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In This Issue

Bush Administration Pushing Last-Minute Rollbacks

The Bush administration is trying to finalize several new rules, covering a range of policy issues, before a new administration takes over and despite its own policy directive. The new rules would relax the standards and enforcement of longstanding federal laws, including the Endangered Species Act (ESA).

In a controversial move, Interior Secretary Dirk Kempthorne announced a proposed rule that would change the way government agencies comply with the Endangered Species Act. The proposal would allow officials to approve development projects that could impact endangered species without consulting federal wildlife and habitat scientists.

The Interior Department published the proposed rule in the *Federal Register* on Aug. 15. But the proposal missed by two and a half months a White House-imposed deadline for Bush-era regulations. A May memo from White House Chief of Staff Joshua Bolten states, "[R]egulations to be finalized in this Administration should be proposed no later than June 1, 2008." All final rules must be completed by Nov. 1 except in extraordinary circumstances,

according to the memo. Bolten claimed the deadlines were necessary to avoid the flurry of regulations agencies often hurry through in the final months of an administration.

However, all signs indicate that Interior intends to finalize the proposed ESA changes before President Bush leaves office and is doing so with the blessing of the White House. The Office of Information and Regulatory Affairs (OIRA), the White House office in charge of approving, changing, or rejecting new administration policy, spent only three days reviewing Interior's proposed rule.

The average review time for the 350 proposed rules OIRA has reviewed this year is 65 days. OIRA's average review time for the 12 Interior Department proposals submitted is 71 days.

Kempthorne also announced that Interior officials will accept public comment on the proposal for only 30 days. The standard comment period for proposed rules is 60 days. OMB Watch Executive Director Gary D. Bass said, "The limited 30-day comment period for this important issue suggests the rule is on a fast track for completion before the Bush administration leaves."

Noah Greenwald, science director at the Center for Biological Diversity, said, "Secretary Kempthorne seems determined to establish a legacy of environmental destruction and extinction."

Allowing agencies to bypass expert scientific review for development projects runs counter to long-standing practices required by the ESA. The act requires project managers to request from Interior "information whether any species which is listed or proposed to be listed may be present in the area" where construction will occur. Greenwald said, "[The proposed rule] would allow thousands of projects that harm endangered species to move forward without mitigation."

Another controversial rule that impacts the health of workers is also moving quickly through the regulatory pipeline despite the Bolten memo's requirements. The rule, proposed by the Department of Labor (DOL), would change the way the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) calculate estimates for on-the-job risks. (Read an article about the rule in the Aug. 5 *Watcher*.)

A draft of the rule was written quickly and without the consultation of occupational health experts inside OSHA and MSHA, Labor Department insiders say. DOL Secretary Elaine Chao's office forwarded the draft to OIRA for the required review period on July 7. OIRA has yet to send the proposed rule back to DOL for publication in the *Federal Register*.

Scientists and public health experts fear the rule change would downplay the severity of workplace risks, thereby weakening the case for regulation. In a letter sent Aug. 14, 80 doctors, scientists, and public health experts asked Chao to abandon the proposal. The letter said the rule "has serious flaws that would weaken current procedures and undermine occupational health rules" and would add delays to an already lengthy process for writing occupational

health rules.

Both proposed rules have drawn criticism from lawmakers. Addressing the ESA rule change, Rep. Nick Rahall (D-WV) told *The Washington Post*, "Eleventh-hour rulemakings rarely, if ever, lead to good government — this is not the type of legacy this Interior Department should be leaving for future generations." Rahall chairs the House Natural Resources Committee.

Rep. George Miller (D-CA) and Sen. Ted Kennedy (D-MA) were critical of both the negative effects the DOL risk assessment rule change would have and the way Chao's office has handled developing the rule. The two sent a letter to Chao July 10 asking to be briefed on the rule. Miller has introduced a bill that would forbid DOL from finalizing the rule.

A controversial rule that could reduce women's access to birth control also appeared to be in the works in the waning days of the Bush administration. A draft of the rule leaked from the Department of Health and Human Services (HHS) would have, for the first time, classified oral contraception as a form of abortion. The rule, as written in the draft, would have attached strings to federal funds given to health care providers who dispense birth control or perform abortions.

On Aug. 7, HHS Secretary Michael Leavitt claimed he had not seen the draft before it had been leaked to the public. On his blog, he wrote, "It contained words that lead some to conclude my intent is to deal with the subject of contraceptives, somehow defining them as abortion. Not true."

Nonetheless, reproductive rights advocates and lawmakers continue to criticize the rule. The rule has not been sent to OIRA for review, and Leavitt says, "The Department is still contemplating if it will issue a regulation or not."

According to an Aug. 16 *Washington Post* article, the Department of Justice (DOJ) proposed a rule July 31 that would "make it easier for state and local police to collect intelligence about Americans, share the sensitive data with federal agencies and retain it for at least 10 years." Under the rule, law enforcement agencies would be able to target groups and individuals but there would have to be a "reasonable suspicion" that the target is engaged in criminal activity before collecting information, according to a source in the article. It appears DOJ hopes to finalize the proposed rule before the end of the Bush administration, which would be yet another example of agencies violating the spirit and intent of the Bolten memo.

Increasingly, it appears the Bush administration is trying to solidify a range of policies before it leaves office — the Bolten memo notwithstanding — tying the hands of the next president and bypassing Congress.

One Year Later, Only Blame about Crandall Canyon Disaster

One year after the deaths at the Crandall Canyon mine in Utah, little has been accomplished at

the federal level to help prevent further mine collapse disasters. Although the House passed legislation addressing safety issues raised by this collapse and a series of other mine accidents in recent years, the Senate has not acted. Reports about the causes of the Utah mine collapse vary in assigning responsibility, which has led to different allegations about who bears the burden for the nine deaths at Crandall Canyon.

Aug. 6 marked the one-year anniversary of the mine collapse that entombed six coal miners. Only days later, during attempts to rescue or recover the miners, three more people died when another section of the mine collapsed. On Aug. 20, 2007, rescue efforts at the mine were called off indefinitely due to concern about the safety of rescue workers. Rep. George Miller (D-CA), chairman of the House Education and Labor Committee, which conducted its own investigation of the collapse, issued a press release on the anniversary saying:

> This anniversary reminds us of the significant risks miners still face while extracting the coal that meets our nation's energy needs. The several mine tragedies that have occurred recently have been the result of weak laws, outlaw mine operators, and government agencies asleep at the switch. This is unacceptable. We must work aggressively toward a future where all miners can return home safely after their shifts.

Miller introduced H.R. 2768, the S-MINER Act, on June 19, 2007, in the wake of a series of mine collapses in 2006 that killed 47 miners, the highest number of fatalities since 2001. The House passed the bill Jan. 16 and sent it to the Senate, where no action has occurred. The bill requires a series of safety improvements and requires the Secretary of Labor and other entities to provide greater protections for miners and to explore new ways of increasing safety.

Two new reports claim different actors are responsible for the mine failure. A July 24 report by the Mine Safety and Health Administration (MSHA) said the mine collapse was caused by a "flawed mine design" and that the mining plan "was destined to fail." The report also states that Genwal Resources, Inc. (GRI), the company employed by mine owner Murray Energy Co. to operate the mine, knew of but did not report a series of coal bursts to MSHA as required by federal regulations. The reporting failures "deprived MSHA of the information it needed to properly assess and approve GRI's mining plans."

As a result of its investigation, MSHA cited GRI with numerous serious violations and fined the company $1.6 million. MSHA also fined GRI's engineering consultant on the mine design, Agapito Associates Inc., $220,000 for its flawed analysis of the roof-control plan.

The second report, issued July 25, was performed at the order of Department of Labor Secretary Elaine Chao and was conducted independently of MSHA officials. Earnest C. Teaster, Jr. and Joseph W. Pavlovich, two former MSHA managers, conducted the independent review with the help of five MSHA employees. The team was charged with "evaluating and identifying deficiencies in MSHA's actions preceding the initial accident, evaluating and identifying deficiencies during the rescue attempt, and providing meaningful recommendations to better

protect the safety and health of miners and prevent such accidents in the future."

The independent report issued scores of findings about MSHA's failures in the plan approval process, inspection and rescue activities, and staffing and resource utilization. In short, the investigators found MSHA's deficiencies "to be evident of a systemic problem, both in District 9 [the regional office], and within MSHA as a whole." The report concludes that MSHA should not have approved the mining plan for Crandall Canyon and that, contrary to MSHA's assertion in its report, MSHA officials knew about the outbursts at the mine in the months before the collapse. In addition, MSHA bears some responsibility for the subsequent rescue failure because it chose not to bring two experts to the site who were more familiar with western, deep-mining conditions and should have been involved in the rescue operations.

Prior to the Education and Labor committee's release of the investigation of the collapse, completed in May, Miller sent a criminal referral to the U.S. Department of Justice (DOJ) asking it to investigate whether the mine's general manager may have hindered MSHA's oversight of the mine. According to an Aug. 1 *Salt Lake Tribune* article, DOJ is still considering the request.

The *Tribune* reported that the families of the dead and injured miners received an extensive briefing from MSHA on its findings but learned little that was new to them. An attorney representing the families was quoted in the article as saying, "This [MSHA] report confirms and underscores the allegations we made in our complaint... This clearly makes it known that these deaths and injuries were preventable."

Fisheries Rule Cuts Public Participation

A Commerce Department proposed rule governing fisheries management threatens to curb public participation in environmental reviews and give greater control to the fishing industry. The public comment period for the proposed rule ended on Aug. 12.

Of the almost 200,000 public comments received, opponents argued that the rule would result in less time for the public to comment on the environmental impacts of fishery management actions, fewer alternatives considered, fewer actions reviewed, greater control by managers with financial conflicts of interest, and an unwelcome precedent.

Proposed in May, the rule would define how managers of the nation's fisheries comply with the National Environmental Policy Act (NEPA), one of the country's bedrock environmental laws. NEPA requires federal agencies to examine the environmental effects of proposed actions and to inform the public of the environmental impacts considered during an agency's decision making process. An essential element in the NEPA process is the requirement to make available to the public environmental impact information, including the impacts of various alternative actions, and to give the public opportunity to participate in the decision making process.

The proposed rule is the result of congressional reauthorization of the primary law governing the management of fisheries, the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Congress instructed the Commerce Department, through its National Marine Fisheries Service (NMFS), to better align the environmental review procedures of the MSA with those of NEPA. Congress's intent was to streamline the environmental review process in the context of fishery management.

Instead, the Commerce Department proposed a new rule that would create additional procedures and new forms of documentation that, according to conservation advocates, would make the procedures more complex. The proposed rule would reduce public input and increase the number of actions that would receive no environmental review at all by expanding the scope of categorical exclusions — categories of actions that fishery managers would not need to review for environmental impacts.

In addition to the hundreds of thousands of public comments opposing the proposed rule, 80 members of Congress have also expressed their opposition, including a letter joined by 72 members of the House of Representatives. The letter states that the proposed rule fails to meet congressional intent made clear during the reauthorization of the MSA. Hundreds of scientists and environmental organizations have also signed on to oppose the rule.

Among the changes proposed by the rule is a reduction of the public comment period for environmental analyses, from 45 to 14 days, under certain circumstances. Some fishermen and others have expressed concern that two weeks is insufficient time to evaluate the sometimes hundreds of pages of complex information contained in new management actions and their environmental reviews, especially given that fishermen may often be at sea for longer than 14 days at a stretch.

The rule's opponents argue that too much power over environmental reviews would be placed in the hands of the fishing industry. The MSA, signed in 1976, established eight regional fishery management councils to recommend regulations to NMFS and to defend U.S. fisheries from foreign exploitation; it did not vest these councils with overseeing environmental and conservation issues. The councils are mostly composed of members of the fishing industry appointed in a heavily political process. The councils play the primary role in developing fishery management plans, which then must be approved or rejected by NMFS. More than 97 percent of the councils' recommended management actions are approved by NMFS.

The councils are exempt from the conflict-of-interest restrictions of the Federal Advisory Committee Act, and 60 percent of the appointed council members have a direct financial interest in the fisheries that they regulate, according to the reports *Conflicted Councils* and *Taking Stock* by the Pew Charitable Trusts. The same studies found that more than 80 percent of the appointed council members represent fishing interests, with few or no conservation groups represented. Moreover, the councils have been criticized frequently for mismanagement and failing to heed recommendations of their scientific advisory groups, leading to overfishing and bycatch problems. The new proposed rule draws heavily on

recommendations from the councils.

Additionally, the proposed rule would restrict public comment to issues raised in previous rounds of public input. Fishery management councils could bring new proposals midway through the public comment process, and public scrutiny of the newly raised issues would be prohibited. The rule also gives the councils authority to decide the scope of the environmental analyses of measures and which new measures would even qualify for environmental review.

Understandably, several of the fishery management councils have come out in support of the new procedures, claiming they will reduce the amount of time needed to enact management decisions and reduce redundant paperwork. However, conservation groups have pointed out that the existing environmental reviews under NEPA do not add time to the decision making process prescribed by the MSA. Other fishing groups have sided with the opponents of the proposed rule, pointing out that the new procedures would curtail public involvement by smaller fishing interests not represented among the politically appointed council memberships.

Conservation groups have also raised the prospect that the new procedures designed for the Department of Commerce would set a precedent for other federal agencies to design unique procedures for their own NEPA compliance, perhaps further reducing public participation and the scope of the alternatives considered during environmental reviews. The NEPA environmental review procedures are often regarded by federal agencies as burdensome, and the prospect of having to do fewer analyses may tempt agencies to craft new procedures.

Opponents of the rule also point to more than thirty years of case law and administrative experience with NEPA that have informed the existing procedures. The departure from this history embodied in the proposed procedures could increase the likelihood of legal actions should the rule be finalized and implemented in its current form.

Recent studies have shown that the world's oceans are in poor health, suffering from the combined problems of climate change, overfishing, habitat loss, and pollution. The most recent NMFS data show that 20 percent of managed fish stocks are overfished or subject to overfishing, but this figure only represents the small portion of stocks for which the agency has enough data to make a determination. According to a report by the Pew Environment Group, globally, one quarter of fish stocks are overexploited, depleted, or recovering from depletion because of excess fishing. In addition, half of the world's fish stocks are on the verge of being overfished. Fish stocks in U.S. waters have been declining for at least 30 years.

Actions that impact these stocks and their habitats have been dominated by the industries that exploit them. Greater public participation and more public information and analyses of environmental impacts — which NEPA is designed to require — could help improve the situation. As the critics have argued, the proposed fisheries rule moves in the opposite direction.

EPA Launches Online System for Reporting Violations

The U.S. Environmental Protection Agency (EPA) recently launched a pilot program to allow companies to electronically self-disclose violations of environmental laws. The new voluntary program, called eDisclosure, is designed to speed the processing times and reduce transaction costs for voluntary disclosures of violations under the Emergency Planning and Community Right-to-Know Act (EPCRA).

The program is part of EPA's Audit Policy, which provides reduced or waived penalties to companies that voluntarily disclose violations of environmental laws. The agency will not waive or reduce penalties for repeat violations or violations that resulted in serious actual harm.

Violators in EPA Region 6, comprising Arkansas, Louisiana, New Mexico, Oklahoma, and Texas, may also use the system to report violations of other environmental laws. Eventually, the agency plans to evaluate the program's performance, make revisions, and, if feasible, expand the program so regulated entities nationwide may self-report violations of all environmental laws under the Audit Policy.

The program will use the EPA's Central Data Exchange (CDX) as the point of entry for violators to submit data and complete electronic forms. EPA hopes that use of the electronic submission system will speed processing times and ensure submitted data are comprehensive. The agency also predicts the system will assure consistency in how disclosures are processed and reviewed.

According to the EPA, CDX provides users with the ability to submit data through one centralized point of access, fill out fewer forms and submit them electronically, receive agency confirmation when submissions are received, and submit data in a variety of formats.

While electronic reporting holds a great deal of promise, and the EPA's pilot is an encouraging step, it remains unclear how much effort is being placed behind it. EPA's numbers on participation have been somewhat inconsistent. According to an August agency release, since 1995, more than 3,500 companies have disclosed and resolved violations at nearly 10,000 facilities under the Audit Policy. However, almost a year earlier, an April 2007 memorandum claimed that under the Audit Policy, more than 4,000 entities had disclosed violations at more than 11,300 facilities through FY 2006. No performance measures for the pilot program have been disclosed. Reliable indicators will be essential to evaluating the success of EPA's effort.

EPA's 2006-2011 Strategic Plan, required under the Government Performance and Results Act, established a modest goal for the various compliance incentives programs, including the Audit Policy. The plan aims for a five percent increase in the number of participating facilities.

It remains unclear to what extent data collected by this pilot program will be made available to the public, if at all. EPA has expressed interest in speeding the process for companies to self-disclose violations, but the agency has not indicated if this will expedite the release of

violations data to the public. EPA also has not released any information regarding the budget for the pilot program or what financial support might be available to it in subsequent years.

Senate Report Documents Problems with State Secrets Privilege

An Aug. 1 report by the Senate Judiciary Committee articulates the need for new legislation to limit the state secrets privilege. The report documents that the current administration has asserted the privilege "more frequently and broadly than before" and that reforms, such as the State Secrets Protection Act (S. 2533), are necessary to restore the proper balance between the right to an open and accountable government and the protection of legitimate state secrets. The report's dissenters — nearly all the Republicans on the committee — disagree with the report, arguing that existing procedures are sufficient.

Since Sept. 11, 2001, courts have frequently assumed that only an agency has sufficient knowledge and expertise to understand the implications of secret information. Hence, the courts have been extremely deferential to the executive branch's stated need to keep information from being made public or even examined by a court in lawsuits involving state secrets.

As reported in the previous *Watcher*, the State Secrets Protection Act, introduced by Sen. Ted Kennedy (D-MA), would reform the state secrets privilege by instituting a procedure whereby judges would have the authority to review the government's claim of a legitimate state secret. In civil cases, the court would review information that the government seeks to protect as well as evidence supporting the government's request for protection. The court would then make a decision assessing the likelihood that harm would result from evidence disclosure.

The Senate report raised several concerns that illuminate the need for a more restricted and defined privilege. "Facing allegations of unlawful Government conduct ranging from domestic warrantless surveillance, to employment discrimination, to retaliation against whistleblowers, to torture and 'extraordinary rendition,' the Bush-Cheney administration has invoked the privilege in an effort to shut down civil suits against both Government officials and private parties."

Attorney General Michael Mukasey already threatened a likely Bush veto of S. 2533. In his March 31 letter to the Senate committee, Mukasey elaborated on the administration's opposition to increased court authority by questioning Congress's authority to alter the states secret privilege. He argued that the privilege derives from the Constitution, and therefore, Congress may not modify it through statutory law. Mukasey also argues the bill would shift powers to the courts in a manner that would unfairly and inappropriately unbalance the separation of powers between the branches. Mukasey concluded that "legislation raises serious constitutional questions concerning the ability of the Executive branch to protect national security information ... and would effect a significant departure from decades of well-settled case law..." Accordingly, the administration would "strongly oppose" the bill.

After receiving the Mukasey letter, Kennedy remarked that his bill was "about safeguarding the public interest, shared by all Americans, in having an executive branch that complies with the law and the Constitution and in preserving the integrity of our courts."

The dissenting section of the Senate report, written by eight Republican senators, argued that current procedures rooted in case law are sufficient to deal with the state secrets privilege and that "the bill is unnecessary because judges already have the necessary tools and procedures to adjudicate state secrets cases."

However, the report also states that the U.S. Supreme Court has repeatedly declined to intervene in matters of the state secrets privilege, which has resulted in a situation where lower courts have been inconsistent in their rulings. In her February testimony on the act, Patricia Wald, a former judge for the U.S. Court of Appeals, argued that such legislation would "contribute to the uniformity of the privilege's application throughout the federal judiciary and to both the reality and the perception of fairness for deserving litigants with valid civil claims"

Sen. Arlen Specter☼ (R-PA) was the lone Republican on the Judiciary Committee to support the report and express approval of S. 2533. Specter, the committee's ranking member, stated, "While national security must be protected, there must also be meaningful oversight by the courts and Congress to ensure the Executive branch does not misuse the privilege."

The Senate report noted that something larger was at stake than the failure to hear the claims of American citizens bringing cases against the government. "As use of the privilege has expanded and criticism has grown, public confidence has suffered. Mistrust of the privilege breeds cynicism and suspicion about the national security activities of the U.S. Government, and it causes Americans to lose respect for the notion of legitimate state secrets."

State Group Launches Government Transparency Wiki

On Aug. 11, the Buckeye Institute for Public Policy Solutions in Columbus, OH, announced the creation of its Center for Transparent and Accountable Government. With the mission of promoting open government initiatives at the federal and state levels, the center is leading the effort in Ohio to provide access to state and local government information and enable user participation in government through its wiki.

The Buckeye Institute, a statewide public policy, education, and research group, recently issued a white paper on Ohio transparency issues, declaring that "while there is a great deal of information available scattered throughout many web sites, Ohio does not meet reasonable, basic standards of transparency."

In response to Ohio's lagging behind on the transparency front, the center created a wiki-based website called OhioSunshine.org, which centralizes access to state and local records such as budget requests, bargaining agreements, and public records policies broken down by

municipality.

Mike Maurer, director of the Center for Transparent and Accountable Government, stated that "there are 11 million pairs of eyes to ensure good government in Ohio." According to Maurer, Buckeye's website is modeled on USASpending.gov, which was mandated by law to post federal contracts and grants after the passage of the Federal Funding Accountability and Transparency Act (FFATA) of 2006 (PL 109-282). USASpending.gov is similar to OMB Watch's FedSpending.org, which was licensed to the federal government to meet the law's requirements.

Government Web-based Transparency Programs in Other States

Other states such as Alaska and West Virginia have recently made strides toward centralized government disclosure of financial information on the Web. Beginning in February of this year, Alaska put its "checkbook" online, and West Virginia now posts the names and salaries of state employees.

In a November 2007 report titled *The State of State Disclosure*, Good Jobs First ranked Ohio in ninth place among American states in terms of public access to government information on contracts, subsidies, and lobbying. Among factors measured were the ease of website use, searchability, level of detail, depth, and "data currency," meaning how soon information was posted online after being generated. In its research, Connecticut ranked highest but still had room for improvement — the report only gave the state a letter grade of "B." While West Virginia's recent program to post state financial information on the Internet may be an improvement since the report was published, it ranked in the bottom two — higher only than Wyoming — a year ago.

Kansas was the first state to pass legislation requiring web access to state expenditure information based on the FFATA example. That 2007 legislation was followed by similar acts in Minnesota, Texas, Hawaii, Oklahoma, and Missouri. According to a July memorandum from Americans for Tax Reform, some 19 states had passed legislation or issued state executive orders creating public Internet disclosure of state financial information, while another 33 states, including Ohio, had stalled or ongoing efforts.

In Ohio, a bill (H.B. 420) similar to FFATA was introduced earlier in 2008. However, it only passed one house of the Ohio legislature and is currently stalled in the other. Regardless, the Buckeye Institute's efforts are a prime example of how local and state groups can utilize existing open records and disclosure laws to make public access to government records easier and ensure government accountability.

Such organizing has already begun in other states. In Virginia, a group called the Alexandria Taxpayers United issued a December 2006 memorandum to the city government to propose a local version of the FFATA legislation.

Federal Court Denies Injunction and Upholds Strict Voter Registration Fines in Florida

On Aug. 6, the U.S. District Court for the Southern District of Florida denied the League of Women Voters of Florida's (LWVF) request for a preliminary injunction to prevent a harsh voter registration law from taking affect. The law levies substantial fines on organizations that register voters and that do not promptly deliver the completed voter registration forms to the Florida Division of Elections. While the law does prescribe tougher penalties for willful misconduct, it does not grant exemptions for undue hardships or for inadvertent errors.

A 2005 Florida law holds third-party voter registration organizations liable if they miss the deadlines the state established for the return of completed voter registration forms. The law also exempted political parties from the law, which resulted in complaints of discriminatory practices.

According to the LWVF, the law will seriously impair nonprofit voter registration efforts and dampen voter turnout in elections. In response, LWVF, along with People Acting for Community Together; Florida AFL-CIO; American Federation of State, County and Municipal Employees, Council 79; SEIU Florida Healthcare Union; Marilyn Wills; and John and Jane Does 1-100, filed for injunctive relief. On Aug. 28, 2006, a Florida federal court blocked implementation of the law and ruled that the law was unconstitutional. The state filed an appeal.

While the appeal was working its way through the court system, the Florida legislature passed a revised voter registration law that was similar to the 2005 statute. The state modified the law slightly to address possible constitutional concerns. Notably, the new law did not exempt political parties, it reduced fines, and it distinguished between willful and inadvertent conduct. Under the original law, the fines were $250 for each application turned in more than 10 days late; $500 for each application collected prior to, but turned in after, the last day to register voters before an election; and $5,000 for each application that is not turned in to the Division of Elections. In addition to reducing these fines, the legislature mandated that the aggregate fine that may be assessed against an organization in a calendar year is $1,000.

The plaintiffs from the lawsuit under the original law filed another suit to stop the amended law. According to the Brennan Center for Justice, which provided the lead attorneys in the case, LWVF argued that the amended law "will produce a serious chilling effect on registration drives and dampen turnout in November. It will also disproportionately burden African-American and Hispanic voter applicants and applicants from Spanish-speaking households, who are twice as likely to register to vote through voter registration drives as white applicants or applicants from English-speaking households."

LWVF argued that the amended law is unconstitutionally vague and that the group was forced to stop its voter registration drives due to the vagueness of the law. The law will affect the people who rely on nonprofits' role in encouraging participation in the political process,

particularly low-income and disabled citizens.

Florida law defines a third-party registration organization as "any person, any entity, or any organization engaged in soliciting or collecting voter registration applications," except "those seeking to register or collect applications from their spouse, child or parent, and those registering or collecting applications as employees or agents of specifically named state agencies or a voter registration agency."

The district court rejected LWVF's arguments concerning vagueness. The court felt the amended law is not vague because it is clear who a third-party registration organization is, and it sufficiently states who is liable for fines. The court also rejected LWVF's argument that the amended law overly burdens the group's right to political speech and free association.

This ruling may seriously undermine voter registration efforts in Florida. According to the Brennan Center, who, along with the Advancement Project and Debevoise and Plimpton, filed suit on the plaintiff's behalf, groups that have traditionally lacked access to the political process, such as disabled citizens, minorities, and low-income citizens, are more likely than others to register to vote during a registration drive. The amended law may deter organizations from conducting voter registration drives due to the liability that they may incur.

Anti-Obama Group Seeks Exemption from Campaign Finance Rules

A new 527 group called The Real Truth About Obama, Inc. (RTAO) has filed a lawsuit in the U.S. District Court in Richmond, VA, against the Federal Election Commission (FEC) and the U.S. Department of Justice (DOJ). RTAO plans to run issue ads examining the Democratic presidential candidate's position on abortion and other policy issues. RTAO argues it is not a political action committee (PAC) because it will not advocate for Obama's defeat or election. The group seeks to prevent the enforcement of several FEC regulations regarding when a group must register as a PAC, as well as the enforcement of federal reporting requirements for political organizations, including 527 groups.

So-called 527 organizations are those organized to influence elections, but to avoid regulation by the FEC, they must steer clear of directly advocating for the election or defeat of a federal candidate. 527 groups across the ideological spectrum are often forced to walk a fine line, however, as the FEC and the courts will sometimes find that ads or other materials go beyond pure issue advocacy. Should an organization cross this line, the FEC will often attempt to treat the group like a PAC, which is subject to spending limits and other rules.

According to a press release from the James Madison Center for Free Speech, "RTAO was formed to tell the American people the real truth about Senator Obama's☼ public policy positions. Its first project is about Obama's radical pro-abortion views and voting record. However, RTAO fears that it will be deemed a federal PAC, if it does the project, because of the FEC's enforcement actions arising out of the 2004 election where various issue-advocacy 527s,

such as the Swift Boat Veterans for Truth, were fined for failure to register as a federal PAC, even though they only engaged in issue advocacy."

The group's lead attorney, James Bopp, Jr., won the 2007 *Wisconsin Right to Life* (WRTL) case against the FEC. In the WRTL decision, the U.S. Supreme Court ruled that the federal electioneering communications ban is unconstitutional when applied to genuine issue ads. RTAO argues that, due to the central holding of the WRTL decision, 527s should not have to disclose their activities, including independent expenditures and election-related communications.

RTAO's abortion information project includes a website, www.TheRealTruthAboutObama.com, and a radio ad called "Change."

The lawsuit challenges the FEC's definition of express advocacy: any communication that "can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." In WRTL, the Court stated that an ad can be considered an electioneering communication when it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," therefore protecting messages put out by political groups that engage in issue advocacy.

However, according to RTAO, the regulation put in place after the WRTL decision is unconstitutionally vague and overbroad. RTAO is challenging this new regulation, which the group charges could restrict messages if they contain "indicia of express advocacy," such as references to political parties, and could exclude some "express advocacy."

"[T]he FEC continues to enforce its vague and overbroad rule defining 'express advocacy,' even where the communication does not contain such explicit words," said RTAO. "If an ad is deemed to contain express advocacy, it becomes an 'independent expenditure,' which is forbidden to corporations, such as RTAO, must be reported to the FEC, must contain a disclaimer, and can trigger PAC status." The group's "Change" ad does not have any words of express advocacy, such as "vote for" or "defeat," but RTAO is arguing that under FEC definitions, the ad could be considered an independent expenditure, rather than the issue advocacy the group claims the piece represents.

RTAO's website is not operational due to the FEC's enforcement policies that prevent RTAO from raising money for the project. The FEC has adopted rules indicating that groups that become involved in federal elections could be viewed as regulated "political committees." The lawsuit challenges this "contribution" solicitation provision the FEC adopted in 2004, which says that groups can be regulated if they solicit money based on an appeal to support or oppose a candidate. RTAO also disputes the FEC's enforcement policy for imposing PAC status, including the determination of a group's major purpose.

The FEC continues to determine PAC status on a case-by-case basis, based on a wide range of factors. After the enforcement actions against 527 groups active during the 2004 presidential campaign, the group feels it will be subject to an FEC and DOJ investigation. In the

preliminary injunction request, the RTAO details reasons why it is not a PAC. "[I]ts Articles establish that its major purpose is issue advocacy, not the regulable campaign activities that could make its major purpose the nomination or election of candidates."

RTAO's lawsuit also named DOJ, citing a letter from a DOJ official to Democracy 21 President Fred Wertheimer that said DOJ would "vigorously pursue instances where individuals knowingly and intentionally violate clear commands" of the Federal Election Campaign Act. According to the lawsuit, "RTAO's chill is heightened by the DOJ's recent declaration."

A Sept. 10 hearing date has been set, and the case has been assigned to U.S. District Judge James Spencer, who has previously issued rulings striking down campaign finance regulations on constitutional grounds. A motion filed by FEC lawyers suggests that the plaintiff engaged in "forum shopping" by filing the case in a court that has been sympathetic to its argument in the past.

In addition, on Aug. 14, the Campaign Legal Center and Democracy 21 filed an amicus brief with the District Court opposing RTAO's request for a preliminary injunction. The amicus argues that the FEC regulations are constitutional and that the FEC "correctly applied the "major purpose" test to determine whether certain 527 organizations were "political committees."

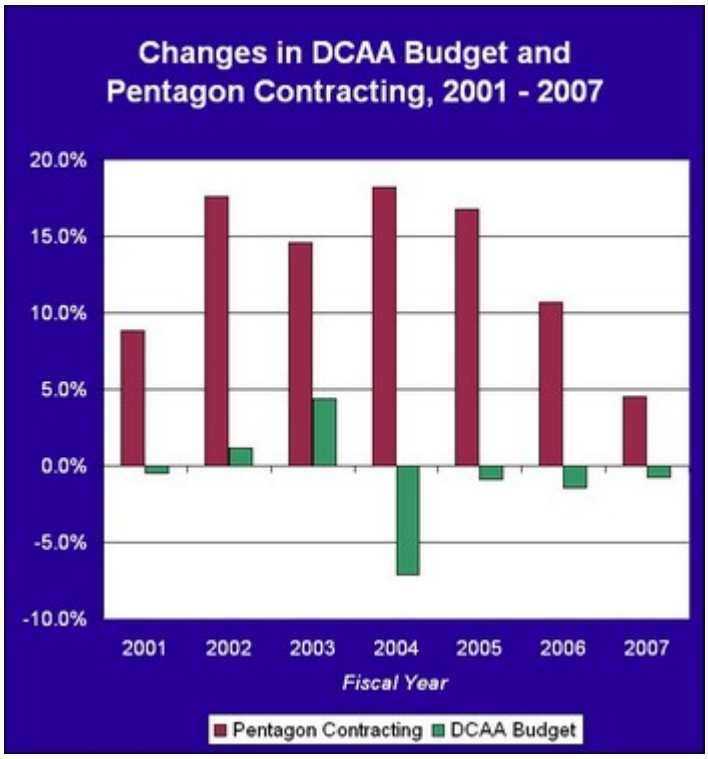
In a press release, Bopp said, "The U.S. Supreme Court has recently reaffirmed the constitutional protection for issue advocacy. The FEC, however, refuses to change its regulations and enforcement policy to conform with that mandate. Instead, the FEC plans to use its complicated PAC enforcement policy, developed in 2004, to punish groups for engaging in issue advocacy. This is unconstitutional, and we hope the federal courts will put an end to it."

Defense Contract Oversight Faces Multiple Challenges

Over the last seven years, the Defense Department has doubled the amount of money spent on private contractors, yet it has remained disturbingly lax on contractor oversight. Recent evidence has emerged showing that the Pentagon spends too little on contract oversight and interferes with current auditors to restrict the length and scope of investigations.

The Government Accountability Office (GAO) recently released a report affirming whistleblower complaints of improprieties at the Defense Contract Audit Agency (DCAA), and a subsequent investigation by the media revealed that DCAA managers are primarily concerned with adhering to performance metrics rather than conducting competent contract oversight. The agency is further hampered by declining employment and a budget that has failed to keep pace with the amount of dollars spent on Defense contracting. The Defense Contract Audit Agency is the primary office in the Pentagon dedicated to auditing contracts and providing financial advisory services.

At the end of July, GAO issued a report entitled *DCAA Audits: Allegations That Certain Audits at Three Locations Did Not Meet Professional Standards Were Substantiated*. GAO investigated 13 cases in 14 audits and found that "the limited number of hours approved for their audits directly affected the sufficiency of audit testing." Moreover, the report was ultimately critical of DCAA management, which it found had interfered with investigations and changed opinions to support contractors even in the face of contradictory evidence. GAO writes:



[i]n many cases [DCAA management] changed audit opinions to indicate contractor controls or compliance with CAS [cost accounting standards] was adequate when workpaper evidence indicated that significant deficiencies existed.... [I]n some cases, DCAA auditors did not perform sufficient work to support draft audit conclusions and their supervisors did not instruct or allow them to perform additional work before issuing final reports that concluded contractor controls or compliance with CAS were adequate.

GAO noted in the report that "DCAA did not agree with the 'totality' of GAO's findings, but it did acknowledge shortcomings with some audits and agreed to take corrective action." However, a media report published by *Government Executive* following up on the GAO investigation showed an oversight agency plagued by more pervasive problems. Nearly a dozen former DCAA employees told GovExec.com a story of agency management so obsessed with meeting certain performance goals that contract oversight was relegated to the periphery; the agency was "broken." The story cited one former employee who believed that "defense contractors big and small are getting away with murder because they know we at DCAA are slaves to the metrics."

Mismanagement of auditing resources at DCAA compound another problem at the agency — an erosion of available resources. In Fiscal Year 2000, the Department of Defense spent over $160 billion (inflation-adjusted for 2007 dollars) on private contractors. By 2007, that number had nearly doubled as DOD paid contractors $312 billion that fiscal year. And yet, as the Pentagon became more and more reliant on contracting to carry out its mission, employment at the DCAA fell from the equivalent of 4,005 full-time employees (FTEs) in 2000 to 3,867 in 2007.

This decline in human resources and increasing contract volume has increased the workload of

DCAA employees substantially. In 2000, an FTE oversaw $40 million in contract obligations on average. However, in 2007, that same FTE was expected to oversee about $79 million in payments to private contractors. A similar trend in DCAA financial resources has also persisted from 2000 to 2007. Although DCAA's real (inflation-adjusted) budget has increased in that time period, the volume of defense contracting has far outpaced those increases. One dollar of DCAA's budget could be devoted to overseeing $417 of defense contracting in 2000, but by 2007, that dollar would have to be used to audit $785 of contract obligations. Even a DCAA management not dedicated to a flawed performance measurement system would have a hard time of effectively guarding taxpayer dollars given the rapidly increasing contracting oversight load seen in the past seven years.

Outside of DCAA, the Pentagon also has yet to demonstrate a commitment to contractor oversight commensurate with the scale of contracting which it has employed since 2000. The problem is especially acute for Iraq War contracting. A pair of instances in which the military removed contract oversight personnel from their duties indicates active hostility to Iraq War contractor accountability. In 2004, Chief of the Army's Field Support Command Division Charles M. Smith was removed from his post after he refused to approve some $1 billion in unsubstantiated charges from then-Halliburton subsidiary Kellogg Brown & Root (KBR). The Army subsequently replaced Smith with private contractor RCI (now SERCO) to review KBR's pricing proposals for future procurement. A year later, the Army Corps of Engineers demoted Procurement Executive and Principal Assistant Responsible for Contracting Bunnatine Greenhouse when she "voiced great concern over the legality of the selection of KBR, the total lack of competition and the excessive duration of the [Restore Iraqi Oil] contract."

Both demotions effectively ended the careers of these oversight professionals, warning other DOD employees that blocking contractor excesses is not in the best interest of their careers. Smith and Greenhouse recently testified about their demotions before the Senate Democratic Policy Committee, which has been holding a series of oversight hearings on misconduct, waste, and fraud in Iraq War contracting. Their testimony comes in the midst of a flurry of hearings in the past two years revealing an agency riddled with procurement and oversight problems.

Smith and Greenhouse are just two examples in a larger system that has lacked oversight and accountability for years. While the DPC hearings have begun to bring to light specific problems, and a newly-formed bipartisan war contracting commission (known as the Webb-McCaskill commission) is beginning to start its own investigations, these efforts have had little impact so far on reforming the system. Unfortunately, until these efforts bear more fruit, the experiences of Smith, Greenhouse, and the auditors at the DCAA are likely to continue for the foreseeable future.

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