EPA "Bubble" Rule Compliance with Reagan's Executive Order 12291—Regulatory Review

Materials on President Reagan's Program for Regulatory Relief

"The Vice President also announced that: (a) he had solicited views on regulation and priorities from business, labor, consumer, academic and other groups, (b) the Envirionmental Protection Agency had approved New Jersey's rule to permit more flexible emission standards, known as "bubble" rules….(p. xi)

The Changing Role of Judicial Review

" NRDC had argued that EPA's interpretation deserved little deference because it departed sharply from the agency's previous construction of the Act." (p. 129) (One of a series of articles quoted herein from the *Administrative Law Review*.)

Editor's Note: To the contrary, OMB was of the view that certainly from a policy viewpoint, and probably from a legal viewpoint, that the action was sound with particular reference to the observation that the Congress made a broad delegation of authority to EPA so that the implementation of the Clean Air Act could proceed with minimal disruption.

"In 1981, however, following the change in administrations, EPA revised its interpretation of " stationary source"….. EPA issued new regulations that defined "stationary source" to mean an entire plant rather than, say, a single smokestack or building". (p.128)

Presidential Policy Management of Agency Rules Under Reagan Order 12,498

"Thus, in a single stroke the order [Executive Order 12,291] infuses a host of substantive policy directives into the calculus of a regulatory initiative. It authorizes the OMB Director, to the extent permitted by law, to take actions necessary to implement this administration's policies and priorities." (p.71)

Tozzi v US Department of Health and Human Services

Subsequent to the Chevron Decision a nationally recognized Administrative Law scholar reflected on a forgotten episode in the Chevron saga, namely its programmatic impact on the use of bubbles in an article titled:*Toward Better Bubbles and Future Lives*

In doing so the author backs into the jurisdictional aspects of Chevron:

"It is mildly amusing to imagine how the proverbial men and women in the black robes are likely to react when confronted with a series of lawsuits arguing in the most arcane terms over the soundness of various pieces of highly technical information. One early indication is the U.S. Court of Appeals for the District of Columbia Circuit's opinion in *Tozzi v. U. S. Department of Health and Human Services.".* See this article.

The Chevron Decision coupled with the aforementioned decision were critical factors which lead to the development and enactment of the Data Quality Act.

The aforementioned author makes the following point regarding the justiciability of the DQA:

"As this article goes to press, the OMB is reviewing the guidelines published by relevant federal agencies and departments to determine their consistency with the OMB's interpretation of the Act. The OMB has not taken an official position on the judicial review question….."

We believe that those individuals who argue that the Data Quality Act is not judicially reviewable must, pursuant to *Chevron*, then agree with the Department of Justice who advised the court that OMB has the final say in all Request for Corrections filed under the DQA.