INDUSTRY COULD FACE TOUGH PRECEDENT IN APPEAL OF DATA QUALITY CASE

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An industry appeal of a court decision rejecting its ability to seek judicial review of a government study under the Information Quality Act (IQA) faces a significant hurdle because of a prior ruling in the same appellate circuit denying review of an agency action, some legal experts say.

The industry filed a petition Jan. 11 with the U.S. Court of Appeals for the 4th Circuit in *Salt Institute and Chamber of Commerce of the United States v. Tommy Thompson,* seeking to overturn a federal district court's ruling denying judicial review of agencies' decisions under the IQA. The suit targets a 2002 Department of Health & Human Services recommendation urging consumers to restrict sodium intake through salt consumption to limit high blood pressure. The industry is waiting for the court to respond to its petition seeking review before filing its brief.

The IQA is silent on the issue of judicial review, and industry groups argue that outside parties' ability to sue under the IQA is implicit in the statute. But critics of the law, which was enacted in 2000 without any congressional debate, say the statute is clear that groups can only seek relief through administrative proceedings.

Industry sources and legal experts tracking the case say the 4th Circuit's 2002 ruling in *Flue-Cured Tobacco Cooperative Corp. v. EPA* could be problematic for industry because of its interpretation of when parties can seek judicial review of agency actions. That case focused on a tobacco industry challenge of an EPA risk assessment of second-hand smoke. According to the court, judicial review under the Administrative Procedure Act (APA) was not appropriate because APA review is only available for final agency actions, not scientific studies without direct regulatory impacts. *Relevant documents are available on InsideEPA.com.*

Although several federal, state and local government entities, as well as private businesses, banned indoor smoking as a result of EPA's risk assessment, the court said those decisions were made independently, and not forced by the agency's scientific study. The court cited the fact that the statute authorizing the risk assessment, known as the Radon Research Act, specifically limited EPA to conducting research.

"We do not think that Congress intended to create private rights of actions to challenge the inevitable objectionable impressions created whenever controversial research by a federal agency is published," the court said in its ruling. "Such policy statements are properly challenged through the political process and not the courts."

That ruling has prompted some concern among industry officials that it could be a barrier to the appeal in the *Salt Institute* case. "Since the Fourth Circuit is so conservative, they would like a more explicit statement by Congress, if people argue that they're creating a private right of action," one industry source says. Other industry lawyers agree, saying they expect the government to cite the case in its brief.

But a lawyer for the salt industry disputes that assumption, saying this is a case of first impression. The lawyer contends the statute allows for judicial review because Congress' intent was to ensure that agencies' used sound science and give an affected party the right for relief in any branch of government. The lawyer says the *Flue-Cured* decision should not be applied to this case because it does not address the IQA. Moreover, the APA is an old statute that does not take into account current technology that can quickly provide information, which can hurt industry if the information is not based on sound science, he says.

The lawyer adds the industry might cite the strict interpretation of the Superfund statute in a recent Supreme Court ruling in *Cooper Industries, Inc. v. Aviall Services, Inc.*, to argue that a strict reading of the IQA shows that an outside group should be allowed judicial review if a study is not based on sound science.

Industry in its brief submitted last year to the district court said, "Where Congressional intent is in doubt, judicial review is presumed." It added, "The Institute has made no showing that the language of the IQA or any other source of authority reveals congressional intent to preclude or limit judicial review of a key action under the IQA. Indeed all

available authority points to a purpose of encouraging vigorous judicial oversight."

In the Nov. 15 district court ruling, Judge Gerald Bruce Lee said IQA and APA do not allow courts to review agency decisions to reject data quality decisions. "There is nothing in the IQA that provides a right of action in a court of law for alleged violations of its provisions . . . the language of the [act] reflects Congress' intent that any challenges to the quality of information disseminated by federal agencies should take place in administrative proceedings before federal agencies and not in the courts."

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