a cost-effective manner." *Id*. ¶ 15.

A dramatic example of a large polluter's abuse of the SSM affirmative defense is Sierra Club's case to enforce violations at Luminant's Big Brown coal-fired power plant in Texas, described in detail in Section I.C.3.c. of the Argument below, where the defendants argued that the power plant's thousands of self-reported opacity[13] exceedances were not violations of the Texas SIP or the facility's Title V permit. EIP Suppl. Comment at 6-9, 12 (JA____-__, ____); *see also* Citizens for Envtl. Justice Comment at 14 (JA____) (describing ExxonMobil's argument in *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.* that there should be a presumption against citizen suit enforcement where state takes no enforcement action for excess emissions (JA____)).

A disadvantaged community's struggle to address frequent SSM events from a large iron and steel manufacturing plant located in Granite City, Illinois illustrates how director discretion provisions interfere with citizen enforcement. Illinois' SIP allows facilities to get advance permission, incorporated into

[13] Opacity is the measurement of a facility's visible emissions that is used as a general indicator of the amount of particulate matter in a plume.

operating permits, to exceed emission limits during SSM events. American Bottom Conservancy (ABC) Comment (JA____-__); 79 Fed. Reg. 55,920, 55,940/2-41/2 (Sept. 17, 2014); 78 Fed. Reg. 12,460, 12,514/2-15/3 (Feb. 22, 2013). The nearest schools to the facility are 95 percent minority and 81 percent qualify for free lunch, and the air quality is some of the worst in the nation.[14] ABC Comment at 5-6 (JA____-__).[15] Though the community has repeatedly raised concerns about the facility's pre-authorization to exceed emission limits during SSM events, and the EPA Administrator has twice objected to the facility's permit on this basis,[16] the permit provisions remain unchanged. *Id*. at 6-9 (JA____-__). The community is left without any recourse to address the facility's recurrent SSM events, which they routinely document in photographs. *Id.* at 9 (JA____); Written Test. of M. Lipeles at 6-16 (JA____-__).

---

[14] The region is in nonattainment for fine particulate matter (PM2.5), ozone and lead. ABC Comment at 1 n.1-3 (JA__-__).

[15] Citing National Center for Education Statistics, Common Core of Data, 2009-2010, *at* http://nces.ed.gov/ccd/.

[16] USEPA Administrator, Order Granting in Part and Denying in Part Petition for Objection to Permit, Petition Number V-2009-03, Jan. 31, 2011, at 39-40, updated link *at* https://www.epa.gov/sites/production/files/2015-08/documents/uss_response2009.pdf; USEPA Administrator, Order Granting in Part and Denying in Part Petition for Objection to Permit, Petition Number V-2011-2, Dec. 3, 2012, at 24-25, updated link *at* https://www.epa.gov/sites/production/files/2015-08/documents/uss_2nd_response2009.pdf.

F. History of EPA's SSM SIP Call Rule.

Loopholes for large pollution events should have never existed in the first place, and fixing the problem is long overdue. SSM provisions were wrongfully approved into many of the original SIPs in the 1970s because EPA simply lacked the resources and experience to review and process the SIPs at that time. 80 Fed. Reg. at 33,843 ("because the EPA was inundated with proposed SIPs and had limited experience in processing them, not enough attention was given to the adequacy, enforceability, and consistency of these provisions. Consequently, many SIPs were approved with broad and loosely defined provisions to control excess emissions."). Starting in 1977, EPA recognized that SSM provisions that provide automatic exemptions for excess emissions violate Clean Air Act requirements, but it did not initiate a broad effort to fix state provisions due to other priorities and resource constraints. *Id*. Sierra Club and other public interest groups have sued EPA several times over this issue, and after courts encouraged Sierra Club to initiate a petition for rulemaking, *Sierra Club v. Georgia Power Co*., 443 F.3d 1346, 1357 (11th Cir. 2006), Sierra Club reviewed SIPs for unlawful loopholes and petitioned EPA to issue a SIP Call.

Sierra Club's petition drew EPA's attention to unlawful SSM provisions in SIPs and explained why each provision conflicted with the Act. (JA____-__). As EPA explains (at 14-15), the agency initially did not propose to call SIPs with

affirmative defenses against civil penalties for malfunction events. But after this Court vacated a materially identical affirmative defense EPA created for national toxics regulations, *NRDC v. EPA*, 749 F.3d 1055, 1062-64 (D.C. Cir. 2014), EPA promulgated a supplemental proposal to call those SIPs as well. 79 Fed. Reg. 55,920; *see* EPA Br. 16 (describing how *NRDC* affected EPA's action). In 2015, EPA finalized its SIP Call leading to the instant challenge by industry groups and select states (collectively Petitioners).

SUMMARY OF THE ARGUMENT

The communities the Clean Air Act aims to protect from harmful pollution include the socially and economically disadvantaged neighborhoods experiencing the real-world consequences of SSM events. Because facilities emit pollution in massive quantities over relatively short durations during SSM events, they cause severe and disproportionate impacts on communities adjacent to the plants. The personal stories shared by community members in Houston, Birmingham, Shreveport, Detroit, and other impacted communities about how SSM pollution events cause devastating impacts to their everyday lives is crucial context for EPA's rule.

SSM events occur far too frequently at many large industrial facilities without consequence because SIPs contain exemptions, director discretion provisions and affirmative defenses. EPA's rule requiring states to revise SIPs that

contain these unlawful provisions will help address the burdens shouldered by the fenceline communities. Because the problematic SIP provisions violate the Act's bedrock principles, EPA's SIP Call was compelled by the Clean Air Act.

SIP provisions that exempt SSM events from emissions limitations automatically or through director's discretion provisions violate the fundamental requirement that SIPs contain enforceable and continuous emission limitations. This core requirement helps to ensure that the ambient air quality standards are achieved, and communities are protected from the harmful impacts of pollution. Exemptions prevent community members from exercising their statutory right to protect themselves against unlawful emissions by seeking judicial remedies for massive and frequent pollution events from neighboring facilities.

Petitioners' argument that exemptions are lawful because vague "general duty" provisions provide continuous control is wrong. Such provisions cannot satisfy applicable stringency requirements, like the Act's mandate for "best available control technology" for new and modified major sources in attainment areas. In addition, generic duty provisions cannot be part of a continuous emission limitation because they are not legally or practically enforceable. Citizens can enforce only specific and quantifiable SIP provisions. At the very least, such provisions are sufficiently ambiguous and troublesome in practice that EPA's determination that they interfere with effective enforcement was reasonable.

EPA's interpretation of the Act as barring affirmative defenses against civil penalties and other redress for emission standard violations is not only reasonable, it is required by the Act. Affirmative defenses that prohibit courts from imposing penalties if certain conditions are met conflict with the clear requirements of the Act: the Act unambiguously gives citizens the right to sue polluters who violate SIP emission limits, gives courts the exclusive power to levy civil penalties and provide other forms of relief against such violators, and requires the court to consider specific factors in making that determination. State-created, EPA-approved affirmative defenses illegally take away federal courts' authority to determine appropriate relief by considering the factors Congress required them to consider. Additionally, as demonstrated in numerous case examples, affirmative defenses frustrate effective enforcement of the Act even in the most egregious cases. In fact, some of the Texas Petitioners have relied on the affirmative defense to avoid liability in a recent Clean Air Act citizen suit, despite thousands of self-reported exceedances of emissions limitations.

Because EPA found the SIP provisions at issue conflict with Act's fundamental requirements that emission limits be enforceable and continuous, that citizens have the right to sue polluters who violate emission limits, and that courts have jurisdiction to decide the amount, if any, of penalties for violations, the Act's SIP-call provision mandated that EPA require states to revise the unlawful

provisions. EPA's interpretation of its duty under the Act's SIP-call provision to require revisions when SIPS are "substantially inadequate" to meet the Act's requirements is sound and consistent with the structure and history of the Act. Indeed, EPA's reading that SIPs must conflict with "fundamental" requirements of the Act before they are substantially inadequate actually gives states more leniency in their SIPs than the statutory language requires. Petitioners' argument that EPA's authority under the SIP-call provision is limited to noncompliance with the NAAQS ignores the Act's express language, and is further based on outdated concepts that precede the 1990 amendments. SIPs must not only demonstrate compliance with the national standards, they must also satisfy other requirements of the Act. EPA properly used its SIP-call authority to require states to revise the SSM provisions that violate the Act's fundamental requirements, and that have allowed bad actors to burden neighboring communities with large pollution events for decades unchecked.

ARGUMENT

I. The Called SSM Provisions Violate the Unambiguous Requirements of the Clean Air Act.

A. SSM Exemptions and Director's Discretion Provisions Violate the Act's Requirements.

EPA explains (at 35-61) why automatic and discretionary exemptions violate the bedrock principles of the Act that SIPs must contain "enforceable emission limitations," 42 U.S.C. §§ 7410(a)(2)(A), which must apply on a "continuous basis." *Id*. § 7602(k); *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008). The requirement for "continuous" emission limitations means that "temporary, periodic, or limited systems of control" do not comply with the Act. *Sierra Club*, 551 F.3d at 1027 (quoting H.R. Rep. No. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170). Yet that is precisely what an exemption from emission limitations allows—temporary, periodic, or limited controls on emissions of air pollution. Congress gave states no authority "to relax emission standards on a temporal basis." *Id.* at 1028. Exemptions thus are illegal under the Act.

As the Court confirmed in *U.S. Sugar Corp. v. EPA*, "exempt[ing] periods of malfunction entirely from the application of the emissions standards…is [not] consistent with the Agency's enabling statutes," 2016 WL 4056404, No. 11-1108

at *14 (D.C. Cir. July 29, 2016), and "EPA had no option to exclude these unpredictable periods." *id*. at *15.

The Act's requirement for continuously enforceable emission limitations is vitally important for protecting public health. *See* EPA Br. 38-39 ("Without an enforceable emission limitation which will be complied with at all times, there can be no assurance that ambient standards will be attained and maintained." (quoting 80 Fed. Reg. 33,901/3)). Indeed, as explained above, SSM events release huge amounts of pollution that can cause exceedances and violations of NAAQS. *See supra* Statement of the Case; *id*. § II.B (*e.g.*, one known event released 165,000 pounds of sulfur dioxide). Because of the limited air quality monitoring network, violations of the NAAQS may escape official notice, *see supra id.* § II.C, but the harmful effects of SSM events nonetheless burden the neighboring communities, *see supra id.* §§ II.A, C. To prevent these deleterious outcomes and to serve the Act's primary purpose—protecting public health—Congress required that emission standards apply continuously.

Congress further required continuously applicable emission limitations to ensure citizens would have meaningful access to the "remedy provided by [the Act's citizen-suit provision] to assure compliance with emission limitations and other requirements of the Act." H.R. Rep. No. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1171. Yet SSM exemptions leave communities without

any ability to seek relief from the courts even when large facilities repeatedly release massive amounts of pollution that exceed the normal emission limitations. *See supra* Statement of the Case §§ II.A-C.

Congress made clear that these continuous emission limitations must be enforceable by citizens. Indeed, the Clean Air Act expressly authorized citizen suits over violations of "an emission standard or limitation under this chapter." 42 U.S.C. § 7604(a)(1). It specifically defined "emission standard or limitation" to mean "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard" "which is in effect under…an applicable implementation plan." *Id.* § 7604(f) (emphasis added). Congress further defined the "terms 'emission limitation' and 'emission standard'" to "mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." *Id.* § 7602(k). Congress also defined "the term 'applicable implementation plan'" to "mean[] the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410… and which implements the relevant requirements of this chapter." *Id.* § 7602(q). Thus, read together, these provisions mean that citizens have the right to bring suits in federal court over violations of EPA-approved, state-established requirements for limiting emissions of air pollutants. *See Lopez v. Gonzalez*, 549 U.S. 47, 56 (2006) ("[O]ur interpretive

regime reads whole sections of a statute together to fix on the meaning of any one of them…."); *Sierra Club v. EPA*, 551 F.3d at 1027 (reading definitions section of Clean Air Act, § 7602, together with other section); *see also* EPA Br. 91-92. Because exemptions remove citizens' ability to enforce emission limitations, they contravene the Act.

Given the Clean Air Act's requirement that emission limitations apply continuously, its health-protective purpose, and Congress's plain intent to create a right to citizen enforcement of all state-established SIP emission limitations, EPA could not lawfully allow these exemptions to remain.

B. Vague General Duty Provisions Are Unlawful Because they Are Not Legally or Practically Enforceable.

Petitioners claim that exempting SSM events from numerical limits is appropriate and lawful because "general duty" SIP provisions provide continuous control during all modes of source operation. Ind. Br. 38-40; State Br. 22-23. This claim lacks merit. *See* EPA Br. 68-84. Not only do such generic provisions fail to meet the level of control required by the applicable stringency requirements, such as reasonably available control technology (RACT) in nonattainment areas, best available control technology (BACT) for certain sources in attainment areas, and best available control technology (BART) for sources impacting regional haze, *see* EPA Br. 69-73, generic duty provisions are not legally or practically enforceable,

as required by the Act. 42 U.S.C. § 7410(a)(2)(A) (SIPs "[shall] include enforceable emission limitations"). EPA Br. at 73-75, 78 n.27.

Congress recognized that protecting public health requires that emission limitations be readily and actually enforceable. In 1970, it explained that "attainment of ambient air quality is possible only through the enforcement of precise and objective emission controls." S. Rep. No. 91-1196, at 21, 91st Cong., 2d Sess. (Sept. 17, 1970). As part of this enforcement scheme, the Act provides for citizens to have easy access to courts to improve the efficacy of the protections established under it. 42 U.S.C. § 7604(a), (f); *see also Train v. NRDC*, 510 F.2d 692, 700 (D.C. Cir. 1975) ("The legislative history of the Clean Air Act Amendments reveals that the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced."). Thus, enforcement of emission limitations, including citizen enforcement of emission limitations, is a cornerstone of the Act's goal of protecting public health.

Congress, however, carefully cabined citizen suits to violations of clear standards, requiring plaintiffs to allege a violation of "a specific strategy or commitment in the SIP." *Coal. Against Columbus Ctr. v. City of New York*, 967 F.2d 764, 769 (2d Cir. 1992) (citations omitted). Congress intended that a citizen suit "would not require reanalysis of technological or other considerations at the

enforcement stage." S. Rep. No. 91-1196, at 36. Since general duty provisions are not quantifiable or objective, they run afoul of these limitations and thus conflict with congressional intent that citizens be able to enforce emission limitations contained in SIPs.

As EPA explains (at 76-78) and State Petitioners confirm (at 26), no source can ever be held liable for violating many of the general duty provisions at issue in the SIP call rule. When there can be no liability for violating a provision, the provision is not enforceable. It thus is not an enforceable emission limitation, and accordingly, the SIP unlawfully lacks continuous emission limitations. *See supra* Argument § I.A; *see also U.S. Sugar*, 2016 WL 4056404, at *15 (rejecting polluters' argument that EPA should have created a "work-practice…standard for malfunction periods" because "[a]ny possible standard is likely to be hopelessly generic").

Indeed, because courts refuse to enforce unquantifiable standards, attempts to enforce general duty and other work practice provisions in SIPs have been unsuccessful. *See Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561, 1566–67 (N.D. Ga. 1994) ("[O]bjective, numerical standards [are] of the type susceptible to citizen suit enforcement."). For example, in *McEvoy v. IEI Barge Servs., Inc.*, the court affirmed the dismissal of a suit by community members arguing that coal dust that drifted onto their properties from an outdoor coal pile violated Illinois SIP

provisions prohibiting air pollution and visible emissions of fugitive particulate matter beyond the source's property line. 622 F.3d 671, 678 (7th Cir. 2010). The Seventh Circuit found both provisions to be unenforceable, explaining that the prohibition provision "is little more than the commandment 'thou shall not pollute,'" and held that "this broad, hortatory statement" "is not an 'emission limitation' or 'emission standard,' which § 7602(k) tells us must limit 'the quantity, rate, or concentration of emissions.'" *Id.* Thus, the court held "we do not think that this statement of principle is the type of "standard" or "limitation" for which Congress provided a cause of action in § 7604(a)(1)(A)." *Id.* The court also found the fugitive particulate matter regulation lacked "metrics that are susceptible to objective evaluation in court." *Id*. at 680.

Similarly, in *Freeman v. Cincinnati Gas & Electric Co*., the court dismissed a suit alleging that the coal-fired Zimmer generating station in Moscow, Ohio violated two "general-duty" type provisions of the Ohio SIP, O.A.C. §§ 3745-15-07 (prohibiting air pollution nuisance) and 3745-15-06 (requiring source to report malfunctions). 2005 WL 2837466, 2005 U.S. Dist. LEXIS 42525 (S.D. Ohio Oct. 27, 2005). Relying on a previous case holding that "violations of vague emissions prohibitions ... are not subject to redress by means of a citizen suit," the court held plaintiffs could not "enforce such non-objective standards." *Id*. at *4-5 (citing to *Helter v. AK Steel Corporation*, No. C-1-96-527, 1997 U.S. Dist. LEXIS 9852

(S.D. Ohio Mar. 31, 1997) (unpublished)). Though subsequent cases analyzing these same provisions held otherwise, *e.g. City of Ashtabula v. Norfolk S. Corp.*, 633 F. Supp. 2d 519, 529, n.3 (N.D. Ohio 2009), the inconsistent rulings support EPA's determination that states must clarify ambiguous general duty provisions to avoid "misunderstanding and thereby interfer[ing] with effective enforcement." 80 Fed. Reg. at 33,943.

C. The Act Unambiguously Bars Affirmative Defenses Against Remedies for Violations of Emission Standards.

Petitioners argue that the Clean Air Act requires EPA to allow "affirmative defenses" so polluters who violate emission limitations can avoid consequences that Congress expressly directed federal district courts to enforce. Petitioners' arguments lack merit because the Act unambiguously bars such affirmative defenses.

1. The Logic of *NRDC* Confirms that Affirmative Defenses Are Illegal.

EPA correctly reasoned that the logic of *NRDC*, 749 F.3d at 1062-64, decides this case. In *NRDC*, this Court held that it is the courts that have jurisdiction to determine the civil penalties that apply in judicial proceedings brought against any entity that violates "an emission standard or limitation under this chapter," 42 U.S.C. § 7604(a)(1). *NRDC*, 749 F.3d at 1063-64. This holding logically excludes any other entity from determining those civil penalties by

creating an affirmative defense that prevents the courts from applying penalties pursuant to the statutorily prescribed factors, 42 U.S.C. § 7413(e)(1). The Court relied on only two Clean Air Act provisions: § 7604(a), which gives federal district courts "jurisdiction…to apply any appropriate civil penalties" in suits by citizens; and § 7413(e)(1), which specifies the factors federal district courts "shall take into consideration" "[i]n determining the amount of any penalty to be assessed under this section or section 7604(a)." *NRDC*, 749 F.3d at 1062-64. Both these provisions apply broadly and, as noted above, cover suits over violations of emission standards or limitations established in SIPs. 42 U.S.C. § 7604(f).

Though the affirmative defense at issue in *NRDC* was established by EPA in an emission standard under § 7412,[17] the *NRDC* Court did not even cite section 7412 in striking down the affirmative defense, 749 F.3d at 1062-64. *NRDC*'s logic applies broadly to any citizen-enforceable emission standard under the Act. *See U.S. Sugar Corp.*, 2016 WL 4056404, at *14 (characterizing *NRDC* as broadly rejecting all EPA-adopted affirmative defenses against civil penalties).

Petitioners contend, based on *NRDC*'s footnote 2, that *NRDC* doesn't apply for emission standards in SIPs, *e.g.*, Ind. Br. 56; State Br. 35-36; *see also* Texas Br.

[17] *See* Ind. Br. 55-56 (implying that *NRDC* applies only to EPA-established standards under § 7412); *see also, e.g.*, State Br. 35 (same); Texas Br. 3 n.1 (so claiming).

6-7 (discussing footnote in statement of case), but that judicially modest footnote does not help them. There, the *NRDC* Court said:

> The Fifth Circuit recently upheld EPA's partial approval of an affirmative defense provision in a State Implementation Plan. *See Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013). We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan.

749 F.3d at 1064 n.2. As EPA explained, the Court simply avoided ruling expressly on—or expressing any opinion about—the issue at hand in this case, as that issue was not directly presented. 80 Fed. Reg. 33,854/1; 79 Fed. Reg. 55,932/1; *see also Fried v. Hinson*, 78 F.3d 688, 692 (D.C. Cir. 1996) ("Precedent and prudence limits comment on questions not essential to a decision"). Thus, contrary to State Petitioners' claim (at 36), the footnote says nothing about whether the *NRDC* Court's reasoning controls the outcome of this case.

As *NRDC* shows, the text of the Clean Air Act plainly demonstrates Congress's intent to give federal courts – not EPA or state agencies – the authority and obligation to determine what penalties (if any) are appropriate in enforcement case. The *NRDC* Court's reasoning applies with equal force in the context of citizen suits alleging violations of SIP emission limits, and equally to any remedy Congress gave courts jurisdiction to order. EPA therefore correctly applied it here. As explained below, the Act unambiguously gives courts the power to levy civil penalties and provide other forms of relief against facilities that violate emission

standards, and thus any state-initiated (and EPA-approved) diminution of that power violates this bedrock tenet of the Act.

2. The Text of the Act Unambiguously Prohibits Affirmative Defenses for SSM Events.

EPA's interpretation of the Act as barring affirmative defenses against Clean Air Act remedies for emission standard violations is not only reasonable, *see* EPA Br. 88, it is compelled. Congress gave "any person" the right to bring Clean Air Act enforcement cases over violations of emission standards established in SIPs, and gave "[t]he district courts" exclusive jurisdiction to hear such cases, "enforce such an emission standard or limitation," and "apply any appropriate civil penalties." 42 U.S.C. § 7604(a), (a)(1)(A), (f); *see also id.* § 7413(e)(1) (providing mandatory factors for court to consider "[i]n determining the amount of any penalty to be assessed under this section or section 7604(a)").

As the *NRDC* Court held, § 7604(a) "creates a private right of action, and as the Supreme Court has explained, 'the Judiciary, not any executive agency, determines "the scope"—including the available remedies—'of judicial power vested by' statutes establishing private rights of action.'" 749 F.3d at 1063 (emphasis in original; quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013)). Any SIP that is enforceable under § 7604 has been approved by EPA. *See, e.g.*, *Comm. for a Better Arvin v. EPA*, 786 F.3d 1169, 1174-75 (9th Cir. 2015).

Thus, contrary to the Act's grant of exclusive jurisdiction to the judiciary, when a SIP includes an affirmative defense, EPA has claimed authority to determine the scope of judicial power. That is illegal. *E.g.*, *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("EPA is a federal agency—a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress…. If EPA lacks authority under the Clean Air Act, then its action is plainly contrary to law and cannot stand."); *see also* EPA Br. 95-96.[18]

Petitioners claim that, under the Clean Air Act, states can establish (and EPA cannot reject) affirmative defenses against civil penalties that bind federal district courts in suits by citizens against polluters who violate state-established emission standards. *See* Ind. Br. 60; State Br. 34; *see also* Ind. Br. 52 (suggesting that Petitioners' arguments about affirmative defenses extend beyond defenses that apply to civil penalties). Just as affirmative defenses created directly by EPA are unlawful, however, so too are affirmative defenses created by states and approved

[18] As EPA explains (at 86-87), § 7413(b) gives EPA authority to file civil suit against those who violate SIP requirements, including emission standards, and gives federal district courts jurisdiction to provide injunctive relief and civil penalties, which courts must assess after considering the factors listed in § 7413(e)(1). Section 7413(b) is thus just like § 7604(a), which also is a jurisdictional grant to federal district courts. Accordingly, the Act also prohibits EPA from approving an affirmative defense that limits a court from applying an Act-authorized remedy in an enforcement action EPA brings. *See* EPA Br. 87-92.

into SIPs by EPA. *See* EPA Br. 89-90 ("enforcement structure" of Act bars affirmative defenses in SIPs). Indeed, Congress unambiguously expressed its intent that courts determine the amount, if any, of civil penalties to assess in citizen suits over violations of emission standards in SIPs on a case-by-case basis, leaving no room for states to create or EPA to approve affirmative defenses. Congress made clear that: (1) citizens can sue over violations of emission standards established by SIPs, 42 U.S.C. § 7604(a)(1), (f); (2) district courts determine the amount, if any, of civil penalties to assess against the violator, *id.* § 7604(a); *NRDC*, 749 F.3d at 1063 (holding that provision "clearly vests authority over private suits in the courts, not EPA") (emphasis in original)); and (3) the court must consider specific factors in making that determination, 42 U.S.C. § 7413(e)(1). Because "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).[19]

[19] To the extent Petitioners contend the Act authorizes affirmative defenses against remedies other than civil penalties, *see* Ind. Br. 52 (alluding to fact that affirmative defenses "typically" apply to civil penalties); *but see id.* 53-59 (specifically discussing affirmative defenses against civil penalties); State Br. 35-37 (same); Texas Br. 8-12 (same), that argument similarly lacks merit. Congress authorized citizens to sue over violations of emission standards contained in SIPs, and gave courts "jurisdiction" "to enforce such an emission standard or limitation." 42 U.S.C. § 7604(a). Nothing in the Act gives EPA or states authority to limit the courts' power over any remedy. *See NRDC*, 749 F.3d at 1063 (discussing *City of Arlington*, 133 S. Ct. at 1871 n.3).

Affirmative defenses purport to prohibit federal district courts from imposing penalties so long as their conditions are met. *See, e.g.*, 30 Tex. Admin. Code § 101.222(b)-(e); *see also id.* § 101.222(a). For example, a court that concluded penalties are appropriate based in part on "the economic benefit[s] of [the] noncompliance," and "the seriousness of the violation"—as § 7413(e) plainly authorizes—would nonetheless be barred from imposing penalties on a violator that satisfies a SIP's separate requirements for the affirmative defense. That is contrary to the system Congress enacted to drive down emissions of harmful air pollutants. *See* S. Rep. No. 101-228, at 373 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3756 (giving district courts authority to levy civil penalties in citizen suits because "assessment of civil penalties for violations of the Act is necessary for deterrence, restitution and retribution" (emphasis added)).

Affirmative defenses undermine the efficacy of the citizen suit provision, and, with it, the effectiveness of the Act. Indeed, Environmental Intervenors provided examples of how polluters have abused affirmative defenses to frustrate enforcement of the Act even in cases with thousands of self-reported exceedances of emission limitations. EIP Suppl. Comment at 6-9, 12 (JA____-__, ____); *see also* Citizens for Envtl. Justice Comment at 14 (JA____); *see supra* Statement of the Case section II.E (describing difficulties encountered in citizen suits in cases involving SSM exemptions and affirmative defenses). Affirmative defenses against

civil penalties cannot stand because meaningful enforcement tools, including civil penalties, are integral to ensuring that emission standards are met, the air is cleaned, and people's health is improved—the core goal of the Clean Air Act. *See* 42 U.S.C. § 7401(b)(1); *see also Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1288 (D.C. Cir. 2000) ("[A]n important purpose of the Act is to ensure effective enforcement of clean air standards." (emphasis in original)).

3. Petitioners' Attempts to Dodge the Clear Text and Case Law Are Meritless.

Industry (at 56-60) and State (at 36) Petitioners principally seek to evade the unambiguous meaning of §§ 7604 and 7413(e)(1) by advancing three basic arguments—none of which has merit. First, they insist that state-adopted emission limits are somehow different from EPA-adopted emission limits,[20] and that § 7410 somehow authorizes affirmative defenses against civil penalties. Second, Petitioners mischaracterize *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013), as somehow foreclosing EPA's SIP Call. Third, Petitioners argue even if *Luminant* did not preclude EPA's SIP Call, the Texas affirmative defense

[20] Industry Petitioners also rely (at 53-55) on EPA's prior position that affirmative defenses against civil penalties were lawful. EPA's prior, unlawful, position is irrelevant because the Act unambiguously precludes it. *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("[P]revious statutory violations cannot excuse the one now before the court. We do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation." (internal quotation marks and alteration omitted)).

provisions do not, in fact, alter or eliminate federal court jurisdiction to hear a citizen suit or assess civil penalties. Texas Br. at 5; 12-13. Petitioners are wrong on the facts and the law.

a. Section 7410 Does Not Authorize Affirmative Defenses Against Civil Penalties.

Relying on § 7410(a)(2)(A) and (C), Industry Petitioners wrongly contend that the Act's requirement that states create "'emission limitations and other control measures' that are 'necessary or appropriate'" and "develop 'a program to provide for the enforcement of the measures'" authorizes affirmative defenses by its "plain language." Ind. Br. 57-59 (quoting 42 U.S.C. § 7410(a)(2)(A), (C)); *see also* State Br. 36 (relying on § 7410(a)(2)(C)). This Court already rejected an analogous argument in *NRDC*. In that rulemaking, EPA argued that it was authorized to adopt emission standards and the affirmative defense was merely "part of the emission standard." 77 Fed. Reg. 42,368, 42,379/3 (July 18, 2012); EPA, National Emissions Standards for Hazardous Air Pollutants: Portland Cement, Summary of Public Comments And Responses (Dec. 20, 2012) (EPA Portland Cement Summary)[21] at 124 ("EPA's view is that the affirmative defense is part of the emission standard and defines two categories of violation."); *see also id.* at 124-25 (contending that because the Act "allows the EPA to

[21] https://www.regulations.gov/document?D=EPA-HQ-OAR-2011-0817-0846.

establish…'enforceable emission limitations,'" EPA could promulgate an affirmative defense). EPA advanced this argument in its *NRDC* brief, too. Brief of Respondents (EPA *NRDC* Br.) 51, *NRDC v. EPA*, 749 F.3d 1055 (No. 10-1371) (arguing that though citizens may enforce emission standards, "[t]he Act…allows EPA to establish such emission standards and associated requirements").

The argument made no headway in *NRDC*, and it is equally meritless here. Affirmative defenses are not emission limitations or control measures: they are not "a requirement…which limits the quantity, rate or concentration of emissions of air pollut[ion]," 42 U.S.C. § 7602(k), or any type of control at all. They are ancillary provisions that purport to limit the liability of a source of air pollution when it violates an emission limitation. *See NRDC v. EPA*, 489 F.3d 1364, 1373-74 (D.C. Cir. 2007) (holding that ancillary provisions are not emission standards).

Nor is an affirmative defense authorized by the Act's requirement that states create "a program to provide for the enforcement of [emission limitations]," 42 U.S.C. § 7410(a)(2)(C). Indeed, this Court has rejected the similar notion that EPA's enforcement powers authorize it to abrogate citizen enforcers' statutory rights. *See Kelley v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994). Petitioners do not explain how an enforcement program—a phrase naturally read as a plan or scheme for exercising the police power to put emission limitations into effect, *Webster's Seventh New Collegiate Dictionary* 275, 680 (1971)—encompasses creating an

affirmative defense that is not actually used for enforcing anything, but instead only eliminates a remedy for a violation.[22] The Act itself expressly specifies the remedies available and the way a court is to assess civil penalties when a polluter violates an emission standard contained in a SIP. *See* 42 U.S.C. §§ 7413(b), (e)(1), 7604(a), (f). It is unreasonable to conclude that Congress allowed states to undermine those remedies through the requirement that states develop an enforcement program. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not…hide elephants in mouseholes.").

A separate attempt by State Petitioners to distinguish *NRDC* also fails. They claim (at 36) that the Court held the affirmative defense illegal "not just because of" §§ 7413(e)(1) and 7604(a), but also "because EPA failed to identify any textual authority to create an affirmative defense" and instead relied on its general rulemaking authority under § 7601(a)(1). Yet the *NRDC* Court noted that EPA's reliance on § 7601(a)(1) was an "alternative[]" argument that failed because the Act was not ambiguous about who gets to decide whether penalties are

[22] Even if the enforcement program requirement were somehow ambiguous about whether it authorized a state to create an affirmative defense that bound courts, EPA's interpretation of the requirement as not so authorizing states would be entitled to deference.

appropriate: courts do. 749 F.3d at 1063-64. Sections 7413(e)(1) and 7604(a) together thus formed a freestanding basis for holding the affirmative defense unlawful, and they are no more ambiguous in this context than they were in *NRDC*.

In *NRDC*, this Court already considered and rejected several other Industry and State Petitioners' arguments. Industry and State Petitioners argue that state-created affirmative defenses do not conflict with the approach Congress took in §§ 7604(a) and 7413(e)(1) to have district courts determine what civil penalties, if any, to assess by considering a specific list of factors because the § 7413(e)(1) factors "only apply…once the court has found a SIP violation subject to penalties has occurred," Ind. Br. 58, or because those provisions do not say when penalties are "appropriate" or whether a state can decide that "penalties are not appropriate for certain SIP violations," State Br. 36. In *NRDC*, EPA similarly contended that the § 7413(e)(1) criteria apply only if the affirmative defense is overcome because penalties are "appropriate" according to EPA. *See* EPA *NRDC* Br. 50-51; *id.* 55 ("The Court never reaches the section [74]13(e) criteria…in a case where a judge finds that the affirmative defense applies."). The *NRDC* Court dismissed EPA's argument: "EPA argues that its proposed affirmative defense simply fleshes out the statutory requirement that penalties be applied only when 'appropriate.' But under this statute, deciding whether penalties are 'appropriate' in a given private civil suit

is a job for the courts, not for EPA." 749 F.3d at 1063. This Court should reach the same conclusion.

State Petitioners further claim (at 36) that affirmative defenses do not conflict with the Act because whether "penalties are 'appropriate'" is purportedly "distinct from the 'amount' of penalties if a monetary penalty is appropriate." In *NRDC*, EPA made the same claim that appropriateness "is not a question of amount," EPA *NRDC* Br. 51, but the claim could not salvage the affirmative defense there, *see* 749 F.3d at 1064 (vacating affirmative defense). It must fail here, too.

b. *Luminant v. EPA* Does Not Preclude EPA's SIP Call.

Relying on an out-of-context reading of a single footnote, Petitioners mischaracterize the Fifth Circuit's *Luminant* decision as somehow foreclosing EPA's action here, at least with regard to Texas's SIP and other jurisdictions in the Fifth Circuit. *See* Ind. Br. 11 (claiming *Luminant* is "[b]ased on the plain language of" § 7413 and citing 714 F.3d at 853 n.9), 58-59 (claiming *Luminant* "flatly rejected" the interpretation EPA advances here and citing 714 F.3d at 853 n.9); Texas Br. 7-12 (relying on *Luminant*, 714 F.3d at 853 n.9 to argue that *Luminant* precludes SSM SIP Call in Fifth Circuit because court purportedly did not defer to EPA); *see also* State Br. 35 (citing and glossing *Luminant*, 714 F.3d at 853 n.9). As EPA explains (at 99-101), however, *Luminant* was decided at *Chevron* step two,

and EPA can revise its interpretation of a statute found ambiguous by a federal court, so long as it explains the reasons for doing so. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005); *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012). EPA's SIP Call easily satisfies that standard.

All the *Luminant* Court did via its footnote 9 was accept EPA's interpretation at the time that affirmative defenses are consistent with the Act's penalty assessment factors provision, § 7413(e)(1), and reject the argument that the provision unambiguously bars affirmative defenses.[23] *See* 714 F.3d at 852-53 & n.9 (applying *Chevron* step two analysis); *see also United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1844 (2012) (plurality opinion) (reviewing entire context of prior case, rather than just isolated quotation, to determine whether prior case found statute unambiguous). To be sure, the Fifth Circuit should not have deferred to EPA, for affirmative defenses are unambiguously unlawful.[24] *See supra*

[23] The *Luminant* opinion does not address the Clean Air Act's citizen suit provision, § 7604(a), upon which this Court relied in *NRDC*, 749 F.3d at 1062-64.

[24] For example, the *Luminant* Court wrongly found that § 7413(e)(1) was ambiguous because it "does not discuss whether a state may include in its SIP the availability of an affirmative defense against civil penalties for unplanned [startup, shutdown, or malfunction] activity." 714 F.3d at 852. That analysis assumes that so long as the Act does not explicitly say whether EPA has authority, the Act is ambiguous. This Court rejects such analysis. *NRDC*, 749 F.3d at 1064 (quoting *Rwy. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc)); *accord, e.g.*, *Shays v. FEC*, 414 F.3d 76, 108 (D.C. Cir. 2005);

Argument § I.C.2; *cf.* Texas Br. 11. But EPA urged the *Luminant* Court to defer to it, claiming that the relevant affirmative defense did not implicate the courts' jurisdiction, Br. of Resp. EPA 14-16, 26-35, *Luminant*, 714 F.3d 841 (No. 10-60934), and the Court in fact deferred, *Luminant*, 714 F.3d at 851-53; *see also id.* 856-57 (deferring to EPA's rejection of certain affirmative defenses); EPA Br. 106-07. Thus, even if *Luminant* were correctly decided—which it was not—it would in no way foreclose the SSM SIP Call. EPA Br. 99-107.

c. One of the Texas Petitioners Has, in Fact, Relied on SSM Affirmative Defense Provisions to Limit Federal Court Authority to Remedy Clean Air Act Violations.

Finally, the Texas Petitioners argue that even if *Luminant* did not preclude EPA's SIP Call, the fact that plaintiffs have brought citizen suit enforcement actions in Texas proves that affirmative defense provisions do not, in fact, alter or eliminate federal court jurisdiction to hear a citizen suit or assess civil penalties or any other form of relief for violations of SIP emission limits. Texas Br. 5; 12-13 (citing *Sierra Club v. Energy Future Holding Corp.*, No. 12-cv-108-WSS, 2014 WL 2153913 (W.D. Tex. Mar. 28, 2014)). This argument is belied by one of the Texas Petitioners' arguments to the contrary in *Energy Future Holdings*, and the

---

Am. Petroleum Inst. v. EPA, 52 F.3d 1113, 1120 (D.C. Cir. 1995); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *see also Friends of the Earth v. EPA*, 446 F.3d 140, 146 (D.C. Cir. 2006) (refusing EPA request that Court follow Second Circuit in rejecting plain meaning of Clean Water Act because D.C. Circuit's case law on statutory interpretation differs from Second Circuit's).

district court's misunderstanding and misapplication of the Texas affirmative defense in that case.[25]

In *Energy Future Holdings*, Sierra Club brought a citizen suit against the owners and operators of the Big Brown power plant in Texas for thousands of self-reported violations of emission limitations for opacity, a measure of particulate matter. The emissions released during those events constituted 15-20 percent of Big Brown's total annual particulate emissions. *Id*. at *3. Those excess opacity and particulate matter emissions often include a variety of toxic metals, such as lead, mercury, arsenic, and selenium, which have been causally linked with serious health and environmental problems.[26] The pollution from Big Brown's opacity exceedances resulted in elevated hourly particulate matter concentrations in the surrounding community. In fact, the Big Brown exceedances caused particulate matter concentrations at nearby residences that were as high as four to five times the usual ambient background particulate matter concentrations for the area.[27]

[25] The Luminant Generation Company and Big Brown Power Company, LLC (the Luminant Petitioners) own and operate the Big Brown power plant, and joined the state of Texas and several other industry petitioners (collectively, the Texas Petitioners) in challenging EPA's SIP Call. The Luminant Generation Company was a co-defendant in *Sierra Club v. Energy Future Holdings Corp*.
[26] Trial Tr. at 57:1-58:2, 324:8-21, 326:4-21.
[27] Trial Tr. at 427:7 - 430:24, *Sierra Club v. Energy Future Holdings Corp,* No. W-12-cv-108 (W.D. Tex. filed Mar. 22, 2014), ECF No. 271.

Despite these real-world impacts, one of the Texas Petitioners argued in *Energy Future Holdings* – contrary to their newly-adopted argument in this appeal—that a Texas Commission for Environmental Quality (TCEQ) determination that a source has satisfied the affirmative defense criteria was equivalent to a determination that "no violations occurred," and even took the position that a citizen suit plaintiff "cannot undermine the [TCEQ's affirmative defense] findings through a federal CAA citizen suit." *See* Def's Mot. for Award of Fees, *Sierra Club v. Energy Future Holdings*, No. 12-cv.108-WSS (W.D. Tex. Apr. 9, 2014), ECF No. 275 at 7 (emphasis added). Indeed, without denying that the Big Brown plant had thousands of self-reported exceedances of the relevant SIP and permit limits for opacity, Luminant explicitly argued in *Energy Future Holdings* that Sierra Club could not obtain summary judgment on liability due to the Texas affirmative defenses:

> Sierra Club's motion for partial summary judgment—claiming to seek only a "liability" ruling—is premised on the false notion that the MSS affirmative defenses applicable to Big Brown are "limited to penalties, and [do] not affect Defendants' liability." . . . To the contrary, the defenses by their plain terms apply to "all claims in enforcement actions" "other than . . . actions for injunctive relief." *See* 30 Tex. Admin. Code § 101.222(e), (h) (emphasis added). Thus, the affirmative defenses go to the claim itself and not simply to the remedy as Plaintiff contends.

Def's Resp. to Sierra Club's Mot. for Summ. J., *Sierra Club v. Energy Future Holdings*, No. 12-cv.108-WSS (W.D. Tex. July 9, 2012), ECF No.

32 at 13 (emphasis and alteration in original). In other words, Luminant argued that TCEQ's SSM affirmative defense determinations did, in fact, shield a defendant from liability under the Act.

At the conclusion of trial, the district court concluded that the TCEQ affirmative defense determinations did, in fact, alter the court's authority to find liability for self-reported exceedances of SIP emission limits, ruling from the bench:

> It does seem to the Court that what the plaintiff seeks is for this Court to overrule the extensive and complete findings of the Texas Commission on Environmental Quality which is designed to and does regulate facilities such as Big Brown the defendant in this case. I don't think that's normally an appropriate function of federal courts and certainly – it's certainly something I decline to do and it's something that should only be done in extraordinary circumstances. It would be the finding of the Court that plaintiff has not proved by a preponderance of the evidence that the defendant has violated the Clean Air Act.

Trial Tr. at 574, *Sierra Club v. Energy Future Holdings Corp,* No. W-12-cv-108 (W.D. Tex. filed Mar. 22, 2014), ECF No. 271. In its final written order on the merits, the district court included other reasons for denying the plaintiff's claims on the merits, but continued to rely on TCEQ's affirmative defense determination to hold that penalties were not appropriate. 2014 WL 2153913, at *8, 12-13.

Thus, despite the Texas Petitioners' assertions that affirmative defense provisions do not alter federal courts' authority to enforce violations, one of the

very same parties has, in fact, relied upon the Texas affirmative defense provisions to argue that a federal court's authority to find liability or impose penalties under the Clean Air Act was limited. In any case, and as EPA explains in the SIP call rule, even if citizens can still attempt to bring federal enforcement actions, the "mere existence of enforcement actions does not negate the fact that affirmative defense provisions interfere with effective enforcement of SIP emission limitations" under section 304. 80 Fed. Reg. at 33,870 (emphasis added).

II. EPA Properly Exercised Its Authority to Issue a SIP Call for the Unlawful SIP Provisions.

Petitioners' finally argue that even if the various SIP provisions violated requirements of the Act, EPA still exceeded its limited authority to fix those illegal provisions. Petitioners' attempts to limit EPA's oversight authority expressly provided in the SIP-call provision in section 7410(k)(5) lack any statutory or even persuasive policy basis. In relevant part, section 7410(k)(5) provides: "Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate . . . to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies." There is no requirement that EPA make any specific findings other than the plan is "substantially inadequate" to comply with "any" requirement of the Clean Air Act. As EPA did here, it must identify the specific

requirements that are not being met and assess whether the plan is "substantially" (*i.e.*, "essentially" or "without material qualification," Black's Law Dictionary 1597 (4th ed. 1951)) "inadequate" (*i.e.*, "insufficient" or "lacking…in conformity to a prescribed standard," *id.* at 902) to comply with that requirement. The revisions required are those that are "necessary to correct the inadequacies."

There is no textual requirement in the Clean Air Act that a SIP-call that is based on a state's failure to comply with requirements of the Act also be based on a finding that the plan is creating serious air quality problems such as a failure to attain or maintain the NAAQS, *see* State Br. 13-18; that is a separate and distinct basis for demanding a plan revision. *See* § 7410(k)(5) (requiring SIP Call if EPA finds plan inadequate "to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport . . ., or to otherwise comply with any requirement of [the Act]") (emphasis added); *see also* EPA Br. 117-18. Nor is there any language suggesting that once EPA finds specific requirements of the Act are not met, EPA must still assess whether the plan as a whole otherwise complies with most of the Clean Air Act or with the goals of the Act. *See* Ind. Br. 24-26. The 10th Circuit came to the same obvious conclusion: "On its face, the statute says nothing about whether the agency is required to make a specific factual finding about a state's current SIP before calling the SIP." *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1167 (10th Cir. 2012).

Turning then to the reasonableness of EPA's interpretation, Environmental Intervenors note that EPA's interpretation of § 7410(k)(5) is actually even more forgiving of state failures than the statutory language demands. The statute indicates that Congress intended states to comply with all requirements of the Act and that the failure to comply with "any" requirement "shall require the State to revise the plan." EPA, here, suggests that even though "substantially" only modifies the inadequacy of the SIP to comply with a requirement, it has extended the "substantial" modifier to the nature of the noncompliance and the importance of the requirement being violated. *See* EPA Br. 112-13 (interpreting substantially inadequate "in light of the specific purpose for which the SIP provision at issue is required, and thus whether the provision meets the fundamental CAA requirements applicable to such a provision") (quoting 80 Fed. Reg. at 33926/2). Thus, instead of just assessing whether the SIP is substantially incapable of complying with the requirements of the Act, EPA is also limiting itself to such noncompliance that goes to fundamental purposes of the Act – a limitation that is not on the face of the statute. Requiring states to correct SIP provisions that limit or chill citizens' ability to enforce the Act thus falls easily within EPA's authority under the Act.

Underlying both Petitioners' baseless reading of the statute, and, to a lesser degree, EPA's compromise reading, is an outdated notion of the "cooperative federalism" enshrined in the Act. *See, e.g.*, Ind. Br. 4; State Br. 4-5. Petitioners

would have this Court believe that Congress intended EPA to set national ambient air quality standards and then step aside and defer to the choices made by states on how to best protect their residents and industries. *See, e.g.*, Ind. Br. 25 (asserting that EPA cannot object to particular provisions so long as the plan achieves the national standards). Petitioners' arguments rely heavily on the *Train* and *Union Electric* decisions from the mid-1970s for the antiquated notion that Congress deferred all specific decisions to the states "so long as the ultimate effect…is compliance with national standards"). *See* Ind. Br. 25 (quoting *Train*, 421 U.S. at 79); *see also id.* at 29 (quoting *Union Electric Co. v EPA*, 427 U.S. 246, 269 (1976), for the proposition that the Act gives states "the power to determine which sources would be burdened by regulation and to what extent"). At the outset, Petitioners' selective citation of these cases is inaccurate because the cases hold that SIPs must not only provide for timely attainment and maintenance of NAAQS but "also satisf[y] [§ 7410's] other general requirements." *Train*, 421 U.S. at 79 (emphasis added); *see Union Elec.*, 427 U.S. at 265. Petitioners also rely on *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), but this Court has explained that, even in that case, the Court "did not suggest that under [§ 7410] states may develop their plans free of extrinsic legal constraints," including those contained in the Act. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1047 (D.C. Cir. 2001).

Moreover, Petitioners' vision of how the Act operates ignores the history of failures that led to multiple amendments and the plain statutory requirements of the Act as presently constructed. This Court in *South Coast Air Quality Management District v. EPA*, (*SCAQMD)* recounts the history of the Act that led to the current version as amended in 1990. *See SCAQMD*, 472 F.3d 882, 886-87 (D.C. Cir. 2006). As the Court explained, "the [pre-1990] approach, which specified the ends to be achieved but left broad discretion as to the means, had done little to reduce the dangers of key contaminants." *Id.* Among the many reasons for the failure of the old approach to achieve healthy air, Congress found states had failed to implement controls they had committed to in their state implementation plans, had failed to enforce controls, had granted variances to control measures, and had failed to require additional controls when it became clear that the required measures were not as effective as assumed. S. Rep. No. 101-228, at 11. "For example, the GAO study reported that EPA identified 13 plants in the Charlotte area in 1985 that were emitting more VOCs than regulations allowed. EPA also found that the county had granted variances to some operations without EPA approval." *Id.*

Congress's unwillingness to rely on the "old ends-driven approach that had prove[d] unsuccessful," *SCAQMD*, 472 F.3d at 887, is reflected in the specific minimum requirements added throughout the Act. For example, before the 1990

amendments, section 7502(b)(3) required state implementation plans to achieve "reasonable further progress [in reducing annual emissions]…including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology." 42 U.S.C. § 7502(b)(3) (1989). The 1990 Amendments no longer allow such open-ended planning and now specify for moderate and more polluted ozone areas the minimum sources that must be subject to reasonably available control technology, *id.* § 7511a(b)(2), and the minimum emission reductions that must be achieved in the interim years leading up to the attainment deadline. *Id.* § 7511a(b)(1)(A). Congress was no longer willing to give states unfettered "power to determine which sources would be burdened by regulation and to what extent." *Cf. Union Elec.*, 427 U.S. at 269. The 1990 Amendments include a long list of specific measures that certain states must adopt including vehicle inspection and maintenance programs, fuel requirements, transportation control measures, controls on specific pollutant precursors, and more prescriptive permitting requirements. *See, e.g.*, 42 U.S.C. §§ 7511a(b)(3), (b)(4), (b)(5), (c)(2)(C), (c)(3), (c)(4), (d), (e)(3), and (f) (measures for ozone nonattainment areas); 7512a(a)(6), (b)(2), (b)(3) (measures for carbon monoxide areas); 7513a(e) (measures in particulate matter nonattainment areas).

Demonstrating compliance with the national standards is not the sole measure for approval. Under the 1990 Amendments, state implementation plans in nonattainment areas must not only provide for meeting the standard, but must also "meet the applicable requirements of part D." § 7410(a)(2)(I). EPA, for its part, cannot approve a plan if it "interfere[s] with any applicable requirement concerning attainment…or any other applicable requirement of this chapter." § 7410(*l*) (emphasis added).[28] This independent obligation to meet Congress's specified requirements in addition to demonstrating attainment is further highlighted in section 7407(d)(3)(E), added by the 1990 Amendments, which now provides that EPA cannot redesignate a nonattainment area as an attainment area unless it finds not only that the area has attained the national ambient air quality standard, but also that "the State containing such area has met all [of the] requirements applicable to the area under section 7410 of this title and part D of this subchapter." § 7407(d)(3)(E).

The obligation to comply with the Act's requirements does not depend on whether the state's illegal approaches are nonetheless working. And while Petitioners might try to distinguish nonattainment area obligations from the

[28] Indeed, courts have repeatedly upheld EPA's authority to disapprove elements of state plans that fail to comply with requirements of the Act, and to impose federal requirements in their place. *See, e.g.*, *Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116 (10th Cir. 2009); *Montana Sulfur v. EPA*, 666 F.3d 1174 (9th Cir. 2012); *Michigan Dep't of Envtl. Quality v. EPA*, 230 F.3d 181 (6th Cir. 2000).

situation in attainment areas, there is no textual basis for reading section 7410(k)(5) to require one set of findings for nonattainment areas and some other set of findings for attainment areas. Moreover, even attainment areas are subject to minimum control requirements and not just a general duty to maintain compliance with the national standards. *See, e.g.*, 42 U.S.C. §§ 7470-7479 (outlining minimum control requirements for permits in attainment areas); 7491 (requiring minimum controls for visibility protection). For all of these requirements on states, EPA is obligated to oversee and ensure state compliance. *See id.* §§ 7410(k)(5) and (*l*). EPA's reading of its authority under section 7410(k)(5) is not only reasonable in light of the plain language, it is the only reading presented to this Court that is consistent with the structure and history of the Act.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

DATED: August 29, 2016

Respectfully submitted,

/s/Andrea Issod
Andrea Issod
Joshua D. Smith
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5544
andrea.issod@sierraclub.org
joshua.smith@sierraclub.org

Counsel for Sierra Club, Citizens for Environmental Justice, and People Against Neighborhood Industrial Contamination

/s/Patton Dycus (w/permission)
Patton Dycus
Environmental Integrity Project
1000 Vermont Avenue, NW
Suite 1100
Washington, DC 20005
(202) 296-8800
pdycus@environmentalintegrity.org

Counsel for Environmental Integrity Project

/s/Seth L. Johnson (w/permission)
Seth L. Johnson
James S. Pew
Earthjustice
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036
(202) 667-4500
sjohnson@earthjustice.org
jpew@earthjustice.org

/s/Paul Cort (w/permission)
Paul Cort
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
(415) 217-2000
pcort@earthjustice.org

Counsel for Sierra Club

/s/John Walke (w/permission)
John Walke
Emily Davis
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 289-2406
jwalke@nrdc.org

Counsel for Natural Resources Defense Council

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), the foregoing Brief of Environmental Intervenors contains 13,415 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: August 29, 2016

/s/Andrea Issod
Andrea Issod
Counsel for Environmental Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2016, a copy of the foregoing Brief of Environmental Intervenors was served electronically through the Court's CM/ECF system on all registered counsel.

/s/Andrea Issod
Andrea Issod
Counsel for Environmental Intervenors