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In This Issue

Crandall Canyon Mine Collapse Implicates MSHA Procedures

The Aug. 6 mine collapse at the Crandall Canyon coal mine in Utah, which trapped six coal miners and led to the deaths of three rescue workers, again calls into question the effectiveness of the federal Mine Safety and Health Administration (MSHA). The mine operators were working under a plan approved by MSHA in June, just months after serious structural problems forced the operators to abandon a work area only 900 feet from where the miners are trapped.

In March, miners were engaged in "retreat mining" — cutting out the pillars of coal supporting the mountain above the main tunnel and allowing the roof to collapse — when the northern tunnel experienced a shift of the ground, a "bump," that caused severe damage, according to an Aug. 12 article by *The Salt Lake Tribune*. Mine operators often use retreat mining to extract the last substantial deposits of coal before abandoning

a mine area altogether.

According to a memo obtained by *The Tribune*, the mine operators knew the pressures from the 2,100 feet of mountain above the mine created the roof problems that caused them to abandon the northern tunnel. The operators, UtahAmerican Energy, Inc., hired a Colorado mining engineering firm, Agapito Associates, Inc., to help the operators determine a safer way of retreat mining the southern tunnel. The southern tunnel area is where the men are now trapped. Rescue efforts were suspended late Aug. 16 after three rescue workers were killed and six others injured by another collapse.

In late May, MSHA began inspecting the Crandall mine roof but the inspection was not completed by the time of the Aug. 6 collapse. In June, amidst the ongoing inspection, MSHA approved an amendment to the mining plan to allow retreat mining in the southern tunnel. To safely do this, Agapito recommended increasing the size of the coal pillars from 92 feet to 129 feet. According to *The Tribune*, it is not clear if the wider pillars were used. The Aug. 6 collapse registered as the equivalent of a 3.9 magnitude earthquake, according to seismology experts.

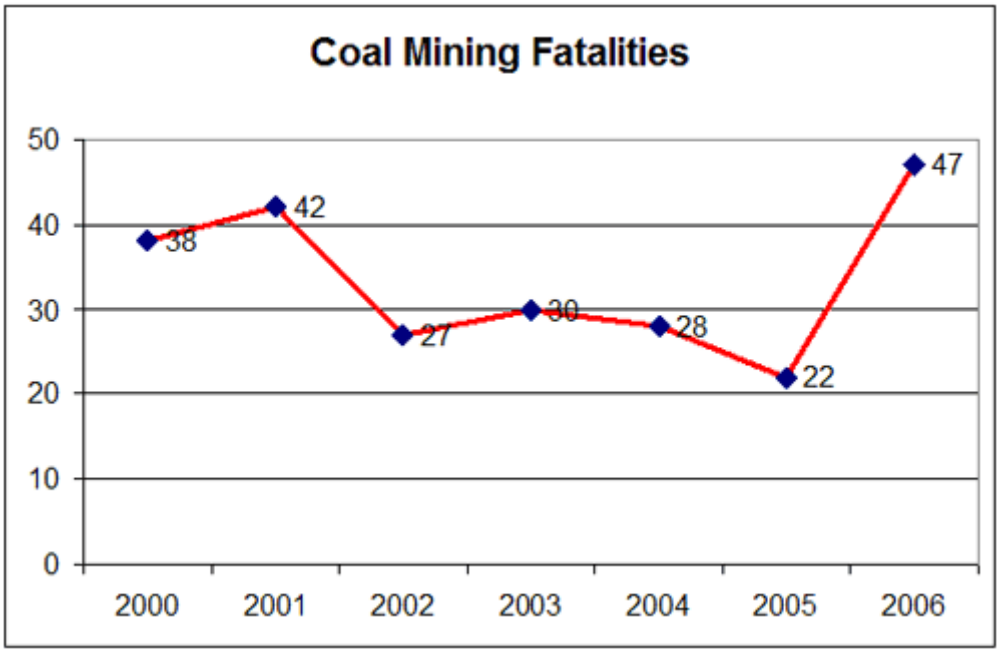
Robert Ferriter, director of the Colorado School of Mines and a 27-year veteran of MSHA, was highly critical of the decision to allow retreat mining in the southern tunnel. The conditions caused by the weight of the mountain above would not have been different from those in the northern tunnel 900 feet away, and that should have triggered a more cautious response from MSHA, he told *The Tribune*.

Others also criticized MSHA's approval of the plan amendment. Tony Oppegard, a former MSHA advisor and a Kentucky mining regulator, criticized the use of retreat mining at the Crandall mine given the conditions, according to another article by *The Tribune*. "Everyone understands that in the West you have tremendous pressures on those coal pillars from the overburden and they are subject to bursting," Oppegard reportedly said.

The Aug. 13 issue of *Mine Safety and Health News* reported that Dr. R. Larry Grayson, who heads the Pennsylvania State University mining and engineering program, agreed with Ferriter that he would not have approved retreat mining under the existing conditions at the Crandall mine. The mining company may have been following the MSHA-approved mining plan, but that does not mean that it was safe. "Generally speaking, most mines would not choose to mine pillars that lie between two extensive abandoned (mined out) areas," Grayson said.

Questions about MSHA's oversight at Crandall come on the heels of the 2006 Sago, Aracoma and Darby mine disasters. Nineteen miners died in these three incidents, and 47 miners died in all 2006 coal mining incidents, the highest number of fatalities since 2001, according to MSHA's statistics. Two House bills were introduced this congressional session to enhance the 2006 MINER Act passed in the wake of these incidents. To date, there have been 14 coal mining fatalities in 2007, not including the

recent deaths in Utah.



On Aug. 20, rescue efforts at the Utah mine were called off indefinitely due to concern about the safety of rescue workers.

Mine Safety and Health News also reported that Utah Gov. Jon Huntsman, Jr. (R) expects the state to play a role in the investigation of the Crandall mine incident and hopes to expand the state's role in regulating worker safety. Huntsman wants to use the model employed by West Virginia Gov. Joe Machin (D) after the Sago incident. Machin hired former MSHA administrator J. Davitt McAteer to represent the state during the Sago investigation. Currently, miner safety is a federal responsibility once the miners go underground. The state has surface environmental and worker health responsibilities. Hunstman wants to explore changes to the limited state role.

Bush Administration Skirts Broad Environmental Law

The Bush administration has expanded exclusions of the National Environmental Policy Act (NEPA). The administration will allow private industry to engage in selected land management projects without first assessing the potential impact on the environment. Furthermore, by excluding these activities, the administration has stripped the public of its opportunity to provide input into potentially damaging projects.

In 1970, NEPA was enacted to ensure environmental responsibility is considered in the actions of the federal government. NEPA is a cross-cutting statute that applies to the actions of all federal agencies.

During the development of agency rules, agencies must study the potential environmental impact of the action. If agencies determine in preliminary studies a proposed action would lead to a significant impact, the agency prepares a more detailed assessment.

However, under NEPA, federal agencies can issue Categorical Exclusions (CEs) for small-scale activities. The CEs exempt the actions from environmental study. This limits the administrative burden for activities that may have minimal or no environmental impact, such as maintenance activities or developing rules that establish administrative activities. According to the Code of Federal Regulations, "Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment" (40 CFR 1508.4).

NEPA also includes specific public participation mechanisms. The public may suggest what environmental factors should be considered in the study of environmental impact, and agencies are required to consider those comments. When an environmental assessment is completed, it is placed in a docket for the public to scrutinize and provide further input.

On Aug. 14, the Bureau of Land Management (BLM), a division of the Department of the Interior, published new CEs. BLM proposed the new exclusions in January 2006 and opened the proposal for public comment.

Two of the exclusions BLM finalized raised the ire of environmentalists during the public comment period. One exclusion will allow companies to use seismic technology to search for oil, gas or geothermal resources without consideration of environmental effects, so long as new road construction is not necessary. A coalition of environmental groups including the Natural Resources Defense Council submitted comments stating, "Seismic testing has direct and indirect effects, as well as cumulative impacts, to a host of natural and historic resources."

The CE could allow a controversial type of truck to travel through natural lands. Exploration using seismic technology often involves trucks which use heavy weights to strike the ground and measure resulting signals. The vehicles, known as thumper trucks, can leave tire tracks over one foot deep and can cause long-term damage to soil structure.

Exempting the projects from NEPA requirements would prevent more environmentally friendly alternatives from being considered. Because the new CE does not require an environmental assessment, companies will be solely responsible for the nature of the project. "As we have found time and time again, industry proposed seismic projects have an obvious bias towards permitting seismic activities in the most cost-effective manner, and not necessarily the most environmentally sensitive," the environmental groups stated in comments.

Another exclusion will allow BLM to issue grazing permits for rangelands without considering environmental impacts. Another group of environmentalists including NRDC and Earthjustice found legal fault with this exclusion. In *Natural Resources Defense Council, Inc. v. Morton* and *Idaho Watersheds Project v. Hahn*, federal courts found the issuance of grazing permits to significantly affect the human environment, according to the groups.

In both cases, the application of CEs will prevent environmental impact from being known prior to a project being undertaken. Additionally, the public will be left out of the decision-making process. The CEs exempt the activities from the public participation provisions of NEPA and will prevent the public from commenting on proposed projects.

BLM published the CEs just days after its new director took office. James L. Caswell was confirmed by unanimous consent in the Senate on Aug. 3.

This is not the first time the Bush administration has met with opposition for CEs of NEPA. In 2003, the U.S. Department of Agriculture's Forest Service issued CEs that allow large-scale logging projects to proceed without the completion of an environmental assessment. Critics charged the administration with pursuing the CEs at the behest of industry. The CEs were contested in court but were upheld.

Those CEs were the subject of a House Natural Resources Committee subcommittee hearing on June 28. In the hearing, a Forest Service official defended the use of the CEs. A witness from the Government Accountability Office testified about the extent to which the CEs have been used. Since taking effect, 72 percent of vegetation management plans impacting 2.9 million acres have been approved using the CEs, according to testimony.

New Report Examines Agency Review of Regulations

The Government Accountability Office (GAO) has released a new report on the process by which federal regulatory agencies review regulations after they take effect. Agencies conduct reviews to comply with existing law, as a matter of agency policy, and in response to White House requests. The report finds the quality of reviews varies widely and determines the major barriers to more useful reviews are gaps in available data and problems with public participation.

In the report, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO examined the reviews of nine regulatory agencies completed from 2001-2006.

GAO found the nine agencies reviewed at least 1,300 regulations. GAO acknowledged the number may be higher because agencies sometimes do not document reviews. Of the 1,300, the majority were conducted at the discretion of agencies, not as a result of

statutory requirements.

GAO categorized regulatory reviews as either mandatory — those required by statute — or discretionary — those resulting from inter-agency policies or petitions from regulated entities or the public. The most common type of mandatory review is that which is required by Section 610 of the Regulatory Flexibility Act. Section 610 requires agencies to review every ten years rules having a "significant economic impact" on small businesses or other small entities.

A significant number of discretionary reviews were performed at the behest of the White House Office of Management and Budget (OMB), according to the report. Under President George W. Bush, OMB's Office of Information and Regulatory Affairs has frequently prepared lists of regulations the White House desires agencies to review. For the rules studied, the OMB initiative accounted for up to 20 percent of reviews. OMB's suggestions accounted for up to 74 percent of the rules EPA reviewed, according to the report.

The outcome of these reviews can be valuable to decision-makers, regulated entities and the public. Agencies most often evaluate "ways to improve the efficiency or effectiveness" of a rule and "options for reducing regulatory burdens on regulated entities." Review results may lead to changes in regulations or identification of the need for further study. If agencies determine no change is necessary, it is often seen as confirmation that the rule is effective and continues to provide public value.

Overall, agencies reported discretionary reviews to be more valuable than mandatory reviews in accomplishing these goals, according to GAO. The report stated, "A primary reason for this appears to be that discretionary reviews may better be suited to address emerging issues than mandatory reviews with a predetermined time frame." Agencies often conduct discretionary reviews in response to public petition or at the behest of regulated entities.

GAO identified three factors as characteristic of a quality review: use of uniform standards in selecting, conducting and reporting reviews; solicitation and consideration of public input; and documentation of the review process. For all three factors, GAO found variability among agencies and between mandatory and discretionary reviews.

GAO's findings related to public participation raise concerns over the access of the regulated community during the review process. For the selection of rules to review, GAO stated, "Agencies in our review more often reported that they solicit public input on which regulations to review during informal meetings with their regulated entities." For the conduct of the review, agencies often publish notices of intent to review a rule in the *Federal Register* allowing both the public and regulated entities to comment, according to the report.

Because reviews varied in the quality of their conduct and their usefulness, GAO

identified barriers impeding more effective review. Among others, problems include a lack of necessary and useful data and a lack of public participation and transparency.

Agency officials complain of a lack of baseline data, according to the report. Baseline data provides information on conditions before a regulation took effect and is necessary to measure progress.

The Paperwork Reduction Act (PRA) impairs the ability of agencies to collect data and may be exacerbating data gaps. The PRA requires agencies to obtain approval from OMB before collecting data or other forms of information, and it creates requirements for reducing government paperwork on an annual basis. Another problem is the failure of agencies to plan for future review during development of a regulation.

Agency officials also believe a lack of public participation negatively impacts the quality and usefulness of reviews, according to GAO. Agencies report receiving little input despite outreach efforts. However, lack of awareness of reviews is still a problem. GAO stated, "We were not always able to track retrospective review activities, identify the outcome of the review, or link review results to subsequent follow-up activities." The lack of transparency may contribute to depressed public participation in the review process.

GAO made several recommendations for officials in the executive branch. GAO urged OMB to propose to agencies guidelines for the review process. GAO encouraged OMB to address how agencies should plan for future reviews during the development of a rule, how agencies can prioritize reviews, what standards should be set for reporting and documenting reviews, and how public participation can be stimulated.

GAO prepared the report for Reps. Joe Barton (R-TX) and Ed Whitfield (R-KY). GAO sent the report to the congressmen on July 16 and released it to the public Aug. 15.

The Year in Fiscal Policy...So Far

After the elections in November 2006, with a new majority and low public confidence in Congress following multiple lobbying and ethics scandals, members vowed to restore integrity and responsibility to the legislative process, particularly in fiscal policy. Congress pledged it would prioritize funding for domestic needs and abide by pay-as-you-go rules for new mandatory spending and taxes. It would shed light on the earmarking process and spend more time minding the people's business in Washington. In short, the new Congress said it would clean up Washington and rebuild public confidence in government.

Now that Congress is in its annual August recess, we have occasion to compare what Congress promised with what it's delivered since January.

Fiscal Responsibility

Steps Forward: Re-enactment of strong PAYGO rules; adherence to the rules thus far.
Steps Back: None yet, but still difficult fiscal issues to resolve.
What's Next: Passage of SCHIP re-authorization and AMT might test dedication to PAYGO.

Over the course of the Bush administration, the U.S. national debt has ballooned from $5.95 trillion to almost $9 trillion. A combination of huge new tax cuts, increases in military spending and enactment of expansions of entitlement programs — all passed without regard for how to pay for the increases — has caused one of the largest fiscal deteriorations in the country's history.

Against this backdrop, the new majority in the 110th Congress promised to bring fiscal responsibility back to Washington and has taken an important step toward doing so by enacting strong pay-as-you-go (PAYGO) rules. The House adopted the proven budget control rules immediately in January as part of its new rules package, and the Senate followed suit in May with the passage of the FY 2008 budget resolution containing PAYGO rules.

Thus far, Congress has adhered to PAYGO rules in the SCHIP re-authorization bill and other mandatory spending bills, as well as on the tax side. But the big hurdles are yet to come with reform of the Alternative Minimum Tax and other difficult fiscal policy issues (i.e., how to handle the president's first-term tax cuts) left unresolved. Moving forward, it will be essential for Congress to pass deficit-neutral legislation in these areas as well to keep the promise of fiscal responsibility alive.

Congress Addressing Federal Priorities, But Conflicts with the White House Remain

Steps Forward: Congress takes first step toward restoring adequate funding for national priorities.
Steps Back: None yet, but antagonism between Congress and the president threatens timely implementation; Senate running out of time to enact appropriations.
What's Next: The Senate has to pass eleven of twelve spending bills; Congress will wrestle with the president over slim differences.

Twenty-one billion and two percent. Those are the numbers over which Congress and the president are going to the mat. The president's $933 billion discretionary budget request represents about a seven percent increase over 2007 levels, while Congress's $954 billion spending plan would boost discretionary spending by nine percent. The president's stubborn objections over the $21 billion difference is absolutely vexing when compared to the $3 trillion increase in the national debt that the president has overseen during his

tenure.

Adjusting for inflation, the president's budget would be a 2.2 percent cut in non-defense, discretionary spending, compared to the 3.1 percent increase under the congressional plan. When population growth and inflation are factored in, the FY 2008 budget passed by Congress represents spending below 2002 levels. That the president would call this budget "irresponsible and excessive" is a stark reminder of how much his priorities are skewed.

When Congress returns in September, the Senate will have nineteen legislative days until the end of the fiscal year to pass eleven of the twelve spending bills and then conference all twelve bills with the House. While it is possible the Senate will pass the bills before the current spending regime expires on Sept. 30, veto threats issued against nine of the bills put timely presidential approval in jeopardy. Congress and the president have held steadfastly to their positions, but both appear willing to discuss differences. If a compromise can be achieved in the coming weeks, a budget standoff may be avoided, but a continuing resolution is almost assured.

Earmarks: Groundbreaking Reforms Enacted

> **Steps Forward:** Enactment of legislative earmark disclosure rules for the first time.
> **Steps Back:** Rules could have been slightly stronger to improve access; ignored executive branch earmarks.
> **What's Next:** Reforms awaiting president's signature.

A popular revulsion at various congressional excesses and scandals in 2006, headlined by the Jack Abramoff investigation, provided Congress with a strong mandate to address the "culture of corruption" in Washington. In response, Congress overwhelmingly passed the Honest Leadership and Open Government Act of 2007, which prescribed disclosure requirements for legislative earmarks for the first time ever.

The Act — which awaits the president's signature — requires that earmarks in bills, resolutions and conference reports be identified and posted on the Internet at least 48 hours before a vote on the underlying legislation, and that sponsors certify they and their immediate families will not financially benefit from the earmark. Earmarks that suddenly appear in a conference report (i.e., not approved by either chamber) are now subject to a 60-vote point of order in the Senate that will not jeopardize the entire conference report. In a related development, plaudits also go to the voluntary publication by the Office of Management and Budget of a database of FY 2005 and FY 2008-to-date earmarks.

Congress ultimately stepped back from adding an earmark reform to the act that the Senate had adopted earlier this year that would have required earmark information be published in a *searchable format* — a reform urged by Sen. Jim DeMint (R-SC).

Congress also seemed to create a partial loophole by allowing earmarks to be voted on without public disclosure in certain instances if such disclosure is not "technologically feasible."

In all likelihood, Congress will not return to earmark reform this year. The next major step forward in earmarks disclosure should be an examination of executive branch earmarks — a form of spending wholly neglected in this year's reform process, but which involves at least as much bottom-line and self-interested spending as its legislative twin. It's also likely continued progress will be made by OMB as it fills in its database of FY 2008 earmark and adds functionality to the website.

Working Harder: Congress Resolves to Spend More Time Legislating

> **Steps Forward:** The House and Senate have been in session more this year than last.
> **Steps Back:** Little work done on Mondays still leaves four-day work weeks.
> **What's Next:** As adjournment approaches, Congress is likely to keep up the pace.

The new majority was elected on promises to put Congress to work. The 109th Congress had neared historic lows of actual days spent in session and number of votes on legislation. This combined with its few legislative accomplishments earned it the "do-nothing" label that President Harry Truman originally gave in 1948 to a similarly inactive Congress.

So far, both the House and Senate have put in longer weeks and more days than Congress did in 2006 (See current and past legislative calendars). The Senate has logged 121 legislative days, compared to the 107 days put in by the last Congress at this stage last year. Meanwhile, the House has spent 40 percent more time working, racking up 111 legislative days in outpacing the paltry 79 days put in last year.

Leaders also promised to try to reinstitute a five-day work week while in session. The House has so far had mixed success. A little more than 40 percent of the weeks spent in session were five-day weeks. This is still better than last session, when only 20 percent were full weeks. The Senate has had more success, with 60 percent of their weeks coming in at five days — about the same proportion as last session. However, most Mondays are still "in session-days" in name only, since voting typically begins at 6:30 p.m. and few votes are held. Therefore, the number of "full" weeks is misleading, as they are usually only four days long.

The House has scheduled 34 more voting days left for the rest of the session and has a target adjournment date of Oct. 26. The Senate has tentatively scheduled its adjournment for Nov. 16, but with significantly more work left to complete, that could easily slip into December.

Reauthorizations: Expanding Investments While Adhering to PAYGO

> **Steps Forward:** Both houses have made good progress on reauthorizations and are expanding crucial investments.
> **Steps Back:** None yet, as no expiration dates have been missed.
> **What's Next:** Intense negotiations will be required to resolve significant differences between the House, Senate and the White House.

Recent Congresses have had difficulty doing the required work of renewing program authorizations before they expire — most notably in the case of the Temporary Assistance to Needy Families, which Congress took four years to reauthorize after it came up for reauthorization in 2002. A host of important programs — including student loan programs, the State Children's Health Insurance Program (SCHIP), and a variety of farm and nutrition programs — are testing Congress's ability to get routine work done.

So far, no deadlines for reauthorization have been missed, but a few are looming on the horizon, most notably the SCHIP, which expires at the end of September. SCHIP reauthorization bills that would significantly expand coverage have been passed by the Senate and the House. The House has passed a version of the farm bill that includes a $4 billion increase for the Food Stamp Program. And both the House and Senate have passed versions of the student loan program reauthorization, both of which increase federal student financial aid packages.

None of these reauthorizations have been completed yet, and Congress has much work ahead of it. Significant differences remain between the House and Senate in these reauthorizations. Further, the Bush administration has said it would veto both the Senate and House versions of the SCHIP reauthorization, and it opposes the current versions of the Higher Education Access Act and the farm bill reauthorization.

Carried Interest Issue Gathering Momentum in Congress

Congress's tax-writing committees have focused increasing attention this summer on a hitherto little-noticed tax preference enjoyed by private equity and other fund managers that allows them to pay capital gains rates (15 percent) on "carried interest" income they are paid to manage investment funds they do not own. This is significantly lower than the income tax rate that would otherwise be assessed, which could be as high as 35 percent. As Congress moves to take action to close this loophole, nonprofit advocacy groups are mobilizing to support a fix to this unfair aspect of the tax code. At the same time, powerful special interests are working to protect this tax break, which affects some of the wealthiest individuals in this country.

Both the House and Senate have been busy investigating this tax loophole and developing solutions. The Senate Finance Committee held two hearings on the issue in July, and the House Ways and Means Committee will hold a hearing on it Sept. 6. In

addition, a bill (H.R. 2834) to close the loophole has been introduced in the House by Rep. Sander Levin ☼ (D-MI) and is co-sponsored by powerful House committee chairs Charles Rangel (D-NY) and Barney Frank (D-MA).

Recently, Rangel and others have raised the possibility that some form of the Levin bill may be paired with legislation reforming or patching the Alternative Minimum Tax (AMT), to help offset the cost. This has improved the odds that the carried interest issue may see floor action in Congress this fall. Rangel and Ways and Means Subcommittee on Select Revenue Measures Chair Richard Neal (D-MA) are known to be working on legislation to overhaul the AMT, which they are expected to introduce in the fall. The Senate will also debate AMT legislation, as Senate Finance Committee Chair Max Baucus (D-MT) and Ranking Member Charles Grassley (R-IA) have long sought to extend the "hold-harmless" patch freezing the number of taxpayers liable to AMT for one or two years.

Baucus, who initially seemed cool to closing the carried interest loophole, appears now to have joined his Finance Committee colleague Grassley in support of the Levin bill in principle. Sen. Charles Schumer ☼ (D-NY), another influential member of the panel who represents New York City's sizable financial sector, is supportive of closing the loophole but wants to make sure the Levin bill will apply equally to managers of funds across all economic sectors. The scope of the bill and the amount of revenue it would bring in are not definitively established, but revenue estimates tend to fall in the range of $5-10 billion a year.

The Levin bill has generated some media interest, with frequent op-ed pieces and editorials appearing in papers across the country, most of which endorse the bill. Private lobbying firms and the U.S. Chamber of Commerce have been busy lobbying Congress against the bill, arguing it discriminates against fund managers unfairly. But in the wake of the $4.3 billion Blackstone IPO in June, which showered fund managers with a windfall of untaxed profits, their views are not meeting with an outpouring of sympathy.

Meanwhile, state, local and national nonprofit advocacy groups — including some of the country's largest labor organizations — have begun to organize support for the effort to close the carried interest loophole. OMB Watch has joined with these groups, signing on to a letter to legislators urging them to close this loophole. **To sign your organization on, visit Citizens for Tax Justice's sign-up page**.

State Secrets Privilege on Trial

The Ninth Circuit U.S. Court of Appeals heard arguments on Aug. 15 regarding the administration's claims that two lawsuits involving the National Security Agency's spying program cannot move forward because of the state secrets privilege. The administration argues that the cases involve secret matters essential to protecting national security.

The arguments were heard in the wake of two important developments involving the executive's use of the state secrets privilege. A U.S. appellate court, for the first time ever, overturned the dismissal of a case based on the state secrets privilege. Second, the American Bar Association (ABA) passed a resolution arguing for limitations on the use of the state secrets privilege.

Based on the judges' questions during the hearing, the three-member panel of the Ninth Circuit appeared deeply skeptical of the government's invocation of state secrets. The cases involve plaintiffs who allege they have evidence of the National Security Agency's (NSA) Terrorist Surveillance Program (TSP). But, the government claimed, "Litigating this action could result in exceptionally grave harm to the national security of the United States."

One of the cases involves an alleged secret room at AT&T in San Francisco, which plaintiffs claim was used to collect and send information to the NSA. The other case involves members of an Islamic charity in Portland, OR, who have evidence of a top secret call log showing that its conversations were monitored by the government. The phone log was accidentally released by the government and, subsequently, ordered to be destroyed. Both of these cases, the government argues, are top secret matters, and proving or disproving their existence would be severely detrimental to national security.

The judges appeared to reject the government's reasoning. "The bottom line here is the government declares something is a state secret, that's the end of it. No cases ... The king can do no wrong," said Judge Harry Pregerson.

The state secrets privilege is a legal power possessed by the executive branch to protect sensitive national security information from disclosure in litigation. It dates to 1953, when it was first invoked to protect the disclosure of information regarding a U.S. Air Force flight in which three civilian passengers died. Declaring the flight, "a highly secret mission," the Air Force refused to disclose information, preventing the widows from suing for damages. Years later, as reported in the *Watcher*, it was revealed that the mission was not a sensitive matter.

The Ninth Circuit arguments were held the same week the ABA passed a resolution calling for legislation that would restrict the use of the state secrets privilege and require court oversight and approval. Absent judicial review, the ABA argued, "There is a risk that the government would effectively judge its own claim that information necessary to prove a plaintiff's case must be kept secret because disclosure would harm national defense or diplomatic relations of the United States."

The government's latest state secrets claims in NSA suits also come after the first ruling to ever overturn the dismissal of a state secrets case. The ruling, *In Re: Sealed Case*, was released on July 20 by the U.S. Court of Appeals for the District of Columbia. By a two to one margin, the court decided to reverse and remand a decision to dismiss a suit on the grounds of state secrets. The government argued that the case could not proceed because

it necessitates the disclosure of national security information. The court held that the plaintiff "can establish a prima facie case without using the privileged information."

The D.C. Circuit's ruling is a very significant decision regarding the state secrets privilege and could provide support for the NSA spying suits. Moreover, it may provide an impetus for Congress to legislate and mandate limitations on the use of the state secrets privilege, since the administration has essentially argued that anything relating to national security is a state secret and, hence, no lawsuits involving privileged information may proceed.

As far as the Ninth Circuit's decision, no date has been set. However, some speculate that since the circuit is perceived as liberal, the decision, if against the government, will be appealed, as the government will want the U.S. Supreme Court to review the state secrets privilege.

EPA Overlooking Testing and Regulations of Nanochemicals

As the nanotechnology sector expands, the U.S. Environmental Protection Agency (EPA) has not kept pace with oversight controls. Despite work to develop research strategies and priorities, the agency has not proposed any actual regulatory program for nanotech materials.

EPA has developed an agency research strategy and participated in setting national research priorities as part of the National Nanotechology Initiative (NNI) of the presidential National Science and Technology Council (NSTC). EPA's only proposal for control over the production and use of this new technology is a voluntary stewardship program. EPA has also proposed requiring no new review for nanochemicals whose "normal" chemical has already been reviewed under the Toxic Substances Control Act (TSCA).

Nanotechnology is the ability to measure, see, manipulate and manufacture things usually between one and 100 nanometers, a "near atomic" scale, with a myriad of potentially beneficial applications. Already incorporated into billions of dollars worth of products, the possible adverse impacts of this radically different material is mostly unknown. Governmental oversight of nanomaterials has been lagging far behind industrial production. Of particular concern is what significant health and environmental risks, if any, do nanomaterials pose on both ends of the lifecycle: production and decomposition.

In a step toward stronger management, on Aug. 16, the National Nanotechonology Coordination Office (NNCO) of NSTC released a list of federal research priorities addressing the environmental, health and safety concerns for nanotechnology. *Prioritization of Environmental, Health and Safety Research Needs for Engineered*

Materials identified top priorities within the following five research areas: scientific methodology, human health, the environment, exposure and risk management. The priorities include developing methods to detect nanomaterials on the biological level, standardizing assessment of particle attributes, identifying principal environmental exposure sources and groups vulnerable to exposure and development of workplace best practices.

While this document is an improvement on previous research agendas, some experts want immediate government action to ensure the safe development and use of nanotech products, not just research. Andrew Maynard, chief science adviser for the Project on Emerging Nanotechonologies of the Woodrow Wilson International Center for Scholars said, "I would give the federal government a B+ for effort, but only a C- for achievement."

The Nanoscale Materials Stewardship Program (NMSP), under which companies agree to share information about nanomaterials and participate in a risk management plan, has also received criticism. J. Clarence Davies, Emerging Nanotechnologies Senior Advisor, sees NMSP as flawed since "the agency has signaled that real regulation is a long way off, and may never happen," which acts as a participatory disincentive. In his May 2007 report, *EPA and Nanotechnology: Oversight for the 21st Century*, Davies called for a voluntary program in the context of a strong regulatory framework.

Even though experts agree that many questions about impacts from nanotechnology remain unanswered, EPA's July paper, *TSCA Inventory Status of Nanoscale Substances*, treats nanochemicals the same as their traditional chemical counterparts. This approach exempts the new nanotech versions of chemicals from pre-manufacture EPA review if the chemical, in its traditional non-nanotech form, is already on the TSCA Inventory. Davies, who also authored the original administrative version of TSCA, explains that this is a legal quandary, not a scientific one. TSCA's legal definition of a chemical substance, created in 1976, could not have imagined size as a distinguishing attribute and unintentionally failed to include this limitation. Nanotechnology has changed those parameters, and in Davies' opinion, EPA's disregard in the July paper for this new reality "flies in the face of the vast majority of scientific evidence."

"Every day that EPA is not exercisizing some kind of oversight on nanomaterials is another day when the American public is involuntarily participating in a huge experiment to see whether nanotechnology poses any threat to health or the environment," Davis said at an Aug. 2 public meeting. "It is another day when the agency is not giving the public the protection it should have."

Prioritization of Environmental, Health and Safety Research Needs for Engineered Materials is open for public comment until Sept. 17.

FOIA Performance Goes from Bad to Worst

The Coalition of Journalists for Open Government's (CJOG) analysis of government's implementation of the Freedom of Information Act (FOIA) indicates record-setting FOIA problems despite a positive June report on FOIA from the Justice Department. These problems come to light as a legislative effort to reform FOIA has passed both the House and Senate and may soon become law.

The CJOG report, *Still Waiting After All These Years: An In-Depth Analysis of FOIA Performance from 1998 to 2006*, reviewed FOIA performance by 30 executive departments and agencies for the past eight years, which is when FOIA performance reporting by government began. The report documents growing problems with backlogs of unprocessed requests, declining levels of disclosure and increasing processing costs.

The report notes that the backlog of unprocessed FOIA requests across all government agencies rose 26 percent from 2005 to 2006 to a new all-time high. According to the report, 26 agencies had a combined backlog of 39 percent at the end of 2006, which means that almost two out of every five requests did not get processed. Overall, the FOIA backlog has grown 200 percent since 1998. This record high occurred even though the number of requests dropped for two years running, six percent from 2005 and 10 percent since 2004.

Information disclosure, even for the requests processed by agencies, has dropped significantly according to the CJOG report. In 2006, the number of denials, even with fewer requests being handled, rose 10 percent from the number of request denials in 2005. The number of requests for information that were fully granted by the government hit an all-time low in 2006, with only 41 percent of requests being fully granted. This is a significant drop from the 56 percent of requests that were fully granted in 1998.

Another troubling trend uncovered in the CJOG report is the growing cost of processing FOIA requests despite reduced requests and personnel. Since 1998, total costs for FOIA processing have risen 40 percent, even though the number of requests processed dropped 20 percent during the same period. The average cost of handling an individual request rose from almost 80 percent, from $294 in 1998 to $526 in 2006. These increased costs also came despite the fact that the number of personnel working on FOIA is down 10 percent.

"The self-reported performances of the federal departments and agencies in responding to Freedom of Information Act requests continues to deteriorate, despite a public nudge from the president, in a December 2005 executive order, to improve service," stated CJOG in the report. The CJOG findings starkly contrast the conclusions of a June report from the Department of Justice on agencies' implementation of a 2005 executive order to improve FOIA processing. The Justice report states that agencies are making "diligent and measurable progress." Executive Order 13392 required agencies to develop plans to improve FOIA procedures, reduce backlogs and increase public access to highly sought-

after government information.

However, as the CJOG report documents, the executive order has not been successful in improving FOIA. One form of help might be FOIA reform legislation, sponsored by Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX). Before the Senate went into its August recess, it unanimously passed the OPEN Government Act of 2007 (S. 849), which is a comprehensive reform of the FOIA process. The House passed similar legislation, the Freedom of Information Act Amendments of 2007 (H.R. 1309), on March 14, by a vote of 308-117. Now the two versions will need to be conferenced, which should not prove difficult. Hopefully, the new legislation will be more successful than the executive order in reducing agency backlogs and increasing the efficiency of FOIA procedures.

Agencies Extend Legal Services Restriction to HIV/AIDS Grants

In an apparent attempt to derail a constitutional challenge to a requirement that all grantees in an HIV/AIDS prevention program adopt formal policies against sex trafficking, the United States Agency for International Development (USAID) and the Department of Health and Human Services (HHS) have issued guidelines for grantees that allow affiliations with groups that do not adopt such pledges. The guidelines, issued July 23, are even more restrictive than similar requirements for legal services programs that are also the subject of a constitutional challenge. They require separate "management and governance" and complete physical separation "between an affiliate which expresses views on prostitution and sex-trafficking contrary to the government's message..." and the grantee. Four leaders in the House have written to USAID urging it to adopt the less restrictive standards that allow faith-based organizations to keep religious and government funded activity separate in time and place without the need for a separate affiliate. Although the guidance is already effective, HHS intends to publish the rule for public comment.

Alliance for Open Society, Inc. v. USAID is one of two constitutional challenges to what has become known as the "pledge policy," which required USAID grantees to pledge they oppose prostitution. USAID, HHS and the Centers for Disease Control and Prevention have appealed a May 2006 ruling of the United States District Court for the Southern District of New York holding the rule unconstitutional. In June 2007, the Court of Appeals for the Second Circuit heard oral arguments in the case and asked government attorneys for more information about the defendants' intent to develop guidelines for affiliates. The following week, DOJ sent a letter informing the court that all defendant agencies would develop such guidelines and follow up with a rulemaking and public comment process. On July 23, HHS and USAID published essentially identical guidelines that describe "the legal, financial and organizational separation that should exist between these recipients of HHS funds and an affiliate organization that engages in activities that are not consistent with a policy opposing prostitution and sex trafficking."

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (PL 108-25) that funds prevention programs. 22 USC 7631(f) bars grants to any group that "does not have a policy explicitly opposing prostitution and sex trafficking." The new requirement, initially only applied to foreign grantees, has been controversial from the start, generating two lawsuits. A 2005 policy brief by the Center for Health and Gender Equity says, "The restrictions preclude recipients of U.S. funds from using the best practices at their disposal to prevent the spread of HIV among marginalized populations...The broad language of the restrictions increases the risk that organizations will self-censor or curtail effective programs for fear of being seen as supporting or promoting prostitution." Their timeline on the restrictions says, "The law is applied inconsistently."

The government's approach capitalizes on another federal appeals court ruling in *DKT International v. USAID*, in the U.S. Circuit Court for the District of Columbia. That March 2007 decision overturned a lower court's ruling voiding the pledge requirement, in part because DKT could have set up a subsidiary organization to adopt the pledge and accept the grant. In the DKT case, the appeals court found that because of the act's educational message, USAID has the right to discriminate based on viewpoint based on its interpretation of the U.S. Supreme Court case *Rust v. Sullivan*. In *Rust*, the Supreme Court said a clinic could provide abortion counseling "through programs that are separate and independent from the project that receives Title X funds." However, in *DKT*, the appeals court applied this principle beyond the government program. DKT has sought a rehearing. The parties in the AOSI case will file briefs on how the new guidelines affect the constitutional claims being considered. In the meantime, the lower court's injunction against application of the rule to U.S.-based groups remains in place.

A July 27 alert from the Brennan Center for Justice, which represents AOSI in the litigation, said, "The guidelines go further than the LSC model, as they also authorize consideration of whether the affiliated entity has separate "management and governance." The Supplementary Information in the guidelines says they are based on legal services standards that have been upheld in the courts. However, the Brennan Center noted that the challenge they brought against excessive separation requirements for legal services programs has been sent back to a lower court for further review, and the appeals court has not ruled on their constitutionality.

The Supplementary Information says a grantee can be affiliated with an independent organization that does not comply with the pledge requirement, and "the independent affiliate's position on these issues will have no effect on the recipient organization's eligibility for Leadership Act funds, so long as the affiliate satisfies the criteria for objective integrity and independence detailed in the guidance." The affiliated organization must be legally separate and receive no funds or subsidy from Leadership Act funds. There must be physical and financial separation. The definition of separation is general, and the guidance says the agency will determine whether there is sufficient separation on a case-by-case basis, based on factors that "include but will not be limited

to":

- separate personnel, management and governance
- separate financial records and accounts, including timesheets
- the "degree of separation" of facilities, equipment and supplies and the "extent of such restricted activities" by the affiliate
- whether signs, printed materials and other public communications distinguish the grantee from the affiliate
- whether the U.S. government and project name are "protected from public association with the affiliated organization and its restricted activities" in the public eye.

Congress Weighs In

Before the guidance was released, four leaders in the House wrote to HHS Secretary Mike Levitt and USAID Administrator Henrietta Fore expressing concern about the upcoming guidelines, noting, "Groups working to address the causes and consequences of prostitution are concerned that the pledge requirement increases stigmatization and hinders outreach; and there is international public health consensus that effective outreach to marginalized populations is crucial to HIV prevention." The letter suggested the legal services model for separation is not the appropriate one, saying it "would require organizations to set up legally and physically separate affiliates, with separate staff, in order to use private funds to speak freely about prostitution and AIDS." Instead, the letter suggested the agencies adopt the less restrictive model used in the faith-based initiative, which only requires religious organizations to conduct government funded activity in a separate time and place. The letter was signed by Rep. Henry Waxman ☼ (D-CA), Chair of the Committee on Oversight and Government Reform, Rep. Tom Lantos (D-CA), Chair of the Committee on Foreign Affairs, Rep. Donald Payne ☼ (D-NJ), Chair of the Committee on Foreign Affairs Subcommittee on Africa and Global Health, and Rep. Barbara Lee ☼ (D-CA).

Panel Debates Pros and Cons of Allowing Charities to Become Partisan

On Aug. 9, the Hudson Institute's Bradley Center for Philanthropy and Civic Renewal hosted a forum titled "Should Nonprofit Organizations Play an Active Role in Election Campaigns?". The debate was inspired by separate opinion pieces in *The Chronicle of Philanthropy*, one by Robert Egger of the DC Central Kitchen, titled "Charities Must Challenge Politicians," and one by Pablo Eisenberg of Georgetown University, titled "Charities Should Remain Nonpolitical". Egger fiercely defended his argument that charities and religious organizations should be directly involved in partisan politics, while Eisenberg warned that such participation would taint the sector.

Both speakers referred to charitable and religious organizations (501(c)(3)s) generally as

"nonprofits." Egger said that the laws preventing 501(c)(3)s from participating in partisan politics should be changed, citing a need for innovation and criticizing the "we are all trapped in this charity" model. Egger reasoned that nonprofits often work on the front lines to help vulnerable populations and so can identify the candidates who would work to solve the root causes of those social ills in the first place. This gives nonprofits a unique role, and the most effective advocacy that nonprofits can engage in, according to Egger, would be the public endorsement of a candidate or other direct campaign activity. Egger argued that a typical "advocacy day" on Capitol Hill is not enough and only brings the same response from the lawmaker. He said, "And the politicians have figured out just how to mollify us, just how to say, I'm your champion on the Hill. I'm your tiger. You can count on me. Nice talking with you. And they pat you off. And down the hill these people go, thinking that their cause is going to be championed on the Hill. And the reality is, as much as they probably mean it, we're no overt threat to politicians right now." Egger saw that the only way for the nonprofit sector to have a real impact in government would be the capability to get those people elected who would work for various nonprofit causes and actually bring about real change.

Eisenberg offered five reasons for keeping nonprofits nonpartisan. First, he said taxpayers would strongly oppose having their charitable funds used for partisan politics. Second, it would simply be politically unpractical. Members of Congress would not want nonprofits interfering in politics and have historically tried to weaken the advocacy role of nonprofits. "[And] third, direct political activity would inevitably taint the integrity and public trust of nonprofits, thereby diminishing their capacity to deliver services, retain public confidence and raise charitable dollars for their operations." A fourth reason addressed the matter of independence of the nonprofit sector. Eisenberg said if nonprofits want to do their jobs well, they must remain independent from business, government and politics. This "unique quality of 'nonprofitness' has been the backbone of our civil society over the years. It is that quality that has enabled nonprofits to challenge governments, monitor and hold accountable corporate America, give a voice to the voiceless, mobilize constituencies, influence public policies and generate crucial scientific and medical research."

The final argument Eisenberg offered is that nonprofits have not taken full advantage of the current regulations that allow for policy activism. "They [nonprofits] have not yet begun to tap their enormous legal capacity to lobby, to shape policies and to influence politicians and the political process. When you think that just a little more than 1 percent of all public charities that report to the IRS report any money going to lobbying, you'll see the untapped potential." Instead of changing the laws as Egger suggests, Eisenberg said we should understand why nonprofits are not currently engaging in the utmost permissible levels of advocacy. As Eisenberg said, the problem is "our own reluctance to be activists." A part of this foot-dragging is inaccurate information from some funders, who say "do not lobby, it's illegal to lobby." In response, organizations fear they will stop receiving funds from foundations if they do any lobbying whatsoever.

The room was filled with people committed to the nonprofit sector, and the discussion

turned into a reflective one about the future of the sector as a whole.

Note to Readers

The next issue of the Watcher *will be published Sept. 11.*

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