ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, *et al.*,	§	
Petitioners,	§	
v.	§	No. 19-1140 and consolidated cases
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	§	
Respondents.	§	

REPLY BRIEF OF PETITIONERS ROBINSON ENTERPRISES, INC., ET AL.

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GLOSSARY OF ABBREVIATIONS

ACE Rule	The Affordable Clean Energy Rule
CAA	The Clean Air Act
CAF	Center for the American Future (TPPF's legal division)
CEI	Competitive Enterprise Institute
CPP	The Clean Power Plan
CO2	Carbon Dioxide
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NSPS	New Source Performance Standards
PM2.5	Fine Particulate Matter
PM10	Coarse Particulate Matter
SIP	State Implementation Plan
TPPF	Texas Public Policy Foundation

SUMMARY OF ARGUMENT

TPPF and CEI have standing, the former because the ACE Rule impeded TPPF's ability to perform its services to the public, requiring measures to counteract those impediments; the latter because the Rule will increase CEI's electricity costs, as EPA's own analysis shows.

EPA's claim that the instant challenge is an untimely collateral attack on the 2015 NSPS is belied by EPA's own published statements.

Substantively, EPA concedes that carbon dioxide is emitted from numerous and diverse sources and poses a danger to health and welfare. Accordingly, if EPA is to regulate the substance it must proceed first under NAAQS and only then, if necessary, under the supplemental source control program of Section 111.

ARGUMENT

I.

TPPF and CEI Have Standing to Challenge the ACE Rule.

A. The ACE Rule directly injured TPPF, which used its resources to counteract the harm.

An organization suffers injury-in-fact when there is "injury to the organization's activities" causing a "drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). This Court applies *Havens* by asking: (1) "whether the agency's action or omission . . . injured the [organization's] interest," and (2) whether "the organization used its resources to counteract that

harm." *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*").

1. The ACE Rule injures TPPF's interest.

The ACE Rule impedes CAF's ability to perform its TPPF organizational functions because the Rule requires CAF to increase operational costs for counseling, referral, and advocacy services to clients in the energy sector beyond those normally expended. Sindelar Decl. ¶¶ 7-8, 9, 14. *See Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129, 133 (2006) (organization had standing to challenge regulations requiring increased efforts to engage in "counseling, referral, advocacy"); *Fair Employment Council, Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (organization had standing to challenge action burdening its counseling work).

Furthermore, CAF's legal work supporting TPPF's energy initiatives was perceptibly impaired and made more difficult because of the Rule's impact on those initiatives. Sindelar Decl. ¶¶13-14. *See PETA*, 797 F.3d at 1094 (organization dedicated to animal welfare "perceptibly impaired" by USDA's failure to adequately protect birds); *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 265 (1991) (organization had standing to challenge airport authority's master plan that would increase noise, making organization's efforts to reduce airport noise "more difficult").

Furthermore, TPPF's programs promoting Tenth Amendment rights, including CAF's litigation on such issues, have been thwarted because the ACE Rule impermissibly imposes federal emission guidelines upon states, thereby raising the cost and difficulty of TPPF's ongoing efforts beyond those ordinarily expended to protect states' sovereignty. Sindelar Decl. ¶¶ 14. *See Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 936-39 (D.C. Cir. 1986) (organization had standing to challenge regulations which "rais[ed] the cost and difficulty" of organization's work).

These impacts are not "redirect[ion of] some of the organization's resources to litigation and legal counseling," EPA Br. 19, but directly impeded CAF's work. Sindelar Decl. ¶¶ 8-14. *See, e.g.*, *BMC Marketing Corp.*, 28 F.3d at 1276 (conduct making plaintiff's "overall task more difficult" sufficient for injury-in-fact). Nor is this a situation in which CAF merely "expended resources on advocacy." The Rule impaired CAF's ability to perform its work. Sindelar Decl. ¶¶ 9-12. Accordingly, the Rule created a "direct conflict between the defendant's conduct and the organization's mission." *See Abigail Alliance*, 469 F.3d at 133.

Moreover, the injury to TPPF goes beyond injury to its counseling, referral, and advocacy work because an important aspect of the service TPPF provides is itself litigation. Sindelar Decl. ¶ 8. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987) (organization providing litigation services in connection

with deportation proceedings was injured-in-fact by interdiction order impairing daily litigation work). Although *Gracey* held the organization had shown injury-in-fact, the court also held the organization did not satisfy causation because there was no showing that third parties who were interdicted (the Haitian refugees) would have sought the litigation services of the organization had they not been interdicted. *Id.* at 801-803. Here, however, CAF's *ongoing* litigation and counseling services have been impeded by the Rule. Sindelar Decl. ¶9. State and Municipal Respondent-Intervenors ("Intervenors") add that redressability is missing. But if the ACE Rule is vacated, EPA may or may not choose to regulate carbon dioxide under NAAQS. Meanwhile, the *discrete* injury caused by the Rule will have been redressed because TPPF will no longer be adversely impacted by it. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[P]laintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself.").

EPA's citation to *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428 (D.C. Cir. 1995), is inapposite because that decision was based in large measure on its status as a "tax case" where "the standing inquiry is more restrictive than in other cases." *Id*. at 1434. This is not a tax case. *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18 (D.C. Cir. 2015), is likewise inapposite because there the plaintiff "did not suffer an injury . . . because [it] had already received exactly what it sought." *Id.* at 23. Not so here.

2. TPPF used its resources to counteract the harm.

TPPF depleted its resources by taking steps to counteract the organizational harm caused by the ACE Rule. Sindelar Decl. ¶¶9-11. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 29 (D.C. Cir. 1990) ("depletion of resources" to counteract organizational harm sufficient).

B. CEI was injured-in-fact because the ACE Rule will increase its costs

For two reasons, CEI has standing as a consumer of electricity. First, contrary to EPA's assertion, injury for standing purposes does not depend on the magnitude of harm. *Coal. for Mercury-Free Drugs (COMED Inc.) v. Sebelius*, 671 F.3d 1275, 1281-83 (D.C. Cir. 2012) (even small financial losses sufficient).

Second, although EPA argues that CEI's future electricity costs depend on the actions of regulated electricity providers not before the Court, EPA's own RIA projects that the Rule will increase the cost of retail electricity that CEI alleges as an injury. ACE RIA, 3-27, JAXXXX; EPA Br. 192; *see, e.g.*, *NRDC v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006) (EPA's assessment of increased health risk sufficient).

II.

This Is Not An Untimely Challenge to EPA's 2015 Section 7411 Rule.

EPA's position that this lawsuit constitutes an untimely collateral attack on the 2015 NSPS is nonsensical because, at that time, EPA asserted categorically that an endangerment finding under Section 111(b) is based solely on *source categories*

that pose a danger and that, consequently, a pollutant-specific endangerment finding for carbon dioxide was not required. *See* 80 Fed. Reg. 64,529-64,530 (January 8, 2014). If that assertion is true, there would have been no basis for a pollutant-specific, carbon dioxide-focused challenge to the 2015 NSPS.

Furthermore, it is disingenuous to argue that the petitioners should have challenged the 2015 Rule when EPA is taking steps to imminently eviscerate it. *See* 83 Fed. Reg. 65,424 (December 20, 2018). In a status report to this Court dated April 24, 2020, EPA stated it "expects to send the [final regulatory] package to OMB in the early summer of 2020." *North Dakota v. EPA* (No. 15-1381), (Doc. No. 1839810).

III.

Substantively, EPA's Arguments Are Meritless.

Robinson Petitioners do not argue that EPA must regulate carbon dioxide under NAAQS. They do argue that *if* EPA is to regulate a ubiquitous substance like carbon dioxide from stationary sources it must do so "in the first instance" under NAAQS. Robinson Pet'rs' Br. 14.

A. EPA impermissibly squeezed regulation of carbon dioxide emissions into the narrow confines of Section 111.

EPA cannot "order emission source controls instead of promulgating ambient air quality standards." *Nat'l Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 327 (2d Cir. 1976). The Ninth Circuit approvingly cited *Train* for that proposition, *Nat'l*

Audubon Soc'y v. Dep't of Water, 869 F.2d 1196, 1201-02 (9th Cir. 1988), and notwithstanding the protestations of the Intervenors, this Court agrees, *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 847 (D.C. Cir. 1972) (EPA "required" to use NAAQS to regulate air pollutants meeting Section 108's criteria).

Although EPA states that "*Train* is not on point," EPA Br. 196, a close reading shows it is. The court held that EPA was required to treat lead as a criteria pollutant *because* "EPA concedes that lead . . . has an adverse effect on public health and welfare, and that the presence of lead in the ambient air results from numerous or diverse mobile or stationary sources." *Train*, 545 F.2d at 324. Here, EPA has not only "conceded" that carbon dioxide endangers public health and welfare but has made formal findings that the substance poses such dangers when emitted from mobile sources, 74 Fed. Reg. 66,537 (Dec. 15, 2009), and power plants, 80 Fed. Reg. 64,530 (Oct. 23, 2015).[1] And EPA has not and cannot plausibly claim that carbon dioxide is not emitted from "numerous or diverse" sources. *See* 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) (listing numerous and diverse mobile sources of carbon dioxide emissions); 80 Fed. Reg. at 64,523 (listing numerous and diverse stationary sources of carbon dioxide emissions).

[1] EPA now asserts that it made a formal endangerment finding to support the 2015 NSPS even though, at the time the rule was promulgated, it disclaimed the need to do so. EPA Br. 168-69. EPA cannot have it both ways.

Contrary to EPA's assertion, *Train's* proscription against using source controls instead of NAAQS is not dicta but is *Train's* heart:

> The [Supreme Court's] language in *Train* and *Union Electric* [instructs] . . . that . . . [u]nder the scheme of the Act, emission source control is a supplement to air quality standards, not an alternative to them.

Train, 545 F.2d 327.

And neither EPA's nor Intervenors' briefs even attempt to address Robinson Petitioners' six arguments showing that 42 U.S.C. 7411(d)(1) does not authorize EPA to regulate carbon dioxide under Section 111(d) instead of promulgating NAAQS. *See* Robinson Pet's' Br. 13-20.

EPA's citation to *Zook v. EPA*, 611 F.Appx.725, 726 (D.C. Cir. 2015), is unavailing. *Zook* is a one-page, nonbinding, unpublished opinion consisting of an affirmation of the district court's holding, *id*., while the district court itself approvingly cited *Train*. *See Zook v. McCarthy*, 52 F.Supp.3d 69, 74 (D.D.C. 2014).

EPA's citation to *WildEarth Guardians v. EPA*, 751 F.3d 649 (D.C. Cir. 2014), is inapposite because there the Court held that EPA was not required to list coal mines under Section 111's NSPS Program in response to an administrative petition, an issue irrelevant here.

For two reasons, EPA's use of *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("AEP"), EPA Br. 195-97, is ineffective. First, EPA conveniently ignores Robinson Petitioners' argument that *AEP* did not address the issue of

whether EPA could *circumvent* NAAQS by source controls under Section 111. Robinson Pet'rs' Br. 19-20. *See, e.g. United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (judicial decisions do not stand as binding precedent for points not raised, not argued, and hence not analyzed).

Second, the central issue in *AEP* was whether federal common law governing control of air pollutant emissions was displaced by the enactment of the Clean Air Act. The Court held that Congress itself made the decision to displace federal common law and it was not necessary for EPA to complete or even commence regulation of an air pollutant for displacement to have occurred. *AEP*, 564 U.S. 425-26. Thus, *AEP*'s observation regarding carbon dioxide emissions from fossil fuel-fired power plants is not "central to the Court's displacement holding," EPA Br. 196, but is the very essence of dicta. *See Phillips Petroleum Co. v. Fed. Energy Regulatory Com.*, 792 F.2d 1165, 1171 (D.C. Cir. 1986) (Supreme Court dicta "made in passing and without the benefit of briefing or argument" not binding).

Moreover, *AEP* specifically rejected EPA's argument that the Clean Air Act gives it discretion with regard to when and how to regulate air pollutants. *AEP*, 564 U.S. 427 (Act "is not a roving license [to EPA] to ignore the statutory text") (citing *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)).

B. EPA failed to use NAAQS because of the perceived administrative difficulty.

EPA shows its hand when it states there are "good reasons for believing that regulation of greenhouse gases under NAAQS would pose difficulties." EPA Br. 195 n.55. It has been exceptionally difficult for EPA to develop NAAQS, as evidenced by the fact that only six air pollutants have successfully gone through NAAQS in the nearly five decades since the program was enacted. *See*, *e.g.*, Adam Babich, *Back to the Basics of Antipollution Law*, 32 Tul. Envtl. L.J. 1, 33-34 (2018).

EPA acknowledges that the main problem with carbon dioxide is its "uniform atmospheric concentration." EPA Br. 195 n. 55. But if EPA chooses to regulate carbon dioxide, then it cannot reject the sole solution provided by Congress, namely, a rule limiting the "uniform atmospheric concentration" of that substance, which EPA is authorized to promulgate for stationary sources exclusively under the NAAQS program. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (agencies may not exercise authority in a manner inconsistent with the administrative structure and procedures that Congress enacted).

CONCLUSION

For these reasons, the Court should vacate the ACE Rule.

DATED: July 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I hereby certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) and this Court's January 31, 2020, order providing that Petitioner's reply brief not exceed 2,250 words, because this brief contains 2,247 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that 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 Times New Roman 14-point font using Microsoft Word.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed on July 28, 2020, with the Clerk of Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH