

Center for Regulatory Effectiveness

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Regulation by Litigation Example #1. Farm Workers, AFL-CIO v. EPA

Dear Attorneys:

On April 8, the Center for Regulatory Effectiveness (CRE) wrote you expressing our concerns with Regulation by Litigation. We notified you that to educate the public and affected parties we had selected four ongoing lawsuits exemplifying Regulation by Litigation. These examples are posted for public discussion on our website under Lawsuits Exemplifying Regulation by Litigation on *CyberActivist.US*.

This letter is of particular pertinence to those interested in our Example #1, cited above.

In this lawsuit, a coalition of environmental interest groups has chosen to go to Federal Court despite the fact that they failed to exercise existing administrative complaint procedures available under the Data Quality Act. Under that Act, they continue to be able to challenge the quality of the scientific studies and their underlying scientific analyses relied upon by EPA in making its pesticide re-registration decisions.

Thus, this coalition of environmental interest groups is seeking to engage in Regulation by Litigation. They are seeking to have the Federal court create its own particular standards of information quality as a substitute for those already adopted by the Congress and the Federal agencies directed to do so information quality standards that were issued after full public notice and opportunity for public comment.

Their failure first to file a Data Quality Act petition is particularly offensive because the Data Quality Act and the OMB and EPA implementing guidelines were developed through particularly interactive procedures fully open to the public procedures not available to the public in this lawsuit.

In the Data Quality Act, the Congress established a process for the public to submit data quality complaints to agencies and to receive responses from the agencies, in accord with general standards for information quality. The Congress directed OMB, with public and Federal agency involvement, to issue government-wide guidelines defining information quality standards and agency complaint procedures more specifically.

OMB, after full opportunity for public review and comment, issued interim final guidelines, and then, after more opportunity for public review and comment, issued final DQA guidelines. These OMB guidelines defined in considerable detail government-wide data quality standards and established for the public responsive agency complaint mechanisms. Thereafter, EPA drafted its own Data Quality Act guidelines building upon the OMB guidelines, and then promulgated these to provide an opportunity for public review and comment. In developing these guidelines, OMB and EPA both followed a process allowing open stakeholder review, comment, and interaction with the agencies similar to that provided for rule making by the long established Administrative Procedure Act.

Over 35 years ago, Supreme Court Justice Douglas explained why agency rule making is to be preferred over the efforts at Regulation by Litigation exemplified by this lawsuit.

The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. * * *

Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. See H. Friendly, *The Federal Administrative Agencies* 45 (1962).

This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us. * * *

Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action. *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759, 777-779 (1969), Justice Douglas, dissenting.

Furthermore, CRE finds the failure of the plaintiffs to file a Data Quality petition to be particularly strange because the Data Quality Act's existing complaint mechanism appears to be able to provide direct relief for all of the concerns they raise. If the plaintiffs fail to obtain the relief they seek under these existing administrative complaint procedures, they can still challenge EPA's decision in a Federal court but with the extra advantage of being able to refer to the explicit existing standards provided by the Data Quality Act and the applicable guidelines in

support of their positions.

In summary, the coalition of environmental interest groups is bypassing EPA's existing Data Quality standards—standards developed after full opportunity for public comment and involvement by interested stakeholders. Instead, this coalition wants the Federal court to formulate its own data quality standards rather than follow the ones already adopted by EPA as the standards for any public complaint about information quality.

This is a blatant example of Regulation by Litigation which the EPA and the Department of Justice should oppose.

Sincerely,

/s/

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