



EPA 'Dropped Ball' On Acid Rain Standards, DC Circ. Hears

By Kelly Rizzetta

Law360, New York (June 04, 2012, 8:52 PM ET) -- Four conservation organizations filed petitions in the D.C. Circuit on Friday challenging the U.S. Environmental Protection Agency's failure to adopt new, more comprehensive acid rain protections the plaintiffs say were right at the agency's fingertips.

The two petitions call for the D.C. Circuit to review the EPA's recent decision to uphold the current secondary National Ambient Air Quality Standards for nitrogen and sulfur oxides — the key components of acid rain — despite the fact that the agency acknowledged current regulations are “not ecologically relevant and thus are not appropriate to provide protection of ecosystems.”

“EPA's scientists identified the problem and provided a formula for action, but EPA dropped the ball,” Charles McPhedran, an Earthjustice attorney representing three of the petitioners, said in a statement Monday.

The petitions target the final action the EPA took on March 20 — which was logged in the Federal Register on April 3 — in which it decided against using the newly devised aquatic acidification index, a multipollutant standard intended to address the effect of acid rain on waterways, forests and wildlife.

The index — which Center for Biological Diversity senior attorney Kevin Bundy touted as “innovative” — marks a departure from previous standards in that it does not merely put a cap on the release of certain chemicals that contribute to acid rain based on their concentrations in the air.

Instead, the EPA's experts started at the ground level, where they first determined how much of each acid rain compound ecosystems could tolerate. Then, they worked backward to arrive at an acceptable air quality standard that reflected the “resilience of the actual ecosystems themselves,” Bundy explained.

The current air quality standards have been in place since 1971, and even though every state is complying with them, acid rain continues to stunt fish growth and exacerbate forest dieback across the country, particularly in the eastern U.S., Bundy told Law360 Friday.

An updated standard is needed, and fast, the petitioners argue.

“EPA had the standard right in front of it,” Bundy said, of the aquatic acidification index.

“What EPA could have ended up with is a national standard that could nonetheless take into account regional variations in ecosystem sensitivity in providing a similar level of protection against acid rain nationwide,” he noted later in an emailed statement. “Unfortunately, EPA dropped the ball, leaving the old, ineffective standards in place.”

Though it acknowledged the benefits of the aquatic acidification index, the EPA said in a fact sheet on the issue that “important uncertainties” prevented the agency from moving forward with implementation just yet.

“While there is strong scientific support for developing a multipollutant standard to address these deposition-related effects, EPA does not yet have enough information to set a multipollutant standard that would adequately protect the diverse ecosystems across the country,” the agency stated.

Citing a need for more data, the EPA laid out a rough plan to work with individual states on implementation issues and develop a new air quality monitoring system to fit the new index.

The call for more time and information is just an excuse, according to the petitioners.

“Instead of following the law and doing what is necessary to protect our natural resources, EPA has chosen to sit on the sidelines,” the Clean Air Council's Joe Minott said in a statement Monday. “Meanwhile, acid rain continues to poison our waters and threaten our forests.”

The main petition comes from three organizations: the Clean Air Council, the Center for Biological Diversity and the National Parks Conservation Association. The Sierra Club filed its own nearly identical petition Friday, along with a motion to consolidate the cases.

On Monday, an EPA spokeswoman said only that the agency would review the petitions, and declined to comment further.

The Clean Air Council, Center for Biological Diversity and National Parks Conservation Association are represented by Charles McPhedran and David Baron of Earthjustice and Kassia R. Siegel and Kevin P. Bundy of the Center for Biological Diversity.

The Sierra Club is represented by Jim Pew of Earthjustice.

The cases are *Sierra Club v. U.S. Environmental Protection Agency et al.* and *Center for Biological Diversity et al. v. Lisa P. Jackson et al.*, case numbers 1237 and 1238, respectively, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Cara Salvatore.