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## The Watcher

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## **Next Steps for Spending Transparency Revealed in Senate Hearing**

At a Senate committee hearing on July 18, the Obama administration announced that it's putting Treasury payment data online, but members of the committee indicated that the government still has a way to go to establish satisfactory federal spending transparency. A legislative path forward, members suggested, will likely be a modified version of the House-passed Digital Accountability and Transparency Act (DATA Act).

In a hearing entitled "[Show Me the Money: Improving the Transparency of Federal Spending](#)," the Senate's Homeland Security and Governmental Affairs Committee asked witnesses from the Government Accountability Office (GAO), the Office of Management and Budget (OMB), the Treasury Department, and a current senator where efforts on spending transparency in the administration stand.

Richard L. Gregg, the Treasury Department's Fiscal Assistant Secretary, announced a major advancement in federal spending transparency: starting in 2013, the public will be able to see Treasury data on agency expenses and payments to recipients of federal contracts, grants, and loans. This data is essentially the entries from the nation's checkbook. Crucially, this payment data will be able to be linked to other government data, including USAspending.gov. And, according to Gregg, it

will "enable the public to follow a payment through the complete spending cycle – from appropriations to the disbursements of grants, contracts, and administrative spending." Unlike USAspending.gov, which shows what agencies said they had committed to spending, Treasury payment data is information on funds that were actually paid out. It is a critical element of federal spending transparency, and if the system announced by Gregg comes online as described, the public will have a powerful new tool to track federal spending.

Despite Gregg's testimony about a new transparency system, the committee expressed doubts about the administration's ability to make comprehensive, high-quality spending data available to the public. Senators and witnesses confirmed that USAspending.gov has not delivered what its creators envisioned – a system to make accurate and timely federal spending data available to the public in a user-friendly way. In his opening remarks, Committee Chair Joe Lieberman (I-CT), though praising the overall goals of the legislation that created USAspending.gov (the Federal Funding Accountability and Transparency Act (FFATA)), said that six years after passage, the USAspending.gov website "has not achieved Congress' goals." Lieberman cited several problems with the website, including its less-than user friendly interface, the inability to connect data on the site with other federal datasets, and individual contractors appearing under different names.

Sen. Tom Coburn (R-OK) recalled that when Recovery.gov was created, lessons from that transparency effort were supposed to be used to improve USAspending.gov. According to Coburn, "[t]hat hadn't happened," and OMB directions to federal agencies stemming from those lessons have not been enforced. Coburn asked witness Danny Werfel, Controller of the Office of Federal Financial Management, which agencies were doing well and which were not complying with getting timely, accurate data into USAspending.gov. Werfel responded that the Department of Agriculture (USDA) was an example of an agency that "takes its responsibilities to produce reliable information most seriously in terms of developing best practices." Seventy-five percent of that agency's award data is 95 percent reconciled. Werfel conceded that, while that is not a "great score," USDA has a mechanism to measure its data quality.

Sen. Mark Warner (D-VA), appearing as a witness, underscored the importance of having timely, accurate, and comprehensive spending data. He testified that a lack of transparency feeds the public's mistrust and cynicism in government and that addressing the nation's fiscal challenges is "undermined" without adequate transparency. Gene Dodaro, head of the GAO, insisted that it was "pivotal" that a "premium be placed on the quality and the reliability" of the spending data because without those things, the data won't be useful to the public or policymakers.

Frustrated by the lack of improvement in data quality on USAspending.gov since [the GAO reported on it in 2010](#), the committee appears to be looking to legislative fixes. In April, the [House passed the DATA Act](#), which would greatly enhance federal spending transparency, bring new datasets online, and help standardize reporting across the government. Werfel, however, denied that legislation is necessary, believing that the administration has sufficient ability and authority to significantly improve federal spending transparency. Referring to the DATA Act, he said that comprehensive revision to spending transparency laws would be "replowing the Earth" and could actually hinder transparency, as ongoing efforts directed at meeting existing laws would have to be diverted.

Rather than lacking a legislative mandate to make spending transparency more robust, OMB, according to Werfel, lacks the resources it needs to fulfill existing requirements. Explaining why USAspending.gov has not advanced as quickly as some committee members hoped, Werfel said that lessons learned from Recovery.gov had not been transferred to USAspending.gov in "large measure because of budget issues." Indeed, Dodaro noted that Recovery.gov was successful because, in addition to dedicated leadership, it received sufficient funding. Congress, however, has made [recent cuts in the Electronic Government fund](#), which provides the funding for USAspending.gov, trimming the fund down from \$34 million in FY 2010 to [\\$12.4 million this year](#).

Coburn, anxious to see to more progress in improving data quality, told Werfel, "You need some help from Congress." Concurring, Dorado stated, "Legislation is absolutely essential here going forward." Both the senators and Werfel expressed concerns about the House-passed version of the DATA Act, including some about the establishment of a new government entity to manage federal spending transparency. Indeed, as Warner remarked, his opinion on the DATA Act has "evolved" since he introduced the bill in the Senate last year, and he now believes that another agency is unnecessary. Werfel, representing the Obama administration's stance, is concerned that the proposed data transparency commission would not have a mechanism to consider objections from OMB or federal agencies. Coburn said that a revised DATA Act should make "everything we're doing now consolidated, put together, and responsive, available, and easy for the American people to know."

Though the Obama administration and the committee are separated in their opinions of how to improve federal spending transparency, both recognize the critical importance of it and are working to build upon the successes of USAspending.gov and Recovery.gov.

## **Local Officials Standing Up to Protect Their Communities from Fracking**

Local officials from more than [200 municipalities in 15 states](#), including city councils, town boards, and county legislatures, have banned natural gas drilling that uses hydraulic fracturing, commonly referred to as fracking. These officials have decided that fracking poses an unacceptable risk to the drinking water, health, and future of their communities. However, state governments and corporations have started legally challenging these efforts, a move that would strip the power of democratically elected local governments to establish quality-of-life protections their constituencies want.

### **Background**

Natural gas fracking is an extraction process in which a well is drilled and sand and fluids are pumped underground at very high pressure to cause fissures in the shale rock that contains methane gas; the well brings the gas to the surface for sale. Numerous toxic chemicals are typically added to the mixture, including benzene (a known carcinogen), toluene, and pesticides, among other harmful substances.

The process has been linked to contamination of drinking water, and the fluids involved in the process create public health and environmental hazards. Drilling each well brings an increase in air and noise pollution, as drilling equipment, water, sand, and chemicals are trucked in and gas is piped out. New [studies](#) link fracking-related activities to contaminated groundwater, air pollution, and [health problems](#) in animals and humans. A recent [study](#) from the Colorado School of Public Health found that those living within a half-mile of a natural gas drilling site faced greater risks of health problems – such as headaches, dizziness, eye irritation, fatigue, and cancer – than those who live further away.

### **Local Fracking Bans and Moratoriums**

Local communities across the country, tired of waiting for state or federal protections,<sup>1</sup> are passing bans or moratoriums on fracking activity within their local jurisdictional boundaries. Many of these new laws also prohibit other activities related to the fracking process, such as the storage, use, treatment, and disposal of wastewater. In fact, in New York State alone, more than 90 towns and counties have passed local ordinances banning drilling and other fracking-related activities.

Supporters of local bans explain that blocking fracking gives their towns a chance to enact safeguards to protect the water supply, maintain infrastructure, and minimize the impact large-scale drilling will have on their towns. For instance, Creedmoor, NC, which passed a fracking ban in January, sits at the headwaters of Falls Lake, which is the primary source of drinking water for Raleigh and several Wake County towns. Mayor Darryl Moss and other council members approved the ban so steps could be taken to protect the reservoir. Creedmoor officials also expressed concerns about the impact of heavy trucks and worried about falling property values. "Our roads are already strained now and this will add more stress than is needed," Moss [said](#).

### **Legal Challenges to Local Fracking Bans**

Local bans have not turned out to be the simple solution that many communities were hoping for. Increasingly, corporations and state governments have been challenging the local ordinances with lawsuits. For example, the Anschutz Exploration Corporation slapped the town of Dryden, NY, with a [lawsuit](#) for passing a local fracking ban, arguing that the state's interest in developing its energy resources preempted the town's authority to regulate land use. In Middlefield, NY, the [legal challenge](#) to the town's ban came from the president of Cooperstown Holdstein Corporation, a dairy farm, arguing that the town was unfairly blocking the company from using its resources. In both of these cases, the towns argued that banning drilling fell within their rights to regulate local land use, and trial judges [agreed](#). However, both companies have appealed the rulings.

In some prior cases, courts have ruled in favor of corporations, holding that local bans are preempted by state law. For example, in June 2011, Northeast Natural Energy sued the city of Morganton, WV, for an ordinance banning fracking within the city or one mile outside of city limits. A state trial court judge [ruled in favor of the energy company](#), holding that the state has exclusive control over oil and gas development and that the town "didn't establish that fracking threatened the community's right to clean air and water."

In 2006, the U.S. 5th Circuit Court of Appeals [ruled](#) in favor of Energy Management Corporation, holding that the City of Shreveport, LA, did not have the right to ban drilling within 1,000 feet of its lake. The ruling reversed the decision of a federal district court, which had found that Shreveport was within its rights to enact a ban in an effort to protect its city's water supply.

## **States and Local Communities Struggle over Rights**

Some state officials are seeking to legislatively strip local communities of their ability to control whether fracking can occur in their areas. A number of states have passed or are considering legislation that would establish that state decisions on natural gas drilling preempt, or override, any local decisions. In Idaho and Pennsylvania, legislators have made clear commitments to expanding gas production. In an effort to ensure local concerns do not jeopardize this expansion, Pennsylvania legislators passed [Act 13](#), a law that preempts the authority of local governments to ban gas drilling. Seven municipalities in Pennsylvania have challenged the constitutionality of the law. In Idaho, state legislators passed [House Bill 464](#) in March, which forbids local communities from enacting ordinances to prohibit gas drilling.

In efforts to establish a better legal position for communities to win preemption challenges, a new strategy has emerged. Local communities have begun passing community-rights ordinances. In April, Las Vegas, NM, passed a "Community Bill of Rights," which seeks to elevate the civil rights of the community and of its natural resources. The ordinance declares "the right of all residents, natural communities and ecosystems to water from natural sources, to unpolluted water for use in agriculture, the rights of natural ecosystems to exist and flourish, and the rights of residents to protect their environment by enforcing these rights." Las Vegas enlisted the support of the [Community Environmental Legal Defense Fund \(CELDF\)](#), a Pennsylvania-based organization, to draft its ordinance.

CELDF has been helping community groups and municipalities create rights-based ordinances, which focus on a community's rights – i.e., a community's right to local self-government, rights to clean water, and rights of community members over corporations. According to CELDF, most fracking bans that have been overturned by the courts are based on state regulatory laws. For this reason, when a corporation sues a local municipality, the laws are stacked on behalf of the corporations, and the legal battle focuses on the violations of a corporation's civil and constitutional rights. But, with a rights-based ordinance, the legal battle would instead be focused on the community's democratic right to self-governance. Over 100 communities across the United States have adopted CELDF-drafted laws.

Despite potential legal action by industry and/or states and the considerable monetary costs that accompany such battles, communities continue to see local bans as a necessary step to protect their communities. Lee Einer, a Las Vegas, NM, resident, [says](#) of the risk of legal challenges, "I would rather be sued than poisoned." Besides, Einer said, "even if the ordinance is struck down, the city will be protected until that point."

## **Conclusion**

As evidence of the public health and environmental risks involved in fracking increases, more and more communities across the country are taking matters into their own hands and enacting local bans on fracking. But the oil and gas industry has found natural gas extraction extremely profitable and is mobilizing its resources to try to retain access to shale beds. By passing "Community Rights bills," local communities are creatively changing the conversation. By making this an issue of democratic control and local choice, they should increase their chances of prevailing in court. And we expect they will expand their grassroots support in the process, since the right of local self-determination is a strongly held American value.

<sup>1</sup> An exemption in the 2005 Energy Policy Act prevents the U.S. Environmental Protection Agency (EPA) from monitoring or regulating fracking under the Safe Drinking Water Act. While state governments have begun establishing disclosure rules on fracking, a recent [OMB Watch report](#) found their actions to be inadequate.

## **Senate Votes Down DISCLOSE Act**

The Senate held two votes on the DISCLOSE Act on July 16 and 17 but failed to pass the legislation each time. The bill would have created new campaign finance disclosure requirements and made public the names of super PAC contributors. In an effort to control the rising tide of "secret money" – political campaign spending by unknown donors – the bill attempted to make the federal election process more transparent.

### **DISCLOSE Act**

The Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act was first introduced in the Senate by Sen. Charles Schumer (D-NY) in July 2010. The [legislation](#) would require individuals, corporations, labor unions, and tax-exempt charitable organizations to report to the Federal Election Commission each time they spend \$10,000 or more on campaign-related expenditures. The legislation would also require all outside spending groups, including super PACs, to report the names of donors. Additionally, the legislation sought to increase the transparency of political advertising with "Stand By Your Ad" requirements, where super PACs and other outside campaign groups that produce ads on TV or radio would have to disclose the top funders in the ad. The CEO or highest-ranking official of an organization would also be required to appear in the ad and officially "approve" the message.

The first vote on July 16 went along party lines, with 51 Democrats voting for the legislation and 44 Republicans against it. Senate Democrats failed to obtain the 60 votes needed to overcome a Republican filibuster. The following day, another attempt was made, and Democrats still fell short with 53 in favor and 45 against. The bill was not expected to pass, but Democrats pushed for the votes anyway, demanding an official record of each senator's position. They apparently believe Republicans may suffer some political damage in the upcoming elections as a result of voting against disclosure.

The bill is based on the assumption that making campaign spending information public will result in more accountability for donors and candidates, that [when the public has complete information](#) about who is behind campaign-related expenditures, including those trying to hide their activities by donating to an intermediary organization, they will consider this information when they go to the polls.

The bill also seeks "to prohibit foreign influence in Federal elections [and] to prohibit government contractors from making expenditures with respect to such elections." Large amounts of money from unknown donors outside the United States have been pouring into the federal election this year.

### ***Citizens United***

The DISCLOSE Act is a direct response to the U.S. Supreme Court's landmark 2010 decision in *Citizens United v. Federal Election Commission*. The ruling [struck down](#) parts of the Bipartisan Campaign Reform Act (BCRA) that prohibited corporations (including nonprofit organizations) and labor unions from airing any "electioneering communications" – i.e., broadcast messages that refer to a federal candidate in the weeks before a general election or primary. The Court also ruled that corporations can use unlimited funds from their general treasuries to expressly advocate for the election or defeat of candidates for federal office as long as the actions are independent of campaigns.

The ruling opened the floodgates for wealthy donors and corporations to establish super PACs to raise and spend unlimited funds from any source. The result has been a large spike in political advertising funded by unknown donors. According to [a study](#) done by the Center for Responsive Politics, "72 percent of political advertising spending by outside groups in 2010 came from sources that were prohibited from spending money in 2006."

### **Reactions to Senate Votes**

"[I]n a post-*Citizens United* world, the least we should do is require groups spending millions on political attack ads to disclose their largest donors. We owe it to voters to let them judge for themselves the attacks – and the motivations behind them," [said](#) Senate Majority Leader Harry Reid (D-NV).

Sen. John McCain (R-AZ) and Republicans voted against the bill, citing its lack of provisions toward increased disclosure for labor unions. McCain called on the Democrats "to go back to the drawing board and bring back a bill that is truly fair, truly bipartisan, and requires true full disclosure for everyone." Echoing these sentiments, Senate Minority Leader Mitch McConnell (R-KY) claimed the bill would "send a signal to unions that Democrats are just as eager to do their legislative bidding as ever," and that it "amounts to nothing more than member and donor harassment and intimidation."

Sunlight Foundation Executive Director Ellen Miller said that in the failure to pass the DISCLOSE Act, the Senate is "thumbing their noses at the very notion of democratic elections."

## Supreme Court's Second Swing

Supporters of the DISCLOSE Act had hoped the Supreme Court would narrow the scope of the *Citizens United* decision through its recent ruling on [American Tradition Partnership, Inc. v. Bullock](#). That case revolved around Montana's Corrupt Practices Act of 1912, which banned corporate spending in political campaigns. The conservative group American Tradition Partnership, "dedicated to fighting environmental extremism," brought a legal challenge to the century-old state law.

On Dec. 30, 2011, the Montana Supreme Court [upheld the law](#), saying it was necessary to ensure that Montanans and their elected representatives, rather than corporations, were governing the state. "Clearly the impact of unlimited corporate donations creates a dominating impact on the political process and inevitably minimizes the impact of individual citizens," the decision reasoned. The court found that "the free speech rights of the corporations are no more important than the due process rights of litigants in Montana courts to a fair and independent judiciary, and both are constitutionally protected."

Though no one expected the U.S. Supreme Court to completely reverse its position, some thought it might temper its earlier ruling and permit some limitations or controls over corporate spending. The Court premised its ruling in *Citizens United* on the belief that corporate spending did not give rise to corruption or the appearance of corruption. However, the Montana law was established because of well documented corruption scandals involving mining barons in the state's early history. On June 25, the Court [overturned](#) the Montana law on a 5-to-4 ruling without even hearing oral arguments in the case. To the question of whether *Citizens United* supersedes Montana state law, the Court said, "There can be no serious doubt that it does."

## Alternative Efforts to Increase Disclosure

Beyond legislation and litigation, open government groups have encouraged executive action to increase disclosure. On July 16, 13 organizations including OMB Watch [wrote](#) to the Securities and Exchange Commission (SEC) encouraging the agency to adopt a new rule "that would require disclosure of corporate political spending above a *de minimis* threshold." Sixteen organizations have also signed onto a [letter](#) to the National Association of Insurance Commissioners (NAIC) urging them to "requir[e] insurance companies to disclose all political spending from corporate funds." However, even if the SEC and NAIC adopt such rules, it would fall far short of a full solution because the agencies only have authority over a limited range of companies.

The Federal Communications Commission (FCC) has taken steps to improve the transparency of political advertisement spending. On April 27, the FCC [approved reforms](#) to modernize the disclosure requirements for broadcasters operating on the public airwaves. The rule will create an online database of TV stations' public files – previously available only by appearing in person at station offices – expanding public access to information about the stations' content, including political advertisements. The FCC's new rule went into effect on June 6, though a legal challenge has already been brought by the National Association of Broadcasters. (Broadcasters don't want to publish their advertising rates and revenues.)

## **Constitutional Amendments**

Some of those who oppose the *Citizens United* decision have proposed amending the U.S. Constitution to settle the matter conclusively. For example, Rep. Adam Schiff (D-CA) has already introduced a resolution ([H.J. Res. 111](#)) to amend the Constitution with an article that would make clear that Congress and the states have the authority to impose limitations on independent campaign expenditures. Montana is likely to have a measure [on the ballot](#) in November that would establish that [corporations are not people](#) and would call on Montana's congressional delegation to support a federal constitutional amendment to overturn *Citizens United*. Public Citizen has launched "[Amend 2012](#)", a grassroots campaign to build support for a constitutional amendment that would specify that corporations are not people. Other officials and organizations around the nation are pursuing similar efforts.

## **Conclusion**

Corporations and wealthy individuals have moved quickly to take advantage of the new freedom of unrestricted spending. While legislators, lawyers, democracy activists, and even state and local governments are trying to reduce the impact of money on elections and government decision making, the money continues to flow – without attribution.

## **Vote Imminent on House Bill that Would Shut Down Safeguards**

The House will vote later this week on the misleadingly titled "Red Tape Reduction and Small Business Job Creation Act." The bill is a brazen attempt to shut down the system of public safeguards that protects our air, water, food, consumer products, and economy and would do nothing to create jobs.

The bill has been nicknamed "the regnibus" because when it comes to the floor, it will comprise seven different pieces of anti-regulatory legislation, each of which would have been objectionable on its own. The most prominent of the bills is the so-called "Regulatory Freeze for Jobs Act," which is designed to paralyze the regulatory system until the unemployment rate falls and stays below six percent. Other components of the bill include:

- An additional moratorium on public protections during an outgoing president's time as a "lame duck."
- Additional opportunities for "interveners" – typically deep-pocketed polluters and large corporations – to obstruct or delay federal consent decrees and settlement agreements reached in lawsuits challenging unreasonable delay by federal agencies in establishing standards authorized by Congress. This would clog our already overburdened courts and harm plaintiffs – corporations, state and local governments, nonprofit groups, and individual Americans – by delaying important health and safety measures.

- A new layer of duplicative and unnecessary analytical requirements in the rulemaking process and additional opportunities for those who oppose safeguards to challenge analyses in court. These new, poorly-defined mandates would make agencies' analyses less reliable while simultaneously increasing litigation, causing regulatory delay and uncertainty.
- Weakened oversight rules that would make future disasters more likely. Despite the massive British Petroleum oil spill disaster in the Gulf of Mexico in 2010, the legislation would make it easier for companies to acquire energy permit approvals without addressing critical environmental concerns.

Placing a moratorium on the regulatory system is the most brazen attack on public protections in recent memory. Testifying before a congressional committee in 2011, Cass Sunstein, President Obama's top regulatory official, said "a moratorium would not be a scalpel or a machete, it would be more like a nuclear bomb, in the sense that it would prevent regulations that, let's say, cost very little, and have significant economic or public health benefits." He went on to say that a regulatory moratorium would hamstring the government's ability to protect Americans from unreasonable risks – including, for example, the [current \*Salmonella\* outbreak, which could have been mitigated by more stringent food safety rules](#) or the [2010 Michigan oil spill, which could have been prevented by stronger pipeline safety measures](#).

A moratorium would mean that this Congress would be directing federal agencies to ignore laws established by previous Congresses. Executive agencies generate rules to implement the laws passed by Congress and signed by the president. Without legislation, the executive branch cannot act. A blanket moratorium gives cover to those who want to weaken the Clean Air Act, the Clean Water Act, and other existing legislation that is too popular with the public to repeal.

Congress already has the tools it needs to revise regulations. It can pass new legislation that repeals existing law or use the [Congressional Review Act](#) (which allows Congress to disapprove a specific agency rule). A regulatory moratorium of the type contained in the regnibus bill is simply a blunt, ideological tool meant to shut down the public protections system.

Moreover, this attack on the regulatory system would not accomplish the ends its sponsors advertise. Despite its name, the bill would not reduce red tape (on the contrary, it imposes redundant procedural hurdles) or help small businesses create jobs. Public and private experts, business owners, and a majority of economists have repeatedly noted that the American regulatory system is good for business and does not impede job growth. A top official at the Treasury Department conducted a thorough analysis of economic data and [concluded](#), "None of these data support the claim that regulatory uncertainty is holding back hiring." Survey after survey of economists, including [one conducted by \*The Wall Street Journal\*](#), report that the overwhelming majority of economists believe lack of demand, rather than uncertainty about government policy, is the main obstacle to increased hiring.

The sponsors of the regnibus bill claim that it will jumpstart economic growth, but there is no evidence that this legislation would create jobs or help small businesses grow. What it clearly would do is stop the agencies that protect the quality of life in America and the health and well-being of

American families from carrying out that important work.

## **EPA Drops Rule to Require Basic Information on Agricultural Sources of Water Pollution**

The U.S. Environmental Protection Agency (EPA) recently [announced](#) that it was withdrawing a proposed rule that would have required Concentrated Animal Feeding Operations (CAFOs) to report basic information to the agency. CAFOs are livestock facilities or farms that confine large numbers of animals and do not grow crops on the land. The concentrated waste from these operations can contaminate groundwater supplies as it sinks into the earth. The rule in question would have required CAFO owners to provide information on operations that could result in water pollution. By dropping the rule, EPA appears to have succumbed to pressure from the agricultural community to limit transparency and citizens' rights to a healthy water supply.

Because of the risk of contamination, CAFOs may be regulated under the Clean Water Act (CWA). The livestock industry has contested efforts by the EPA to monitor its activities under the act – for example, the agency's use of aerial surveillance to identify instances where livestock waste is being illegally discharged into rivers, streams, and lakes.

Manure and wastewater from large-scale concentrated animal operations may contain pollutants like nitrogen and phosphorus, pathogens, heavy metals, antibiotics, and ammonia that can contaminate food, water, and other environmental resources. On Oct. 21, 2011, EPA published a [proposed disclosure rule](#) as part of a settlement agreement reached with environmental groups.

Section 308 of the CWA allows EPA to collect records and information from point sources of pollution, such as CAFOs, and requires the agency to make non-confidential information available to the public. The proposed EPA rule would have collected five items of information from CAFOs: contact information, location, the type and number of animals confined at the CAFO, whether the CAFO is covered by a pollutant discharge permit, and the total number of acres on which the owner spreads manure. The agency had proposed two options for collecting this information: it would have gathered data either from all operations or from a select group of CAFOs operating in watersheds where concerns about water quality had been raised.

Opponents of the rule argued that the information could be collected through means other than a rulemaking under section 308 and raised privacy and bioterrorism concerns about making the information publicly available. The National Pork Producers Council and dozens of other agriculture industry associations [wrote in their comments on the rule](#) that making CAFO location information publicly available would lead to trespass and property damage against CAFOs "by animal rights activists as well as other persons."

Environmental and sustainable agriculture groups, however, view the withdrawal of the rule as EPA's latest failure to fully implement clean water protections and provide the public with information about CAFO pollution. The National Sustainable Agriculture Coalition (NSAC) [stated](#) that public access to the information reported under section 308 "could give communities and rural residents better

information about CAFOs as a source of water pollution, allowing them to take actions to protect water resources under the citizen suit provisions of the Clean Water Act."

As NSAC noted, the lack of information about CAFOs has impaired EPA's ability to monitor and regulate those sources of water pollution. A 2008 [report](#) by the Government Accountability Office (GAO) found that "EPA does not have comprehensive, accurate information on the number of permitted CAFOs nationwide." "As a result," the report concluded, "EPA does not have the information it needs to effectively regulate these CAFOs."

### **Avoiding Duplication or Dodging Transparency?**

EPA's explanation for withdrawing the rule cited comments from CAFOs maintaining that they have already provided much of the information to other state and federal agencies. EPA [said](#) that it would work with states and other agencies to obtain the information requested instead of requiring CAFOs to submit the information to the EPA. However, the 2008 GAO report found that "no federal agency collects consistent, reliable data on CAFOs." GAO also interviewed state officials to determine the accuracy and reliability of the CAFO data EPA collected from the states between 2003 and 2008, but found that the data was not reliable and could not be used to identify trends in permitted CAFOs.

If the industry has its way, any information that is found will remain a mystery to the public. Industry comments warned that a central repository of information would threaten security and privacy and noted that if EPA obtains the information without using section 308, it will not have to make the information public. Agriculture operations and policymakers are also vocally protesting EPA's use of aerial surveillance to check for illegal activity by cattle ranchers and other livestock operations. Flying over land to monitor farm operations is an extremely efficient way for EPA to identify potential polluters. The agency does not target individual farms but uses the surveillance to identify areas where potential violations may occur and follows up with on-site inspections.

Opponents charge that the surveillance is intrusive and unnecessary. Last week, Rep. Shelley Moore Capito (R-WV) and other members of the House introduced a [bill](#) to prevent the EPA from using aerial or any other overhead surveillance to enforce the Clean Water Act without written consent or a court order.

Although some regulated operations contend they are not trying to conceal wrongdoing, it's hard to understand why they would object to the flights. If no violations were found, inspection visits would be less likely. In fact, EPA [told](#) the *Omaha World-Herald* that the flyovers have saved money because more than 90 percent of the operations viewed by air have been in compliance, eliminating the need for on-site inspections. All this serves to reinforce that the industry has a penchant for secrecy, which could cause the public to wonder: what are they afraid of disclosing?

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