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Novel Suit Cites Species Review In Effort To Force Stricter EPA PM NAAQS

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Environmentalists are pursuing a novel first-time lawsuit that aims to force EPA to account for adverse impacts from air pollution on endangered species when it reviews its ambient air standards, challenging the Trump administration's decision to retain the existing suite of particulate matter (PM) limits and saying a species review would justify stricter standards.

"This suit, which is the first of its kind, seeks to ensure that the EPA consults with agencies responsible for wildlife and plant protection to ensure its action does not drive any endangered species to extinction," said the Center for Biological Diversity (CBD) in a Feb. 9 statement on its lawsuit filed that day. The group is aiming to set a precedent that ESA reviews are legally required not just for the PM standards but for all six pollutants covered by ambient air limits.

EPA's national ambient air quality standards (NAAQS) include primary health-based limits on PM and the five other criteria pollutants, as well as secondary limits to protect the environment.

Robert Ukeiley, senior attorney for CBD, said, "The science is very clear that soot may cause devastating harm to vulnerable plants and animals. The EPA ignored the law when it failed to make sure soot in our air and water won't drive endangered species to extinction, and we're going to hold it accountable."

In [the lawsuit](#), filed in the U.S. Court of Appeals for the District of Columbia Circuit, CBD says that the Trump administration's Dec. 18 rule to retain the existing PM limits failed to include a formal consultation with other government departments as required by the Endangered Species Act (ESA).

Other environmental groups and 17 states [are already suing](#) EPA over the decision to retain the current limits for PM, or soot, which they say are unlawfully weak. The Biden EPA is under pressure to reconsider and tighten the PM standards, and has said it intends to prioritize a review of the Trump EPA NAAQS rule.

However, CBD's suit is distinct because it focuses on the ESA, and not Clean Air Act violations, although it is being consolidated with states' and other environmental groups' suits in *State of California, et al. v. EPA, et al.*

The CBD statement says PM "is a known threat to imperiled wildlife. Research has linked it to harm in numerous endangered species, including whooping cranes, desert tortoises and small mammals like the critically imperiled Preble's meadow jumping mouse. And yet despite its legal mandate to consider the impacts of agency actions on endangered species, the EPA refused to consider how soot might affect these species."

The Trump EPA rule retained EPA's full suite of PM primary and secondary limits, including standards for both "coarse" PM10, and the smaller "fine" PM2.5 that is thought to be responsible for many adverse health effects.

EPA retained a key annual primary limit of 12 micrograms per cubic meter (ug/m3) for PM2.5, despite advice from its staff to consider tightening it to a level between 8 ug/m3 and 12 ug/m3 in order to mitigate adverse public health effects shown by some studies from exposure to PM2.5 at levels below the current NAAQS.

Environmentalists and some former agency science advisers argued the agency should have gone even further, and tightened a primary daily limit for PM2.5 down from the current level of 35 ug/m3 to 25 ug/m3.

Potential Species Reviews

Lawsuits over the PM NAAQS, and the Trump EPA's decision finalized Dec. 31 to retain existing ozone standards that were last tightened in 2015, are expected to focus on the adequacy of the standards themselves, and also on the alleged failures of the Trump EPA's streamlined review process.

There has been less focus in the debate over PM standards on the adequacy and lawfulness of the secondary limits, however, and these are directly relevant to protecting animal and plant species. The secondary NAAQS is set at 15 ug/m3 annually and 35 ug/m3 daily for PM2.5, and at 150 ug/m3 daily for PM10.

A CBD source says that EPA has never before conducted an ESA consultation as part of a NAAQS review, and CBD's suit would be the first to test whether this is required. The ESA mandates that federal agencies engage in ESA Section 7 consultation for all agency actions that may affect listed species or critical habitat, and agency actions pursuant to the Clean Air Act are "a subset of all agency actions," the source says.

This goes beyond the analysis EPA has conducted in NAAQS reviews for the secondary standards, and applies a different legal standard that could help justify stricter limits, the source adds. "The ESA mandates the use of the best available science to prevent putting species in jeopardy of extinction and of adverse modification of critical habitat," and the ESA "brings in the wildlife expert agencies, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. EPA isn't an expert agency when it comes to listed species and critical habitat," the source says.

CBD's action aims to establish a precedent requiring ESA consultation for future NAAQS rules, the source says. It is currently unclear whether the group will pursue a similar lawsuit over the Trump EPA's December decision to retain ozone NAAQS instead of tightening them.

The Biden EPA has also prioritized the ozone standard for a review and possible reconsideration, while 15 states have sued to scrap the Trump rule, in the D.C. Circuit suit *State of New York, et al. v. EPA, et al.* -- Stuart Parker (sparker@iwpnews.com)