Little-Known Federal "Information Quality Act" Hits Home

by Margaret H. Clune*

Introduction

Last June, the Maryland State Bar Association's *Bar Bulletin* featured an article in its Environmental Law focus section entitled "*Bad Science" in State Regulations May Come under Federal Data Quality Scrutiny available at* http://www.msba.org/departments/commpubl/publications/bar_bult/2005/june05/science.htm (last visited Feb. 2, 2006). The article brought into focus the potential local impacts of a little-known federal statute called the Data Quality Act. The Act, also referred to as the "Information Quality Act" (IQA), came quietly onto the legislative stage in late 2000 as an appropriations rider. Its stated goal is relatively non-controversial: it aims to ensure the "quality objectivity, utility and integrity" of information disseminated by federal agencies. To further that objective, the Act required first the Office of Management and Budget (OMB), and then the federal agencies, to establish information quality guidelines. The Act also required that agencies establish an administrative process to allow members of the public to request that agencies correct information falling short of these guidelines.

As implemented by OMB and used by regulated industry, the IQA has raised significant concerns among proponents of environmental, health and safety regulations. The MSBA *Bar Bulletin* article, and the petition upon which it relied to make its case, serve as compelling illustrations of several of these concerns.

Ozone, the Clean Air Act, and VOCs in Paint

The article's authors highlighted an IQA petition filed by one of their clients, the Sherwin-Williams Company. A year earlier, Sherwin-Williams, joined by the National Paint and Coatings Association (NPCA), filed an IQA "Request for Correction of Information" with the United States Environmental Protection Agency (EPA). In it, the paint industry challenged the adoption by states in the Ozone Transport Commission (OTC) of rules that would regulate emissions of volatile organic compounds (VOC) from certain paints and coatings more strictly than does the existing federal rule.

Maryland is among the OTC states striving to control ground-level ozone pollution – also known as "smog" – formed when VOCs react with oxides of nitrogen (NO_x) in the presence of heat and sunlight. Ground-level ozone is one of the six criteria pollutants regulated under the Clean Air Act (CAA). It causes a range of adverse health effects, including shortness of breath, increased susceptibility to respiratory infection, impaired lung function, severe lung swelling and even death. Data collected by the American Lung Association demonstrate that more than 8% of Maryland's population suffers from asthma.

Under the CAA, states that contain areas that fail to attain the federally-mandated CAA levels of criteria pollutants must develop State Implementation Plans (SIPs), which EPA must then approve, so long as they meet statutorily defined criteria. SIPs set forth a variety of strategies for curbing emissions of criteria pollutants (or, in the case of ground-level ozone, its precursor compounds, VOCs and NO_x) to levels within the National Ambient Air Quality Standards (NAAQS).

In 1999, EPA advised Maryland and other mid-Atlantic states that even all the control measures then contained in their state implementation plans (SIP) would not be sufficient to bring the states into compliance with the NAAQS for ozone. Additional measures would have to be implemented to further reduce VOC emissions – Maryland would have to cut an additional 13 tons per day. The state looked to what its 1990 base-year emissions inventory counted as the fourth largest source of VOC emissions in the Baltimore area – paints and coatings. As oil-based "architectural and industrial maintenance" paints and coatings dry or sit out in the open, they emit VOCs.

To help achieve the CAA ozone standard, Maryland implemented a paint rule based on an OTC model rule. The OTC model rule, in turn, was based on a similar rule adopted in Southern California in the late 1990s and throughout that state in 2000. The California and model rules regulate VOC emissions from AIM coatings more stringently than does the existing federal paint rule, also adopted in the 1990s. The NPCA and the Sherwin-Williams Company have fought the stricter state rules every step of the way.

The Industry's IQA Challenge to the Paint Rules

After unsuccessfully objecting to the paint rules during the state rulemaking processes, the industry filed an IQA petition with EPA. The supposedly inaccurate information to which the industry objected (and thus its ostensible ground for filing the petition) was a spreadsheet used by the states to help predict the VOC emissions reductions that would result under the new paint rules. In the state rulemakings where the paint industry raised the arguments it later made to EPA in its IQA petition, the

states provided reasonable explanations for the supposed "errors" and further assured industry that the spreadsheet was neither the sole nor primary source of explanation of the emission reductions calculations used by the states in writing the rules.

More important than the ins and outs of the information claimed to be of insufficient "quality," however, are the troubling implications of the petition's logic. NPCA and Sherwin-Williams argued that a single document among the voluminous *state* rulemaking records in support of the AIM rules violates the *federal* IQA and that EPA should therefore reject any proposed SIP revision containing such a rule. As summed up by the *Bar Bulletin* article, "[t]o the extent a state needs to obtain EPA approval for a state rule . . . a state rule can become the subject of [IQA] scrutiny." In other words, when EPA conducts its internal review of the state administrative records in support of the SIP revisions and subsequently proposes to approve the revisions, the agency "disseminates" the information in the state administrative records, *even if EPA never communicates that information to the public*.

EPA correctly rejected the Sherwin-Williams/NPCA petition, noting that in approving the state AIM rules, the agency was not "disseminating" the spreadsheet but was merely following its obligations under the CAA to approve state SIP submissions that meet the statute's criteria. Sherwin-Williams filed an administrative appeal of EPA's denial of its IQA petition, which EPA also denied, and sued EPA over the agency's approval of Pennsylvania and New York's paint rules in federal court. Sherwin-Williams later withdrew the lawsuit over the Pennsylvania paint rule, reportedly because state environmental officials threatened to publicize its actions, which it was pursuing while marketing itself as an environmentally friendly company. Nonetheless, the authors of the *Bar Bulletin* article argued that as the result of the Sherwin-Williams IQA petition and appeals, EPA agreed that an alternative methodology to the allegedly flawed spreadsheet could be used to calculate VOC emission reduction credits. Indeed, EPA has undertaken an evaluation of other potential methodologies for calculating the emissions reduction credits that states may take after implementing their paint rules, though it has indicated its decision to do so is not a response to the paint industry's criticism of the spreadsheet.

What's Next for the IQA?

Whether or not parties can actually have their IQA cases heard in court (as distinct from merely filing suit) is currently the subject of much debate. Two federal district courts have already ruled that there is no judicial review of agency decisions on IQA challenges. This March, the United States Court of Appeals for the Fourth Circuit upheld one of those district court decisions. In agreeing with the lower court that the plaintiffs in the case lacked Article III standing to pursue their IQA suit, the court held that the IQA does not create a legal right to correctness of information. *Salt Institute v. Leavitt*, 440 F. 3d 156 (4th Cir. 2006).

The Fourth Circuit's word in the *Salt* opinion, however, will not be the last. Industry proponents eager to ensure that they can proceed to court if they are unhappy with an agency's decision on an IQA petition have made clear their intent to ask Congress to pass legislation specifically providing for judicial review of the Act. Whether or not the IQA is ultimately found by a court, or made by Congress, to provide for judicial review will undoubtedly determine the Act's true potential for changing the landscape of environmental, health and safety law. The Sherwin-Williams Company's attempt to use the IQA as one last chance to derail Maryland's paint rule makes vividly clear that a little-known statute, seemingly of interest only to those most intimate with regulatory policy and/or administrative law, can have impacts so far-reaching as to affect everyone who breathes Baltimore's summer air. It is therefore imperative that any legislation offered to make the IQA judicially reviewable be – unlike the IQA as originally passed – the subject of congressional hearing and debate.

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NOTICE TO ALUMNI

The next issue of the *Environmental Law at Maryland* Newsletter will include the "Alumni Update." Please send any changes in employment or address to Laura Mrozek at lmrozek@law.umaryland.edu.

Thank you.