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In This Issue

Poor Data Quality and Lack of Website Functionality Hobble Recovery Act Recipient Reports

The release of the first round of Recovery Act contracts spending data marks the first time that recipients of federal funding have been required to report to the federal government on their use of the funds in a timely and transparent manner. This represents an important milestone in government transparency and accountability. However, the poor data quality and Recovery.gov's limited functionality hinder the promise of a new era of fiscal transparency – at least for this round of recipient reporting.

Since the Recovery Accountability and Transparency Board (Recovery Board) released the first round of Recovery Act recipient reporting on Oct. 15, everyone from federal officials, members of Congress, transparency advocates, and ordinary citizens have gone to the site to see the new

data. These recipient report data provide a new level of detail on federal projects. Provisions in the Recovery Act require that recipients of Recovery Act funds report back to the federal government on the amount of funds received and expended on Recovery Act projects, including project status updates. The Recovery Act also requires that recipients indicate the number of jobs created or saved by the project, along with a narrative explaining why and what kind of jobs were created. Additional information is also being collected.

This level of information has never been reported before. However, this new dataset will deliver full transparency only when two dimensions of data publication are adequately implemented. First, the public should be able to access recipient reports on Recovery.gov in myriad ways that allow for an array of searches and analyses. Second, the data that are made available should accurately reflect how recipients used Recovery Act funds.

Recovery Act transparency requires that sufficient tools be available to access spending data. In this respect, the website built to disclose the recipient reports to the public, Recovery.gov, falls significantly short. Users have very limited options to search, sort, or sift through the recipient reports, limiting the connections that can be drawn between various data points or the ability to find out if a particular company has received Recovery Act funds. While the site does allow rudimentary searches by ZIP code, allowing users to find out how many Recovery Act contracts XYZ Corporation received in any given neighborhood, users cannot find out the total number of contracts and total dollar amount XYZ Corporation received in the state or throughout the nation. In other words, the user cannot search by recipient. This information is vital to developing a balanced understanding of how Recovery Act funds are being deployed. Without this type of searching and sorting that enables users to slice and dice Recovery Act spending data, Recovery.gov severely limits the usefulness of the data set produced by the transparency provisions in the Recovery Act.

In addition to online analytical resources provided by the federal government, Recovery Act data must be made available in machine-readable formats to allow outside stakeholders to create their own tools. When the Recovery Board first released the data, it also made recipient reports available in one machine-readable format, but the implementation of this feature was cumbersome. Initially, the data were only available in 180 separate files (organized by state), but after some loud complaints, the Recovery Board corrected this issue by re-releasing the recipient reports as one, nationwide file. When the Recovery Board received additional feedback that the file contained formatting errors, it released a corrected version in a very short timeframe. Although these issues have been fixed, it is still necessary to make additional data formats available on Recovery.gov, such as an ATOM feed, which makes it easier for machines to process and display the data without human intervention.

Beyond issues with information access, Recovery Act transparency is also hobbled along a second dimension: data quality. Specifically, the jobs information, a much-touted feature of the recipient data, is rife with errors. One recurring problem is that job creation narratives do not match up with job creation numbers. For example, the narrative description of the jobs created and saved might indicate that no jobs were created or saved, but the number field that contains a count of jobs shows that 10 jobs were created or saved. Another common problem is that

similar projects have different job creation numbers (for instance, both Chrysler and General Motors were given projects to build cars for the government for similar amounts of money, but according to their respective recipient reports, Chrysler created no jobs at all, but General Motors created or saved more than 105 jobs).

Furthermore, it is not always clear where jobs were created. A particular outlier in this regard is a report in which a recipient noted it created 4,685 jobs in Colorado, the most of any state in the nation. Yet a close reading of the report reveals that 3,852 of those jobs were actually created in other states.

From the large number of errors, it is clear many recipients have differing interpretations of the jobs reporting requirements. The upshot of these data quality problems is that the total number of jobs created or saved by Recovery Act contract recipients is simply an unreliable gauge of the impact the act is having on the economy.

Transparency in the Recovery Act will continue to be constrained unless Recovery.gov is substantially improved and unless recipient report data quality improves significantly. There have been improvements already to the website, and it is likely that subsequent rounds of recipient reports will contain improved data quality. The Recovery Board, which built and maintains Recovery.gov, has been responsive to outside feedback and criticism, giving good reason to be optimistic this groundbreaking transparency model will continue to improve.

Senate Continues to Struggle with Appropriations

Congress is preparing to pass a second continuing resolution (CR), as the first stopgap appropriations measure is set to expire on Oct. 31 and little progress has been made toward completing the remaining appropriations bills in the Senate. As the window of opportunity to pass all the appropriations bills individually continues to close, even the once-optimistic head of the Senate appropriations process has stated that Congress will likely have to use an omnibus spending bill to finish the work before the end of 2009.

The Senate has consistently lagged behind the House in completing appropriations bills in 2009. The House passed all twelve of its appropriations bills very quickly, wrapping up the process on July 30, just before Congress left for its summer recess. In contrast, the Senate – even when incorporating the need for more time due to debate rules in the upper chamber – has not prioritized passage of its spending measures. The Senate managed to pass just half of its twelve appropriations bills before the start of the new fiscal year on Oct. 1.

With the end of the calendar year looming, which is the stated deadline of Senate Appropriations Chair Daniel Inouye (D-HI) for appropriations work, it is unlikely Congress will pass all twelve appropriations bills individually, especially with major legislation addressing health care reform and climate change taking up a majority of Congress's time. The slow pace of appropriations work has finally taken a toll on the once-optimistic members of the Senate appropriations process.

During the week of Oct. 19, stories began to emerge from Capitol Hill that the once-rosy outlook of senators had turned sour, and legislators were proportionately scaling back expectations. When asked by *Congressional Quarterly* (subscription required) on Oct. 20, Sen. Inouye acknowledged that Congress would "likely have to pass a multi-bill appropriations package to wrap up this year's spending work."

Since gaining an extra month under the first CR, the Senate has passed one appropriations bill, the Defense spending measure, and the House and Senate have conferred on three more bills (Agriculture, Energy & Water, and Homeland Security) that were then sent on to the president for his signature.

The Senate still has four appropriations bills left to pass, including the Commerce-Justice-Science, Financial Services, Veterans, and State-Foreign Operations spending measures. Once passed, the Senate must conference those bills with the House. The two chambers are currently conferencing two bills (Defense and Transportation/HUD), and on Oct. 27, the House-Senate conference committee for the Interior and Environment appropriations bill approved the conference report that includes a new CR that will fund the federal government through Dec. 18.

FY 2010 Appropriations*

As of Oct. 28, 2009	*FY 2009*	*President's Request*	*House*			*Senate*			*Conference*
			Sub-Cmte	Cmte	Floor	Sub-Cmte	Cmte	Floor	
Agriculture	20.6	23	22.9	22.9	22.9	23.1	23.6	23.6	23.3
Commerce-Justice-Science	57.7	64.6	64.4	64.4	64.3	64.9	64.9		
Defense	631.9	640.1	636.3	636.3	636.3	636.3	636.3	636.3	
Energy & Water	33.3	34.4	33.3	33.3	33.3	34.3	34.3	33.8	33.5
Financial Services	22.6	24.2	24.1	24.2	24.2	24.4	24.4		
Homeland Security	40.1	43.1	42.6	42.6	42.6	42.9	42.9	42.9	42.8
Interior & Environment	27.6	32.3	32.3	32.3	32.3	32.1	32.1	32.1	32.2
Labor-HHS-Education	151.8	160.7	160.7	160.7	160.7	163.1	163.1		
Legislative Branch	4.4	5.2	4.7	4.7	4.7	4.7	4.7	4.7	4.7
Military Construction-VA	72.9	77.7	77.9	77.9	77.9	76.7	76.7		
State-Foreign Operations	50.0**	52	48.8	48.8	48.8	48.7	48.7		
Transportation-HUD	55.0	68.9***	68.8	68.8	68.8	67.7	67.7	67.7	

**Numbers are amounts of discretionary spending in billions of dollars. Green boxes indicate approval; grey boxes indicate bill not yet approved by appropriate body.*
***Includes supplemental funding*
****Does not include $39.5M presidential request for general fund appropriations*

(*click to enlarge*)

If an omnibus bill is required, it is not clear which appropriations bills will be included in it. The most likely scenario is that it would include only those bills that have not passed the full Senate chamber. Since the new CR will last until Dec. 18, it is possible the Senate will make more progress on the four remaining bills it has left to pass, leading to a smaller omnibus bill in December.

U.S. Waters Still Toxic Dump Sites

A new report from Environment America uncovers a dirty truth in publicly available government databases about the country's waterways – widespread toxic pollution dumped by industrial facilities. More than 230 million pounds of toxics were discharged into 1,900

waterways across all 50 states in 2007, including chemicals known to cause cancer and birth defects.

The report, *Wasting our Waterways: Toxic Industrial Pollution and the Unfulfilled Promise of the Clean Water Act*, draws on publicly available data collected by the U.S. Environmental Protection Agency (EPA) and other agencies, underscoring the importance of public right-to-know laws, which enable citizens to use information to hold government and polluters accountable. Key among the government databases used was the 2007 Toxics Release Inventory (TRI), a public database maintained by EPA that tracks the releases and transfers by a wide range of facilities nationwide of more than 600 toxic substances.

Environment America used the data to not only determine the overall pollution levels from industrial facilities, but also to identify specific facilities with the highest amount of toxic water waste. For instance, the report identifies AK Steel Corporation's Rockport, IN, plant as the facility with single highest waterway discharges of toxics in the whole country. In 2007, the facility dumped more than 24 million pounds of toxic nitrate compounds into the Ohio River. In addition to their toxicity, nitrate compounds are largely responsible for the colossal "dead zones" that perennially afflict water bodies such as the Gulf of Mexico, where the Ohio River's waters eventually end up.

The federal government also appears among the report's list of the top twenty polluters. The U.S. Army's Radford Ammunition Plant in Virginia dumped 13.6 million pounds of nitrate compounds into the New River, making it the second biggest water polluter in 2007 and another contributor to dead zones. Scientists consider pollution from agricultural storm water runoff to be a much larger contributor to dead zones, but TRI does not track agricultural runoff, and measuring such pollution has been problematic.

The study also draws on scientific data developed by the state of California to characterize the types of harm that specific chemicals might cause. California's Proposition 65 database includes approximately 800 chemicals known to cause cancer, birth defects, or other reproductive harm.

The report explains that "among the potential health effects of [developmental and reproductive toxicants] are fetal death, structural defects such as cleft lip/palette and heart abnormalities, as well as neurological, hormonal, and immune system problems."

Weyerhaeuser's Pine Hill, AL, paper mill released the most developmental toxicants into a waterway in 2007. In addition to 35,000 pounds of the pesticide nabam and 35,000 pounds of the biocide sodium dimethyldithiocarbamate, the mill discharged lead, mercury, and zinc into the Alabama River.

Several shortcomings with the TRI database are exposed by the report. Misspelled or inconsistent names of waterways made regional tracking of pollution difficult. To ensure the right bodies of water were identified, the authors were forced to review and repair manually thousands of records. The TRI program also has several important gaps in the information collected. The program currently does not cover several industries especially relevant to

waterway pollution, such as wastewater treatment plants and agricultural facilities. The list of chemicals reported to TRI omits numerous important water pollutants, and small facilities are excluded from the program entirely.

For the most part, toxic releases reported to TRI fall within a facility's permitted levels. In response to the report, several large polluters emphasized their compliance with their water pollution permits. However, the report's authors present the data in an effort to defend their calls for stricter permits. Such disclosures of a company's pollution often also result in public pressure on companies to voluntarily reduce their emissions.

Enforcement of and compliance with the nation's primary water protection statute, the Clean Water Act (CWA), have been weak in recent years. *The New York Times* is currently running a series describing the worsening pollution problems with American waterways and the feeble enforcement of clean water laws. According to the *Times*, "In the past five years, companies and workplaces have violated pollution laws more than 500,000 times. But the vast majority of polluters have escaped punishment."

The Environment America report also makes clear that even if widespread compliance with CWA permits were achieved, the nation's waterways would still be severely harmed unless permitted pollution levels are reduced.

The report includes recommendations for policymakers to improve the health of the nation's waters. The policy emphasis should be placed on reducing the use of toxic chemicals in industry by promoting safer substitutes. First, the country's chemical policy must be reworked to regulate chemicals based on their intrinsic hazards, with the goal of eliminating public exposure to hazardous substances. Additionally, chemical manufacturers should be required to test the safety of their products and disclose all results prior to putting the chemicals on the market.

The authors also call on federal policymakers to strengthen implementation of the Clean Water Act. Their first recommendation is to ensure pollution permits are renewed on schedule and permitted levels of pollution are ratcheted down, with the goal of eliminating pollution entirely –as the CWA calls for. Moreover, the penalties for violating the CWA should be strengthened by establishing mandatory minimum penalties. Congress is called upon to ensure EPA has adequate resources and staff to meet its CWA requirements.

Federal FOIA Mediator Begins to Use Technology to Reach Public

On Oct. 22, the National Archives and Records Administration (NARA) launched the website for the Office of Government Information Services (OGIS), which will mediate disputes between the government and those who seek its information. The office, once in danger of being all but muted by the Bush administration, is showing signs of emerging as an independent arbiter seeking out creative solutions to old problems.

The primary purpose of OGIS, created by the 2007 OPEN Government Act, is to improve agency implementation of the Freedom of Information Act (FOIA). OGIS will review the FOIA policies and procedures of agencies, agency compliance with FOIA, and recommend policy changes to Congress and the president to improve FOIA administration.

The OPEN Government Act specified NARA as the location for OGIS in an effort to establish the office at an objective agency with a good reputation for records management. Since the Department of Justice (DOJ) defends agencies accused of inappropriately withholding documents, it is viewed as having a bias toward federal agencies. Hence, Congress created OGIS to be an independent voice on FOIA compliance and complaints.

The OGIS website demonstrates the office's interest in positioning itself as a liaison between the public and the federal government on FOIA matters. The website provides the public with several ways to contact the office, along with news on FOIA administration developments and congressional testimony. Further, it provides centralized access to FOIA resources outside of the federal government that assist the public in gaining access to federal information. Included in these resources is the Federal Open Government Guide, published by the Reporters Committee for Freedom of the Press, that is oriented toward the non-lawyer general public.

The office appears likely to expand its online capabilities in the near future. Miriam Nisbet, the first director of OGIS, has set a goal of utilizing online tools to fulfill its mission. In testimony before the Senate Judiciary Committee in September, Nisbet stated that she saw potential in using current technologies to better assess agency compliance and performance under FOIA "similar to what is being done to assess federal agencies' information technology initiatives through the IT Dashboard [an assessment of federal spending on information technologies offered through USAspending.gov] and Data.gov [a new service providing access to government databases in a one-stop website]." Further, she described plans to establish an online dispute resolution (ODR) system to efficiently process and evaluate a large volume of cases in the office's role as mediator. The utilization of tools to make this process more efficient and more likely to avoid litigation would, according to Nisbet, "save time and money for agencies and public alike, as well as bolster confidence in the openness of government."

The use of new technology to help monitor government compliance with FOIA and to resolve disputes is an advance that could help resolve disputes more quickly and save agencies and the taxpayers from having to pay the cost of litigation. In recent years, the cost of FOIA litigation has ranged in the hundreds of thousands of dollars. During several of these years, fees collected from FOIA requests amounted to less than half of litigation expenses.

Nisbet, appointed in June, entered the position from UNESCO's Information for All Program. She also served as the legislative counsel for the American Library Association from 1999-2007. Prior to that, she was the Deputy Director of the DOJ's Office of Information Privacy.

House Moves to Reduce Risks from Chemical Plants

On Oct. 21, the House Energy and Commerce Committee approved two pieces of chemical security legislation that encourage plants to switch to safer and more secure technologies. Although the bills still lack crucial accountability measures, they represent a major improvement over the flawed and inadequate temporary security measures currently in place.

According to Department of Homeland Security (DHS) testimony, U.S. chemical plants and water facilities remain vulnerable to terrorist attacks. The department has identified more than 7,000 high-risk chemical facilities. The current program does not cover drinking water and wastewater facilities.

A terrorist attack against a chemical facility – or against the railcars that deliver chemicals – could release a cloud of poison gas resulting in thousands of casualties. The new legislation aims to address this threat in several ways, including by promoting the conversion to chemicals that pose less or no risk to surrounding communities.

The bills – the Chemical Facility Anti-Terrorism Act of 2009 (H.R. 2868) and the Drinking Water System Security Act of 2009 (H.R. 3258) – require plant workers to participate in the security process and preserve states' authority to establish stronger security standards. Both bills also require covered facilities to assess whether there are alternative chemicals or processes that they could use that would reduce the consequences of a terrorist attack.

For example, numerous water facilities across the country have independently switched from using chlorine gas as a disinfectant to liquid bleach or ultraviolet light. These alternate technologies work as well or better than chlorine gas and do not potentially threaten thousands should a terrorist attack cause a release.

One glaring weakness in the legislation is the absence of transparency. The bills allow the government to keep secret even the identities of facilities that are covered by the security programs. The types of information considered "protected" and thus not available to the public are overly broad and allow DHS to deny the public access to basic regulatory data needed to ensure the government and facilities are obeying the law. Such excessive secrecy could threaten the security of the millions of citizens living near, or even just passing by, what then-Senator Barack Obama referred to as "stationary weapons of mass destruction."

Notably, the bills give DHS or the U.S. Environmental Protection Agency the authority to require the most high-risk facilities to convert to whichever safer technology the facility identifies for itself – under limited circumstances. A chemical plant can only be forced to convert if it is economically and technologically feasible to do so and if the conversion would actually reduce the risks. The legislation specifically prohibits requiring a facility to convert if doing so would force the facility to move to another location to avoid the requirement.

The bills' supporters agreed to numerous other compromises to ensure broader support and dampen what had been strong industry opposition. One change reduced the number of high-risk

chemical facilities that may be required to eliminate catastrophic risks with safer technologies. Another change prevents citizens from suing individual companies for noncompliance. Instead, citizens may petition the government to investigate alleged violations at specific facilities.

The House Energy and Commerce Committee, chaired by Rep. Henry Waxman (D-CA), a sponsor of the bills, approved both bills on near party-line votes. Only one Democrat, Rep. Zach Space of Ohio, voted to oppose the chemical facility bill even after he sponsored a successful amendment to add further protections for agricultural interests. All the Republicans on the committee voted against the bill. The water facility bill was approved by voice vote.

The House Homeland Security Committee passed a weaker version of the chemical facilities bill in June. The existing security regulations expired in October, but interim appropriations measures have extended the program.

A long legislative road remains ahead of the legislation. Before the full House can vote on the measures, several issues must be worked out. The two House committees passed different versions of the bills, with different weakening and strengthening amendments. The House Rules Committee must negotiate the form the legislation will take on the House floor. Additionally, technical questions remain, such as how government responsibility for covered wastewater and drinking water facilities will be decided. The legislation is still expected to be on the House floor before the end of 2009. Then the focus shifts to the Senate, which to date has taken no action on the issue.

OMB Role in EPA Chemical Program Questioned

The White House Office of Management and Budget (OMB) has repeatedly inserted itself in the development of a U.S. Environmental Protection Agency (EPA) program designed to study the effects of chemicals on human and animal endocrine systems.

On April 15, EPA asked OMB to approve scientific test orders it plans to send to chemical manufacturers. Under its Endocrine Disruptor Screening Program (EDSP), EPA is attempting to require manufacturers to screen certain chemicals to determine whether they are endocrine disruptors – a term used to categorize any compound capable of causing certain reproductive and developmental abnormalities. Before issuing the orders, EPA was required under the Paperwork Reduction Act to seek OMB approval. (All agencies must receive OMB clearance before collecting information from 10 or more people.)

OMB approved EPA's request Oct. 2, and EPA has said it will begin sending test orders for seven chemicals later in October. EPA will send out orders for 60 other chemicals from November through February 2010. Recipients of the test orders have the option of subjecting their chemicals to new tests or submitting existing studies.

While EPA will continue to manage the process, OMB cleared the information collection request with caveats. The primary focus of the EDSP is to require manufacturers to subject chemicals to

fresh testing designed to detect endocrine effects. Manufacturers could also submit existing studies if appropriate. When OMB approved the request, it instructed the agency to consider existing studies "to the greatest extent possible."

OMB's role has caused concern among scientists and public health advocates. They say most currently available studies were not conducted with the goal of determining a chemical's effect on the endocrine system and did not study low-dose, long-term exposures.

Scientists have long suspected some chemicals, including those found in certain pesticides and plastics, of mimicking or interfering with natural hormones and disrupting development in the process. The term "endocrine disruptor" was coined in the early 1990s because these substances wreak havoc with the endocrine system – the web of glands and receptors that interact with hormones in both humans and animals. Exposure to endocrine disruptors may begin to cause adverse health effects even at very low doses.

A paucity of reliable data and rising public concern prompted Congress to pass the Food Quality Protection Act (FQPA) in 1996. The law instructed EPA to develop a screening program to determine if pesticides and other chemicals could affect endocrine systems and to pinpoint the doses at which harm occurs.

The role of OMB

At the crux of the OMB controversy is the issue of "other scientifically relevant information," a term found in the FQPA. An EPA document describing the procedures and timeline for the EDSP says manufacturers may submit other scientifically relevant information and that EPA will accept such information if it satisfies the test order. But like the information collection request approved Oct. 2, the EDSP procedures document was reviewed by OMB. Again, OMB emphasized the use of existing studies.

An EPA draft of the procedures document submitted to OMB in August 2008 includes an option whereby test order recipients could submit existing data. EPA's initial language presented the issue in stark contrast: in order for a submission of existing data to be deemed sufficient, the data would have to "satisfy the request in the test order."

OMB edited the option to add a significant amount of language about existing data and other scientifically relevant information. OMB suggested language allowing for submission of "relevant" information, regardless of whether it satisfies the order. EPA accepted OMB's edits and published the document April 15.

According to the final document, the ultimate decision rests with EPA, and EPA must provide a written determination to the recipient who submitted existing data as to whether its response is acceptable. Under the FQPA, if manufacturers do not comply with EPA test orders for a certain chemical, EPA may bar them from selling that chemical.

OMB has defended its role in the EDSP. Speaking at an American Bar Association meeting Oct. 23, Michael Fitzpatrick, associate administrator of the White House Office of Information and Regulatory Affairs (OIRA), the arm of OMB that reviews information collection requests and regulatory documents, said that OMB had not manipulated EPA's scientific work or decisions. He emphasized that EPA will maintain complete control over the EDSP and said that EPA welcomed the increased emphasis on the inclusion of other scientifically relevant information.

Still, OIRA's role raises questions. OIRA is not a scientific agency. It employs mostly economists and policy analysts and only a few scientists.

Critics have long urged OIRA to defer to agencies' scientific judgments. In November 2008, a diverse group of regulatory experts and advocates coordinated by OMB Watch recommended that agencies, including White House offices, "abstain from inappropriate interference in the work of other agencies and end secretive interagency reviews of scientific and technical information."

On Oct. 22, the Center for Progressive Reform wrote to newly confirmed OIRA administrator Cass Sunstein, criticizing OMB's role in the EDSP and saying, "As a result, there is a real danger that the EDSP's testing efforts, already behind schedule because of the Bush EPA's delays, will be postponed for many more years" because of the potential for delay from EPA's review of studies that are not ultimately relevant.

A letter from Rep. Edward Markey (D-MA), chair of the House Energy and Commerce Committee's Subcommittee on Energy and the Environment, further raised the profile of the controversy. Markey reiterated concerns voiced by the scientific community, writing, "OMB has suggested that EPA use existing data from toxicological tests, many of which have not been designed to assay whether these chemicals interfere with the endocrine system." Markey added, "These actions could put public health at risk."

Markey asked OMB Director Peter Orszag to respond to six questions, including whether OMB had assessed whether other scientifically relevant information would be legally and scientifically sufficient to fulfill the requirements of the EDSP and whether OMB had been influenced by outside parties.

The latter question alludes to the role of industry in OMB's review of the information collection request. Several industry groups filed public comments asking OMB to reject EPA's request.

Importance of reliable data

The impact, critics fear, is that EPA will not be able to receive the proper data on exposure to harmful chemicals. "Getting a clear picture of those risks requires up-to-date, evidence-based science," said Kathryn Gilje, Executive Director of Pesticide Action Network North America.

The 11 tests, or assays, EPA has developed to screen for endocrine disrupting effects would evaluate chemicals' effects on a variety of human and animal functions, including reproduction,

sexual differentiation and development, and thyroid function. Under Tier 1 of the EDSP, if satisfactory existing studies do not exist, manufacturers will subject their chemicals to EPA's test battery (which has also been criticized). If a chemical is identified as an endocrine disruptor, it advances to Tier 2, where scientists will attempt to pinpoint a dose-response relationship.

An EPA scientific advisory committee formed to aid in the design of the EDSP first addressed the issue of existing studies in 1998: "There are numerous reasons for using only validated assays. These include: having confidence that the assay is detecting the effect it purports to be detecting, that the results of the assay are reproducible and comparable from laboratory to laboratory, and that the results permit a comparison of the toxicity of various chemicals."

The full impact of OMB's comments cannot be gauged until manufacturers begin responding to EPA's orders for information. If manufacturers attempt to submit other scientifically relevant information that is not sufficient to determine endocrine disrupting effects, EPA will face a choice over whether to accept it. The back and forth between EPA and industry, which could occur for multiple chemicals, will in part shape the EDSP.

EPA may also experience political consequences if it seeks to add chemicals to the EDSP beyond the 67 currently included. In addition to encouraging EPA to use other scientifically relevant information, OMB asked EPA to revise its estimates for the time the agency expects manufacturers to spend complying with EDSP test orders. EPA must present its revisions if it decides to seek approval to send test orders for additional chemicals, OMB said, at which time OMB may approve or disapprove the request.

If for any reason EPA is unable to obtain information on the endocrine disrupting properties of chemicals, public health could suffer. Endocrine disruptors have been blamed for health effects in both humans and animals, including birth defects and thyroid problems. Endocrine disruptors were also implicated after researchers discovered that 80 percent of male smallmouth bass in the Potomac River watershed are producing immature female eggs. Similar intersex fish have been discovered in other water bodies across the country.

Without reliable science on low-dose exposure to endocrine disruptors, government officials will be unable to determine the best steps to manage the risk to public health and the environment.

EPA Inspector General Targets Water and Air Enforcement

The U.S. Environmental Protection Agency's (EPA) Office of Inspector General (OIG) recently provided two assessments of EPA's weaknesses in enforcing water and air programs. The OIG cited management problems at the federal and regional levels that largely indict the Bush administration's lax approach to environmental enforcement.

On Oct. 14, the OIG released an evaluation report entitled *EPA Oversight and Policy for High Priority Violations of Clean Air Act Need Improvement*. High priority violations (HPVs) are significant violations of the Clean Air Act (CAA) by stationary sources like power plants and

factories. These significant violations led the EPA to institute a high priority violation policy during the 1990s. The policy contains thresholds defining HPVs and steps the agency should take to address the violations. The steps may ultimately lead to EPA regional offices displacing states in pursuing violators if a state is unable or unwilling to act.

OIG's investigation of the HPV program focused on violations classified as HPVs between October 2005 and Dec. 31, 2007, from five regions with the highest number of unaddressed high priority violations. EPA's policy requires that these significant violations be addressed (either resolved or have formal enforcement actions taken) within 270 days after EPA or the states receive notice of the violations.

The report summarized the results of the reviews of more than 3,700 violations, concluding:

> HPVs were not being addressed in a timely manner because regions and States did not follow the HPV policy, EPA Headquarters did not oversee regional and State HPV performance, and regions did not oversee State HPV performance. According to EPA data, about 30 percent of State-led HPVs and about 46 percent of EPA-led HPVs were unaddressed after 270 days.

The report cited several management problems throughout EPA. For example:

- Polluters did not receive notices of violations within the time required
- None of the states and regional offices met to review case strategies within the time required
- States often employed voluntary approaches with the violators rather than imposing formal enforcement actions as required by agency policy
- Regional offices did not take over enforcement of delinquent cases when states failed to act

The OIG report was directed to Cynthia Giles, Assistant Administrator of the Office of Enforcement and Compliance Assurance (OECA), and contains several recommendations for agency action. In her response to the OIG (contained in the report), Giles outlined several actions the agency has already taken or intends to take to remedy its poor performance. She noted, however, that EPA intends to review the HPV policy "to determine what revisions might be necessary to ensure the most effective implementation of an HPV policy" and whether the policy is the appropriate tool to address significant violations of the CAA. Until that review is complete, some of the OIG recommendations will not be implemented.

On Oct. 15, the House Committee on Transportation and Infrastructure held an oversight hearing entitled "The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters." The focus of the hearing was to explore state and federal enforcement issues. Among the ten witnesses were Lisa Jackson, EPA Administrator, and Wade T. Najjum, Assistant Inspector General for Program Evaluation, of EPA's inspector general's office.

At the hearing, Jackson announced the creation of the Clean Water Action Enforcement Program, the "first step in revamping the compliance and enforcement program," according to the agency's press release. The plan had been under development by OECA since July. It outlines EPA's strategy to target its enforcement to the most significant water pollution problems, to provide better access by the public to water quality data in local communities, and to strengthen performance at both the federal and state levels.

The plan describes the challenges forcing EPA to focus on the most significant sources of pollution, noting, "Over the last 30 years, water enforcement focused mostly on pollution from the biggest individual sources, such as factories and sewage treatment plants. Now we face different challenges. The regulated universe has expanded from the roughly 100,000 traditional point sources to nearly one million far more dispersed sources such as animal feeding operations and storm water runoff. Many of the nation's waters are not meeting water quality standards, and the threat to drinking water sources is growing."

Najjum's testimony focused on the challenges EPA faces in its management and enforcement. Each year, the OIG lists the major management issues that should be addressed agency-wide. For FY 2009, three issues on that list affected management and enforcement at the agency: EPA's organization and infrastructure, its oversight of states' responsibilities, and performance measurement.

In each of these areas, Najjum presented a range of problems similar to those described in the OIG report on air program enforcement. Reporting and data problems, for example, make it extremely difficult for the agency to oversee state activity to determine if the law is being adequately enforced. States and regional offices are inconsistent in their approaches to managing enforcement of violations and often interpret EPA guidance differently.

In addition, Najjum discussed problems resulting from the organizational structure of EPA, which has both functional offices (monitoring, research, enforcement, and standard-setting) and pollution media offices (air, water, radiation, pesticides, etc.) As a result, there is inadequate coordination between offices at the federal level and between headquarters and regional offices; the missions, goals, and performance measures across programs are not linked together; and inadequate resources force difficult allocation decisions.

Both OIG assessments of EPA's enforcement capabilities and challenges reinforce the arguments critics have leveled at EPA and presidential administrations for at least the last decade. Although the agency has been significantly underfunded to meet its responsibilities, it has not energetically enforced the law, its oversight of states has been lax, and it faces a continuous stream of new challenges.

FEC Decides Not to Appeal EMILY's List Decision

The Federal Election Commission (FEC) has decided not to appeal a September ruling by a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit in *EMILY's List v. FEC*. That

opinion struck down FEC regulations that limited donations to some nonprofit groups that engage in campaign activity. The FEC's decision not to appeal may have major implications for campaign finance issues, as well as certain nonprofits' activity during upcoming elections in 2010 and 2012.

The appeals court ruled that the FEC regulations violated EMILY's List's speech rights in violation of the U.S. Constitution. EMILY's List is a non-connected nonprofit political action committee (PAC) that seeks to elect pro-choice, Democratic women to office. In 2005, the group challenged the FEC's regulations as they relate to the treatment of funds received in response to certain solicitations and amended rules regarding federal/nonfederal fund allocation ratios for PACs.

There has been much speculation since the *EMILY's List* ruling as to whether the FEC would appeal. There are many reasons why the FEC's decision not to appeal is unsurprising. Currently, there is a deep partisan divide on the FEC, and that divide was evident in the FEC's decision not to appeal. All three Democratic commissioners voted to appeal the decision while the three Republican commissioners voted not to appeal it. With the commission split 3-3, there was not the clear majority needed to proceed with an appeal. This split is consistent with other partisan schisms at the FEC over the past year.

The FEC had the option to appeal to an *en banc* court comprised of the appeals court's nine judges, rather than accept the decision from the original three-judge panel that decided the case. However, the likelihood that an *en banc* court would have affirmed the panel's decision may have played a role in the FEC's decision not to appeal the case. Since the September decision striking down the FEC regulations was unanimous, five of the remaining six judges would have had to vote to uphold the regulations. This "seems highly unlikely based on the record of those judges," according to the Center for Competitive Politics. Thus, the Center concludes that, "an *en banc* appeal would most likely be a waste of time."

Campaign finance reform groups see this as an issue that tends to break down partisan lines. Democracy 21 President Fred Wertheimer said in a statement that "[n]ormally government agencies take actions to defend the constitutionality of the regulations they have issued, but [the Oct. 22] vote by the Republican FEC Commissioners to block an FEC appeal continues their pattern of doing everything they can to emasculate the nation's campaign finance enforcement agency and thereby to emasculate the nation's campaign finance laws."

Paul Ryan, an election law expert at the Campaign Legal Center, told *Politico* that the "EMILY's List decision, if allowed to stand, loosens the campaign finance law restrictions on committees like EMILY's List and allows them to use more soft money to engage in activities that arguably influence federal elections." This could result in an unprecedented amount of "soft money," which is unlimited donations to certain nonprofit groups by individuals, corporations, political action committees and unions for use during elections.

Charlie Spies, an election lawyer who has represented the Republican National Committee, believes that "an appeal would further upend the already shifting election law landscape heading

into the 2010 midterm elections," according to *Politico*. "It is important for groups planning to participate in the political process to have certainty going into 2010, and the commission is helping provide that by not appealing the court's decision," Spies told *Politico*.

There is some speculation about whether Solicitor General Elena Kagan can still appeal the case to an *en banc* court. "There is no doubt that Kagan could take the case to the Supreme Court now; legal analysts are not sure she has the option of seeking *en banc* review, or whether that was a choice left to the FEC," according to the *Supreme Court of the United States Blog*.

The Center for Competitive Politics notes that the "Solicitor General represents the FEC in the Supreme Court, and can appeal statutory and constitutional questions even if the FEC does not ask her to do so. However, such action by the SG is extremely rare. Moreover, it is not entirely clear that she can appeal a regulation without the agency's acceptance – her authority is to defend "statutes" of the United States. No statute is at issue in *Emily's List*. It would be strange indeed for the Solicitor General to seek *certiorari* in the Supreme Court in order to defend the validity of a regulation that the agency itself does not believe is constitutional, and it would seem a waste of the Supreme Court's time to hear such an odd appeal."

Most legal experts, however, believe that the Solicitor General can appeal the case even if the FEC does not support the decision, according to *Politico*. Kagan is studying the decision, according to *The Hill* and *Roll Call*.

What remains clear is that if the outcome of this case stands, it has created a new standard for election-oriented nonprofits to raise and spend unlimited funds to directly support or oppose a candidate's campaign. The results suggest major implications on the upcoming elections in 2010 and 2012.

Census Amendment Stalls Appropriations Bill, LSC Funding

Civil rights groups are urging the Senate to reject a controversial amendment to the FY 2010 Commerce, Justice, and Science (CJS) Appropriations bill (H.R. 2847) currently working its way through Congress. Sens. David Vitter (R-LA) and Robert Bennett (R-UT) have proposed the amendment, which is designed to cut off funding to the Census Bureau unless the 2010 Census survey includes a question regarding citizenship and immigration status. The amendment flap has delayed passage of the CJS legislation, which would, in part, increase funding and restore speech rights to Legal Services Corporation (LSC) grantees.

According to Sen. Vitter, "If the current census plan goes ahead, the inclusion of non-citizens toward apportionment will artificially increase the population count in certain states, and that will likely result in the loss of congressional seats for nine other states, including Louisiana."

Many civil rights groups argue that this additional question about citizenship will discourage census participation and in turn, undermine accuracy. According to the Leadership Conference on Civil Rights (LCCR), "The question would inflame concerns within both native-born and

immigrant communities about the confidentiality and privacy of information provided to the government and deter many people from filling out their census form."

On Oct. 20, a broad coalition of civil rights and advocacy organizations held a press conference on Capitol Hill to urge the Senate to vote against the amendment. Some of the groups involved include LCCR, the National Association of Latino Elected and Appointed Officials (NALEO), and the Asian American Justice Center (AAJC). Many of the groups released statements denouncing Vitter and Bennett's effort. Wade Henderson, president and CEO of LCCR, stated, "The 14th Amendment clearly requires a count of every resident for apportionment of U.S. House seats, yet the Vitter amendment echoes a shameful period when the census counted most African Americans as three-fifths of a person. The ideals that our country was founded on, and the sacrifice and struggle of generations of Americans to realize them, deserve better than this."

In addition, many House leaders and members of the Congressional Hispanic Caucus, Congressional Black Caucus, and Congressional Asian Pacific American Caucus condemned the amendment. They, too, held a press conference, during which House Majority Leader Steny Hoyer (D-MD) said the census changes are "something that neither the Census Bureau or the country can afford."

The 2010 census is scheduled to begin on April 1, 2010, and most of the materials have already been printed and finalized. Reportedly, the amendment's addition of a new question would require the Census Bureau to reprint materials, at a cost to American taxpayers of more than $7 billion.

In response, Rep. Joe Baca (D-CA) introduced the "Every Person Counts Act" (H.R. 3855), which would restrict the Commerce Secretary from including any questions regarding citizenship or immigration status on the census.

In mid-October, *The New York Times* ran an editorial commenting that the changes proposed by Vitter and Bennett would be wasteful and counterproductive. "Adding a new question about citizenship would further ratchet up suspicions that the census is being used to target undocumented immigrants," said the editorial. "That would discourage participation not only among people who are here illegally but also their families and friends who may be citizens and legal residents. That leads to an inaccurate count. And since census numbers are also used to allocate federal aid, undercounting minorities shortchanges the cities and states where they live."

When the full Senate began consideration of the CJS bill in early October, Majority Leader Harry Reid (D-NV) scheduled a cloture vote, but Senate Republicans blocked the effort to cut off debate. Reid plans to hold another cloture vote soon.

The NALEO Educational Fund issued a press statement stating, "We urge the Senate to vote in favor of cloture, which would lay the foundation for halting the Vitter-Bennett amendment. If the cloture vote is not successful, we urge every Senator to oppose this unconstitutional and costly measure if it comes to the Senate floor."

In addition to its civil rights and logistical implications, the Vitter-Bennett amendment is stalling an appropriations bill that would overturn onerous restrictions on legal aid nonprofits. The CJS legislation includes a provision that removes advocacy-related restrictions placed on the private and local funds of LSC-funded nonprofits. Currently, these legal aid groups are barred from using their non-federal funds to engage in lobbying, initiate class-action litigation, or participate in agency rulemakings. These restrictions even apply to funds that come from private donors.

For more information on the LSC provision, see the July 29 issue of *The Watcher*.