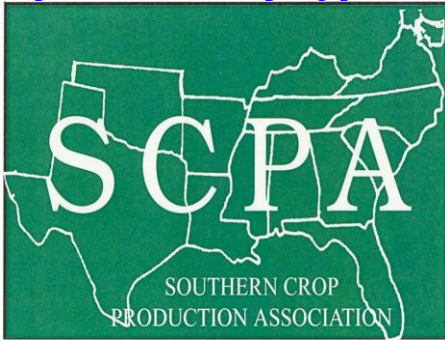


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On Guard

February 26, 2015
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EPA Critics Float New Strategy to Challenge Agency Rules Using Data Law

Backed by former White House regulatory review officials, a free-market advocate is proposing a new legal theory to allow states and private companies to sue EPA based on alleged violations of the Information Quality Act (IQA) in the development of a host of rules, dodging the long-standing holding that IQA violations are immune from judicial review.

Federal courts have long held that private plaintiffs lack standing to challenge agency actions under the IQA, finding that the law lacks an explicit right of action and that suits brought under the Administrative Procedure Act (APA) are not reviewable because challenged agency actions are not “final.” But in a February white paper published by the Washington Legal Foundation (WLF), Lawrence A. Kogan, a trade lawyer and free-market advocate, suggests that states and private plaintiffs could have standing to challenge EPA’s greenhouse gas (GHG) endangerment finding on the theory that the plaintiffs have a right to be free from regulations that are founded on flawed science that contravenes the law’s intent.

“The contemplated cause of action is based on the theory that Congress intended that the IQA . . . protect the *negative* right of a designated class of persons not to be burdened, financially or otherwise, by poor quality science that agencies disseminate in support of major regulations,” Kogan says in the paper, “Revitalizing The Information Quality Act As A Procedural Cure For Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study.”

He suggests that a challenge to EPA's 2009 finding that GHGs endanger public welfare -- the basis for EPA's climate regulatory program -- could provide a venue for plaintiffs to test the theory. "EPA's 2009 GHG Endangerment Findings and the decision-making process that led to those Findings, offer an ideal case study in how the IQA applies in the rulemaking context and how agencies contravene the law. . . . Such final agency action potentially gives rise to legal challenges of EPA's failure to comply with the IQA's peer-review standards," the paper says.

If courts accept Kogan's reasoning it would open the door for EPA's opponents to allege IQA violations in challenges against a broad array of other rules, including still-pending actions and some recently finalized regulations. For example, Jim Tozzi -- formerly a high-ranking official in the White House Office of Management and Budget -- says in an introduction to the paper that Kogan's theory could also be used to challenge EPA's controversial new source performance standards (NSPS) for GHG emissions limits from power plants when the final versions of that rule is released later this year.

"Another possible target of the type of IQA challenge [Kogan] proposes would be against EPA's failure to conduct a peer review of 'highly influential scientific information' in its determination that carbon storage and sequestration is a viable technology -- the central component of its proposed rule to control emissions from new gas-fired power plants," Tozzi writes in the introduction.

InsideEPA.com, Feb. 19, 2015