OMB WATCH
Promoting Government Accountability and Citizen Participation
ACTION CENTER | BLOGS | DONATE
The Watcher
January 9, 2007 Vol. 8, No. 1

In This Issue

House Imposes New Ethics Rules

On Jan. 4, even before debate began on the Democrats' promised first 100 hours agenda, the House, by a 430-1 vote, approved rules changes aimed at ending the "culture of corruption" of the past Congress. The changes address relations between lobbyists and members of the House and are meant to curb abuses revealed in last year's scandals involving convicted lobbyist Jack Abramoff and several members of the House. On the next day, the House approved additional rules changes.

The new rules prohibit House members and their staff or designates from accepting meals and gifts from lobbyists or organizations that "retain or employ" them, or from the agent of a foreign principal. This eliminates the former maximum gift values of $49.99 per gift and $99.99 per year, but these amounts will still apply to gifts from non-lobbyists. Existing exemptions to the gift rules, such as widely attended events or personal friendships, will still apply, although many will be obsolete because the new ban extends to a lobbyist's employer. Employees who are not lobbyists can give gifts under

the limits if they are not reimbursed by their employers.

The most extensive changes to the rules involve congressional travel. The new rules provide that, beginning March 1, members of the House:

- cannot accept travel funded by lobbyists or the entity that retains or hires them, or a foreign agent, except for one-day/one-night trips to specific sites, where there is "de minimis" lobbyist involvement. The ethics committee will write rules to govern these situations, which are meant to allow trips to give speeches and attend forums or panel discussions.
- may not travel with a lobbyist present on any segment of the trip. It is not clear if this also applies to the destination event if the lobbyist travels separately.
- cannot pay for non-commercial, non-charter air travel from personal or campaign funds, or use their official allowance for these private jet flights.

Travel expenses that can be paid for by non-lobbyist groups include:

- trips paid for by colleges and universities
- pre-approved trips paid for by non-lobbyist organizations where the expenses are reasonable and the event is official. The sponsor of the trip will be required to certify they have met the requirements for permissible travel, and the House member must file a report within 15 days of the trip, which will be publicly disclosed by the clerk of the House.

The House ethics package also includes a provision meant to end the notorious "K Street Project," where members of Congress used their influence to force lobbying firms and others to consider political affiliation in hiring decisions. The new rule prohibits members "from threatening official retaliation against private firms that hire employees that do not share the Member's partisan political affiliation." The package also requires House employees to participate in annual training on the ethics rules.

The Senate's approach will be similar, but changes are included in legislation instead of new rules. S. 1, sponsored by Majority Leader Harry Reid (D-NV) and Minority Leader Mitch McConnell (R-KY), is based on the ethics bill passed by the Senate last year (S. 2349). However, it will be tougher, calling for a complete ban on gifts and travel paid by lobbyists, rather then increased disclosure. It also includes changes to the Lobbying Disclosure Act (LDA) aimed at increased transparency, including disclosure of grassroots lobbying by lobbyists and firms already required to disclose under LDA. (The House will be taking up similar legislative lobbying reforms, probably in February.)

The Senate is expected to begin a week-long debate on these issues Jan. 9. Amendments to strengthen the bill are expected, with Sens. Barack Obama (D-IL) and Russell Feingold (D-WI) poised to introduce their own bill. It would have stricter travel rules and call for creation of an Office of Public Integrity, which would be an independent

enforcement body.

The LDA changes would increase the frequency of reporting and make reports available to the public electronically. The grassroots disclosure provision is aimed at making large-scale efforts to engage the public on federal legislation more transparent. It would require groups already registered under LDA because of their direct lobbying expenses and firms that spend over $25,000 in a quarter conducting such campaigns on behalf of clients to disclose grassroots lobbying costs.

This proposal has come under fire from some conservative free speech and direct mail operations, but their analysis misinterprets the bill. For more information, see OMB Watch's analysis of the proposal.

Court Upholds Wisconsin Group's Right to Air Grassroots Lobbying Ads

On Dec. 21, 2006, in a victory for grassroots lobbying rights, a federal court ruled that three radio ads Wisconsin Right to Life (WRTL) wished to broadcast in the months before the 2004 election should have been allowed because they did not expressly advocate election or defeat of a federal candidate. The 2-1 decision held that a campaign finance rule banning broadcasts referring to a federal candidate aired during the campaign is unconstitutional as applied to WRTL's lobbying ads, but limited its ruling to the facts of this case. The Federal Election Commission (FEC) and sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA) appealed to the U.S. Supreme Court and joined in WRTL's request to expedite the case.

WRTL's ads called for Sen. Russell Feingold (D-WI) to oppose judicial filibusters when the issue was before the Senate in the fall of 2004. Under BCRA, "electioneering communications," broadcasts that refer to federal candidates within 60 days of a general election or 30 days of a primary, cannot be paid for with corporate funds, including treasury funds of nonprofit organizations. In August 2004, WRTL filed a lawsuit challenging application of the electioneering communications rule to its ads as a violation of its First Amendment rights. Although the lower court ruled WRTL could not challenge the law, in January 2006, the Supreme Court overturned that decision, saying constitutional challenges could question application of the ban as applied to specific ads. The case was then sent back to the lower court to determine whether or not the ads in question were genuine grassroots lobbying communications that would not be subject to the rule.

Content not Context

The December ruling found that WRTL's three ads addressed a legitimate public policy issue, did not refer to the election, and did not contain language promoting or attacking a federal candidate, and therefore were not subject to the electioneering communications

ban because they did not contain "express advocacy" opposing the re-election of Feingold. The court held that ads about a public policy issue that do not link the issue to a candidate/officeholder's fitness for office cannot be banned. The court said without a link, it is unclear if the ad was intended to have an impact on the election.

For that reason, the majority opinion said the court should limit its review to the specific words of the ads and not examine other factors to determine whether they were intended to influence the election. The court rejected the FEC's arguments that they should look beyond the content of the ad and consider the context and WRTL's intentions in airing it, since WRTL, a 501(c)(4) organization, had opposed Feingold's re-election. In rejecting any assumption that experts can decipher the impact of any ad on an election, the opinion states; "Indeed, to the untutored viewer's eye, the ads, on their face, neither reveal either Senator's thinking on the issue, nor reference Senator Feingold's upcoming election contest. Therefore, plaintiff contends that these ads are a textbook example of genuine issue ads that are neither express advocacy nor its functional equivalent."

The court refused to carve out a general exemption for grassroots lobbying ads, saying exceptions can only be made by the courts on a case-by-case basis. However, it is likely the Supreme Court will rule on the issue before the next blackout, which is Dec. 15, 30 days before the Iowa presidential caucus. The FEC and congressional sponsors of BCRA have appealed to the Supreme Court, and on Dec. 29, 2006, WRTL filed a motion to expedite consideration of the FEC's appeal. U.S. Solicitor General Paul D. Clement's response on behalf of the FEC also urged the court to hear the case during its current term. The court has set a case conference for Jan. 19.

The issue has been hotly debated since the law passed in 2002, and those on both sides of the issue hope the Supreme Court will put the controversy to rest. This most recent ruling drew responses from critics of the law as well as reform groups that want to limit use of soft money in campaigns. Election law expert Bob Bauer praised the decision on his blog, saying the court was right to limit its review to the content of the ad itself and refuse to consider the context. Otherwise, "the proceedings become an intrusive process in which political operatives and consultants are put under oath and questioned about what they meant and intended and thought." Bauer says, "Such a review might also make a sensible citizen's blood run cold." Critics of the decision, such as Prof. Rick Hasen have called the decision a "see no evil approach." Hasen worries that the court's approach will "bring us back to the days before Congress passed McCain-Feingold," allowing broad circumvention of the electioneering communications rule.

House Begins Session with New Process Rules

On Jan. 5, the House approved new rules covering civility, legislative process and fiscal responsibility, the second of two rules packages in as many days that the Democrats passed since taking over the chamber. The new rules should help restore some transparency, fiscal responsibility and fairness to the legislative process in the House and

represent an important first step in restoring faith in the congressional process. But further reforms are still warranted.

In a 280-152 vote, the House passed the "fiscal responsibility" section of the rules package (Title IV), concerning legislation that relates to the federal budget. The package included the return of pay-as-you-go (PAYGO) budgeting rules to the House, where legislation had not been subject to any form of PAYGO since 2002. The new PAYGO rule will require that any new mandatory spending or tax breaks are offset by mandatory spending cuts or tax increases.

The House vote also extended and strengthened an earmark disclosure rule that the last Congress had adopted. The new rule requires that appropriations, authorizations, and tax bills identify the sponsors of earmarks they contain. Earmark sponsors now must also provide a justification for the earmark they have requested, and must publicly certify that neither they nor their spouses will benefit financially from the earmark. The rule adopted by the last Congress had only applied to appropriations bills, and did not require justification of the earmark or certification of who might benefit from it.

The earmark disclosure lists will be available to the public electronically through committee publications or in the Congressional Record. It is unlikely that the information will be in any type of searchable database or if the lists will be available online before the bill in question is voted on. Additionally, according to the rules, any request for an earmark that makes it into a bill is to be subject to "public inspection." It remains unclear how the public inspection process will work.

Another important provision in the budget package bans "reconciliation" bills, which are not subject to Senate filibuster, that increase the deficit. Congress had used the fast-track reconciliation process to pass a deficit-increasing tax bill in 2006 — a practice that runs contrary to the original purpose of reconciliation rules. Unless there are enough votes to waive this provision, it will end the use of reconciliation as a vehicle for passing tax cuts unless they are paid for with other tax hikes or entitlement cuts.

The House also adopted, in a 430-0 vote, the "civility" section of the package (Title III). This section made changes to legislative procedures, particularly regarding conference committees, where delegates from each chamber work out differences in a bill. The new rules require that members receive 48 hours notice of conference committee meetings, and that all information about these meetings is made available to all conferees. It also bars any changes to conference reports after conferees have signed the report. Unfortunately, the provision does not address public access to the conference committee process or any information or decisions made during those meetings.

Other rules in the "civility" title concern debate and amendment procedures. Notably, one rule prohibits the Speaker of the House from holding a vote open longer than fifteen minutes, a technique used to pressure members to change their votes.

Though promising, these rules are lacking somewhat in force and scope. The rules package is not a law and because of that, it will apply only to the House and will lapse in two years, at the end of this legislative session. Each rule is enforced by a point of order that can be overruled by special rules or orders of the House. Finally, there are additional disclosure and transparency changes that could be made to House rules that would open up legislative and budgetary processes to the public, such as opening conference committees to the public.

The Senate will consider separate legislation this week that would adopt similar reforms, including banning gifts, meals, and travel from registered lobbyists, but as legislation, instead of rules changes, the Senate proposals would need to be passed in the House and signed by the president.

Will Congress Stick with PAYGO?

On Jan. 5, the House took a significant step in the direction of fiscal responsibility, adopting pay-as-you-go (PAYGO) budget rules by a 280-152 margin. PAYGO rules bar consideration of legislation including tax cuts or entitlement expansions that would have the net effect of increasing the deficit. While a necessary step toward putting the country back on the right fiscal path, PAYGO rules may make fulfilling the policy goals of the new Democratic Congress significantly more difficult to achieve.

The new PAYGO rules are internal to the House and will create a procedural hurdle called a budget point of order against legislation that violates its terms. Any such violation would not automatically trigger a point of order, and any point of order raised could be waived by a simple majority of the House.

The Senate currently has a weaker version of a PAYGO rule, one that exempts tax cuts while requiring new entitlement spending to be offset. In recent years, Republicans have passed numerous sizable tax cuts without offsetting the cost with alternative tax increases or spending cuts. These tax cuts have contributed significantly to the recent fiscal decline of the federal government. Like the House, Sen. Majority Leader Harry Reid (D-NV) and other key Democrats have pledged a return to PAYGO constraints in the new Congress and are likely to enact a true, two-sided PAYGO rule early in the year.

This may present a problem for the Democrats' agenda. Assuming that both chambers operate under the new House PAYGO rule or a similar statute and resist temptations to waive the rule or create exceptions, Democrats face serious constraints on many of their campaign promises and policy goals. Some of the more popular items among those goals are:

- "patching" and/or permanently reforming the Alternative Minimum Tax (AMT)
- closing the "doughnut hole" on Medicare prescription drug coverage
- cutting interest rates on student loans by roughly 50 percent

- making permanent the research and development tax credit
- addressing shortfalls in children's and veterans' health benefits

Enacting these goals will involve daunting costs. A mere patch on AMT (i.e. holding those not currently liable under it harmless) would cost $70 billion in FY2008. Full AMT repeal - the reported highest priority of House Ways and Means chair Rep. Charles Rangel (D-NY), and Senate Finance Committee chair Sen. Max Baucus (D-MT) and ranking member Sen. Charles Grassley (R-IA) — could cost up to $1.6 trillion over ten years. To close up the Medicare doughnut hole would cost an estimated $400 billion over ten years. There are certainly more goals, with additional costs, but the picture is clear: PAYGO complicates, if not compromises, the Democratic congressional agenda.

There are additional problems with shortfalls in certain "capped entitlement" programs. Under traditional entitlement programs, the baseline grows with demographic and inflationary changes, so funding for these programs continues to grow, even with PAYGO rules. However, for capped entitlements, such as the State Children's Health Insurance Program (S-CHIP), there are no automatic increases due to demographic and inflationary changes. The entitlement is capped at a specific amount. Any increases in spending to keep pace with the number of people served will require new spending and face PAYGO rules. Thus, to continue spending at current levels, PAYGO will require finding offsets to pay for capped entitlements. This is particularly problematic for the S-CHIP program, which, despite a stop-gap measure passed by Congress in December 2006, still faces funding shortfalls that will threaten coverage for children in 17 states this year.

Because of these challenges, early on Democrats tried to rein in expectations in a few areas. For instance, senior House Democratic aides said the promise to cut in half interest rates on student loans will have to be phased in over five years instead of being passed immediately in order to minimize the costs.

But the enormity of the agenda taken as a whole may imperil the whole PAYGO principle, causing Congress to abandon the fiscally responsible mechanism. Rep. John Spratt (D-SC), the chair of the House Budget Committee, issued this enigmatic statement last week after the House voted to reinstate PAYGO: "That's not to say that you couldn't come back later in a budget resolution and have some sort of a dispensation from the rule for a certain-sized tax cut." This sounds like a potential slippery slope back to the fiscal practices of most of this decade.

Some have suggested that only restoring the statutory form of PAYGO, which lapsed in 2001, could bind Congress to follow its own rules. But statutory PAYGO would also constrain Congress' ability to extend the 2001 and 2003 tax cuts President Bush is bent on making permanent, and so might draw his veto.

Further complicating matters, Office of Management and Budget director Rob Portman

said during a speech in Cleveland last week

> "Because spending is the real problem, the Administration supports a stronger version of 'PAYGO' than Democrat leaders have offered. The Administration supports 'PAYGO' for ALL spending, not just so-called mandatory spending. It should also apply to the annually appropriated funds that most of us think of as government spending."

With such divergent views on PAYGO, Congress and the Administration might be headed for statutory stalemate.

For all the perils surrounding PAYGO in 2007, its passage reflects an important departure from recent Congress' disregard for the deficit, and a 180-degree turn away from the "Cheney doctrine" that deficits do not matter.

No one, whether inside of Congress or out, regards PAYGO as a panacea for the deficit or the country's long-term fiscal problems. The new rule itself will not guarantee that the Congress and the President act in a fiscally responsible manner, or that any deficit reduction will, in fact, occur. But if nothing else, the action taken in the House last week is an important acknowledgement of the serious deficit problems facing the nation and that future legislation ought not exacerbate it.

EPA Finalizes Rules for Toxics Release Inventory

Just before the holidays, the U.S. Environmental Protection Agency (EPA) delivered industry an early present — a final rule relaxing reporting requirements for the Toxics Release Inventory (TRI), the country's flagship database on toxic pollution. The agency has moved forward with these changes despite findings in an OMB Watch report, *Against the Public's Will* (released Dec. 14, 2006), that the American public is overwhelmingly opposed to a reduction in reporting on toxics.

EPA has essentially maintained its original proposal in the final rule with only minor changes. The rule increases the reporting threshold for the majority of the 650-plus TRI chemicals tenfold, from 500 lbs. to 5,000 lbs., with a restriction that only 2,000 lbs. of the chemical may be released directly to the environment. Also, for the first time in the 18-year history of TRI, EPA is permitting reduced reporting for the most dangerous category of toxic chemicals, persistent bioaccumulative toxins (PBTs). These ill-conceived changes will leave more people in the dark about what chemicals are in the air they breathe and water they drink.

EPA officials have claimed that the proposed rule does not de-list chemicals from the TRI program, but, according to the agency's own calculations, a 2,000-lb. threshold would likely eliminate detailed reporting for at least 16 chemicals. An initial OMB Watch analysis of the 2004 TRI data indicates that EPA may be underestimating the reporting

loss for chemical pollutants. OMB Watch projects that EPA's reporting changes would have eliminated all detailed reporting on 39 chemicals and the reporting on more than half the pollution created for another 28 chemicals.

"This is a clear case of the agency disregarding the will of the American people," said Sean Moulton, Director of Federal Information Policy for OMB Watch. "The EPA has no scientific or health data supporting these changes — nothing to ensure public safety. The agency is only interested in saving polluting companies a few dollars, at the expense of public health."

"Americans who live near industrial facilities want to know what's going into their air and water," stated Rep. Frank Pallone, Jr. (D-NJ) at a press event organized by OMB Watch. "This [OMB Watch] report shows that the public supports the original intent of the TRI program — to give communities the right to know what kinds of toxic chemicals are being dumped in their backyards. ... [W]e will take every step necessary to stop [the changes] in Congress."

EPA's finalized rule:

1. Fails to take into consideration the overwhelming opposition to EPA's ill-conceived ideas to reduce TRI reporting as clearly evidenced in OMB Watch's report.
2. Leaves the public at greater risk of exposure to dangerous pollution and cripples state governments' ability to track toxic chemicals.
3. Provides minimal savings to companies (estimated by EPA to be between $430 and $790 per chemical).

Against the Public's Will documented opposition to EPA's TRI proposals from 23 state governments and more than 120,000 average citizens, 60 members of Congress, 30 public health organizations, 40 labor organizations and 200 environmental and public interest organizations.

In the months following the close of the public docket, EPA received other strong criticism and resistance to the changes to TRI reporting:

- The House of Representatives passed an appropriations rider preventing EPA from implementing the rule changes;
- Sens. Frank Lautenberg (D-NJ) and Robert Menendez (D-NJ) placed a hold on a Bush administration nominee to protest the proposals;
- EPA's Science Advisory Board formally, in a letter offering the agency unsolicited advice, opposed the proposals; and
- The Environmental Council of States, an association of state governmental environmental agencies, passed a resolution urging EPA to withdraw its proposals.

The OMB Watch report and statements from Lautenberg, Pallone, and Rep. Hilda Solis (D-CA) are available at our TRI Resource Center.

Chemical Security Program Leaves the Public Vulnerable

On Dec. 28, 2006, the Department of Homeland Security (DHS) issued an interim final rule for the creation of a chemical facility security program. However, the program appears to provide little means for increasing security and shrouds important assessments in a veil of secrecy that will prevent any public accountability or oversight.

Congress gave DHS the authority to create a safety certification program in the Department of Homeland Security Appropriations Act of 2007, signed into law on Oct. 4, 2006. The chemical security provisions of the bill were the result of a backroom deal that excluded bipartisan agreements worked out in the House and Senate. As previously reported in the *Watcher*, House and Senate Democrats deemed the backroom agreement between Sen. Susan Collins (R-ME) and Rep. Peter King (R-NY) to be "inadequate chemical security measures promoted by the chemical industry."

According to the interim rule, DHS will assess the risk level of every chemical facility. The standards by which such an assessment is made, though, will remain secret. For the highest risk facilities, DHS will require the submission of a security plan, which will then be reviewed and approved by DHS. A major weakness, however, is that only the highest risk facilities are subject to scrutiny. Critics say that other deficiencies associated with the program are that facilities can be approved by third parties (including state governments and private sector entities) without individualized oversight and approval of DHS, and at no point will facilities be required to use safer procedures or technologies.

Public interest and environmental organizations, including OMB Watch, have also called for a chemical security program that keeps communities informed about the risks they face and steps being taken to protect them. Information regarding whether or not certification of a facility's plan is granted or denied would create pressure on unsafe facilities to improve their status. The proposed rule, though, would exempt a great deal of information from public disclosure. DHS proposes the creation of a new category of sensitive but unclassified information (SBU), despite the numerous documented problems associated with SBU. The interim rule would prevent all information marked as Chemical-terrorism Security and Vulnerability information (CVI) from being disclosed to the public.

This new information category would severely restrict access to a wide range of information. Not only would the detailed security plans, the notes from DHS audits and information on vulnerability points at uncertified chemical facilities be subject to CVI markings, but basic information regarding whether or not a facility is a high risk facility and whether or not a plant is safe and certified by DHS would also be rendered secret. Such information is not detailed enough to be used by terrorists but would be of

immense value to the public in ensuring health and safety. There is also vagueness surrounding who can mark information CVI, what information will qualify as CVI, and how the program will be managed. The rule establishes a decentralized authority to mark information as CVI, which, coupled with the lack of specific criteria for evaluation and absence of any mention of training, could easily lead to excessive use of the CVI marking.

The 9/11 Commission and others have repeatedly noted that the safety of chemical facilities across the country has been a point of weakness in protecting against a potentially catastrophic terrorist attack. Though it has been over five years since 9/11 and though there were strong bipartisan agreements worked out in Congress, the federal government has done little to improve the safety of chemical security facilities across the country. The 110th Congress has an opportunity, however, to improve a bill passed at the end of the last term and encourage a robust DHS chemical security program that is universal and uniform in coverage, requires the use of safer technologies and procedures, and provides strict oversight and public accountability.

EPA Library Closures on Hold

The U.S. Environmental Protection Agency (EPA) has performed an about-face on its plan to close numerous libraries run by the agency. EPA has closed five regional libraries but has announced that the agency will not close any of its remaining 22 libraries until it can present its plan to Congress.

The EPA began closing several libraries and destroying or recycling large amounts of paper data this fall in response to a proposed $2.5 million cut in the budget for the library system. The agency has already closed libraries in Chicago, Washington DC, Dallas and Kansas City and limited public access in four others.

On Nov. 30, 2006, shortly after the elections that placed Congress in Democratic control, four Representatives wrote to EPA Administrator Stephen Johnson expressing serious concerns about the library closures. In their letter, Reps. John Dingell (D-MI), Bart Gordon (D-TN), Henry Waxman (D-CA) and Jim Oberstar (D-MN), requested that "destruction or disposition of all library holdings be immediately ceased."

EPA officials have assured the lawmakers that plans to close additional libraries have been placed on hold pending congressional review. The agency has defended its plan with explanations that the closures are part of a modernization effort to digitize information and make it available online. Critics counter that digitization efforts are limited and much information will be lost. Scientists have vehemently opposed the library closures, saying much of the information being locked in storage or destroyed isn't yet and may never be available online.

The critics are supported by findings in a recent report from the Congressional Research Service (CRS). In the report entitled *Restructuring EPA's Libraries* the CRS notes that

within EPA's plans "which materials will be retained, dispersed, or discarded, and the amount of time and funding needed to complete this [restructuring] process, are uncertain."

Another letter from House Democrats, dated Sept. 19, 2006, has initiated a formal investigation of the EPA library closures by the Government Accountability Office (GAO). The letter, signed by Waxman, Gordon, and Dingell, asked GAO to investigate several specific issues, including the impact the closures will have on services, the process and criteria EPA used to develop its plan, and if the public and other users of the libraries had the opportunity to provide input on the plan. The eventual GAO report on EPA's activities may shed more light on the areas of concern to lawmakers.

OIRA Back Door Open to Dudley?

Susan Dudley is likely to be named as a senior consultant in OMB's Office of Information and Regulatory Affairs (OIRA), according to a BNA story published Jan. 8. If true, Dudley would be in a position to influence OIRA decisions about regulations across all government agencies. Dudley was nominated by President Bush in 2006 to be the administrator of OIRA to replace John Graham, who resigned in February of that year. Thanks to widespread opposition from the public interest community, Capital Hill, and individuals, the Senate failed to hold a vote on her nomination before the end of the 109th Congress because she lacked sufficient support in committee.

OMB Watch and Public Citizen released a report, *The Cost is Too High: How Susan Dudley Threatens Public Protections*, documenting Dudley's extreme views based on her writings and comments as a scholar at the Mercatus Center, an industry-financed, anti-regulatory think tank. Opposition also arose over potential conflicts of interest because her husband has responsibility for regulatory issues at EPA. Her nomination signaled an attempt by Bush to push further the anti-regulatory agenda that Graham started as OIRA administrator from 2001-2006.

If Bush names Dudley to such a senior consultant position, it would be another example of his actions not matching his rhetoric on the importance of bipartisanship. The opposition to Dudley may have prevented Bush from making a recess appointment after the 109th Congress adjourned in December, but a decision to bypass the nominating process altogether is a figurative finger in the eye to the new Congress. Rather than offering a candidate with less extreme views about the regulatory process and seeking a compromise nominee, Bush would, if he pursues this appointment, be continuing his "my way or the highway" approach to congressional relations, albeit by backdoor methods.

According to the BNA story, Dudley would be an advisor to the current acting administrator, a position she could hold for the remainder of the Bush presidency. This might also be a temporary assignment as Bush could still make a recess appointment to

make her the administrator, allowing her to serve until the end of his administration. There are few congressional recess days scheduled as a strong work ethic has been embraced by the Democrats. Civil service law might also allow moving Dudley from the senior advisor role to acting administrator, but her time in that position would probably be limited.

EPA: Home for the Holidays

While legislators were leaving Washington and families across America spent time celebrating the holidays, the U.S. Environmental Protection Agency (EPA) continued to issue rules and contemplate regulations. Several issues received little attention from media and lawmakers despite their potentially significant impact on the nation's public health and welfare. Here is a brief summary of some of EPA's work during late December and early January.

EPA and OMB Ease Disposal Requirements on Certain Hazardous Substances

EPA and the White House Office of Management and Budget (OMB) continue to argue over the provisions of a waste regulation rule, according to BNA news service. EPA will likely reissue the rule, originally proposed in October 2003, soon if the two administrative entities can reconcile their differences.

The proposed rule would reclassify certain hazardous waste substances as solid waste. Though both classes of substances are regulated under the Resource Conservation and Recovery Act (RCRA), hazardous substances are subject to more stringent disposal requirements.

The impasse occurs not over the rule itself, but over how states are to interpret its impact. Under RCRA, states must have in place waste disposal programs that are "no less stringent than" federal programs. These are to include comprehensive recycling programs.

EPA asserts the proposal — which clearly eases disposal requirements for the waste management industry — is less stringent than existing regulations. However, OMB claims that, because the resulting increase in solid waste would increase the amount of waste subject to recycling, the proposed rule is a more stringent regulation. Therefore, in OMB's view, all states should implement the proposed rule.

BNA reports that an EPA official described the rule as in its "final administrative review." OMB was to complete its review of the proposed rule by Jan. 8, but an OMB official tells OMB Watch the review period has been extended by 30 days.

EPA Rules that Drinking Water Facilities Assess 25 New Contaminants, not Perchlorate

On Dec. 21, EPA issued a final rule which will expand the list of chemicals, from 90 to 115, that drinking water utilities are required to monitor. EPA uses the monitoring data to identify opportunities for drinking water regulation.

However, while the proposed list of chemicals included perchlorate, the final list does not. Perchlorate, a chemical commonly found in rocket fuel, interferes with thyroid function and is a possible carcinogen.

No federal or state regulation of perchlorate currently exists. On Jan. 4, Sens. Barbara Boxer (D-CA), Dianne Feinstein (D-CA) and Frank Lautenberg (D-NJ) introduced legislation addressing perchlorate contamination.

According to BNA news service, an EPA official commented the agency is examining other sources of perchlorate exposure such as food, as well as assessing the health impacts of the chemical.

EPA Proposes Relaxed Controls for 'Major Source' Air Polluters

On Jan. 3, EPA published a proposed rule potentially allowing "major source" air pollutant emitters to be downgraded to "area source" emitters. Major sources are those emitting more than 25 tons of hazardous air pollutants per year. Major sources are subject to maximum achievable control technology (MACT), which often results in a significant reduction in air pollution. Area sources are not subject to the MACT standard.

Under the current rules, major sources retain that designation permanently — a policy EPA refers to as "once-in, always-in." The proposed rule would repeal the current policy. EPA argues the proposed rule would encourage all facilities to maintain pollution levels below 25 tons per year.

However, critics argue more pollution will ultimately occur if the number of facilities subject to the MACT standard decreases. The proposed rule raised the ire of Boxer. In a press release, she stated: "We need less, not more, cancer-causing air pollution. This proposal will allow thousands more pounds of cancer-causing air pollution to be emitted each year." Boxer went on to promise action during the 110th Congress: "I have said that the days of rollbacks without scrutiny are over, and I meant it."

Boxer's comments may raise the public profile of this issue and cause EPA to consider her objections before the agency issues a final rule. The public comment period on the proposed rule lasts until March 5.

EPA Takes Preliminary Step on Valuating Ecosystems

The federal government's regulatory process requires agencies to perform cost-benefit analyses when formulating new rules. This requirement often complicates the work of the EPA due to the complexity and abstractness of some environmental benefits. With

this in mind, the EPA released its "Ecological Benefits Assessment Strategic Plan" the week of Dec. 18. The plan attempts to "help improve Agency decision making by enhancing EPA's ability to identify, quantify, and value the ecological benefits of existing and proposed policies."

The plan's intent is to influence EPA managers, analysts, and scientists, and is not itself a rule. The directive contains both short-term and long-term objectives and focuses on incorporating "ecological benefits" into EPA cost-benefit analysis. It is unclear at this early stage whether EPA's objectives would more accurately value intangible aspects of the natural environment.

© 2006 OMB Watch
1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)