House Panel Targets Agency 'Data Quality' Petitions, OMB Rule Review

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House oversight committee Republicans are vowing to review how agencies like EPA respond to petitions under the Data Quality Act (DQA) as part of its broad scrutiny of the administration's regulatory policy -- amidst renewed calls from key industry groups for new legislation to ensure judicial review of recent EPA and other agency decisions.

The House Committee on Oversight & Government Reform, chaired by Rep. Darrell Issa (R-CA), held a Feb. 10 business meeting where it released its oversight plan for the 112th Congress, which also indicates a focus on broad slew of environment, energy, financial and other issues.

"The Committee will examine agencies' performance under the Data Quality Act in terms of responding to petitions for correction in a timely and reasonable manner," the plan says. And the plan also says the panel will examine the role of the White House Office of Information & Regulatory Affairs (OIRA), which reviews EPA and other agency rules, "in agency rulemakings and the transparency of OIRA's interactions with agencies and outside entities."

The plan says it will further look at "the effectiveness of the agency and interagency review process in ensuring that all required review and analysis is conducted and utilized" in the development of rules.

The DQA requires agencies to ensure that scientific and other data used to develop policy stances are objective, reproducible and peer-reviewed. 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 the agency responses to DQA petitions are not judicially reviewable, eliminating an enforcement mechanism for private parties to pursue challenges if agencies deny their petitions.

In response to requests from Issa, several industry groups, including the U.S. Chamber of Commerce and American Farm Bureau Federation, are now renewing calls for Congress to amend the law to ensure courts can review agency decisions.

In a Dec. 29 letter that Issa released Feb. 7, the Chamber points out that it has filed a DQA petition with EPA challenging the data used in the agency's climate endangerment finding under the Clean Air Act, but "has virtually no legal recourse now that EPA has not acted on it."

"Because the DQA does not explicitly allow judicial review of claims by interested parties challenging whether an agency has met its burden under this law, agencies claim there is no right to judicial review and assert that they may violate it with effective impunity," the Chamber writes. "Yet the underlying data EPA uses is often fraught with error and uncertainty."

The Chamber in the letter also points out, "One value of the DQA is that it recognizes the importance of non-regulatory agency actions such as guidance documents."

While the Chamber is urging Congress to amend the law, other proponents of judicial review of the petitions have come out against changing the act, pointing to progress made in the courts on the issue.

But the most recent court ruling on a DQA petition came in an unpublished Oct. 14 decision by the U.S. Court of Appeals for the 9th Circuit in *Americans for Safe Access (ASA) v. Department of Health & Human Services (HHS)*, which rejected efforts by medical marijuana advocates seeking to correct a HHS finding that the drug had no medicinal value.

The 9th Circuit agreed with a lower court that HHS' rejection of the DQA petition filed by ASA "did not constitute final agency action" under the Administrative Procedure Act and therefore was not eligible for judicial review.

Several DQA petitions are pending at EPA challenging agency data underpinning its climate and other rules, but even if EPA denies those petitions it could be several years before a lawsuit challenging that denial makes it to the U.S. Court of Appeals for the D.C. Circuit or another appeals court.

Opponents of judicial review for the petitions argue that judicial review would give industry the opportunity to delay agency actions by pursuing court cases on guidance documents and other agency decisions to stymie rules. The 4th Circuit's 2006 decision in *Salt Institute & U.S. Chamber of Commerce v. Michael Leavitt*, which is currently the only decision dealing directly with the issue of judicial review of DQA petitions, says DQA challenges rejected by federal agencies are not judicially reviewable.

The oversight committee will also "place special emphasis" on oversight of rules that seek to minimize burdens on small businesses, job creation and economic growth, as well as the impact of unfunded mandates on state and local governments, the plan says Aaron Lovell.

-- Aaron Lovell

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