OMB WATCH
Promoting open government, accountability, and citizen participation since 1983

Subscribe | Blog | Donate

The Watcher

June 2, 2010 Vol. 11, No. 10

In This Issue

How Would Enhanced Rescission Authority Affect the Budget Process?

The Obama administration recently caused considerable controversy when it sent a proposal to Capitol Hill on May 24 asking for enhanced authority to cut spending already approved by Congress. Fiscal hawks like Rep. Paul Ryan (R-WI) hailed the president's proposal for "enhanced rescission authority" as "an important tool to target wasteful spending," while congressional appropriators from both parties argued that the proposal would give the president too much power over the spending process. Questions remain about the proposal's potential effects on deficit reduction.

Currently, the president can withhold funding for a spending program for 25 days and ask Congress to rescind the spending, but the legislature is under no obligation to take up the spending cuts. After 25 days, the president must restore the funding. The administration's

enhanced rescission authority proposal would provide the president with 45 working days after Congress passes an appropriations bill to cull unwanted spending from the measure. The president would then send all cuts back to Congress as a legislative package for a mandatory up-or-down vote. Congress would have 25 working days to vote on the bundle of spending cuts, which would not be amendable and would be shielded from Senate filibusters.

In a blog post announcing the proposal, Office of Management and Budget Director Peter Orszag said the proposal would "reduce unnecessary or wasteful spending" because "we should never tolerate taxpayer dollars going to programs that are duplicative or ineffective and because, especially in the current fiscal environment, we cannot afford this waste."

Since the proposal only applies to items in appropriations bills, it would exempt entitlement spending and tax expenditures. Tax expenditures, for example, contribute over $1 trillion to the federal budget deficit and represent about the same amount of spending as the cash outlays resulting from discretionary appropriations.

If presidents were granted enhanced rescission authority, the impact would likely fall on congressional earmarks and programs without powerful constituencies. Most likely, spending on homeland security and the military would be protected, while non-security discretionary spending would quickly be bumped to the front of the line for cuts. These programs, like nutrition and housing assistance, consumer and environmental protection agencies, and scientific research, which compete against each other for funding during the annual appropriations process, would become even more vulnerable to cuts.

This is not to say that security spending will remain untouched. The Obama administration earlier in 2010 proposed a $156 million cut to the Coast Guard's FY 2011 budget. Although the recent BP oil spill disaster has drawn heavy scrutiny to this cut, in an enhanced-rescission-authority world, had Congress disregarded Obama's initial Coast Guard budget request prior to the spill, it is possible that such funding would have seen a red line via Obama's enhanced rescission authority, leaving the Coast Guard short of resources to deal with the catastrophe.

Cutting programs popular with Congress may lead to intense legislative-executive conflicts. The current dispute between the administration and Congress over the C-17 cargo plane and the F-35 alternate engine are illustrative examples. In 2009, President Obama and Secretary of Defense Robert Gates asked Congress not to fund these two programs because, in the opinion of the Pentagon, the military did not need them. Despite this, Congress included funding to keep both programs going.

Spending programs like the C-17 and the alternate engine for the F-35 employ people throughout the country, often in areas that would lack any manufacturing presence if it were not for these defense programs. It is not hard to imagine all of the representatives and senators from each state represented in the building process of one of these programs to band together or make deals with other representatives and senators to fight off a rescission attempt. The more rescissions a president includes, the more a diverse, bipartisan coalition may coalesce against them.

Giving the president more power over the spending process has appropriators very concerned. A president's decision to target wasteful and duplicative programs that are draining resources away from other, more effective programs is often a political judgment call, one that has traditionally rested with Congress and that the legislative branch is not likely to give up without a fight.

Some have felt that the rescission authority proposal is similar to earlier gambits to give the president line-item veto authority. That concept was struck down by the U.S. Supreme Court as violating separation of powers in 1998 after Congress granted the power to President Bill Clinton. The current proposal, however, may pass constitutional muster since it requires Congress to vote on the president's proposals for spending cuts, thereby obviating the obvious separation of powers issues raised by the line-item veto.

Enhanced rescission authority bills were introduced in the Senate by Sen. Russ Feingold (D-WI) and in the House by Rep. Paul Ryan (R-WI) prior to the announcement of the president's proposal.

GAO: Recovery Act Reporting Getting Better, But Still Room for Improvement

When Congress passed the American Recovery and Reinvestment Act (Recovery Act) in early 2009, the legislation's transparency provisions represented a significant step forward for government openness. While select agencies and programs have been using recipient reporting for years, the Recovery Act represented the first time such reporting had been attempted across all agencies at once and presented to the public online. Thus, bumps in the road toward transparency and accountability, including data quality problems, were inevitable. A new Government Accountability Office (GAO) report shows that while there are fewer reporting errors as time passes, there is still room for improvement in both data quality and implementation details.

Understandably, the first battles over the Recovery Act revolved around implementation details, as the Obama administration tried to turn the law into a working framework for reporting. After the first round of recipient reports were released, though, the public's attention turned to data quality, as high-profile mistakes, such as "phantom" congressional districts, dominated news coverage.

The GAO report moves beyond these issues, with the main focus being an examination of how states and local governments are using and administrating their Recovery Act funds, with emphasis on education, transportation, and public housing funds. The GAO publishes a report like this every two months to help give a sense of how Recovery Act money is being used, whether the spending is meeting the act's dual goals of recovery and helping those most in need, and how federal agencies are managing the act's transparency provisions.

In this report, the GAO also fact-checked a selection of third-round recipient reports, looking for errors. In previous examinations of recipient reports, the error rate was not exceptionally high, but it was enough to add caveats to any analysis of Recovery Act data, according to GAO. And while previous GAO analyses, and select data from Recovery.gov, indicated that the error rate was dropping, having only two sets of recipient reports made it difficult to establish a trend.

In its examination of the third round of reports, GAO confirmed this trend, finding that while recipients are still reporting flawed information, they are doing so with far less frequency than in the previous two quarters. For instance, compared to the second quarter of recipient reporting, reports incorrectly marked as finished fell by almost 60 percent, and errors in reporting the Treasury Account Symbol (TAS) code and Catalog of Federal Domestic Assistance (CFDA) numbers fell by 40 percent.

In other words, recipients are learning how to report. It appears that the more often recipients report, and the more time agencies have to communicate to recipients how to report, data quality improves. Unfortunately, the report does not give overall numbers for data quality, making it difficult to gauge how serious the data quality problems are.

In an effort to address the lingering data quality problem, the GAO met with a handful of outside groups to "solicit feedback from data users about their use of recipient reported data and suggestions they had for improving the recipient reporting process and the data." Groups interviewed included transparency organizations such as OMB Watch, news media such as ProPublica, quasi-governmental groups such as the Council of State Governments, and research entities such as the Federal Funds Information for States. The GAO report conveys a wide range of critiques and improvements suggested by the groups.

The most prominent critique from these groups concerned data quality, which fits well with the report's focus on the quality of the recipient reports. The groups were particularly concerned with the "capacity of recipients to report correctly, difficulty with determining the flow of awarded funding through state capitals or state agencies down to the local level, and the difficulty using the data across quarters because of the FTE calculations." To help fix these problems, the groups suggested that Recovery Act information be provided at the county level instead of at the congressional district level; agencies allow more time to review reports so that they can spend more time correcting errors; and a move toward ultimate-recipient reporting instead of the current two-tier model, to give a more comprehensive picture of where the money is going.

It is important to note that the GAO is not officially recommending any of these changes and has decided to not evaluate the effectiveness of any of the suggested improvements. Most of the report's recommendations are either agency-specific, such as recommendations for the Department of Education on how to report certain education jobs, or are focused on improving agencies' single audits. Since the GAO is an auditing office, it is not surprising that its recommendations are so narrowly focused. However, observers say instituting something such as ultimate-recipient reporting would help the GAO accomplish its mission of investigating the uses of Recovery Act funding.

Despite lingering data quality problems, the GAO found that recipient reporting is relatively well received by states. Although some state officials complained that the reporting requirements demand precious resources, many expressed optimism. According to the GAO, "when asked about the perceived costs and benefits of the recipient reporting exercise, state officials reported benefits resulting from the reporting requirements." States found that the recipient reports gave them a trove of new data, which they could then use to help educate their citizens, revamp websites, and overhaul internal cost controls. While data quality may still be an issue, this positive reception indicates that recipient reporting has been a positive development and will likely continue to be an aspect of federal spending transparency in the future.

As EPA Takes Action, Trade Secrets Continue Threatening Health and Safety

The U.S. Environmental Protection Agency (EPA) has taken a significant step toward making more chemical health and safety information available to the public even as trade secrets claims continue to conceal such information elsewhere. A new EPA policy will reject most industry claims that chemical identities included in health and safety studies are trade secrets. Meanwhile, the oil and gas industry continues to use trade secrets privileges to thwart attempts to disclose chemical information related to the BP oil spill and controversial natural gas drilling operations.

On May 27, the EPA announced a new "general practice" where the agency will review all claims by manufacturers that a chemical's identity should be treated as confidential business information (CBI) when the identity is part of a health and safety study or the study's underlying data. The agency expects that unless the disclosure of the chemical identity explicitly reveals how the chemical is produced or processed, the secrecy claim will be rejected, allowing the public to link the chemical to its health and safety information.

This is the third recent major action by EPA to rein in overuse of trade secrets claims by the chemicals industry under the nation's primary chemicals statute, the Toxic Substances Control Act (TSCA). Earlier, the agency announced that chemical identities that were public in the TSCA inventory (a list of more than 83,000 chemical substances) could not be claimed as trade secrets and that the agency would provide free access to the inventory, which had only been available for a fee.

According to EPA, the new practice "is part of a broader effort to increase transparency and provide more valuable information to the public by identifying data collections where information may have been claimed and treated as confidential in the past but is not in fact entitled to confidentiality under TSCA." By late August, EPA plans to begin reviewing new and existing confidentiality claims for chemical identities found in health and safety studies, as well as associated data.

TSCA generally prohibits chemical health and safety information from being withheld from the public. Up to this point, however, the public might have had access to the health studies but not

the identity of the chemicals the health studies referred to, rendering the studies and data practically useless. The practice of claiming chemical identity as CBI has been widespread at EPA despite regulatory language that clearly states that "chemical identity is part of, or underlying data to, a health and safety study" and also states, "Chemical identity is always part of a health and safety study."

EPA "believes that Congress generally intended for the public to be able to know the identities of chemical substances for which health and safety studies have been submitted." EPA announced that it "believes these actions will make more health and safety information available to the public and support an important mission of the Agency to promote public understanding of the potential risks posed by chemical substances in commerce."

EPA further acknowledges that TSCA was not intended "to limit the uses of information from a health and safety study" by keeping the public – including a chemical company's competitors – in the dark about chemical identities. Manufacturers have argued that their competitors could use disclosed chemical identities to learn about the proprietary manufacturing processes. EPA has rejected this argument, stating that "[disclosing] the end product of a process (i.e., a chemical identity) is not the same thing as disclosing the process to make that end product."

Oil and Gas Drillers Push for Secrecy

Despite EPA's actions, the disclosure of chemical identities remains a major issue on other fronts. At a recent House Energy and Commerce Committee mark-up, an amendment to the Safe Drinking Water Act that would have required the disclosure of the identities of chemicals used in a near-ubiquitous natural gas drilling process called hydraulic fracturing was withdrawn by its sponsor following strong industry criticism.

Hydraulic fracturing (or fracking) is a process where water, chemicals, and other materials are pumped under high pressure into a well to create and prop open fissures in underground rock, thus allowing trapped natural gas to flow out and be recovered. Fracking chemicals may include known carcinogens and other toxins.

Hydraulic fracturing, which was exempted from federal regulation in 2005, is linked to numerous cases of groundwater contamination. Fracking fluids may also leak or spill on the surface, creating additional ecological and public health threats. The House measure, sponsored by Rep. Diana DeGette (D-CO), only would have required the chemical constituents used in hydraulic fracturing to be posted on the Internet, with no other federal regulations placed on the process.

Another fracking disclosure measure is included in the discussion draft of climate change legislation now pending in the Senate. The language in the climate bill and other measures would only require disclosure of chemical constituents, imposing no other regulation of natural gas drilling. Regardless, the oil and gas drilling industry has fought vociferously against the disclosure of the chemicals being pumped underground, claiming the information is proprietary.

The day after the House mark-up, during which DeGette withdrew her disclosure amendment, a subcommittee of the same House Energy and Commerce Committee held a hearing to examine the BP oil spill catastrophe in the Gulf of Mexico. The poor flow of information to the public and Congress was a topic of concern.

Significant concerns have been raised regarding the use and identity of chemical dispersants on the BP oil spill. The dispersants are chemicals that attempt to break down oil before it can reach the shoreline. So far, BP has used more than 980,000 gallons of dispersants. The identities of the chemicals being poured into the Gulf of Mexico are considered to be trade secrets, and the EPA has not released this information to the public. The toxic effects – both short-term and long-term – of the dispersants are not fully understood. Scientists remain concerned about the ultimate fate of the chemicals and how they travel and interact with marine life and other chemicals in the Gulf.

EPA states, "All the information EPA can make public about these dispersants can be found on the Product Schedule. Some of the ingredients are listed as confidential. This is because the manufacturer has chosen to keep this information proprietary, and as a result EPA is obligated to withhold this information."

Both the general rules EPA uses to make CBI determinations and the specific rules that apply to TSCA's CBI determinations contain emergency provisions that allow the EPA to disclose CBI under conditions where public health and the environment face "imminent and substantial danger" or "an unreasonable risk of injury."

The chemical reportedly being used by BP to disperse the oil is banned in Britain but approved for use in the United States and Canada. Recent reports of fishermen becoming ill after possibly being exposed to the dispersants, combined with the unprecedented quantities of dispersants being used and the unique situation involving their use at extreme ocean depths, would seem to qualify the situation for the same level of openness that EPA is applying to chemical identities elsewhere. As the EPA made clear in describing its new TSCA CBI policy, without knowing what the chemicals are, researching their impacts is considerably more difficult.

EPA is First Agency Heard on Spending Data Quality

On May 18, the U.S. Environmental Protection Agency (EPA) became the first agency to release its plan to ensure that federal spending information from the agency is current and of high quality. While the plan details the agency's current quality procedures, it seems lacking in several areas. Data quality plans for federal spending information were mandated by the Open Government Directive (OGD), but most have not been made public.

The current economic difficulties and the large government programs designed to counter them, including the bank bailout and the Recovery Act, have brought federal spending under increased scrutiny. Transparency of government actions is only one component needed for effective oversight of this spending. Ensuring the quality of the data being made available to the public is

another vital aspect. Currently, challenges to data quality include the duplication of data, missing transactions, inaccurate data, and untimely data. These problems and their associated risks vary by agency and depend on variables, such as the types of data a particular agency collects, and thus require agency-specific solutions.

Plan Requirements

The OGD, issued on Dec. 8, 2009, instructed each agency to create a data quality plan that enhances the transparency of how the agency spends federal funds. Office of Management and Budget (OMB) Deputy Director Jeff Zients issued a memorandum on Feb. 8 outlining a timeline for public release of the plans, as well as what information should be contained in the plans. Data quality plans were due to OMB by April 14. OMB was to work with agencies to improve their plans and finalize them by May 14.

Zeints' memo requires agencies to be accountable for the quality of federal spending information that is publicly disseminated through venues such as USAspending.gov and similar websites. The memo prescribed a data quality framework for the agency plans, requiring them to define measures for assessing the quality of data and its collection, reporting on data quality, identifying risks that could misstate or misrepresent data, and monitoring data quality. Further, the memo requires compliance with the public participation and collaboration elements of the OGD by mandating a communications strategy to engage the public in the solicitation of feedback via websites and social media.

The Zeints memo also requires specific plans to address spending information submitted for inclusion on USAspending.gov and evaluation of information on grants, loans, contracts, and other forms of assistance. Agencies are required to discuss compliance, review, and monitoring of data quality and identify if improvements are necessary. If improvements are needed, the agency is also supposed to establish a timeline and milestones for implementation.

OMB clarified these instructions in a subsequent April 6 memo. The second memo notes that by Oct. 1, USAspending.gov will begin disclosing information about recipient and sub-recipient reports on use of federal awards. Currently, only agency award information has been available through USAspending.gov, so the public has only been able to obtain information about who the prime recipient has been, but not how they have used the money. The new Oct. 1 system is premised on the experience from disclosure under the Recovery Act. This new procedure of recipient and sub-recipient reporting will increase agency responsibility for data quality. Zeints wrote that "the goal is to move toward 100% of awards data being reported on time, complete, and accurate (free of error) by the end of the fourth quarter of FY 2011, with interim milestones." For each metric of timeliness, completeness, and accuracy, agencies are required to achieve a 10 percent improvement each quarter beginning in FY 2011.

EPA's Plan

EPA is the first agency to publish its plan. EPA's plan complies with many of OMB's requirements. EPA makes significant effort to explain its governance process and structure. In

particular, the agency has developed a Spending Information Quality (SIQ) working group to develop the plan and integrate it into a long-term agency strategy to ensure the integrity of federal spending information. The plan also describes in detail the procedures and systems employed by the agency to address data quality. For instance, the plan explains in depth the existing audit process for the Federal Procurement Data System (FPDS) and includes the results of the latest audit in the plan's appendix.

However, the plan fails to identify substantial changes needed to comply with the transparency, collaboration, and participation elements of the OGD. The plan appears to be lacking in three main areas: plans to improve accuracy, recipient and sub-recipient reporting, and mechanisms for public participation.

The EPA document provides little detail on how the agency will accomplish the data accuracy goals stated in the OMB memos. EPA reports that the accuracy of key contactor spending data from FPDS is between 86.5 percent and 96.5 percent. While this may seem to be a relatively strong degree of accuracy, it falls short of OMB's goal of error-free reporting to be met by the last quarter of FY 2011. The agency briefly announces the impending implementation of a new electronic acquisition system that is expected to improve the accuracy of FPDS data. However, EPA does not describe how the features of its new acquisition system will address the known deficiencies.

Additionally, the agency fails to provide any quantifiable metrics for the deficiencies of assistance awards data in the Financial Award Assistance Data System (FAADS). EPA does identify FAADS deficiencies, including missing data, misspelled names, incorrect use of codes, and mistyped numbers from recipient-submitted information. However, the plan provides no proposals to address these issues or any process underway to develop a solution.

EPA also does not present concrete milestones to fix problems that are identified by the agency, as required by OMB guidance. According to the Zeints memo, OMB is to monitor progress through "potential" dashboards that will be publicly available. To do this, the memo states it will require periodic updates to the plans and use portions of the plans to facilitate the measurement of progress. However, it is unknown how OMB will be able to monitor the progress of EPA and other agencies if the plans lack concrete goals and milestones to implement improvements.

EPA's plan contains little discussion of the likely difficulties in ensuring strong data quality for the newly expanded data from recipients and sub-recipients. The plan does note, however, that current federal acquisition regulations require that agencies recognize the lack of "privity of contract," or a direct relationship, between themselves and sub-contractors. EPA claims that these rules would prevent the agency from placing any requirements, such as reporting on funds received, directly on sub-contractors. The EPA indicates that forthcoming requirements for sub-recipient reporting will be included in future contract language and passed on to sub-contractors in the agreements between them and prime recipients. However, the agency says that the lack of a direct relationship between the agency and sub-contractors will prevent the government from directly confirming submitted data with sub-recipients. How EPA plans to deal with this apparent data quality hurdle is not specified in the plan.

Beyond the brief acknowledgment of the difficulties reviewing or confirming new recipient and sub-recipient data, the EPA plan does not identify any specific expected data quality problems, nor what steps could be taken to minimize and track these problems. The problems with inconsistency in spelling, codes, format, and completion of data fields that the agency noticed in the data submitted to FAADS are likely to also be problems in forthcoming recipient reports.

The EPA plan also does not comply with the OMB guidance on agency communications efforts. EPA states that the agency sought internal "EPA participation." However, the OGD defines participation in terms of public engagement, not simply the engagement of agency employees. The plan makes no mention of public collaboration but only notes that the agency's spending data will be made available to the public by OMB through a dashboard. There is not enough information in the plan to indicate any attempt to involve the public in the data quality process.

There are several ways EPA's plan could include more participation and collaboration. The agency could commit to receiving outside input for future versions of the plan, such as the agency does with its Open Government Plan. Similarly, EPA could utilize the same IdeaScale collaboration tool used to solicit public input to develop its Open Government Plan. Further, outside participants could provide an independent source of data quality auditing. Many corporations track spending information and may have solutions to data quality problems.

Currently, it is unknown how other agencies will implement OMB guidance, as the plans are not yet public despite the expiration of the May 14 deadline. However, since the plans are approved by OMB prior to release, EPA's plan may be representative of the scope and content that can be expected from other agencies.

Obama Administration Starts Reforms at MMS

In the wake of the worst oil spill disaster in the country's history, the Obama administration has begun to restructure the federal agency charged with the development of energy resources and oversight of the oil and gas industry. Critics argue the changes do not go far enough.

On May 19, Department of Interior (DOI) secretary Ken Salazar issued a formal order restructuring the department's Minerals Management Service (MMS). MMS is the agency that both collects revenues from extraction industries such as oil and gas companies and oversees safety and environmental processes of these same industries.

MMS came under fire after BP's Deepwater Horizon oil rig exploded on April 20, killing eleven workers and causing the largest oil spill in U.S. history, according to both government and independent estimates. The Offshore Energy and Minerals Management program oversees resources management on the Outer Continental Shelf, which includes the Gulf of Mexico. The program has been widely cited since the explosion as having given cursory review of and exemptions from filing safety and environmental quality plans submitted by oil and gas companies it regulates.

Salazar's order divides MMS into three separate offices to make the functions of MMS independent of each other. First, the order creates the Bureau of Ocean Energy Management to exercise the traditional energy management tasks associated with developing both renewable and oil and gas resources. Second, the order establishes the Bureau of Safety and Environmental Enforcement to "inspect, investigate, summon witnesses and produce evidence, levy penalties, cancel or suspend activities, and oversee safety, response, and removal preparedness."

These two offices will be led by directors and report to the DOI assistant secretary for land and minerals management. The reorganization leaves these two functions and lines of authority in the same part of DOI as MMS.

Third, the order creates the Office of Natural Resources Revenue to conduct activities related to both the onshore and offshore collection of revenues, compliance auditing, and investigations and enforcement. This office will also have a director but be under the supervision of the assistant secretary for policy, management, and budget.

There is no timetable for the reorganization. The two assistant secretaries are responsible for implementing the order, in consultation with the Office of Management and Budget (OMB) and relevant congressional committees and are required to report a plan for achieving the changes to Salazar within 30 days.

The head of MMS at the time of the explosion, Elizabeth Birnbaum, resigned May 27 under pressure from the administration, according to *The Washington Post*. Birnbaum was appointed by Salazar in July 2009. Bob Abbey, the director of the Bureau of Land Management, is the new acting director of MMS and will have much of the responsibility for implementing the reorganization plan.

There was mixed reaction to Salazar's restructuring plan. For example, Public Employees for Environmental Responsibility (PEER) criticized the plan because it merely raises the conflict-of-interest issues that have characterized MMS up one level within DOI. "Conflicts between resource protection and promotion are merely elevated, not eliminated, as the new entities are supervised by political appointees with energy and revenue production mandates," according to PEER's press release.

The Center for Biological Diversity's (CBD) executive director, Kierán Suckling, said in a press release on the restructuring, “It is only a baby step forward, but at least it is in the right direction." CBD's statement went on to criticize Salazar for not changing the substantive processes that helped lead to the BP Deepwater disaster, such as issuing environmental impact waivers and approving drilling and production applications without having legally required permits in place. According to the *Post* article, Suckling also noted that Salazar had appointed a former BP executive, Sylvia Baca, to be the deputy assistant secretary for land and minerals management, the office that oversees MMS and will oversee two of the new offices created by Salazar's order.

President Obama and Salazar have made changes to the substantive processes used by MMS. In his May 27 report to the president on immediate and long-term steps that could improve the safety of offshore drilling, Salazar makes several recommendations. The recommendations include mandatory inspections of the blowout preventers that are used on mobile drilling rigs to see that they meet design specifications and improving the testing and inspections process for blowout preventers. Failure of the blowout preventer on the Deepwater Horizon rig was one of the leading causes of the explosion and spill.

Other recommendations addressed a systems-based approach to improve safety. According to the report, "The Department [DOI] is committed to moving to finalize a rulemaking that would require operators to adopt a systems-based approach to safety and environmental management. This rule would require operators to incorporate global best practices regarding environmental and safety management on offshore platforms into their operating plans and procedures. In finalizing this rulemaking, the Department will analyze carefully the current circumstances in the Gulf of Mexico and lessons learned from the ongoing investigation into the causes of the BP Oil Spill."

The report also recommended a six-month moratorium on permits for new wells being drilled using floating rigs. The moratorium was not limited to the Gulf. In addition, Salazar called for a halt to drilling operations for six months on all 33 deepwater wells that are currently being drilled from floating rigs in the Gulf.

In accepting Salazar's recommendations at a press conference May 27, Obama announced additional steps to address the oil spill, including the suspension of oil exploration off the coast of Alaska and the cancellation of pending and proposed lease sales in the Gulf and off the coast of Virginia.

Whether these changes will lead to long-term safety and accountability improvements in managing and overseeing offshore resource extraction remains to be seen. The many investigations into the causes of the oil disaster may help identify the many fixes that need to occur to avoid another human and environmental catastrophe of this type. It is likely that DOI will be reacting to this event for years to come.

Commentary: Changes to Coal Ash Proposal Place Utility's Concerns above Public Health

An internal administration document shows the U.S. Environmental Protection Agency (EPA) may have weakened a proposal to regulate toxic coal ash at the behest of the Tennessee Valley Authority (TVA), owner of a Kingston, TN, power plant where a dam break spilled 5.4 million cubic yards of coal ash in 2008.

Catastrophes like the one that occurred at the Kingston facility, as well as shoddy storage practices that allow coal ash to escape into water supplies, make coal ash a public health and ecological risk. TVA's comments could have struck a blow to EPA's efforts to mitigate that risk.

TVA Makes Comments Like a Government Agency

TVA, a major coal-burning utility as well as a manager of coal combustion residuals like coal ash, should have waited until the public comment period, just like citizens, environmental groups, and other businesses must do. The fact that TVA exercised its influence behind the scenes, before EPA released the proposal to the public, makes for a troubling situation.

In fact, TVA should have had the decency to recuse itself from commenting during the review stage of the rulemaking process if it considers itself a government agency. Not only would TVA be regulated by the EPA proposal, its failures in the Kingston coal ash disaster represent one of the driving forces behind EPA's push to regulate. (Crews are still not finished cleaning up the December 2008 spill.) This indicates serious conflict-of-interest issues that should have been addressed.

Instead, TVA filed comments recommending an approach easier on utilities and less protective of public health and the environment. TVA criticized EPA's original draft, in which the agency concluded the most appropriate course of action was to treat coal ash as a hazardous waste. In the May 4 version, EPA proposed hazardous waste regulation but also included an alternative, a weaker approach that would relinquish more authority to state and local governments and rely in part on citizen enforcement to curb pollution. TVA's comments say it is concerned with the impact hazardous waste regulation "could have on our, and other utilities', daily operations." In fairness to EPA, other agencies, such as the Departments of Agriculture and Interior, also argued against EPA's hazardous waste designation.

TVA also raised concerns about EPA's seemingly problematic definition of "new" and "existing" landfills as they relate to coal ash disposal. Among those concerns was the notion that EPA's definitions create regulatory uncertainty for utilities that are attempting to determine if they're dealing with or operating a new or existing landfill. This uncertainty could have real-world public health and environmental impacts, as described in greater detail later in this article.

Where was the public during all this? Waiting. Waiting for the EPA to publish its proposal and begin the comment period. Little did we know that a regulated interest was first getting a sneak peek at the proposal during the interagency review process.

EPA and OIRA Both Responsible for Debacle

Both EPA and the White House Office of Information and Regulatory Affairs (OIRA), the office responsible for managing the review process and collecting government-wide comments, share the blame. President Obama promised to curb the corrosive influence of special interests in Washington, but neither EPA nor OIRA lived up to that promise in this case.

EPA should have flatly ignored TVA's comments, and while it may be plausible to assume that they did, and that the edits to the landfill definition were mere coincidence, it's more than plausible to assume a cause-and-effect relationship. EPA made the wrong decision from both a policy and a political standpoint. However, the agency still insists the review process was

valuable. "EPA believes that the interagency review significantly improved this rulemaking package," the agency told OMB Watch.

OIRA should have known better, too. Under Executive Order 12866, which gives OIRA the authority to conduct an internal review of agency draft proposed and final rules, all government agencies are to be given an opportunity to comment. TVA, as a government-owned corporation, falls into that category. But at some point, common sense needs to take hold. OIRA Administrator Cass Sunstein should have recognized the situation and, in his position as a Senate-confirmed presidential appointee and high-ranking White House official, politely informed TVA officials that their comments simply weren't welcome this time around.

TVA's comments were uploaded to Regulations.gov, the central site for agencies' regulatory material, on May 17, along with other documents relevant to the development of the proposed rule. While EPA generally discloses the nature of the comments received on draft proposals, it is unusual for the public to have access to specific comments attributed to specific agencies.[1]

Real-World Impacts of TVA Comments

The comments show that TVA is trying to have it both ways: it wants to enjoy the perks of its government ties while maintaining the anti-regulatory mindset of a private polluter. Applying its expertise as a regulated utility to attempt to undermine technical details of an environmental standard, like the definitions the EPA wants to apply to utility-owned facilities, is an inappropriate use of TVA's quasi-government-agency status.

Here's a prime example of how TVA's comments appear to have influenced the content of EPA's definitions for new and existing landfills. According to EPA's original draft, the agency planned to designate as "existing" those landfills operating at the time the rule is finalized and designate as "new" those landfills that begin operation after the rule takes effect. New landfills will be subject to a number of requirements from which existing landfills will be exempt.

In the proposed rule released to the public May 4, EPA used the effective date of the rule, not the finalization date, as the threshold for the definition of existing landfills, consistent with TVA's comments. This means that more coal ash landfills could be exempt from the rule's more stringent requirements.

The change made to the definition of "existing landfill" could have real consequences. Under EPA's proposal, unlike new facilities, existing landfills will not be required to:

- Install liners intended to prevent or limit coal ash, and the pollutants in it, from leaching into the ground on which the landfill sits;
- Install a collection system for any leaching that does occur;
- Abide by EPA's location restrictions intended to keep new landfills away from wetlands and unstable areas, including areas susceptible to earthquakes, and above the water table.

Existing landfills would have to meet other requirements that apply to new landfills, including groundwater monitoring. (Unlike landfills, surface impoundments, such as the one that failed in Kingston, TN, would have to retrofit liners and leachate collection systems under the rule, or close, within seven years.)

In an appendix to EPA's notice of proposed rulemaking, the agency included a list of proven cases where coal ash containment facilities have harmed the environment. Of the 16 cases when coal ash has leached into the groundwater supply, four occurred at unlined landfill sites. In these cases, leaching has led to unsafe levels of lead, boron, and arsenic in groundwater. The risk posed by unlined landfills is real.

Process Let the Public Down

As a resident of Meigs County, OH, a hub for coal ash disposal, Elisa Young knows the human toll coal ash exposure can take. Young told *The Huffington Post* that she blames coal combustion residuals for a cancer epidemic in her community. At least six of her neighbors have died from cancer in the last ten years. Young is working with Ohio Citizen Action to advocate for coal ash regulation.

The regulatory process is complex and laden with details and definitions that can overwhelm even the most ardent observers. Those details are important – important to agencies and important to the businesses and other organizations they regulate. However, they are absolutely critical to the public. Details determine the level of protection government gives to citizens, including the most vulnerable among us. The public deserves to have regulations developed openly and with its interests in the forefront.

In the case of the coal ash proposal, the Obama administration let the public down. Special interests wedged their way into the process and undermined confidence that the proposal was developed fairly. EPA must see to it that its final rule meets the public's needs and takes Americans' concerns into account.

The public comment period for the proposal will remain open for 90 days after EPA publishes it in the *Federal Register*.

[1] After realizing it had disclosed the interagency comments, EPA removed the document from Regulations.gov, saying it had been "inadvertently posted." In a statement to OMB Watch, EPA said, "Interagency comments on draft rules by federal agencies under Executive Order 12866 are part of a deliberative process." However, on May 20, EPA reposted the document, explaining, "Because this document was inadvertently disclosed, EPA has decided, in this instance and with the agreement of the agencies, to allow the document to remain in the docket."

Citizens United Decision Spurs State Campaign Finance Legislation

State legislators across the nation are introducing campaign finance legislation to mitigate the impact of the *Citizens United v. Federal Election Commission* decision, in which the U.S. Supreme Court ruled that corporations and unions may now directly and expressly advocate for the election or defeat of candidates for federal office.

Recently, attention has focused on 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. The DISCLOSE Act would create new, rigorous campaign finance disclosure requirements meant to prevent moneyed interests from drowning out the voices of citizens and smaller advocacy organizations.

States have also come up with various pieces of legislation to minimize the impact of the *Citizens United* decision. Here are some examples:

Colorado

In Colorado, Gov. Bill Ritter (D) signed legislation (S.B. 203) in May mandating new campaign finance disclosure requirements. The bill requires corporations and labor unions that make independent election expenditures exceeding $1,000 to register with the state.

The law also prohibits foreign corporations from making independent expenditures on elections. "Prior Colorado law was silent on foreign corporations because all corporations in the state were barred from making independent expenditures," according to BNA (subscription required). The *Citizens United* decision does not prevent localities from instituting bans on donations from foreign corporations.

The law also requires that election-related communications must disclose the person or entity that paid for the communication. "The new state law also requires that persons who accept donations for independent expenditures maintain such funds in a separate bank account. It requires the Colorado secretary of state to post information relating to independent expenditures on its web site," according to BNA.

Nonprofit leaders are applauding the efforts in Colorado. Colorado Ethics Watch Director Luis Toro told BNA that the legislation is a "worthwhile improvement to Colorado law" but "there is more that can and should be done in future legislative sessions to improve Colorado's campaign finance laws, including even stronger disclosure requirements and a voluntary public financing system for state campaigns."

Michigan

There are also legislative efforts in Michigan to diminish the impact of the *Citizens United* decision. Michigan Common Cause, which was instrumental in crafting parts of the legislation authored by six state House Democrats, told *Michigan Live* that the bills would:

- Require that corporations that make independent campaign expenditures disclose the names and addresses of their top five contributors.
- Require that printed communications, TV, and Internet ads include a disclaimer stating they were paid for with corporate funds, as well as the name and photo of the president of the corporation. Radio ads must include a disclaimer read by the president of the corporation.
- Require that corporations receive consent from their shareholders and notify them at least 30 days before making independent campaign expenditures.
- Ban the following groups from making independent campaign expenditures: corporations that receive state grants, tax credits, or incentives; corporations that apply for, submit a bid for, or obtain a state contract; corporations that have accepted federal bailout money; semi-public corporations, including utility and insurance companies.
- Prohibit foreign and foreign-controlled corporations from making independent campaign expenditures.
- Ban the funneling of corporations' independent campaign expenditures through other sources, including individuals and businesses.
- Penalize shareholders, officers, or members of a corporation who knowingly consent to an independent expenditure that violates the Michigan Campaign Finance Act with a civil fine of as much as $1,000.

Michigan officials understand the challenges that they face in getting the legislation passed. Rep. Tim Bledsoe (D-Grosse Pointe), a former political science professor and the author of one of the pieces of legislation, told *Michigan Live* that he believes "it will be a huge challenge to get this legislation passed. When you are talking about substantial campaign finance reform legislation, it is usually a multi-year struggle."

There are others in Michigan who do not believe that *Citizens United* will have the impact that many fear. Rich Robinson of the Michigan Campaign Finance Network told the *Detroit Free Press* that he doubts that major corporations "would risk alienating customers to advocate one candidate" when they can funnel money into issue ads that praise or critique the candidate without telling the audience which candidate to vote for. "They're not going to start doing express advocacy because they are able to eviscerate a candidate figuratively with issue ads," Robinson said.

New Hampshire

In New Hampshire, state Sen. Maggie Hassan (D) sponsored legislation (HB 1459) that would require businesses and nonprofits other than charities to register with the state if they spend

$10,000 during an election cycle on advertisements that identify a candidate or evaluate a ballot item, according to the *Concord Monitor*.

The Center for Competitive Politics (CCP) asserts that the legislation requires "corporations, partnerships, and non-profits to register with the Secretary of State's office within 48 hours of launching a political advertisement – regardless of whether the advocacy is political or issue-based in nature." CCP further states that, "In its original form, the bill would have required non-profits to disclose their donors and corporations to disclose the maximum amount that the corporation would spend on political activity."

The bill was later modified by a New Hampshire House-Senate Committee of Conference. As part of the negotiation, legislators agreed "to drop a proposal requiring groups to identify donors who had given $10,000 toward political advertising. They decided that corporate shareholders would not be required to approve spending for political advertisements and that directors of organizations would not be required to report a maximum budget for the spending. They also exempted nonprofit charitable organizations, eliminated a small filing fee for affected groups and lowered the penalty for violations to $250 from $1,000," according to the *Concord Monitor*.

Both Republican and Democratic legislators have spoken out against the legislation. Conservative and liberal groups have spoken out against it, as well. CCP referred to the legislation as "an attempt by the New Hampshire legislature to stifle political speech." The New Hampshire Center for Nonprofits (NHCN) believes that the legislation will negatively impact nonprofits. "The amendment appears to be unconstitutional. It would curtail 1st Amendment free speech rights, free association rights, and privacy rights for nonprofits," according to NHCN.

Hassan and supporters of the legislation argue that "disclosure requirements are necessary to prevent corporations from unleashing unlimited and anonymous ads in order to sway New Hampshire elections," according to New Hampshire Watchdog.

"We're not saying they don't have a right to advocate. We're just saying we want to know who's behind the advocacy. If out-of-state or even foreign companies want spend a lot of money to influence New Hampshire elections, we want the voting public to know who they are," Hassan told the *Union Leader*.

More Efforts Likely

As the fight over the DISCLOSE Act heats up on the federal level and state and federal candidates begin to endure the ramifications of *Citizens United*, more state-level efforts to blunt the decision's impacts are likely. As in Colorado, Michigan, and New Hampshire, these legislative measures will have to strike a tricky constitutional balance if they are to survive brutal legislative and courtroom fights.

Nonprofit advocacy could play a key role in all of these legislative approaches, and many in the sector are calling on organizations to keep a close eye on any proposed legislation to make sure

that it works to diminish the potential damage that a flood of corporate money could do to our democracy while preserving the First Amendment rights of nonprofits and the people they serve.

Nonprofits Tell Subcommittee about Impact of Ineffective Counterterrorism Rules

On May 26, representatives from the nonprofit sector testified before a subcommittee of the House Financial Services Committee to address how anti-terrorist financing laws impact charities. The hearing marked the first time an oversight panel has considered how the Department of the Treasury's policies impact charitable groups and was a major step in bringing attention to the largely ignored challenges facing charities and foundations since the Sept. 11, 2001, terrorist attacks.

While some members of the committee and some of the panelists expressed support for the government's ability to shut down entities suspected of providing "material support" to terrorist groups, critics charge that the laws are too vague and have had a chilling effect on legitimate charitable giving. Nonprofit officials testified about the need for greater transparency and due process.

The hearing, "Anti-Money Laundering: Blocking Terrorist Financing and Its Impact on Lawful Charities," featured testimony from Daniel Glaser, deputy assistant secretary for terrorist financing and financial crimes at the Department of the Treasury (Treasury). Kay Guinane, director of the Charity and Security Network, a project of OMB Watch, also testified at the hearing. Other witnesses included American Civil Liberties Union (ACLU) Policy Counsel Michael German and Mathew Levitt, director of the Stein Program on Counterterrorism and Intelligence at the Washington Institute for Near East Policy.

Since 2001, efforts have been made to reform federal laws and policies that have targeted American charities, particularly Muslim charities, and donors. The nonprofit sector has been adamantly countering the charge that charities are a "significant source of terrorist financing," as suggested by government officials. This hearing was one of many requests for congressional oversight and reform.

Executive Order 13224, issued by President George W. Bush on Sept. 24, 2001, directed Treasury to designate Specially Designated Global Terrorists (SDGT) and take action to freeze all assets subject to U.S. jurisdiction. If Treasury finds a group has provided material support to an SDGT, or to be "otherwise associated" with an SDGT, the entity can be "designated" and have its assets frozen by the government.

In effect, an organization can be shut down without notice or hearing and without any judicial review. No criminal charges ever need to be filed in order to close a charity, and the charity may never be told what evidence or allegations led to its termination. The statistics undergird this reality: Treasury has designated nine U.S. charities, three of which faced criminal prosecution; only one has been convicted on terrorism-related charges.

Glaser acknowledged that the agency's work has "had the unfortunate and unintended consequence of causing a chilling effect on well-intentioned donor activity within Muslim American communities." But Glaser defended Treasury and argued that the designation process has safeguards to avoid unfairly targeting groups.

Glaser also highlighted that Treasury officials have met frequently with U.S. Muslim organizations to improve relations. However, charitable groups describe a more strained relationship. Guinane detailed various communications with Treasury in her written testimony. "While Treasury officials have made efforts to reach out to the charitable sector by speaking at events and meeting with charities, these efforts have not been productive," wrote Guinane. "There continues to be substantial disagreement about the nature of the problem and the proper way to address it."

Overall, Guinane and German highlighted the lack of basic due process rights designated charities face. Guinane stated that the hearing "is a critical first step in calling attention to an often overlooked and serious problem: barriers current national security laws and policies create for legitimate charitable, development, educational, grantmaking, peacebuilding, faith-based, human rights and similar organizations."

German, a former FBI counterterrorism instructor and recognized expert in terrorist group behavior, told the panel that "at a time when humanitarian aid is needed the most, the Treasury Department's capricious, arbitrary and discriminatory enforcement of overbroad US anti-terrorism financing laws has made it far more difficult for nonprofit organizations to provide critical aid and service."

Guinane noted that the Charity and Security Network has identified specific changes Treasury could make, such as giving charities more opportunity to correct mistakes before they are shut down. Her testimony states, "Changes are needed in the areas of transparency, accountability, proportionality and humanity."

Meanwhile, Levitt defended the government, saying that charities are "especially susceptible to abuse by terrorists and their supporters for whom charitable or humanitarian organizations are particularly attractive front organizations." This was a sentiment also expressed by Treasury's Glaser.

Levitt argues that nonprofits should conduct even "greater due diligence" and the government should carry out "information campaigns." He said that the problem is not the laws, but rather the unintended impact on charitable giving.

The U.S. charitable sector does engage in extensive due diligence and has taken steps to address the threat of terrorism. For example, the Treasury Guidelines Working Group (a group of U.S. charitable organizations, foundations, and experts) published the *Principles of International Philanthropy*, and the Council on Foundations and Independent Sector released the *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*.

Most committee members did not seem to be alarmed about any negative impact on charities. However, Rep. Keith Ellison (D-MN) expressed an understanding of the experiences of charities and donors. Ellison asked about what happens to the frozen funds of charities and the lack of an appeal process for groups whose money has been frozen. Guinane responded that the estimate of funds being held range from $3-$7 million, with no process or attempt by government to distribute funds to other, similar charitable causes.

Upon questioning, Guinane said that the Obama administration has been more open to dialogue with charities, but it had not introduced any new policies or made other changes.

In a June 2009 speech from Cairo, Egypt, President Obama addressed the importance for American Muslims to be able to fulfill their religious donation, or zakat, and promised to "ease the hurdles to charitable giving." One year after he pledged to reform charitable giving laws, there have yet to be any policy changes. On May 12, 2010, a group of thirty charities, including OMB Watch, wrote to Obama, asking him to fulfill the commitment made in Cairo.

Advocates hope this oversight hearing is just a first step and that the unique position charities face will be considered more in-depth by legislative and executive branch policymakers. They note that anti-terrorist financing programs have indeed negatively affected the U.S. nonprofit sector with long-term consequences, such as decreased international giving and program cutbacks. Many American groups have even reduced their work in conflict zones where terrorist groups operate and where humanitarian aid is needed most. For more information, see the testimony from the Charity and Security Network.