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DAILY NEWS

Immigration Order Could Boost EPA Critics' Data Quality Suits Over Rules

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A Texas federal judge's order allowing states to advance with their suit aiming to block President Obama's immigration policy could also boost EPA critics' plans to sue the agency over alleged Information Quality Act (IQA) violations in rules, because the order reinforces states' litigation rights that are similar to those in the planned IQA suits.

The immigration order, by U.S. District Court for the Southern District of Texas Judge Andrew S. Hanan, embraces the "*parens patriae*" legal theory, under which states can sue the federal government to defend their citizens' rights as long as those rights have been guaranteed by a federal law even if they are generally barred from challenging federal policies in court outside of an explicit statutory right of action -- the same legal theory underpinning the potential IQA suits. "I would advise those of you interested in [IQA challenges] to follow" the immigration suit because of its adoption of the *parens patriae* theory, said Lawrence A. Kogan, a trade lawyer and free-market advocate, during a Feb. 20 roundtable in Washington, D.C., to discuss a February white paper for the Washington Legal Foundation (WLF) that encouraged private parties and states to pursue new IQA suits over key EPA climate policies.

"States are not barred outright from suing the federal government based on a *parens patriae* theory; rather, provided that the states are seeking to *enforce* -- rather than prevent the enforcement of -- a federal statute, a*parens patriae* suit between these parties may be maintained," says Hanan's Feb. 16 order in *State of Texas, et al., v. USA, et al.*

The case deals with President Obama's "deferred action" program announced in November to provide what Hanan calls "legal presence" to more than 4 million individuals currently in the United States illegally, and to enable them to secure various state and federal benefits. Texas and its allies have argued that the program "will injure the economic interests of their residents" by crowding the job market and sending benefits such as unemployment to a population that until the president's action did not qualify for them, among other issues.

Hanan's logic in the order mirrors an argument that Kogan raised in his February white paper, in which he encouraged both private parties and states to claim standing to sue EPA over alleged IQA violations in EPA's determination that greenhouse gases (GHGs) endanger human health and welfare -- the basis for many climate regulations -- as **a test case for further data act suits**.

"The key point here is to consider that states can be players in an action against EPA or other agencies who have been involved in the development or peer review of science assessments underlying proposed rulemakings," he said.

The IQA sets out criteria for the use and peer-review of scientific data in rulemaking actions. Federal courts have long held that private plaintiffs lack standing to challenge agency actions for failing to meet those criteria, finding that the law lacks an explicit right of action. Even though the IQA allows for citizen petitions to address claimed violations, judges have also denied attempts to challenge petition responses under the Administrative Procedure Act on the grounds that the challenged agency actions are not "final."

But Kogan argues in the paper that the IQA can be read to create a "negative right" to be free from regulations founded on flawed science that contravenes the law's intent, and that both states and individuals could sue over new EPA rulemakings and binding actions in order to enforce that right.

Legal Theory

While Kogan's paper focuses mainly on the potential for individuals and private groups to challenge EPA rules, he also addresses state challenges and says they could get a boost from broader adoption of the *parens patriae* theory, which he argues would not only allow states to bring IQA suits but allow them to meet a less onerous standard to show that they have been injured by the contested regulations.

"States bringing suit in their quasi-sovereign capacity on behalf of their citizens will arguably be subject to a less rigorous test for standing that requires injury-in-fact to collective, rather than individual, state, and citizen interests. To this end, States should be able to utilize collective statistical and other data, including computer projections of current and future economic harm, to prove injury-in-fact, along with a lesser standard of general causation," the paper says.

The "quasi-sovereign capacity" under the *parens patriae* doctrine has varied over time, Kogan writes, but generally involves a state's defense of the well-being, "both physical and economic," of its populace, and aiming to protect a state's "rightful place within the federal system," which can extend to situations where a state's residents are denied benefits guaranteed by a federal law -- in this case the IQA's "negative right" against regulations that are alleged to be mis-crafted because they are based on what critics say is flawed data.

If a test case over the climate endangerment finding is successful, Kogan says it would pave the way for further challenges to EPA actions including its pending Clean Water Act jurisdiction rule; the social cost of carbon, which underlies many GHG standards; the proposed national ambient air quality standard for ozone; EPA's study on the human-health and environmental impacts of hydraulic fracturing; review of the Keystone XL pipeline's environmental impacts; joint EPA and National Oceanic and Atmospheric Administration disapproval of states' coastal nonpoint source pollution control programs; and the Fish and Wildlife Service's endangered species designations. -- *David LaRoss (dlaross@iwpnews.com)*

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