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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. *Relevant documents are available on InsideEPA.com.* *See page 2 for details.* *(Doc. ID: 179012)*

"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 (OMB) — 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 version 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.

Later in the white paper, Kogan says that a successful climate IQA suit would pave the way for further challenges to EPA actions including the pending rule to define which waters are subject to the Clean Water Act; 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.

Tozzi in his introduction to the paper says that if courts reject Kogan's legal arguments, the executive branch — in particular OMB — could step in to conduct more robust oversight of agencies' research and response to petitions under the IQA. And he also suggests that if the effort fails, "then it is time for the Congress to pass legislation which declares . . . the [IQA] to be judicially reviewable."

The IQA — also known as the Data Quality Act — generally requires agencies to ensure that scientific and other data used to develop policy stances are objective, reproducible and peer-reviewed. While the law requires agencies to accept and respond to petitions to correct allegedly flawed data used in rulemakings and other decisions, key federal courts have so far held that agency responses to IQA petitions are not final actions and therefore not judicially reviewable, eliminating an enforcement mechanism for private parties to pursue challenges on the merits if agencies deny their petitions (*Inside EPA*, July 4).

Despite the legal hurdles, EPA critics have continued to file IQA petitions seeking corrections of agency determinations. For example, conservative groups have long alleged that EPA ignored IQA requirements in its 2009 endangerment

finding — which was a prerequisite for EPA regulation of vehicle GHG emissions and other sources after the Supreme Court ruled in *Massachusetts v. EPA* that GHGs are "pollutants" and subject to Clean Air Act regulation.

The endangerment finding has already survived one major court challenge, *Coalition for Responsible Regulation v. EPA*, in which the U.S. Court of Appeals for the District of Columbia Circuit upheld the agency's determination and the Supreme Court declined a petition for review.

But the WLF paper argues that the finding could be vulnerable to a second challenge, largely based on the IQA, even though courts do not allow suits directly challenging EPA's responses to IQA petitions.

Kogan says that even though the law does not allow direct suits, it can be read as creating a right "to be unburdened by improperly peer-reviewed information" — and that opponents of EPA rules could invoke that right when suing under the APA, which allows challenges to any "final agency action" that is allegedly "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

In prior rulings, courts have held that an agency's denial of an IQA petition is not a "final action" subject to APA suit, because it is not "an action by which rights or obligations have been determined, or from which legal consequences will flow," which is the test established by the Supreme Court in the 1997 ruling *Bennett v. Spear*.

While the *Bennett* standard bars suits over IQA petition responses, Kogan says EPA's endangerment finding, its denial of requests to reconsider that finding, and its forthcoming climate rules are all unquestionably final actions whose development involved scientific findings subject to IQA procedures — meaning underlying violations of the IQA could support a decision that EPA violated the APA in taking those steps.

Linking alleged IQA violations to EPA rulemakings could also help plaintiffs establish that they were directly injured by the agency's actions, Kogan continues. Litigants seeking to overturn a rule or other action must show that they suffered a negative impact from the agency's conduct, but courts have generally ruled that IQA violations do not in themselves satisfy that test.

The paper argues that without EPA's scientific findings, which were subject to IQA peer-review requirements, "it would not have been possible to issue [the determination], and consequently, it would have been neither necessary nor possible to promulgate the GHG emissions-control regulations they subsequently triggered."

Opponents of EPA's GHG rules already raised the alleged IQA violations involved in the endangerment finding in connection with its forthcoming GHG rules for existing power plants.

Most recently, the Institute for Trade, Standards and Sustainable Development (ITSSD), a free-market group that Kogan serves as executive director, raised those concerns in its Aug. 13 comments on the agency's GHG rules for existing power plants. The group, which says it advocates for "scientifically and economically benchmarked and justified, market-driven" regulations, says that EPA failed to ensure proper peer review of 28 "core reference documents" that supported EPA's conclusion that GHGs endanger public health and welfare.

The group in its comments notes that EPA offers as the basis for the existing source performance standards' "major assessments" by the federal government, the United Nations and the National Academy of Sciences (NAS), a body outside of government but funded substantially with federal dollars. These same assessments, deemed "highly influential" under the IQA, formed part of the body of research supporting the endangerment finding.

Similarly, the Southeastern Legal Foundation, another free-market group that is still seeking to challenge the GHG endangerment finding, Feb. 9 filed a new suit under the Freedom of Information Act seeking documents related to the agency's development of its finding.

"The purportedly 'scientific' information on which the Agency relied was the subject of a number of systematic manipulations, including collusions to withhold scientific information, deletion of emails and raw data to prevent discovery of key facts, manipulation of data and computer code to create false impressions, and concerted efforts to boycott key journals to excluded disagreement," the complaint says. — *David LaRoss*
