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## Air quality monitoring during “exceptional events”

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# Air Quality Monitoring during “Exceptional Events”: A Challenge to the EPA’s Final Rule in *Natural Resources Defense Council v. Environmental Protection Agency*

## INTRODUCTION

On March 20, 2009, the D.C. Circuit held that the Environmental Protection Agency’s (EPA) definition of “natural event” as used in the Clean Air Act’s (CAA) exceptions to air quality monitoring standards was not subject to judicial review,<sup>1</sup> nor were statements in the final rule’s preamble reviewable.<sup>2</sup> The court found that the Natural Resources Defense Council (NRDC) could not challenge the final rule for three reasons. First, NRDC’s comment to the proposed rule failed to adequately specify the portion of the proposed rule it was arguing against, and thus the objection was unreviewable.<sup>3</sup> Second, the court held that the preamble was insulated from review because it used conditional and equivocal language.<sup>4</sup> Finally, the statements in the preamble were not ripe for review because NRDC failed to show the statements had immediate legal or practical consequences.<sup>5</sup>

## I. EXCEPTIONAL EVENTS

Since 1977, EPA regulations have documented the need for a flagging system for air quality monitoring data affected by “exceptional events.”<sup>6</sup> A 2005 amendment to the CAA required the EPA to promulgate regulations governing such exceptional events.<sup>7</sup> In the amended statute, Congress defined “exceptional event” as an event that

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1. *Natural Res. Def. Council v. EPA*, 559 F.3d 561, 563 (D.C. Cir. 2009).
2. *Id.* at 564–65.
3. *Id.* at 564.
4. *Id.* at 565.
5. *Id.*
6. Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13,560, 13,562 (Mar. 22, 2007) (to be codified at 40 C.F.R. pts. 50–51).
7. 42 U.S.C. § 7619(b) (2006).

“(i) affects air quality; (ii) is not reasonably controllable or preventable; (iii) is an event caused by human activity that is unlikely to recur at a particular location or natural event; and (iv) is determined by the Administrator . . . to be an exceptional event.”<sup>8</sup> The EPA adopted this statutory language in its final rule,<sup>9</sup> but the rule also went on to define “natural event” as “an event in which human activity plays little or no direct role.”<sup>10</sup>

The final rule governing exceptional events also listed and examined several examples, some in its preamble, of what the EPA believes to be and what it may later determine to be exceptional events.<sup>11</sup> Within the examples, the EPA states that it believes natural disasters and associated clean-up activities may be considered exceptional events since they would qualify as one “natural event.”<sup>12</sup> The clean-up activities associated with major natural disasters will be allowed a 12-month timeframe, after which time a State may submit a request for an extension in order for the event to remain classified as a natural event.<sup>13</sup> Additionally, the final rule notes that such clean-up activities may also be flagged as due to an exceptional event, and not just part of a natural event.<sup>14</sup>

## II. OPINION AND DISSENT IN *NRDC v. EPA*

Judge Randolph, writing for the D.C. Circuit, found NRDC’s challenges to the EPA’s final rule unreviewable due to NRDC’s failure to satisfy the CAA’s exhaustion requirement and to meet threshold requirements of justiciability.<sup>15</sup> Judge Rogers, writing in dissent, believed NRDC had met its burden regarding the exhaustion requirement and thus would test the validity of the “natural event” definition.<sup>16</sup> She concurred with the court’s justiciability determination.<sup>17</sup>

Concerning the exhaustion requirement, the majority reasoned that NRDC’s challenge to the final rule was unreviewable since NRDC had not raised with “reasonable specificity”<sup>18</sup> its definitional objection during

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8. *Id.* § 7619(b)(1)(A).

9. 40 C.F.R. § 50.1(j) (2009).

10. *Id.* § 50.1(k).

11. Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. at 13,564.

12. *Id.* at 13,565.

13. *Id.*

14. *Id.*

15. *Natural Res. Def. Council v. EPA*, 559 F.3d 561, 563, 564–65 (D.C. Cir. 2009).

16. *Id.* at 569 (Rogers, J., dissenting).

17. *Id.*

18. Section 307 of the CAA states: “Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.” 42 U.S.C. § 7607(d)(7)(B) (2006).

public comment.<sup>19</sup> The court reasoned that NRDC merely objected to the EPA's classification of clean-up activities associated with natural disasters as "natural events," thus framing the objection as simply a complaint about the application of the term "natural event" rather than a challenge to the underlying definition of the term.<sup>20</sup> Articulating the "reasonable specificity" rationale, Judge Randolph emphasized the requirement's purpose of ensuring that the agency and other interested parties are put on notice as to the party's objection.<sup>21</sup> This purpose allows the agency to properly respond to the objection and allows interested parties to contribute to the dialogue.<sup>22</sup> Here, the court reasoned, "no EPA official" would have discerned that NRDC was actually challenging the "natural event" definition in the proposed rule.<sup>23</sup>

In order to avoid "obscure criticism" and "implied challenges," the court stated that a citation to the section of the rule in question or a description of it "may be all that is needed."<sup>24</sup> Additionally, the court raised new fears that vague objections unnoticed by the agency, if able to pass the exhaustion requirement, would leave the agency vulnerable to the argument that the agency acted arbitrarily because it never responded to the comment.<sup>25</sup>

The court found the balance of NRDC's challenge to the final rule nonjusticiable for two reasons. First, statements in the final rule's preamble—which NRDC argued were impermissible examples of per se exceptional events—did not amount to final agency action since the preamble used conditional language in the contested statement.<sup>26</sup> Specifically, the use of the word "may" instead of "will" decisively signaled that the statements were merely general statements of policy instead of binding legal requirements.<sup>27</sup> Second, the court held that the preambular statements about exceptional events were not ripe for review

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19. *Natural Res. Def. Council*, 559 F.3d at 563 (majority opinion).

20. *Id.* at 563–64.

21. *Id.* at 563, 566.

22. *Id.* at 563.

23. *Id.*

24. *Id.* at 564 (citing *Mossville Env'tl. Action Now v. EPA*, 370 F.3d 1232, 1240 (D.C. Cir. 2004) (in an action challenging the lack of beyond-the-floor standards, failure to mention those standards—by name or by the specific provision of the CAA which deals with them—results in a lack of "reasonable specificity"); *Motor & Equipment Mfrs. Ass'n v. Nichols*, 142 F.3d 449 (D.C. Cir. 1998) (finding a failure to exhaust since citation to CAA was unspecific and covered numerous areas)).

25. *Id.*

26. *Id.* at 565.

27. *Id.* (citing *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537–38 (D.C. Cir. 1986)).

since the statements were “hypothetical and non-specific.”<sup>28</sup> NRDC did not persuade the court that any of the statements had direct or immediate consequences; thus the statements are unreviewable until it is more certain what the EPA intends to classify as an exceptional event.<sup>29</sup>

Judge Rogers, dissenting, reviewed the definition on the merits—since NRDC’s comments were “close enough” to put the EPA on notice that the underlying definition was being challenged<sup>30</sup>—and found it passed muster under *Chevron*, but left the question as to whether the application of the term “natural event” to particular circumstances would be permissible for another day.<sup>31</sup> Judge Rogers points out that the statute does not define “natural event,” nor does it specify how to categorize events with predominately natural causes but some human contribution.<sup>32</sup>

### III. ANALYSIS: NATURAL EVENTS, EXCEPTIONAL EVENTS, AND THE INCREASING RISK TO PUBLIC HEALTH

In implementing the CAA, the EPA’s highest priority is protecting public health.<sup>33</sup> The National Ambient Air Quality Standards (NAAQS) ostensibly help achieve this priority by penalizing states containing nonattainment areas.<sup>34</sup> The consequences for nonattainment could include loss of narrowly proscribed federal highway funds or stricter emissions requirements for the area’s industries.<sup>35</sup> Certainly there are events—both natural and anthropomorphic—for which it is reasonable, even necessary, to exclude emissions data when evaluating a region’s compliance with the EPA’s air quality standards. But the final rule now governing exceptional events, taken in part from Congress’s legislation, boldly expands the definition of natural events and exceptional events without adequately addressing public health risks—which do not disappear simply because of changes in terminology.

The consequences from this decision would have been less severe if the EPA had required states to issue public notifications upon an

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28. *Id.* (citing *Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior*, 88 F.3d 1191, 1223 (D.C. Cir. 1996)).

29. *Id.*

30. *Id.* at 567 (Rogers, J., dissenting) (citing *Nat’l Petrochemical & Refiners Ass’n v. EPA*, 287 F.3d 1130, 1139–40 (D.C. Cir. 2002)).

31. *Id.* at 569 (citing *Chevron U.S.A., Inc v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984)).

32. *Id.*

33. 42 U.S.C. § 7619 (b)(3)(A)(i) (2006).

34. *Id.* § 7509.

35. *Id.* §§ 7509(a)–(b). If a sanction is applied, and within six months the deficiency is not corrected, the Administrator shall apply both sets of sanctions. For emissions requirements, the Administrator must set the rate of emission reductions to at least two-to-one for increased emissions in new or modified sources for nonattainment areas.

occurrence of an exceptional event. The EPA has backtracked and has been inconsistent on public health risk mitigation plans related to exceptional events. Originally, the EPA was going to require states, as a condition of excluding emissions data, to submit documentation on actions it took to mitigate the impact of exceptional events.<sup>36</sup> The EPA, however, rescinded that requirement, and now states are free to determine what “reasonable” measures should be taken to protect public health.<sup>37</sup> Meanwhile, the EPA adopted in the same final rule the requirement that approval for prescribed fire exceedences is contingent on the state certifying that it has adopted and is implementing a Smoke Management Program.<sup>38</sup> A similar requirement should, at the very least, be required for clean-up activities.

While local government actors may be adequately responsive and knowledgeable about measures to be taken to protect public health, the basic requirement that mitigation plans be submitted—adding an important layer of process, and thus, to some degree, creating disincentives for non-essential anthropomorphic sources of pollution—is paramount. Under this final rule, it is possible for clean-up activities to occur and exceed the NAAQS, for a year or more, without consequence and without any oversight of public health protections.

Additionally, it would be more consistent with the EPA’s statutorily mandated priorities to attach public health requirements to exceedences of exceptional events, particularly clean-up activities, as a way to protect public health and to better ensure that frivolous clean-up activity is less likely to occur. If the NAAQS carry the lofty goal of measuring the level at which certain kinds of pollution become intolerable to human health, the current regulation of exceptional events undermines this pursuit. In order for expediency and practicality to coexist with public health protections, greater oversight of states’ actions pursuant to NAAQS exceedences endangering public health needs to exist.

#### CONCLUSION

Since the court did not decide NRDC’s main challenge to the final rule on the merits, uncertainty remains as to the viability of the

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36. Treatment of Data Influenced by Exceptional Events, 72 Fed. Reg. 13,560, 13,576 (Mar. 22, 2007) (to be codified at 40 C.F.R. pts. 50–51).

37. *Id.*

38. *Id.* at 13,567.

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definition, particularly when challenged on an as-applied basis. If and when the EPA classifies actual clean-up activity associated with a natural disaster as a natural event, litigation is sure to follow. Looking at the statute's plain meaning, it is hard to imagine a single natural disaster—such as a hurricane, and twelve months of cleanup—as a single and discrete “natural event.” Public health would benefit from a tighter reading of the statute and a return to the protections from pollution afforded by the CAA.

*Adam Shearer*