News from Inside EPA
provided by the Environmental NewsStand

Industry Sees Ruling Opening Door To Court Review Of Data Quality Suits

Date: April 30, 2010 -

Industry groups say a recent appellate ruling could open the door to courts for the first time reviewing suits against EPA and other agencies under the Data Quality Act (DQA), though activists question whether the decision will outweigh a different appeals court's earlier precedent-setting decision that found agencies' DQA decisions are not reviewable.

The DQA requires EPA and other federal agencies to accept and respond to petitions to correct allegedly flawed data used in rulemakings and other decisions, but is silent on whether agency responses can be challenged in court. Industry officials say judicial review is critical in helping them force agencies to follow the law's mandates, but have so far failed to win a favorable court ruling.

Now, the Center for Regulatory Effectiveness (CRE), a think tank with links to industry, says a March 26 ruling by the U.S. Court of Appeals for the District of Columbia Circuit may open the door to DQA lawsuits because it finds that DQA guidelines issued by the White House Office of Management & Budget (OMB) are "binding." *The decision is available on InsideEPA.com.*

CRE says the ruling in *Prime Time Int'l Co. v. Vilsack*, when read with a Supreme Court decision cited in the ruling *United States v. Mead*, which established when the legal test for agency deference is applicable, means "you could readily conclude that the DQA is judicially reviewable."

However, the D.C. Circuit still dismissed the industry challenge of the U.S. Department of Agriculture's (USDA's) failure to respond to its DQA petition challenging tobacco tax assessments, but for different reasons than the lower court, which cited the earlier precedent-setting decision by the 4th Circuit in *Salt Institute & U.S. Chamber of Commerce v. Michael Leavitt* finding that plaintiffs lacked standing to sue under the act.

Instead, the D.C. Circuit dismisses the challenge because it finds the USDA decision not to respond to the petition was an "adjudication" specifically exempt under the OMB guidelines. "Prime Time's contention that USDA violated the [DQA] when it did not respond to a request to disclose and correct certain information underlying the tobacco assessments thus fails," the court ruled.

CRE says the ruling shows "the D.C. Circuit ignored the district court opinion's reasoning and embraced a new government argument that the substantive USDA action at issue was an 'adjudication,' and therefore specifically exempt from the [DQA] under the OMB guidelines," meaning other agency actions that are not adjudications could potentially be challenged and invalidate the 4th Circuit precedent, the group says in an April 14 post on its Web site.

The *Salt Institute* ruling, issued in 2006, was a major blow to industry efforts to use the courts to challenge EPA and other federal agencies' DQA decisions. The DQA "creates no legal rights in any third parties," the decision found. "Instead, it orders [OMB] to draft guidelines concerning information quality and specifies what those guidelines should contain."

CRE further argues that the *Prime Time* decision could also impact a pending 9th Circuit appeal, *Americans for Safe Access v. Department of Health & Human Services* (HHS). In that case, medical marijuana advocacy group Americans for Safe Access filed a lawsuit against HHS and the Food & Drug Administration arguing that the agencies violated the DQA for failing to rely on sound science in determining that marijuana has no medicinal value.

"The D.C. Circuit's opinion is definitive and puts to rest the 4th Circuit's unexplained [DQA] decision in the *Salt*

Institute case and will presumably have to be taken into account by the 9th Circuit," CRE says in its Web post.

But a source with the Center for Progressive Reform (CPR), a think tank that supports greater regulatory protections for human health and the environment, says the D.C. Circuit's decision on the DQA is a "convoluted and creative argument at best" for justifying that DQA petitions are reviewable.

The source questions the impact of the D.C. Circuit's decision in light of the *Salt Institute* precedent and the fact that the appellants lost the overall case, including the DQA challenge. "Courts do not go back and consider these [decisions . . .] as if it were a blank slate," the source says. "There are precedents."

Groups such as CPR say making the DQA judicially reviewable "could tie the agencies in knots" with challenges from industry on agency decisions and activists on the application of cost-benefit analysis, the source says. -- *Aaron Lovell*

Source: Inside EPA via InsideEPA.com
Date: April 30, 2010
Issue: Vol. 31, No. 17

INSIDEEPA-31-17-20