

## DC Circ. Urged To Unlink Species Claim From Soot Rule Suits

By [Morgan Conley](#)

Law360 (February 24, 2021, 3:37 PM EST) -- An environmental group has asked the D.C. Circuit to decouple its allegations that the federal government ignored how endangered wildlife is affected by looser soot pollution standards from other challenges to the standards, arguing they were wrongly consolidated.

In a motion to sever Tuesday, the [Center for Biological Diversity](#) said the claims and relief it's seeking are distinct enough from other challenges that the court shouldn't have consolidated [its suit](#) with petitions for review from states and other advocacy groups that focus on Clean Air Act violations. The Center accuses the [U.S. Environmental Protection Agency](#) of failing to properly research how its decision not to tighten particulate matter regulations would impact endangered plants and animals.

The Center told the court that while all three petitions challenge [a December final action](#) taken by the EPA that declined to strengthen standards for both fine and coarse particulate matter, or soot, the grounds for the challenges differ significantly.

The Center told the court that by hitching its suit to the other group's wagon, the court is subjecting it to a stay while the Biden administration reassesses the Trump-era rules governing particulate matter emissions. But the Center told the court "there is no indication at all from the Biden administration or specifically from EPA" that it will engage in Endangered Species Act consultation during the review.

The group urged the court to sever its suit and issue a ruling that the EPA must engage in consultation with other agencies to consider the impacts particulate matter emissions standards will have on listed species. The group emphasized that consideration is legally required to take place at the "earliest possible time" and delaying litigation over the issue jeopardizes the group's ability to "to get meaningful relief," according to the motion.

The Center additionally told the court that if its bid to break off from the consolidated action is not granted, even a victory down the line would not guarantee consideration of endangered species is done in a timely manner. The group argued there is no deadline for court-ordered review and the agency has a history of kicking the can down the road. It said the court must step in to ensure listed species are taken into account during the current particulate matter National Ambient Air Quality Standards review so it doesn't take a "decade or more" for listed species and their habitat to be protected.

The Center's attorney, Robert Ukeiley, told Law360 on Wednesday that the new administration's goals of protecting environmental justice and transitioning away from fossil fuels can be achieved "just by obeying the law, and that includes engaging in Endangered Species Act consultation when it's required."

"Sometimes people don't see the connection between protecting public health and protecting environmental justice communities, and the Endangered Species Act. But endangered species are the proverbial canaries in the coal mine and so protecting them protects everybody," Ukeiley said.

An EPA spokesperson told Law360 on Wednesday that the agency "will follow the science and law in accordance with the Biden-Harris administration's executive order and other directives in reviewing all of the agency's actions issued under the previous administration to ensure that they protect public health and the environment."

The agency declined to comment further on the pending litigation.

After the EPA announced in December it wouldn't tighten rules governing particulate matter emissions, a coalition of 17 states— including New York, California, Michigan and Pennsylvania — and New York City petitioned the D.C. Circuit for review on Jan. 13.

A little over a week later different public interest groups, including the [Sierra Club](#) and American Lung Association, sued the EPA on Jan. 22. Both of the January petitions challenged the EPA's choice to maintain the NAAQS for particulate matter. They claim the action to not lower the standards is insufficient, can be detrimental to public health and fails to meet requirements set by the Clean Air Act.

The Center was the last to file for review on Feb. 9. Its petition does invoke the Clean Air Act, but Ukeiley explained to Law360 on Wednesday that because the CAA provides for a direct appeal, courts have held parties must use that avenue and challenge the law as arbitrary and capricious due to it being unlawful under another statute, which in this case would be the ESA.

Since the group's statement of issues was not due until March, the motion to sever is the first time the true nature of the group's suit is spelled out before the court. The group said in the motion to sever it "only intends to raise one issue; EPA's failure to engage in Endangered Species Act Section 7 consultation when it reviews NAAQS."

As is the case in numerous other suits challenging Trump-era regulations, the court granted a request from the agency last week to hold the consolidated suits be held in abeyance while the new administration reviews the rulemaking as directed by President Joe Biden in one of his first executive orders. The executive order instructs agencies to review and potentially revise all rules promulgated in the last four years that aren't in line with the new administration's priorities to tackle climate change and protect public health.

The rest of the states challenging the rule are Connecticut, Delaware, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Virginia, Washington and Wisconsin.

The Center noted in its brief that the states and groups bringing the consolidated challenges "take no position" on the motion to sever.

Particulate matter standards were last revised in 2012, when the EPA tightened the primary standard for fine particles, or PM2.5, to 12 micrograms per cubic meter, down from 15 micrograms per cubic meter. The 24-hour fine particle standards, also set in 2012, stayed at 35 micrograms per cubic meter. And the 24-hour limit for coarse particulate matter, or PM10, stayed at 150 micrograms per cubic meter, the same since 1987.

The Center for Biological Diversity is represented by its own Robert Ukeiley.

The states are represented by their respective attorney general offices.

The coalition of public interest groups are collectively represented by Ariel Solaski of the Chesapeake Bay Foundation Inc., Seth L. Johnson and Sean M. Helle of [Earthjustice](#), Ann Brewster Weeks and Hayden Wong Hashimoto of [Clean Air Task Force](#), Michael Landis of the Center for Public Interest Research, Rachel Fullmer and Peter Zalzal of the [Environmental Defense Fund](#) and John Walke and Emily Davis of the [Natural Resources Defense Council](#).

The EPA is represented by Simi Bhat of the [U.S. Department of Justice](#)'s Environment and Natural Resources Division, Environmental Defense Section.

The consolidated suits are Center for Biological Diversity v. U.S. Environmental Protection Agency et al., case number [21-1054](#); State of California et al. v. EPA et al., case number 21-1014; and American Lung Association et al. v. EPA, case number 21-1027, in the [U.S. Court of Appeals for the District of Columbia Circuit](#).