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The Watcher

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In This Issue

Obama Begins 2012 Budget Process with Eye toward Doing More with Less

On June 8, Office of Management and Budget (OMB) Director Peter Orszag rolled out details of the administration's FY 2012 budget guidance for federal agencies. The budget request will again attempt to strike a balance between fiscal austerity and adequate funding for government programs. In addition to the continuance of a three-year freeze on non-security discretionary spending, Orszag revealed two new initiatives that the administration hopes will help agencies achieve more with less: a government-wide initiative to improve federal acquisition and information technology (IT) processes and a requirement for agencies to identify programs that are the "least critical to advancing their agency missions."

In a six-page memorandum directed to the heads of federal agencies, Orszag lays out the administration's FY 2012 budget request guidance. And, in a second, two-page memo, Orszag

requests that agencies "identify the programs and subprograms that have the lowest impact on [each] agency's mission and constitute at least five percent of [its] discretionary budget."

The budget guidance memo is divided into two sections: budget and performance targets and government-wide initiatives. The first section provides specifics for agencies to take into consideration when submitting their budget proposals, including policy and funding priorities; terminations, reductions, and savings; and tax and spending policy integration.

Perhaps the most notable request from the president to the agencies is that their FY 2012 budget requests be at least five percent less than the discretionary total provided for each agency in the FY 2011 President's Budget Request. Obama's FY 2011 request would impose for three years a freeze in non-security discretionary spending; the five percent cut asked for by the administration is below that level. In remarks at the Center for American Progress (CAP) announcing the budget guidance, Orszag stressed that the administration is implementing the initiative to help agencies "live within the three-year freeze," meaning that while some agencies will see nominated cuts take effect, others will see funding boosts for other, more critical programs. This will allow the administration to freeze overall spending on non-security discretionary items. Agencies are also asked to include at least five significant terminations, reductions, and administrative savings initiatives that reduce costs below FY 2011 levels.

Orszag's memo also specifies a slew of other rules for agencies in preparing their FY 2012 budget requests. Agencies are also asked to:

- Include specific FY 2012 performance targets for each High Priority Performance Goal (HPPG) (HPPGs were established in 2009 to help agencies execute their missions and improve the efficiency in which they do so)
- Include information showing the performance gains associated with any proposed increases above the FY 2011 Budget
- Highlight the methods used to allocate base funding, such as cost-benefit analysis or other merit-based or competitive criteria
- Use their budget submissions to reconsider the basic design of their programs to institutionalize the use of evidence, to foster innovation rooted in research, and to encourage rigorous evaluation
- Consult with each other during the budget planning process so that resources are allocated to maximize their impact and avoid inappropriate duplication

The administration also appears to be moving toward taking a more comprehensive approach toward measuring program performance by including tax expenditures as programs that should be evaluated on the basis of their effectiveness and equity. Orszag's memo requests that agencies include an "analysis of how to better integrate key tax and spending policies with similar objectives and goals."

The second section of the memorandum covers the administration's broader efforts to modernize and reform government through smarter IT investments and changes in federal acquisition policies. (Some of these directives were outlined in a previous memo released in

March 2009.) The administration requests that agencies include in their FY 2012 budget requests:

- Specific actions for contributing to the FY 2012 government-wide goals of reducing improper payments by $20 billion and recapturing $2 billion in improper payments to vendors
- Specific actions and goals to reduce the agency's reliance on high-risk contract vehicles, including contracts awarded noncompetitively, procurements where only one bid is received, and cost-reimbursement and time-and-materials contracts
- Appropriate funds for the continued execution of the agency's plan for development of the agency's acquisition workforce
- Funding for the timely execution of agency plans to consolidate data centers developed in FY 2010

In the second memorandum co-authored with White House Chief of Staff Rahm Emanuel, Orszag sets out specific additional FY 2012 budget request guidance for agencies that asks them to identify programs that have the "lowest impact" on each agency's mission, totaling at least five percent of the agency's discretionary budget. Indentifying these programs is part of the Obama administration's "priority of identifying and cutting unnecessary and wasteful spending." But, as the memo mentions, the identification of these programs is a "separate exercise from the budget reductions necessary to meet the target for [each] agency's FY 2012 discretionary budget request." While agencies are asked to identify low-impact programs, it is not certain that these programs will be cut. If the administration implements all of the cuts specified in an agency's base budget request *and* if the administration eliminates all of the low-impact programs specified by an agency, then that agency would see a 10 percent total budget cut (from the FY 2012 number that was initially requested in the president's FY 2011 budget). However, this scenario is highly unlikely.

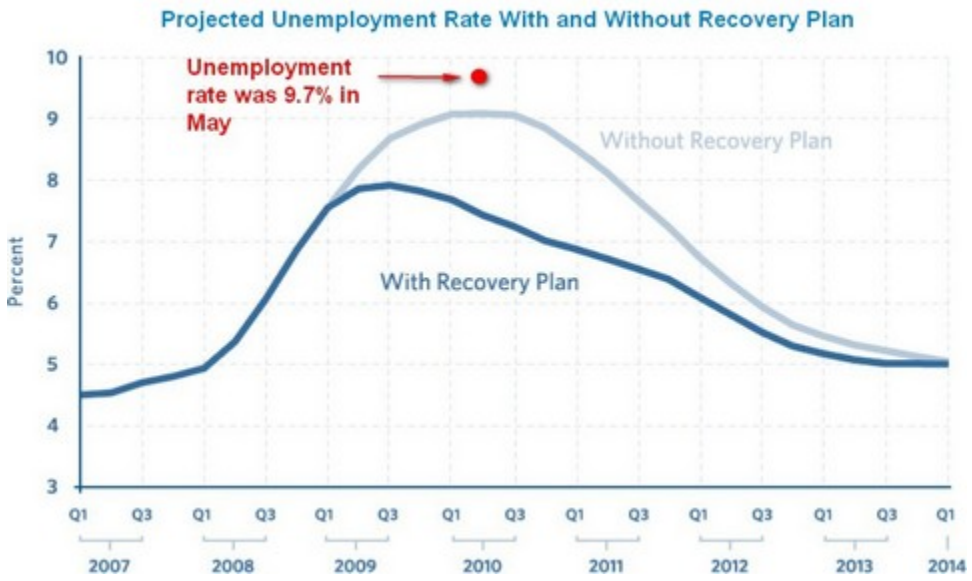
The administration has instructed both security and non-security agencies to target programs that have "an unclear or duplicative purpose, uncertain Federal role, completed mission, or lack of demonstrated effectiveness," and to stay away from "across-the-board reductions" and "incremental savings in administrative costs."

In a recent article in the *Federal Times*, some budget experts worried that without "good data and tools to measure program performance," agencies may allow "political considerations [to] trump the desire to improve efficiency." Moreover, with the administration directing agencies to "disregard statutory, regulatory, or administrative challenges to actually eliminating or reducing a program," budget analysts further fret that agency heads that want to "short-circuit the administration's efforts" might suggest "programs that have strong political backing on Capitol Hill" for cuts.

Commentary: Budget Cuts Imperil Vital Federal Role

Around the time that the American Recovery and Reinvestment Act (the Recovery Act) was being developed, a report co-authored by Christina Romer and Jared Bernstein indicated that passage of such an economic stimulus package could avert economic calamity. Yet now, with the unemployment rate hovering close to 10 percent, the president is setting about cutting federal spending by hundreds of billions of dollars in the coming years. The president's cuts are imprudent in the short run, given their potential to smother the burgeoning economic recovery before it can fully take hold, and could impair the federal government's ability to respond to economic or environmental disasters.

When Congress was debating the Recovery Act in early 2009, the fear was that unemployment could potentially hit nine percent, necessitating large federal outlays to combat the failing economy. The nation blew past that mark soon after passage of the bill, and yet somehow, those earlier arguments no longer apply. Does Congress no longer believe that kick-starting the economy through an expansion of the deficit is as fiscally responsible as it was in early 2009? Has the president quit caring about the plight of the unemployed?



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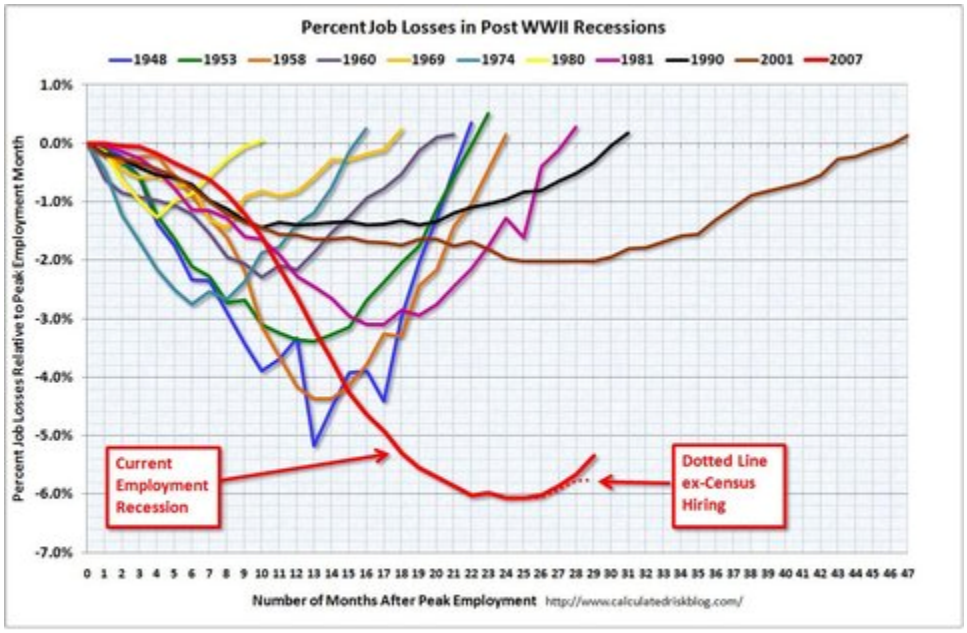
A letter from Obama to Congress sent June 12 suggests that this is not quite the case. In it, the president asks Congress to move $50 billion in aid to state and local governments to stay layoffs of thousands of teachers, firefighters, and police officers. Congress is attempting to approve a bill that would extend Unemployment Insurance funding for millions of unemployed workers. And although it dropped critical funding for health insurance assistance, there is some glimmer of recognition that Americans are struggling. It remains a mystery, however, why Congress and President Obama refuse to do more.

The economic outlook is still bleak; even the Office of Management and Budget (OMB) predicts unemployment to remain above eight percent until 2013. But not only is the number of

unemployed seriously high, the duration of their unemployment is also startling. According to the Bureau of Labor Statistics, those seeking employment for more than 27 weeks is at the highest level since data have been available (1967). Another measure of the unemployed – one that includes workers marginally attached to the labor force and those employed part-time for economic reasons – is also remarkably high. In other words, we are in the midst of a deep employment crisis. Meanwhile, President Obama wants to give in to the deficit hysterics by pushing for real spending cuts (see our companion piece in this week's *Watcher*.)



Source: Calculated Risk

(click to enlarge)

The fiscal austerity game is a dangerous one. The president has taken up the mantle of spending restraint, but his proposed cuts will do little to reduce the short-term federal budget deficit and nothing to avert the looming crisis in the long-term fiscal outlook. The proposed cuts ignore the simple fact that the non-security areas of the federal government that are vital for the nation's well-being have been living off of table scraps for years.

The president should be congratulated for putting emphasis on performance improvements and program evaluation. This makes government more effective and can result in modest savings through reduction of waste and fraud. Additionally, we acknowledge that the budget is on an unsustainable path. In the long term, there will be a need for progressive tax hikes and spending cuts across the board, including cuts to military spending.

However, the agencies and programs that will be slated for spending reductions in the short-run are those that protect our country, from a struggling economy to lead in our children's toys to offshore oil drilling. Today, we are confronted by a devastating oil spill disaster and by a recession that has buffeted millions of families. Tomorrow's crises are unpredictable, and

cutting back on federal spending will mean that we will be left ill-prepared to cope with the next disaster, economic or otherwise.

The Minerals Management Service (MMS) used to be a relatively unknown federal office, charged with regulating the nation's natural gas, oil, and other mineral resources. MMS is now in the public eye, thanks to the BP Deepwater Horizon disaster in the Gulf of Mexico. Although mismanagement at MMS surely contributed to its failure to properly oversee BP's operations, MMS officials could have performed more rigorous onsite inspections with additional resources.

Regulatory oversight, through federal offices such as MMS, costs money but provides important protections to the American people. While MMS will likely benefit from increased scrutiny as well as increased funding, other public protection agencies that have remained out of the spotlight will not fare as well in the coming fiscal years.

Cuts to the U.S. Environmental Protection Agency (EPA) could result in fewer inspectors for its air or water quality programs. The Department of Health and Human Services (HHS) could cut Food and Drug Administration inspectors, making it more likely that the nation suffers another *E. coli* outbreak. As the president and Congress pursue budget cutbacks, we are left to wonder: when will the next Deepwater Horizon occur, what will it be, and will we as a nation be prepared to respond to the disaster without the adequate resources to do so?

Lack of Transparency Afflicts Oil Spill Response

Adding insult to injury, the worst oil spill in U.S. history has been plagued by a lack of transparency that is hindering the response to the disaster and may impact responses to future spills. Reports of restrictions on media access to the spill site, the delayed disclosure of information on dispersants, and frustrations with BP's overall lack of transparency have confounded efforts to hold the company and government agencies accountable.

Both the administration's and the oil industry's response to the oil spill in the Gulf of Mexico have drawn criticism over the slow pace of release of information to the public. As congressional investigations and continued public outcry bring attention to the lack of openness, the federal response seems to be slowly moving toward greater transparency.

Confusion about Size of Spill

In the first weeks of the catastrophe, conflicting, inaccurate, or missing information regarding the amount of oil leaking into the Gulf of Mexico created confusion. Despite initial, unofficial estimates of up to 64,000 to 110,000 barrels of oil per day, the U.S. government and BP initially estimated up to 1,000 barrels of oil per day were leaking from the crippled Deepwater Horizon rig. Later, relying on estimates from BP, federal officials raised the estimate to 5,000 barrels per day. Weeks later, the interagency Flow Rate Technical Group, after analyzing data and reviewing undersea video footage of the leak, estimated a range of 11,000 to 25,000 barrels per day. On June 10, another revised estimate placed the range at 25,000 to 30,000 barrels of oil a day.

The task of quantifying the amount of oil gushing out of the broken pipe was made more difficult by BP's delay in providing scientists a high-definition video of the leak for computer analysis, as well as by the company's resistance to permit a direct measurement of the flow rate. The National Oceanic and Atmospheric Administration (NOAA), the scientific agency that produced the government's 5,000 barrel-per-day estimate, refused to provide more detailed information on the mathematics behind its figure.

Getting a clear, accurate understanding of the flow rate of the oil leaking from the destroyed wellhead is important for numerous reasons. Understanding the ecological impacts of the spill depends on a clear picture of the size of the leak. Planning for the prevention of and response to future deep-sea oil spills will be also informed by clear understanding of the characteristics of the Deepwater Horizon spill. In addition to learning about the root causes of the accident, the public and government regulators will need to know the consequences in order to plan for the next catastrophe.

Moreover, the amount of fines faced by BP will likely depend on the amount of oil released into the Gulf. In an interview with *The New York Times*, Rep. Edward Markey (D-MA), whose House Subcommittee on Energy and the Environment is investigating the spill, noted that under the Oil Pollution Act of 1990, companies face fines of up to $1,000 per barrel spilled, or up to $3,000 per barrel in the case of gross negligence. The need for accurate figures will have a major impact on potential fines. "I think they were hoping they could fix it before they would be forced to allow the world to measure it," Markey said.

Markey's subcommittee also compelled BP to release underwater video footage of the leak. In response to the company's lack of transparency during the spill response, Markey stated, "We cannot trust BP. It's clear they have been hiding the actual consequences of this spill."

Media Access Restricted

According to numerous reports, BP and its contractors have turned journalists and photographers away from impacted sites, and local law enforcement, the Coast Guard, and other government officials have also restricted media access to important areas affected by the spill. In addition, BP initially directed its cleanup workers to not speak with the media. The company has since rescinded that order.

Many reporters trying to cover the spill complain that access, even when granted, is strictly controlled by BP or BP contractors, frequently with the complicity of local or federal government officials. Markey commented on BP's role in restricting media access, "I think they've been trying to limit access. It is a company that was not used to transparency. It was not used to having public scrutiny of what it did."

On June 6, Coast Guard Admiral Thad Allen, the National Incident Commander, announced that he had issued orders granting the media "uninhibited access" to cleanup efforts, except if the access is "a security or safety problem." According to a BP spokesman, "From the beginning, we have tried to provide information, data and access to government officials, the news media

and the public. But we always are striving to enhance and improve our lines of communication and our responsiveness."

Secret Chemicals

More than 1,262,000 gallons of dispersants have been used on the oil spill to date. Numerous concerns have been raised about the long-term consequences of using such unprecedented quantities of dispersants and the unique conditions of their application under thousands of feet of water. Scientists and environmentalists had been calling for the disclosure of the ingredients to allow the public to analyze the possible human and ecological health impacts and what worker safety measures are needed. The chemical ingredients in the dispersants were kept secret until June 4, when the U.S. Environmental Protection Agency (EPA) quietly disclosed the ingredients on the agency's website.

The chemical components had been kept secret because the manufacturer had claimed the information was confidential business information, and therefore, it qualified for special protections by the EPA. Open government advocates had asserted that because of the clear emergency situation and the potential health and safety consequences of keeping the information secret, the EPA had the legal authority to disclose the chemical identities. EPA disputes that it had such authority, saying that the agency is subject to possible criminal penalties in the event of unauthorized disclosure of confidential business information, even in a situation as dire as the Gulf disaster.

Reflecting the concerns about the toxicity of the dispersants, EPA ordered BP to analyze alternative dispersants that were less toxic than the products the company had been using. BP, with help from the Coast Guard, conducted toxicity tests of alternative dispersants, but the results were neither released nor shared with the EPA. The company refused to select an alternative, claiming its current product was the most appropriate for the situation. EPA is now conducting its own toxicity tests of dispersants.

The data gaps related to the use of dispersants is emblematic of a chemicals policy that allows chemicals into commerce before the public has an adequate understanding of the chemical's hazard. One researcher who has studied dispersants used on oil spills lamented, "There's such limited funding out there to do this research. Would I would have liked to screen six dispersants? Yes, but there wasn't money."

Federal Transparency Efforts

Despite the numerous concerns raised about the quantity, quality, and access to information about the spill, there have been several government efforts to provide the public with data. The EPA created its own website providing water and air quality monitoring data, along with information on the agency's activities in the Gulf. The interagency command center, known as the Unified Command, provides extensive online updates on cleanup activities, as well as live video feeds from underwater remotely operated vehicles and telephone numbers for incident reports from the public.

After several weeks of inadequate transparency from BP, EPA Administrator Lisa Jackson and Department of Homeland Security Secretary Janet Napolitano called on BP to release more data about the spill and increase the company's transparency.

On June 14, NOAA launched a new website that provides information about the BP oil spill via an interactive map. Described as a "a one-stop shop for detailed near-real-time information about the response to the Deepwater Horizon BP oil spill," the interactive map includes data from DHS, the Coast Guard, the U.S. Fish and Wildlife Service, EPA, NASA, the U.S. Geological Survey, and the Gulf states.

The Obama administration is also calling for a high level of transparency in the awarding and disbursement of public claims against BP. Adm. Allen of the Coast Guard recently wrote to BP chief executive Tony Hayward demanding greater disclosure of compensation payments. Allen wrote, "We need complete, ongoing transparency into BP's claims process including detailed information on how claims are being evaluated, how payment amounts are being calculated, and how quickly claims are being processed."

House Moves to Increase Oversight of Intelligence Community

On May 28, the House approved an amendment to the defense authorization bill that requires the Office of the Director of National Intelligence (DNI) to cooperate with audits and investigations conducted by the Government Accountability Office (GAO). The measure was passed despite threats by the White House to veto what the Obama administration perceived to be an expansion of GAO authority.

The amendment to the National Defense Authorization Act for Fiscal Year 2011 (H.R. 5136) was introduced by Rep. Anna Eshoo (D-CA) and cosponsored by a group of Democrats including Reps. Howard Berman (D-CA), Jane Schakowsky (D-IL), Rush Holt (D-NJ), John Tierney (D-MA), and Mike Thompson (D-CA). Ultimately, it passed by a bipartisan vote of 218-210.

The GAO is an office of the legislative branch, authorized by statute to investigate all matters relating to the receipt, disbursement, and application of public funds. Only congressional committees may request the GAO to open an investigation. Although the GAO currently has some access to intelligence records, the amendment would statutorily mandate intelligence community cooperation.

The DNI is a component of the executive branch serving as the point office of the 16-agency intelligence community. Generally, legislative branch oversight of this body is limited to the two congressional intelligence committees. Although the GAO does have a relationship with the DNI, its authority to review intelligence activities would be considerably expanded under this amendment.

The executive branch has consistently maintained that GAO has no authority to investigate any intelligence activities. The argument stems from a 1988 opinion by the Justice Department's

Office of Legal Counsel, which stated that the creation of congressional intelligence oversight structure implicitly exempts reviews of intelligence activities from the scope of GAO's existing audit authority. In years since, this has been expansively applied by administrations to preclude GAO investigation of activities that extend into the realm of traditional intelligence activities.

The amendment states that the DNI "shall ensure that personnel of the [GAO] designated by the Comptroller General are provided with access to all information in the possession of an element of the intelligence community that the Comptroller determines is necessary for such personnel to conduct an analysis, evaluation, or investigation of a program or activity of ... the intelligence community." The amendment also expands the authority to request an investigation to any congressional committee. Currently, only the intelligence committees of Congress may make inquiries into the activities of the DNI. The amendment would require that the requesting committee inform the intelligence committees of the request.

The amendment would allow the DNI to redact portions of GAO investigations related to intelligence sources or methods but requires DNI to notify Congress that it has done so. Further, it instructs GAO and DNI to enter into procedural discussions prior to any investigation. DNI is allowed to suggest modifications to investigative procedures within five days of the initial discussion. GAO employees handling the investigation would be subject to the same statutory penalties for unauthorized disclosure as employees of the intelligence community.

Congressional supporters of the amendment made strong statements that the amendment is necessary for them to exercise their constitutional powers as elected officials. After the bill passed in the House, Tierney stated, "Oversight is an essential responsibility of the legislature and the Government Accountability Office, as Congress' investigative agent, is essential to that role. The Intelligence community should not be insulated from oversight. The amendment was crafted carefully to protect sources and methods and I am glad that the red herring of fear of disclosure was not 'bought' by the majority voting."

The amendment may find similar support in the Senate. In 2008, Sen. Daniel Akaka (D-HI) stated that Congress must "redouble its efforts – that is what we are trying to do – to ensure that U.S. intelligence activities are conducted efficiently, effectively, and with due respect for the civil rights and civil liberties of Americans."

Previously, the Obama administration threatened to veto the 2010 Intelligence Authorization Act due to a similar amendment expanding GAO's authority to review intelligence activities. On March 15, Office of Management and Budget (OMB) Director Peter Orszag wrote to the senior members of the intelligence committees, stating that the new requirement would "undermine the president's authority and responsibility to protect sensitive national security information." The White House argued that expanding GAO authority would adversely affect oversight relationships between intelligence committees and the DNI.

However, GAO pointed out that the administration's veto threat was based on an erroneous interpretation of law. In a March 18 letter to senior committee members, the acting GAO Comptroller General, Gene Dodaro, wrote that Orszag made "several misstatements of law and

fact." In particular, Dodaro argued that such an amendment would only reinforce GAO's already existing oversight authority and not substantially alter GAO's current mandate as stated by Orszag. Dodaro wrote, "GAO acknowledges and does not seek to displace the special relationship between the congressional intelligence committees and the [intelligence community]."

It is unknown how the intelligence community leadership will react to the current amendment. As a congressman, Leon Panetta, current director of the Central Intelligence Agency (CIA), proposed the CIA Accountability Act in 1987. That bill would have increased GAO's oversight authority of the CIA. However, President Obama's recent nomination of Gen. James Clapper to succeed outgoing DNI Dennis Blair may result in a resistance to the legislation. Clapper reportedly has tense relationships with some members of Congress. Rep. Pete Hoekstra (R-MI) stated that Clapper is "not forthcoming, open, or transparent."

The amendment does not include any requirement that the public be informed of GAO findings concerning the DNI. While standard GAO practice is to publish the results of its findings free to the public, it often withholds reviews that concern issues of national or homeland security.

Although the bill passed the House, it must be voted on in the Senate. The Senate received the legislation on June 9.

As Senate Defeats Challenge to Climate Finding, EPA Faces Additional Trials

Opponents of climate change regulation are attempting to dismantle the regulatory framework the U.S. Environmental Protection Agency (EPA) has crafted thus far under the Obama administration. The Senate unsuccessfully attempted to overturn a scientific determination in which the agency found that greenhouse gases threaten public health and welfare. However, EPA still faces court challenges by industry groups on regulations limiting emissions from both vehicles and industrial sources.

On June 10, the Senate defeated a resolution (S.J. Res. 26) introduced by Sen. Lisa Murkowski (R-AK) that would have canceled EPA's endangerment finding for greenhouse gases. The Dec. 7, 2009, endangerment finding declared climate-altering emissions a threat to "the public health and welfare of current and future generations" under the Clean Air Act. A procedural vote that would have brought the resolution up for a vote failed, 47-53, effectively killing it.

Critics accused the Senate of attempting to interfere with an agency scientific determination and hailed the defeat of the resolution as a victory not only for the environment, but also for scientific integrity. "It's deeply disturbing that some senators thought they could wave a magic wand and make the entire body of climate science disappear," Kevin Knobloch, president of the Union of Concerned Scientists, said in a statement. "The EPA determined that global warming emissions endanger public health," he added. "Fortunately a majority of the Senate stood up to this attack on science."

Murkowski introduced the resolution under the Congressional Review Act (CRA), a 1996 law that allows Congress to veto agency regulations and gives privileged consideration to resolutions introduced in the Senate if sponsors meet certain deadlines. Murkowski missed a deadline under the CRA; however, Senate Majority Leader Harry Reid nonetheless allowed her to bring the resolution to the floor. Some benefits of moving a resolution under the CRA include limited time for debate, a prohibition of amendments or filibusters, and the need for just a simple majority to pass any such resolution of disapproval.

"[I]n the face of the worst environmental disaster in our nation's history, Senator Murkowski's resolution never should have even reached the Senate floor," former Vice President Al Gore said in a statement, referring to the BP oil spill disaster in the Gulf of Mexico. "The fact that we had to work to defeat this legislation is a testament to the continued strength of the fossil fuel lobby."

The resolution drew significant Democratic support, with six Democrats joining all 41 Republicans to vote in favor. Even if the resolution had cleared the Senate, it was unlikely to pass the House, and President Obama had threatened to veto it.

EPA's decision to explore an endangerment finding was first prompted by the U.S. Supreme Court. In 2007, the Court ruled in *Massachusetts v. EPA* that greenhouse gases were eligible for regulation under the Clean Air Act pending an EPA examination of whether emissions posed public health risks.

The endangerment finding is not only EPA's most definitive statement to date on the link between greenhouse gas emissions and global climate change, but it also serves as a legal trigger for future regulation. EPA recently finalized two regulations supported by the endangerment finding, one limiting emissions from passenger vehicles and the other targeting stationary sources.

The vehicle emissions rule, finalized in April in partnership with the Department of Transportation (DOT), sets new fuel economy standards for vehicles from model years 2012 through 2016. The standards will require new cars to reach an average fuel economy level of 34.1 miles per gallon by 2016, resulting in 1.8 billion barrels of oil saved over the life of the vehicles, according to administration estimates.

A coalition of industry groups is suing EPA and DOT over the joint rule. The coalition includes, among others, Massey Energy, the owner of the West Virginia mine where an explosion killed 29 miners in April, according to BNA news service (subscription required).

Auto makers support the EPA/DOT rule and have filed in court on behalf of the administration. The standards were set after Obama brokered a deal among the auto industry, environmental groups, and states. The industry agreed not to challenge stricter fuel economy standards as long as those standards were consistent across all 50 states. Environmental groups have also filed in court on the agencies' behalf.

EPA faces a more serious challenge to its standards for stationary sources such as power plants and oil refineries. The rule, finalized in May, requires new and existing facilities emitting greenhouse gases above certain thresholds to obtain permits and upgrade pollution control technology beginning in 2011. EPA says the rule covers only major facilities but will still allow the agency to oversee 70 percent of greenhouse gases emitted from stationary sources. At least 14 lawsuits have been filed against EPA over the stationary source rule, according to BNA. Plaintiffs include the U.S. Chamber of Commerce and the National Association of Manufacturers. The Center for Biological Diversity, an environmental group, is also challenging the rule, hoping to force EPA to move up the implementation schedule.

Additional legislative challenges are also expected. Sen. Jay Rockefeller (D-WV) has introduced legislation (S. 3072) that would delay for two years implementation of EPA's stationary source regulation. The bill would not impact vehicle emissions standards. Some Democrats who opposed the Murkowski resolution said during the debate that they would support Rockefeller's bill and hoped to bring it to the floor for a vote.

Both Obama administration officials and environmental advocates hope that the continued presence of EPA regulation will prod Congress into more quickly passing comprehensive climate change and energy legislation. The House passed a bill (H.R. 2454) in June 2009 that would establish a cap-and-trade program for greenhouse gases, but action has stalled in the Senate, where different proposals, likely without cap-and-trade provisions, are being considered.

Senators from both sides of the aisle have said they prefer legislation to EPA regulation, and supporters of the Murkowski resolution assailed EPA over what they characterized as an administrative attempt to usurp Congress's power. "Many of the senators who voted for the resolution say they want Congress, not the administration, to address climate change," Knobloch said. "That position has integrity only if the Senate moves swiftly to pass a strong climate and energy bill."

Senate Democrats say they hope to consider and pass a comprehensive bill before breaking for the August recess. However, the BP oil disaster has further complicated both the politics and the timing of the legislation. Obama is scheduled to address the nation Tuesday evening (June 15) and will likely continue his push for comprehensive energy and climate policy.

White House Issues Guidance on E-rulemaking and Paperwork Practices

On May 28, the Office of Information and Regulatory Affairs (OIRA) issued two memoranda to federal agencies that impact key features of the regulatory process. The memos direct agencies to change practices related to electronic rulemaking dockets and to paperwork clearances that agencies request when collecting information from the public.

On Jan. 21, 2009, President Obama charged the director of the Office of Management and Budget (OMB) to develop an Open Government Directive (OGD) outlining actions executive

departments and agencies needed to take to encourage transparency, public participation, and collaboration. OMB issued the directive on Dec. 8, 2009.

The OGD requires OIRA, the office within OMB that oversees federal regulatory policy, to review its policies and procedures and issue revisions to them, if necessary, "to promote greater openness in government." The two May memos are among several issued by OIRA Administrator Cass Sunstein in accordance with the OGD.

The memo on Increasing Openness in the Rulemaking Process – Improving Electronic Dockets urges agencies to make more and better rulemaking information available on Regulations.gov, the main centralized public site for tracking regulations. Specifically, the memo calls for agencies to make their paper-based and electronic dockets consistent with each other. To date, many agencies have had more complete paper dockets available to the public in agency reading rooms physically located at the agencies. The memo urges agencies to put the paper dockets and the electronic dockets on equal footing.

Agencies should also make the electronic dockets more complete. The memo states that "supporting materials (such as notices, significant guidances, environmental impact statements, regulatory impact analyses, and information collections) should be made available by agencies during the notice-and-comment period by being uploaded and posted as part of the electronic docket." Public comments, regardless of the form in which agencies receive them, are to be posted to the dockets in "a timely manner."

The memo also instructs the U.S. Environmental Protection Agency (EPA), which manages and operates Regulations.gov, to develop within six months best practices for classifying documents and establishing data protocols. Changes to the consistency and completeness of data should help alleviate some of the problems that have made Regulations.gov difficult to use and the site's search results unreliable.

The memo on Paperwork Reduction Act – Generic Clearances addresses changes to certain types of information collections that agencies use to gather information from the public and regulated entities. Under the Paperwork Reduction Act (PRA), agencies are required to seek OMB approval when they wish to collect information from 10 or more people.

Agencies have been given "generic clearances" by OMB when the information collected is voluntary (that is, the respondents are not required to submit the information to the requesting agency), uncontroversial, or easy to produce. Generic information collections "can be used for a number of information collections, including methodological testing, customer satisfaction surveys, focus groups, contests, and website satisfaction surveys," according to the memo.

Besides making agencies aware of and encouraging the use of these generic clearances, the memo describes the process agencies should use to request generic clearances from OIRA. Once approved, the clearance may remain in effect for three years, the maximum time under the PRA that any information collection can be approved.

Although the memo is intended to provide the agencies with a "significantly streamlined process" for receiving OIRA's approval for the plans to collect generic information, OIRA still maintains its control over the substance of the information collections. Once the generic clearance plans are approved, the agencies must still submit "specific information collections (e.g., individual focus group scripts, test questions, surveys) to OMB for review, in accordance with the terms of clearance set upon approval of the plan." Should the specific information collections an agency submits fall "outside the scope" of the clearance, OIRA may require "further consideration" by the agency or force the agency to skip the generic clearance process and go through the complete information collection request outlined in the PRA.

The full list of OIRA's memos to agencies issued pursuant to the OGD is available on OIRA's website under the heading "OIRA Focus."

BP and Environmental Nonprofits: Conflicts and Complaints

Nonprofit organizations are working diligently to counter the effects of the catastrophic oil spill that followed the failure of BP's Deepwater Horizon rig in the Gulf of Mexico. Groups are aiding in cleanup efforts, protesting, raising money, and engaging in various other activities to turn anger into action. However, some nonprofits are also facing harsh criticism for accepting donations and other gifts from the oil company, and the worst oil spill disaster in the country's history has jeopardized partnerships between energy companies and environmental nonprofits.

BP and some of the largest environmental organizations formed relationships in the past, which the oil company used to create an Earth-friendly image while helping the groups pursue their causes. Now, after the spill, nonprofits that are connected to BP, either through funding or any other work affiliation, are facing intense disapproval from their supporters.

The fact that organizations with ties to BP are facing scrutiny highlights the perpetual debate regarding the relationships between for-profit businesses and nonprofits and how a nonprofit should react when a donor becomes involved in scandal. More importantly to many is whether that relationship affects a group's ability to speak out against or criticize the sponsoring business.

Some insist that there must be a separation between industry and nonprofits, while others see value in some type of partnership. In this case, an environmental group may believe that working with a corporation will advance better corporate environmental policies.

The Nature Conservancy, America's third-largest nonprofit based on assets, has received the most media attention for its connections to BP. In late May, *The Washington Post* reported that the group "has given BP a seat on its International Leadership Council and has accepted nearly $10 million in cash and land contributions from BP and affiliated corporations over the years."

The Nature Conservancy's website has been inundated with complaints from donors upset about the group's decision to work with and accept donations from BP. CEO Mark Tercek posted a

statement defending the organization. "Anyone serious about doing conservation in this region must engage these companies, so they are not just part of the problem but so they can be part of the effort to restore this incredible ecosystem," he said. The group stresses that contributions from BP and other corporations make up only a portion of the organization's total revenue.

The Nature Conservancy's chief scientist, Peter Kariva, also responded with a blog post defending the group's collaboration with BP. "In fact, although we have never engaged with BP or other energy companies on their offshore Gulf drilling, maybe we should have — we might have been able to help site their activities to reduce the risk to the Gulf's globally significant habitats." Commenters fired off many angry responses to Kariva's post.

Reportedly, BP also provided $2 million in donations to Conservation International. In response to the spill, the group plans to review its relationship with BP. Conservation International Vice President Justin Ward said, "Reputational risk is on our minds."

Further, the Sierra Club and Audubon, along with other energy and environmental groups, joined with BP Wind Energy in 2007 to form the American Wind and Wildlife Institute. *The Economist* also reports that the Environmental Defense Fund helped BP develop its internal carbon-trading system.

Another example involves funding for an aquarium in California. The Aquarium of the Pacific in Long Beach recently opened a new sea otter habitat, which was funded by a $1 million donation from BP. However, the *Los Angeles Times* reports that the aquarium has no desire to distance itself from the oil company. There has also been no question of changing the exhibit's name, which will remain the BP Sea Otter Habitat. The aquarium's president said, "The aquarium is still open for future partnership with BP."

Paul Dunn, an expert on corporate ethics, told the *Times* that how these situations are dealt with "depends largely on whether the donor's scandalous acts are directly at odds with the recipient's mission. [. . .] People can see a direct link there. Aquatic animals are being harmed by the disaster."

The Economist notes the intricate relationships that many nonprofits have with large corporations and their possible repercussions. "The spill also highlights the question of whether NGOs should accept money for the advice they give to companies," according to the publication. "For organisations [*sic*] such as the Nature Conservancy, which protects ecologically sensitive spots by buying them or persuading others to set them aside, businesses are a big source of income. But partnerships with grubby firms risk turning off its million-odd individual donors."

Nancy Schwartz, a marketing consultant who works with charities, said in an interview on Katya's Non-Profit Marketing Blog, that in order to rebuild its reputation, the Nature Conservancy should recognize that accepting money from BP was a mistake. Schwartz said, "The fact of the Nature Conservancy's taking funding from BP for years, no matter how small a percentage it is of the overall organizational budget, is a very bad sign of organizational values gone missing or soft. And once those values are endangered, resultant policy decisions are too."

These issues address important questions for nonprofits – for example, whether or not a collaboration can thrive when the two entities have very different values and priorities. Such associations endanger a nonprofit's ability to question or criticize the business or industry. Whether a group can advocate around the corporation's work may also come under question when a group accepts contributions or other gifts from that company. Therefore, some believe that environmental groups should not be associated with businesses whose work may harm the environment.

Wrangling over DISCLOSE Act Slows Bill Down, but Deal May Be Near in House

Some members of Congress have started to explore exempting certain nonprofits from the DISCLOSE Act, the bill developed by Democrats to respond to the *Citizens United v. Federal Election Commission* decision from the U.S. Supreme Court. While some nonprofits are concerned about donor disclosure requirements in the bill, other groups are concerned that exemptions or changes to the bill would render the legislation ineffective. These organizations worry that without strong disclosure requirements, the bill would allow political ads sponsored by anonymous sources to flood the airwaves at election time.

A few nonprofits, mostly those supporting the legislation, have been playing a key role in negotiations concerning development of the DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act), federal legislation sponsored by Rep. Chris Van Hollen (D-MD) and Sen. Charles Schumer (D-NY) to blunt the impacts of the *Citizens United* decision. In *Citizens United*, the Supreme Court ruled that corporations and unions may now directly and expressly advocate for the election or defeat of candidates for federal office through independent expenditures paid for by general funds.

Other groups, such as the AFL-CIO and the National Rifle Association (NRA), a 501(c)(4) organization, have raised concerns about the legislation. Responding to the NRA, Rep. Heath Shuler (D-NC), a "gun rights advocate and a co-sponsor of the package, has drafted a change that would exempt the gun lobby – and all other groups organized under 501(c)(4) of the tax code – from the disclosure requirements in the measure," according to *Roll Call*.

Shuler proposed the amendment because "the gun lobby has objected to the bill's provision requiring a group to identify its top donors in its political ads, charging it would force the group to turn its membership list over the government," *Roll Call* noted.

At least some of what Shuler wants has reportedly been wrapped into a manager's amendment by House leadership, though the official language of the proposal was not available at press time. According to *Politico*, "The proposal would exempt organizations that have more than 1 million members, have been in existence for more than 10 years, have members in all 50 states and raise 15 percent or less of their funds from corporations." This has been confirmed to OMB Watch by sources who have reviewed the manager's amendment. Citing unnamed Democratic sources, *Politico* indicates that the NRA may be the only organization that qualifies under the

criteria. In a press statement issued June 15, the NRA said that if the manager's amendment is included in the bill, the group "will not be involved in final consideration of the House bill."

Far more hostile is the U.S. Chamber of Commerce, which is threatening to "score" the bill. The threat poses a big dilemma for some Democrats who are vulnerable in the 2010 midterm elections and who do not want to be listed as supporting a bill that the Chamber opposes.

The National Right to Life Committee, which opposes the DISCLOSE Act, also sent a letter to lawmakers informing them that it would use their vote on the legislation in evaluating their records.

Other nonprofits favor disclosure requirements but do not want them to be overly broad. Abby Levine, deputy director of advocacy for the Alliance for Justice (AFJ), told the *Washington Independent* that AFJ is "in favor of meaningful disclosure" and that the group wants "the relevant information without casting too wide a net."

Lisa Gilbert, U.S. Public Interest Research Group's (U.S. PIRG) democracy advocate, told the *Washington Independent*, "The thing about this bill is that there is disclosure that wasn't required before of all entities' in the politically active tax-exempt world. These are things people aren't accustomed to doing."

Other nonprofits support the DISCLOSE Act in its original form, are strongly opposed to Shuler's original (c)(4) exemption, and are seeking to narrow the exemption. According to a press release from the Campaign Legal Center, the group joined Democracy 21, the League of Women Voters, and Public Citizen in a letter to House members asking them to vote for the DISCLOSE Act.

In the letter, the groups wrote, "The Supreme Court stated in *Citizens United* that disclosure and disclaimer requirements 'do not prevent anyone from speaking,' and disclosure 'permits citizens and shareholders to react to the speech of corporate entities in a proper way.'" They also urged House Members to "oppose any efforts to undermine or weaken the provisions in the legislation."

Nan Aron, president of AFJ, came out strongly against the manager's amendment version of the (c)(4) exemption. According to *CQ Politics*, Aron said, "This outrageous attempt to garner support for the bill does nothing more than make the already powerful even more powerful and undermines both the stated purpose of the legislation and fundamental Constitutional principles."

During the last week of May, just before the House Rules Committee was set to consider the DISCLOSE Act, the committee session was canceled. Some have blamed the lobbying efforts of groups opposed to the bill for disrupting the committee's schedule. Though a House deal may nevertheless be near, the legislation faces a tough road in the Senate, and the longer the bill is delayed, the less likely it will pass in time to affect the 2010 midterm elections.

Editor's Note: Due to the rapidly evolving nature of the DISCLOSE Act, we urge readers to visit The Fine Print for breaking news and changes that may have occurred after press time.

OMB Watch • 1742 Connecticut Avenue, N.W. • Washington, D.C. 20009
202-234-8494 (phone) | 202-234-8584 (fax)

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