



Environmentalists Seek Vacatur Of EPA Decision Delaying NO_x-SO_x NAAQS

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Environmentalists are asking a federal appeals court to vacate EPA's decision to delay a first-time joint secondary national ambient air quality standard (NAAQS) for nitrogen oxides (NO_x) and sulfur oxides (SO_x) to reduce waterbody acidification pending more studies, saying the Clean Air Act requires EPA to issue such a standard.

In a Nov. 30 brief, Center for Biological Diversity, Clean Air Council and National Parks Conservation Association also argue that EPA decided to retain the existing standards despite "ample" evidence to set the novel standard, and that the joint NO_x-SO_x limit is necessary to meet an air law requirement that the agency's NAAQS be "requisite" to protect public welfare.

The agency's initial response in the lawsuit, Center for Biological Diversity (CBD), et al. v. EPA, currently pending before the U.S. Court of Appeals for the District of Columbia Circuit, is due Feb. 12.

The lawsuit challenges EPA's June 1 final rule in which the agency resisted calls by environmentalists, the National Park Service (NPS) and others to set a secondary NAAQS

to better protect waterbodies from excess acidification due to NO_x and SO_x deposition. Secondary NAAQS aim to protect the environment, and primary NAAQS apply to human health. NPS has said the environmental risks of not issuing the standard "far outweigh" EPA's defense of not pursuing it due to scientific uncertainty and the need for more data.

Ahead of the proposed rule's release EPA developed a novel methodology that would have set the standard by measuring the acid-neutralizing capacity of waterbodies, rather than the concentrations of pollutants in ambient air as is currently the case for all NAAQS pollutants. The methodology gauged the ability of a waterbody to respond to acidification from deposits of NO_x and SO_x.

Despite some uncertainty behind the method, the agency's Clean Air Scientific Advisory Committee (CASAC) backed the approach, noting in a May 2011 letter that it "is appropriate for use in determining a secondary standard to help protect aquatic ecosystems from acidifying deposition of oxides of sulfur and nitrogen. EPA staff has done a commendable job in developing the innovative [aquatic acidification index], which provides a framework for a national standard

based on ambient concentrations that also takes into account regional differences in sensitivities of ecosystems across the country to effects of acidifying deposition."

But EPA in the proposed rule deferred any joint NO_x-SO_x standard based on acid neutralizing capacity, instead saying it would launch a five-year pilot research effort on the issue to determine the level of environmental protection that such a standard could offer.

In the final rule EPA adopted that approach while also retaining the existing separate limits of 0.053 parts per million (ppm) for NO₂ averaged over a year, and 0.5 ppm for SO₂ averaged over three hours, not to be exceeded more than once a year. EPA justified its approach on the basis that too many uncertainties remain over the science to take the novel approach. In its response to public comments in the final rule, EPA agreed with many environmentalists' arguments regarding the scientific validity of specific aspects of the novel approach, but said that the uncertainties were too great to implement the methodology for the first-time joint secondary NAAQS.

'Necessary' Secondary NAAQS

In their opening brief, CBD and the other groups challenging the

decision note that EPA in the final rule concluded that acidic deposition from NO_x and SO_x is “damaging sensitive ecosystems, disrupting the aquatic food chain, killing fish (including trout and salmon) and suppressing aquatic life in acidified lakes and streams,” among other harms, and that the existing standards are “inadequate to address these adverse effects on the public welfare.”

EPA Administrator Lisa Jackson’s decision to retain the existing standards, the groups argue, “violated her statutory duty to identify a requisite level of protection for the public welfare” as required by the air law and set a secondary NAAQS “necessary to achieve and maintain that level of protection.”

They say “scientific uncertainties do not excuse EPA from this duty” and that EPA’s finding that the “uncertainty is so great as to prevent any reasoned judgment as to the ‘requisite’ level of protection for public welfare . . . has no support in the law, the record, or EPA’s own explanations.”

Environmentalists also argue that EPA’s claims are inconsistent with the findings of CASAC and EPA staff that there is “ample scientific basis for setting a standard requisite to protect against aquatic acidification.

. . . the Administrator unlawfully, arbitrarily, and without reasoned explanation failed to adopt a requisite standard. The Final Rule must be vacated.”

The American Petroleum Institute and the Utility Air Regulatory Group, both of which supported EPA’s decision to forgo setting the novel standard, have filed to intervene on EPA’s behalf in the suit. Their briefs are due March 14.