ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 18-1167

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

Sierra Club,

Petitioner,

v.

U.S. Environmental Protection Agency, et al.,

Respondents.

BRIEF OF *AMICUS CURIAE* AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF RESPONDENTS U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL. AND DENIAL OF PETITION FOR REVIEW

Mara E. Zimmerman
American Petroleum Institute
200 Massachusetts Ave NW
Washington, D.C. 20001
(202) 682-8000

Megan H. Berge
Scott A. Keller
Jared R. Wigginton
C. Joshua Lee
Baker Botts L.L.P.
1299 Pennsylvania Ave NW
Suite 1300
Washington, D.C. 20004
(202) 639-7700

Counsel for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*:

All parties, intervenors, and *amici* appearing in this case are listed in Respondent's and Petitioner's Briefs, except for proposed *amicus curiae* listed above.

Rulings Under Review:

References to the rulings at issue appear in Respondent's and Petitioner's Briefs.

Related Cases:

References to related cases appear in Respondent's and Petitioner's Briefs.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, undersigned counsel provides the following disclosure: American Petroleum Institute (API), founded in 1919, is a national trade association that represents all aspects of America's oil and natural gas industry. API's members include oil producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as supporting service and supply companies. API is a "trade association" as defined by Circuit Rule 26.1. API's mission is to promote safety across the industry globally and to support a strong U.S. oil and natural gas industry. API has no parent corporation, and no publicly held company has 10% or greater ownership in API.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

In accordance with D.C. Circuit Rule 28(a)(3), the following is a glossary of uncommon acronyms and abbreviations used in this brief:

1977 Guidelines	Guidelines for Air Quality Maintenance Planning and Analysis, Volume 10 (Revised): Procedures for Evaluating Air Quality Impact of New Stationary Sources (Oct. 1977).
2018 SILs Guidance	Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program, at 4 (Apr. 17, 2018)
Act	Clean Air Act
Air Quality Standards	National Ambient Air Quality Standards
API	American Petroleum Institute
Modeling Guidance	EPA's "Guidance on Air Quality Models"; 40 C.F.R. pt. 51, app. W.
PSD	Prevention of Serious Deterioration
PSD Increment	Maximum allowable increases in pollutant concentrations.
SIL	Significant Impact Level

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Petroleum Institute (API), founded in 1919, is a national trade association that represents all aspects of America's oil and natural gas industry. API's members include oil producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as supporting service and supply companies. API's mission is to promote safety across the industry globally and to support a strong U.S. oil and natural gas industry.

API has a substantial interest in this case. Members of API are subject to the Prevention of Significant Deterioration (PSD) permitting program of the Clean Air Act when they seek to construct new major sources or to complete major modifications at existing sources. Within this program, the Environmental Protection Agency (EPA) uses Significant Impact Levels (SILs) as a screening tool to determine the scope of modeling that a permit applicant must complete to show compliance with the PSD program, including relevant National Ambient Air Quality Standards (Air Quality Standards) and PSD increments. For new constructions or modifications that would result in emissions below applicable SILs—*i.e.*, *de minimis* levels of emissions—permit applicants are excused from completing expensive and onerous modeling, in part, because such modeling would provide no meaningful environmental benefit. In short, SILs allow API's members to show compliance with the PSD program in a cost-effective manner.

This lawsuit threatens the viability of SILs within the PSD program because Petitioner claims that EPA's use of SILs is unlawful. If Petitioner's claim prevails, API members would no longer be able to rely on SILs to avoid costly modeling when their proposed projects would have a trivial impact on air quality. This modeling would produce no meaningful environmental benefit and could increase the overall costs of and time for obtaining PSD permits. API therefore has a substantial interest in participating in this case to support EPA's continued use of SILs.[1]

SUMMARY OF ARGUMENT

Effectively overseeing a complex, national permitting program requires a high level of ingenuity. In overseeing the Prevention of Significant Deterioration (PSD) permitting program under the Clean Air Act (Act), EPA has demonstrated this ingenuity by, among other things, developing and using significant impact levels (SILs). SILs are expertly determined threshold values permitting agencies may rely on to approve proposed projects with *de minimis* emissions, without forcing applicants to model all sources of emissions within a radius of up to 50 kilometers of the project. The SILs approach—which permitting agencies have lawfully used since the

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* affirm that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than *amicus curiae*, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus curiae* brief, except for Sierra Club which stated that it takes no position.

inception of the PSD program in 1977—provides valuable benefits to applicants and agencies alike. This Court should reaffirm that permitting agencies can continue using SILs as they have for decades, as SILs will preserve these benefits, comport with the law, and are essential to the continued success of the PSD program.

ARGUMENT

EPA and state agencies have long recognized that SILs are necessary and lawful. These agencies depend on SILs to effectively implement the PSD program. And this is especially so for state agencies that are primarily responsible for PSD permitting in their respective jurisdictions.[2] Facing resource constraints and increasing duties to implement myriad legislative directives, agencies regularly exercise their discretion to adopt screening tools like SILs that facilitate efficient resource allocation and decision-making, while preserving environmental benefits. SILs exemplify the pragmatic and lawful product that results when agencies exercise their discretion to this end. EPA's and state agencies' longstanding and lawful use of SILs streamlines the PSD permitting process and provides substantial shared benefits to government agencies and permit applicants throughout the country. SILs and their attendant benefits should not be removed from EPA's regulatory repertoire based on

[2] States administer the PSD permitting program through EPA-delegated authority. EPA does, however, administer the program in limited jurisdictions. *See*, *e.g.*, EPA, Air Permit Delegations in Region 2, https://www.epa.gov/caa-permitting/air-permit-delegations-region-2 (indicating that EPA administers the PSD program for certain tribal lands, the Virgin Islands, and Puerto Rico).

Petitioner's unsubstantiated and non-expert concerns about air quality impacts from *de minimis* emissions.

I. Agencies and Permit Applicants Have Reasonably Used and Relied on Significant Impact Levels (SILs) for Decades.

Over 40 years of agency practice refutes Petitioner's claim that the SILs approach is a "novel methodology disconnected from the statute." Pet. Opening Br. at 1. During this 40-year period, EPA—under both Democratic and Republican presidential administrations—has required a source to have a "significant impact" on ambient air quality before EPA will conclude the source causes or contributes to a violation of Air Quality Standards or PSD Increments.[3] *See* Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program, at 4 (Apr. 17, 2018) (2018 SILs Guidance), JA0005; Guidance Concerning the Implementation of the 1-hour NO_2 NAAQS for the Prevention of Serious Deterioration Program, at 5-6, 11 (June 29, 2010), JA0387-388, 393.[4] "Significant impact" thresholds have been and remain critically important to PSD permit applicants and permitting authorities. They should be preserved.

In 1977, Congress passed, and President Carter signed into law, substantial

[3] Whereas an Air Quality Standard is the maximum allowable concentration of a pollutant (*i.e.*, a concentration ceiling), a PSD increment is the maximum allowable increase in concentration that may occur above the baseline concentration for a pollutant. *See* EPA, Prevention of Significant Deterioration Basic Information, https://www.epa.gov/nsr/prevention-significant-deterioration-basic-information.

[4] https://www.epa.gov/sites/production/files/2015-07/documents/appwno2.pdf.

amendments to the Clean Air Act.[5] These amendments primarily addressed the prevention of significant deterioration of air quality in areas attaining the Air Quality Standards through the creation of the PSD program. *See id.*

Shortly after the adoption of these amendments, EPA issued guidance on evaluating the air quality impacts of new major stationary sources. *See generally* Guidelines for Air Quality Maintenance Planning and Analysis, Volume 10 (Revised): Procedures for Evaluating Air Quality Impact of New Stationary Sources (Oct. 1977).[6] Although the 1977 Guidelines did not use the term SILs in its methodologies, it used a functionally equivalent screening process to show compliance with Section 165(a)(3) of the Act. *Id.* at 1-1 (establishing "a simple screening procedure" to determine whether the proposed source "clearly poses no air quality problem" or "the potential for an air quality problem exists"). Like SILs, the purpose of that screening procedure was to streamline the review process by "eliminat[ing] from further consideration those sources that clearly will not cause or contribute to ambient concentrations in excess of short-term air quality standards." *Id.* at 4-1.

Subsequently, EPA promulgated regulations implementing the 1977 amendments to the Act. *See generally* Prevention of Significant Air Quality Deterioration,

[5] *See* EPA, Evolution of the Clean Air Act, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act#caa77.
[6] https://nepis.epa.gov/Exe/ZyPDF.cgi/2000UOSI.PDF?Dockey =2000UOSI.PDF.

43 Fed. Reg. 26,388 (June 19, 1978), JA0690-712.[7] In that rulemaking, EPA considered whether, under the PSD Program, "a preliminary screening technique should be used to determine if full scale modeling would be necessary for preconstruction review." *Id.* at 26,398, JA0700. EPA acknowledged that state agencies (the entities mainly implementing the PSD program) and the regulated industries favored such a preliminary screening technique "to alleviate resource burdens"; those burdens include "the costs and time involved in sophisticated computer modeling of ambient air impacts." *Id.* EPA decided to retain the screening procedures from the 1977 Guidelines because doing so would "reduce resource burdens where there is little or no threat to the PSD increments or [Air Quality Standards]." *Id.*

Later, in 1980, EPA reaffirmed its continued use of "the concept of significant contribution within the PSD regulations." Memorandum from Richard G. Rhodes, Director, Control Programs Development Division, U.S. EPA, to Alexandra Smith, Director, Air & Hazardous Materials Division, U.S. EPA Region 10, Regarding "Interpretations of 'Significant Contribution,'" at 1 (Dec. 16, 1980), JA0354.[8] Specifically, EPA stated that "[i]f the proposed source or modification has no significant contribution to the nonattainment problem, then the proposed project does not contribute to this violation." *Id.* EPA preserved and further elaborated on this approach

[7] https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1978/6/19/26374-26388.pdf#page=7.

[8] https://www.epa.gov/sites/production/files/2015-07/documents/reaffirm.pdf.

eight years later and has continued to do so since then. *See generally* Air Quality for Prevention of Significant Deterioration (PSD) (July 5, 1988), JA0351-355; *see also, e.g.*, Modeling Procedures for Demonstrating Compliance with $PM_{2.5}$ NAAQS (March 23, 2010);[9] 2018 SILs Guidance, JA0001-21.

Now, four decades after EPA adopted the SILs approach, Petitioner claims that the concept is unlawful and wants it eliminated. The Court should reject Petitioner's belated attempt to undercut the viability and durability of EPA's longstanding use of SILs.

II. SILs Should Be Preserved Because They Provide Valuable Benefits to the Regulated Community, Permitting Agencies, and the Public.

The broadly shared benefits attributable to SILs merit this Court's serious consideration. SILs exemplify the beneficial type of discretionary tools agencies use to eliminate unnecessary regulatory burdens, reduce state agency resource expenditures, and promote the public interest. SILs optimize governmental administration of the PSD Program while sparing projects with *de minimis* emissions from unhelpful and expensive modeling requirements. These benefits, in turn, strengthen local and regional economies by creating job opportunities, promoting infrastructure maintenance, and allowing agencies to reallocate their preserved resources to addressing significant environmental concerns.

[9] https://www3.epa.gov/scram001/guidance/clarification/Official%20Signed%20Modeling%20Proc%20for%20Demo%20Compli%20w%20PM2.5.pdf.

A. SILs Relieve Permit Applicants of Undue Costs Connected with Unnecessary and Unhelpful Modeling.

Petitioner would prefer that all permit applicants complete comprehensive ambient air quality modeling, regardless of the costs or how trivial a project's emissions. *See* Pet. Opening Br. at 20. But Congress did not require that. And Congress assigned EPA, *not Petitioner*, the responsibility of adopting appropriate compliance methods. 42 U.S.C. § 7475(e) (providing permit applicants or states are to complete the "analysis in accordance with regulations of [EPA]."). EPA reasonably adopted both robust modeling requirements for projects that threaten air quality and SILs to screen out projects that do not. SILs protect applicants against the potentially exorbitant costs and delays of comprehensive modeling for projects that would not jeopardize air quality.

The air quality modeling analysis required under EPA's "Guidance on Air Quality Models" (Modeling Guidance) is resource-intensive, regardless of whether agencies screen out a project using SILs. *See generally* 40 C.F.R. pt. 51, app. W. The Modeling Guidance directs applicants to first complete a preliminary, single-source impact analysis to determine whether the proposed project would have a significant impact on air quality. *See* 40 C.F.R. § 52.21(m)(1)(i); Modeling Guidance § 9.2.3(a)(i), (b)-(c); *see also* Office of Air Quality Planning & Standards, U.S.

EPA, *New Source Review Workshop Manual*, at C.24 (draft Oct. 1990).[10] A proposed project will not have a significant impact on air quality—and thus can receive a permit—where modeled project-only emissions are less than relevant SIL values. *But see* Pet. Opening Br. at 13-14 (incorrectly stating that the preliminary analysis does not consider air quality).

The requirements for single-source impact analyses and cumulative impact analyses are drastically different, with the latter being much more complex and imposing significantly greater burdens on the permit applicant and reviewing agency.[11] Unlike single-source impact analyses, cumulative impact analyses require the applicant to, among other things:

- Account for *all sources* of pollutants, including point sources (*e.g.*, other stationary facilities that emit), line sources (*e.g.*, roadways and lines of roof vents and stacks), area and volume sources (*e.g.*, multitudes of minor sources), natural sources, regional transport contributions from more distant sources (domestic and international), and all "other sources" of background emissions. Modeling Guidance §§ 8.2.1(a); 8.3.1(a)(ii).

[10] https://www.epa.gov/sites/production/files/2015-07/documents/1990wman.pdf.

[11] *See Sierra Club v. EPA*, 356 F.3d 296, 305 n.4 (D.C. Cir. 2004), *amended by Sierra Club v. EPA*, No. 03-1084, 2004 WL 877850 (D.C. Cir. Apr. 16, 2004) (acknowledging the scientific and technical complexity of accurately modeling air quality).

- Account for point source characteristics and operating conditions, such as the plant layout, stack parameters, boiler size and type, potential operating conditions, and pollution control equipment parameters. *Id.* § 8.2.1(c).
- Use data on the road layout, including the width of each traveled lane, the number of lanes, and the width of the median strip when modeling mobile emissions. *Id.* § 8.2.1(d).
- Consider traffic patterns like daily cycles of rush hour, differences in weekday and weekend traffic volumes, and changes in the distribution of heavy-duty trucks and light-duty passenger vehicles. *Id.*
- Procure the most appropriate modeling source and meteorological data to input into the model.[12] *Id.* § 8.0(a).
- Establish the modeling domain, or geographic area for which the required air quality analyses will be conducted, which may encompass up to a 50-kilometer radius from the proposed project.[13] *Id.* §§ 8.1.1(a); 8.1.2(a).

[12] EPA imposes "[m]ore specific data requirements and the format required in the user's guide for each allowable model." *See id.*; *see also id.* § 8.4 (imposing significant other requirements for meteorological input data for modeling); *see also Envtl. Def. v. EPA*, 369 F.3d 193, 205 (2d Cir. 2004) (observing that the Modeling Guidance provides only "broad guidance" on modeling and other documents provide greater details).

[13] Other requirements include ensuring the required air quality analysis is carried out within the modeling domain with characterization of source impacts, nearby source impacts, and background concentrations. Modeling Guidance § 8.1.2(a).

These are only some of the requirements related to cumulative impacts analyses, which go far beyond those of single-source impact analyses. Having to develop and acquire all relevant modeling data not just for the proposed project but also for dozens, if not hundreds, of other background sources is a laborious and time-intensive effort—as EPA has long recognized. *See* Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$), 75 Fed. Reg. 64,864, 64,891 (Oct. 20, 2010), JA0803.

Unsurprisingly, cumulative impact analyses are expensive to conduct and much more time-consuming than single-source analyses, causing project delays and potential revenue losses. Industries have noted that conducting a cumulative impact analysis "would take at least an additional year to perform."[14] Project delays and lost revenue may lead to additional harms.[15] Without SILs, PSD permit applicants would unnecessarily be forced to incur the full costs of conducting cumulative impact analyses that would provide no air-quality benefits. *Cf.* 2018 SILs Guidance at 5, JA0006 (SILs "have helped to reduce the burden on permitting authorities and

[14] *See, e.g.*, Western Energy Supply and Transmission Associates, Comment Letter on Proposed Rule, Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$), at 4 (Jan. 21, 2008).

[15] For example, while repairing the upper end of its boiler stack, a mill was able to avoid an 18-month outage and associated layoffs because SILs allowed the mill to efficiently obtain a permit to operate its lower stack during repairs. *See* The NAAQS Implementation Coalition, Comment Letter on the Revised Draft Guidance on Significant Impact Levels for Ozone and Fine Particles in Prevention of Significant Deterioration Permitting Program, at 4 (Sept. 30, 2016).

permit applicants to conduct often time-consuming and resource-intensive air dispersion modeling . . . ."); 42 U.S.C. § 7470(3); *Envtl. Def. v. EPA*, 489 F.3d 1320, 1323 (D.C. Cir. 2007) (explaining that the 1977 amendments were intended not only to protect air quality but also to assure doing so would not impede economic growth).

B. SILs Promote Effective Governance by Reducing Resource Burdens and Prioritizing Environmental Protection Efforts.

Like applicants, permitting agencies must expend significant resources when dealing with cumulative impact analyses. With SILs, however, permitting agencies can bypass the cumbersome review process for cumulative impact analyses where proposed projects would have *de minimis* emissions. SILs thus provide meaningful gains in efficiency and preserve precious agency resources without compromising the agency's mission to protect ambient air quality.

SILs are uniquely important for state and local permitting agencies because they typically have far fewer resources at their disposal to implement the PSD program than EPA.[16] Indeed, after the program became effective, "[m]any State and local agencies expressed a deep concern that to make [all] sources subject to the full PSD requirements . . . would result in an unimaginable number of detailed and resource intensive reviews." 43 Fed. Reg. at 26,381. National SILs address this

[16] This fact does not undercut the importance of the benefits SILs provide EPA in the face of the agency's constantly growing regulatory responsibilities and fluctuating budget.

problem by providing state and local agencies a free and uniform tool for streamlining qualifying projects. *See* Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Minimum Federal Standards*, 20 St. Louis U. Pub. L. Rev. 67, 105–06 (2001) (explaining how federal air quality standards produce "significant scale economies" that eliminate the resource burden of state and local governments to process the data and promulgate the regulations themselves); *see also* 2018 SILs Guidance at 14, JA0015 ("National SIL values . . . eliminate the need to determine local or regional approaches for developing a SIL value . . . .").

EPA's adoption of national SILs also advances the "cooperative federalism" framework, which is a "core principle" of the Act. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511 n.14 (2014). National SILs protect against a patchwork of competing SILs across the country that would impose additional burdens on permit applicants that would have to account for different SIL values and the agencies that would have to develop and defend them. *See Frequently Asked Questions Regarding the February 2011 Proposed Changes to 18 AAC 50* (explaining that the Alaska Department of Environmental Conservation was adopting EPA's interim SIL for SO_2 because it "reduces the burden that would otherwise exist if applicants and the Department had to make a case-by-case SIL decision for each permit

application").[17] EPA, too, has recognized that "a national SIL value promotes consistency in implementation and prevents possible confusion or arbitrary choices that may arise with highly localized SIL values." 2018 SILs Guidance at 14, JA0015.

PSD permitting agencies generally have numerous responsibilities arising under many other environmental programs, including other programs within the Act. By reducing administrative burdens, SILs free up resources that agencies can then allocate to address priorities in the environmental programs they administer to better accomplish their broader missions.[18] When they are afforded this flexibility, agencies can maximize environmental benefits for the communities they serve by focusing on serious environmental concerns.

III. Courts Should Encourage Agencies to Innovate by Adopting Tools Like SILs That Promote Efficient Resource Allocation.

With increasing agency responsibilities and requirements for the regulated community, agency innovation is imperative to maximize resources and reduce regulatory burdens. There are already numerous demands on permitting agencies and requirements for applicants to satisfy. Petitioner wants to pile on even more onerous procedures. But agency innovations and decisions like SILs—that balance

[17] *Available for download at* https://dec.alaska.gov/air/air-permit/permit-regulations/.

[18] SILs can also provide meaningful environmental benefits by accelerating project permitting for, and thereby the construction and operation of, new energy facilities (*e.g.*, natural gas plants) that replace electricity generated from higher-emitting existing facilities (*e.g.*, coal plants).

competing interests and determine the extent of information necessary to show legal compliance—should be respected. *See, e.g., Tsegay v. Ashcroft*, 386 F.3d 1347, 1356 (10th Cir. 2004) (recognizing an agency's broad discretion to "innovate and establish new procedures" in the context of case management).

In the PSD permitting context, agencies must be allowed to decide what evidence establishes compliance. After all, an agency is "in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). Indeed, "[w]ith its broader perspective, and access to a broad range of undertakings, and not merely the program before the court, the agency has a better capacity than the court to make the comparative judgments involved in determining priorities and allocating resources." *Nat'l Cong. of Hispanic Am. Citizens (El Congreso) v. Marshall*, 626 F.2d 882, 889 (D.C.Cir.1979). Accordingly, the agency is the "master of its own house, lest effective agency decisionmaking not occur in [a]ny proceeding . . . ." *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1056 (D.C.Cir.1979) (citation omitted); *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (acknowledging that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities") (citation omitted); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543–544 (1978) (agencies must "be free to fashion

their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (internal quotation marks and citation omitted).

Courts are particularly hesitant to interfere with how an agency "allocat[es] its limited resources for investigations of different aspects of a complex and highly technical regulatory problem" like PSD permitting. *See Natural Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1416–17 (D.C. Cir. 1985). In these contexts, agencies are in the best position to "prioritize sources that are the most significant threats to public health to ensure effective administration of the agency's regulatory agenda." *WildEarth Guardians v. EPA*, 751 F.3d 649, 655 (D.C. Cir. 2014).

SILs exemplify the line-drawing and resource-allocation decisions that are effectively committed to agency discretion. *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214–15 (D.C. Cir. 2013) (affording agencies "'wide discretion' in making line-drawing decisions"). Preserving EPA's discretion in this regard, therefore, is appropriate as a matter of law and necessary as a matter of practicality. Contrary to Petitioner's position, EPA's lawful and longstanding ingenuity merits this Court's praise.[19]

[19] In accordance with Circuit Rule 28(a)(5), the required statutory addendum is attached at the end of this brief.

CONCLUSION

The petition should be denied.

Dated: June 11, 2019

Respectfully submitted,

By: /s/ Megan H. Berge

Mara E. Zimmerman
American Petroleum Institute
200 Massachusetts Ave NW
Washington, D.C. 20001
(202) 682-8000

Megan H. Berge
Scott A. Keller*
Jared R. Wigginton
C. Joshua Lee**
Baker Botts L.L.P.
1299 Pennsylvania Ave. NW, Suite 1300
Washington, D.C. 20004
(202) 639-7700

Counsel for Amicus Curiae

* Admitted only in Texas. Not admitted in the District of Columbia. Practicing under the supervision of principals of the firm who are members of the District of Columbia bar.

** Admitted only in Massachusetts. Not admitted in the District of Columbia. Practicing under the supervision of principals of the firm who are members of the District of Columbia bar.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,638 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Office Word 2016 word processing software in 14-point Times New Roman type style.

Dated: June 11, 2019

Respectfully submitted,

/s/ Megan H. Berge
Megan H. Berge
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and D.C. Circuit Rule 25(c), I hereby certify that on this 25th day of March, 2019, I have served the foregoing Motion for Leave to Participate as an *Amicus Curiae* and supporting *Amicus Curiae* Brief upon all counsel registered to receive service through the Court's CM/ECF system via electronic filing.

Dated: June 11, 2019

Respectfully submitted,

/s/ Megan H. Berge
Megan H. Berge
Counsel for Amicus Curiae