In This Issue

Service Cuts for the Poor to Pay for Tax Cuts for the Rich

Over the last two weeks, Congress has forged forward with plans to enact fiscally irresponsible budget and tax reconciliation bills that together will raise the deficit by as much as $35 billion over the next five years. That such a plan ignores new fiscal strains and the public's changed priorities since Hurricane Katrina seems of little consequence to lawmakers. Despite reaching agreement earlier this year on the elements of a dreadfully harmful reconciliation package, the House and Senate are currently crafting even more appalling (and now drastically different) bills. The various versions now aim to cut more than the original $34.7 billion from entitlement programs agreed to last April and threaten the ability of the two chambers to reach consensus in conference committee later this fall.

Senate Increases Cuts, But Attempts to Protect Beneficiaries

A number of committees in the Senate spent much of the last two week crafting individual bills that, in total, would cut a net of $39.1 billion from entitlement programs over the next five years. This is $4.4 billion more than was outlined in the original budget agreement that Congress passed last April.

Last Thursday, the Senate Budget Committee compiled those bills into the omnibus spending reconciliation bill and sent it to the floor of the Senate on a 12-to-10 party-line vote. The $39.1 billion outlined in the bill includes cuts to Medicare, Medicaid, agricultural subsides, student loans, pension supports, and other entitlement spending.

It appeared for a time that the Senate Finance Committee would not be able to meet its requirement to cut $10 billion from programs under its jurisdiction, which include Medicaid and Medicare. Sen. Charles Grassley (R-IA), chairman of the committee, spent weeks negotiating with Republican members of the panel from both ends of the political spectrum to forge consensus on a package. In the end, he was able to win the approval of Sens. Jim Bunning (R-KY) and Trent Lott (R-MS), who generally wanted more cuts to Medicaid and none to Medicare, and Sens. Gordon Smith (R-OR) and

Olympia Snowe (R-ME), who would only agree to a package with cuts from both Medicare and Medicaid.

Despite the cuts, the compromise worked out by Grassley in committee is not expected to impact program beneficiaries from either Medicaid or Medicare, instead it focuses on eliminating the Medicare stabilization fund for private health care plans, linking Medicare payments to quality of care, and closing loopholes for seniors who transfer assets in order to qualify for Medicaid nursing home care.

Many other committee chairs in the Senate seemed to go out of their way to spare low-income Americans from a decrease in vital human needs supports. Senate Agriculture Committee Chairman Saxby Chambliss (R-GA) had originally planned to include significant cuts to the Food Stamp program, but eventually reported a bill with no cuts after a number of Agriculture Committee members requested they be removed. The Senate bill also does not include cuts to foster care, supplemental security income, child support enforcement, or child care funding -- all services that primarily benefit children and low-income families.

The Senate began the required 20 hours of debate Monday afternoon at 4:00 pm and the debate will continue through Wednesday and possibly Thursday of this week until time for debate expires. Senators will then begin a succession of votes on amendments to the bill and then eventually vote on final passage. It is unlikely the unexpected secret session that took place in the Senate on Tuesday afternoon will push a final vote on the budget reconciliation bill beyond the end of this week.

House Version Contains More Ruthless Cuts

The House is approximately a week behind the Senate's reconciliation schedule since the House has been maneuvering to increase cuts to entitlement programs to $53,9 billion. Multiple House committees compiled individual bills detailing required cuts last week, and the House Budget committee is scheduled to compile those bills this Thursday, Nov. 3. The bill will likely be considered on the House floor the following week.

The House version is drastically different from the Senate and hits low- and middle- income Americans particularly hard. First, the House version includes no cuts to Medicare, instead slashing $9.5 billion from the Medicaid program and requiring beneficiaries to pay more for prescription drugs, adding new co-payments for children and other new costs, while also limiting beneficiaries' access to medical care. The stark contrast between this and the Senate's approach to program cuts in Medicaid and Medicare could be a central point of contention between the two chambers during a conference.

Also unlike the Senate's version, the House bill will cut $844 million from the Food Stamp program that will, according to Congressional Budget Office estimates, exclude between 225,000 and 300,000 working families from this essential nutrition support. It would seem the proposal could not come at a worse time for the working poor, with a report from the Agriculture department released the same day the cuts were approved showing the number of "food insecure Americans" has increased for the fifth consecutive year. The USDA reported the total number of people living in "food insecure households" -- those suffering from hunger without resources to purchase an adequate diet -- increased to 38.2 million last year, an almost two million person increase from 2003. The food stamp program cuts proposed by the House would undoubtedly increase those ranks, leaving hundreds of thousands more Americans struggling to put food on their tables without the support.

Both the House and Senate include cuts to student loan programs, but the House includes almost twice as much ($8.5 billion vs. $15 billion). The State Public Interest Research Group's Education Project has calculated these cuts in the House bill will cost a typical student $5,800 per year on average in additional education costs - causing many financially strapped students to drop out of school.

The list of cuts continues, with the House bill including cuts to foster care ($600 million), supplemental security income for the disabled ($730 million), and a whopping 40 percent cut to child support enforcement ($5 billion). In general, the Senate has been less draconian in proposing cuts that affect low-income Americans, yet any compromise reached with the House during conference will almost assuredly add or increase cuts to low-income programs from the Senate level.

All For The Tax Cuts

Most troubling of all is that the savings from these miserly proposals would merely pay for new tax

cuts for wealthy Americans. GOP leaders, leaving out this inconvenient fact, claim the reconciliation bills are needed to reign in spending to get the deficit under control. Yet, the same voices calling for tightening our belts, plan to pass $70 billion in additional tax cuts through the fast-tracked reconciliation process in the next two weeks, after the spending bill is completed.. Once the spending bill is passed, the reconciliation process -- designed to make easier enacting difficult legislation to cut entitlements and increase taxes in order to *reduce* deficits -- will actually **increase deficits by at least $35 billion**.

Neither the House nor the Senate is considering canceling plans to pass these new tax cuts or delaying the enactment of planned cuts benefiting the richest of the rich. A disproportionate share of the burden is being hoisted on the shoulders of those least able to bear it - the young, the old, the sick, disabled, and hungry, and many other vulnerable citizens. All the while, the well-off continue to receive very generous benefits through continued tax cuts.

House GOP leaders announced today that a final agreement between the House and Senate on a tax cut reconciliation bill could slip into 2006 due to difficulty not only building consensus among House Republicans, but also finding support within the Senate GOP, as to the necessity of enacting another round of new tax cuts. Acting House Majority Leader Roy Blunt (R-MO), however, remained optimistic about passage in the House of the additional tax cuts this year.

The Urban Institute-Brookings Institution Tax Policy Center (TPC) reports that households with incomes of over $1 million are receiving tax cuts this year from the 2001 and 2003 tax-cut legislation that total on average $103,000 a year. The total cost for these tax cuts for this year alone is $225 billion.

In addition, neither chamber has even broached the subject of stopping two extremely expensive tax cuts that will exclusively benefit very high-income households that have yet to take effect but are scheduled to do so on Jan. 1. The TPC estimated that 97 percent of the benefits from these tax cuts (commonly referred to as the PEP and Pease provisions) will go to the 4 percent of households with incomes greater than $200,000. When these two tax cuts are fully in effect, more than half (54 percent) of their benefits will go to households with income of over $1 million a year -- each millionaire household will receive $19,200 *each year* -- an amount nearly equal to that earned by two working parents each year making minimum wage: $21,424.

Speak out now and tell your representatives to scrap the reconciliation bills this year and enact sound fiscal policies that promote the common good for all Americans.

Congress' Reconciliation Work Crowds Out Appropriations

A month after the close of Fiscal year 2005, the Senate has finally completed work on all appropriations bills funding discretionary spending in 2006 after wrapping up the Labor/Health and Human Services bill last week. Conference negotiations with the House, however, remain on eight of the 11 spending bills, and time is running out for Congress to complete the appropriations bills before the stark continuing resolution currently funding the federal government expires on Nov. 18. While it is not rare for Congress to miss its appropriations deadline, this year's delays are especially contentious given that much of the congressional leadership's energies over the past month have been spent working on reconciliation bills that lack fiscal responsibility, compassion and, perhaps most importantly, necessity.

Last April when Congress voted on and passed the budget resolution for Fiscal year 2006 (FY06), they chose to include in the resolution reconciliation instructions aimed at cutting taxes (by $70 billion) and entitlement spending (by $35 billion). Reconciliation is a two-step process to change current law in order to bring revenue, spending, and debt-limit levels in line with the policies of the annual budget resolution. The first step is to instruct committees to find savings to achieve the objectives in the budget resolution. The committees provide their recommendations to the Budget Committees, which then begin the second step.

The second step involves consideration of the reconciliation legislation under expedited rules that limit the amount of time for debating the legislation, the type of amendments that can be offered, and, in

the Senate, prevent filibusters. Unlike the budget resolution, the reconciliation legislation must be signed by the president to become law. While reconciliation is usually used to lower the deficit, this year the reconciliation instructions will actually increase the deficit by $35 billion.

Anyone following the reconciliation process over the past six weeks has seen that it has been anything but expedited. Since Hurricane Katrina, many Republicans, particularly House conservatives, have been pushing the envelope to increase the entitlement cuts done under reconciliation by $15 billion (for a total of $50 billion) before final passage. In the meantime, the appropriations process languishes. While all work has been completed on the House and Senate floors only two bills out of 11 have been signed into law by the president. FY06 programs, which began one month ago, have not been funded at an amount agreed to by both chambers in conference. In fact the continuing resolution passed to keep the government afloat is drastically under-funding many programs and services.

Congress' role as appropriators of all public funds -- arguably its most important duty -- has not always been completed by the stated deadline. When this occurs, lawmakers pass a continuing resolution (such as the resolution passed this year), until they can complete all spending bills or, as a last resort, combine bills together in one massive omnibus bill. This year it is very likely that Congress will serve up yet another omnibus, with the likelihood of conferees completing work on all bills in the next few weeks being slim at best.

An omnibus bill this year, as with ones before it, promises to be large and so complex that many lawmakers may hardly know what they are voting on. Omnibus bills are bad legislative practice: they remove transparency and accountability from the appropriations process and usually lead to fiscal irresponsibility. Could this year's continuing resolution and the likely omnibus have been avoided if congressional leaders were not so wrapped up in cutting funding for low-income supports to pay for more tax cuts for the wealthy? It is certainly possible as reconciliation has received the lion's share of Congress' attention this year, while the appropriations process has floundered.

Congress' priorities need to shift away from a misguided, far-right agenda back to completing the core functions for which it is responsible in a way indicative of concern for both the direction of our nation and the most vulnerable Americans. The Senate will be voting on a budget reconciliation bill this Thursday, and the House is expected to vote on its version next week. **Take action now!** Send an email to your senators and representative telling them to vote against harmful budget cuts and irresponsible tax cuts.

Congress Remains Out of Step with Public in Hurricane Relief Efforts

It has been two months since Hurricane Katrina hit and one month since Rita made landfall on the already-ravaged Gulf Coast, yet reverberations continue to be felt not only in Washington, but throughout the country. Congress was forced to reshuffle the legislative calendar to address the immediate needs of the relief effort, postponing consideration of the reconciliation bills and a vote on repealing the estate tax, dropping Social Security reform legislation, and passing a stark continuing resolution to fund government services past the end of the fiscal year and allow for more time to pass the annual appropriations bills. Outside of Washington though, a larger reshuffling is occurring as the vast majority of Americans no longer believe the country is on the right track and are turning to government to help redress some of the startling inequalities witnessed in the wake of the hurricanes.

Polls conducted post-Katrina have overwhelmingly shown a public that places higher importance on combating poverty and inequity in American society than ever before. The results of a recent national poll released Oct. 27 by New California Media, a San Francisco-based coalition of ethnic media, showed Americans more concerned with eliminating poverty than fighting terrorism, establishing democracies in Iraq and Afghanistan, or rebuilding cities devastated by natural disasters. In the poll - which surveyed whites, blacks, Asians and Hispanics about how Hurricane Katrina influenced the way people view poverty, race relations, climate change and government - a majority of the 1,035 respondents felt the United States should be using revenues to build strong cities and communities here at home rather than oversees.

Waning public support for U.S. involvement and spending in Iraq has been seen in other recent polling, notably in the results from an AP-Ipsos poll conducted last month. The AP poll found that 42

percent of people favored cutting spending on Iraq to pay for relief efforts in the Gulf Coast. In that same poll, respondents identified poverty as the number one issue the government needs to dedicate time and resources to overcoming.

Sergio Bendixen, whose firm conducted the poll, stated, "I don't remember poverty ever finishing as the number one priority on any kind of list. The aftermath of Hurricane Katrina [and Rita] and the images of poverty have clearly made a large impact on many Americans."

According to a study released in October by the Marguerite Casey Foundation, approximately 90 percent of those surveyed realized that poverty is a problem in America today and a majority supported a broad range of long-term investments to help reduce poverty, such as increased wages, health insurance, education, job training and tax credits.

Unfortunately, Congress does not seem to be listening. While the hurricanes have had a significant impact on Congress' schedule this fall, they have not changed the priorities of Republican leaders in either the House or Senate. Following Katrina Congress immediately passed a $10.5 billion emergency supplemental bill to keep the Federal Emergency Management Agency operating, and followed it with a much larger $51.8 billion bill to fund short-term relief and recovery efforts throughout the region. On Oct. 28, President Bush sent a third supplemental request for aid to Congress, which will consider it over the coming weeks. This third supplemental does not require any new funds to be approved by Congress; it simply reallocates $17 billion of the $62 billion that was previously provided for FEMA's disaster relief fund. According to the Office of Management and Budget (OMB), sufficient funds will remain in the disaster relief fund to continue meeting ongoing and current recovery demands. In addition, the White House requested $2.3 billion in rescissions to programs it deemed to be a "lower priority."

The $17 billion transferred would include funds to reconstruct military bases ($3.31 billion); repair and rebuild highways and bridges ($2.33 billion); rebuild levees and improve waterways and wetlands ($1.6 billion); support Community Development Block Grants ($1.5 billion); reconstruct veterans health care facilities in New Orleans and Biloxi ($1.16 billion); and help meet child care, mental health, and other human services needs ($500 million), among other smaller projects.

The $2.3 billion in rescissions, which will come from twelve cabinet departments and the Environmental Protection Agency, would, according to the OMB, "offset the unprecedented cost of this disaster and control growth in discretionary spending." In reality these extraordinarily small spending cuts will have little long-term effect on the growth of unsustainable deficits.

In addition to supplementals, Congress has worked to pass tax packages to bring relief to some victims and spur new growth. On Sept. 21, Congress agreed to a $6.2 billion tax package to expand tax deductions for dislocated victims and provide charitable incentives to encourage other Americans to help. The bill, sponsored by Rep. Jim McCrery (R-LA), will provide some financial support in the future, but will do less to get victims back on their feet than direct spending would.

This very point was made by Daniel Doctoroff, the deputy mayor for economic development and rebuilding for New York City, in his Sept. 28 testimony before the Senate Finance Committee. Doctoroff testified that tax breaks were not the most effective approach to assist those most in need in the wake of a disaster and that direct spending by the government was more immediately beneficial. Doctoroff described the tax code as "a crude vehicle for delivering assistance - particularly in comparison to appropriations."

Despite reservations raised by independent analysts, McCrery has introduced a second tax package that focuses on tax cuts for businesses in the Gulf region. On Oct. 27, McCrery, a senior member of the Ways and Means Committee, introduced the bill, which is expected to carry a 10-year cost of slightly less than $8 billion. The bill would:

- Provide new cash for tax-exempt bonds, in order to help states and localities rebuild infrastructure and private industry rebuild commercial and residential property;
- Authorize $14 billion in new private activity bonds and allow the interest on those bonds to be excluded from income for purposes of calculating the alternative minimum tax (AMT), ensuring that any tax benefit investors gain from the bond will not be recaptured by the AMT;
- Allow for a second advance refunding of outstanding bonds to allow state and local

governments to restructure their debt, a key provision sought by hurricane-effected states;
- Double the limit on expensing of new property and equipment for small businesses to $200,000, but only for businesses operating in the disaster zone;
- Establish Gulf Opportunity Zones, or GO Zones, for areas effected by Hurricane Katrina, similar to the Liberty Zones set up after the Sept. 11 terrorist attacks;
- Create a new tax credit bond, which would allow states to offer investors a federal tax credit instead of paying interest on the bond. Authority would be limited to $200 million for Louisiana, $100 million for Mississippi and $50 million for Alabama.

It is unclear when Congress will take up work on this second tax relief package. GOP leaders continue to claim they will finish all legislative duties before the Thanksgiving holiday, but with many appropriations bills still left unfinished, starkly different reconciliation bills to rectify, and an open seat on the Supreme Court to fill, more than likely Congress will be working in Washington well into December this year.

TRI: The Tool For Public Protection Against Toxic Pollution

The Environmental Protection Agency (EPA) implied that the public had already received most of the benefits the Toxic Release Inventory (TRI) could offer when the agency recently proposed significantly cutting the amount of information companies report under the program. This is not, however, reflected in the facts, which show the TRI continues to be an important public health tool widely used by community groups, labor unions, local officials and citizens.

The following examples demonstrate the ongoing importance and usefulness of the annual data on toxic pollution collected under the TRI. Approximately 26,000 industrial facilities in neighborhoods across our country annually report under the program the amounts of some 650 chemicals that they release or dispose of The program which has been in place since 1988 has been tremendously successful in achieving reductions in toxic pollution by simply making the information public.

However, on Sept. 21, EPA officially proposed allowing thousands of companies to pollute more before requiring they report the details of that pollution. The agency also plans to cut the TRI program in half by letting facilities report every other year. The changes will make it difficult for communities to track local polluters and demand reductions.

EPA claims that TRI reductions have 'leveled off,' and implies that companies have already learned the importance of reducing toxic pollution. One EPA official claimed that the major reductions under TRI occurred years ago. However, each of the examples to follow illustrate how the TRI continues to play a vital role in protecting public health.

- Louisville, Kentucky -- On June 21, Louisville city officials approved a new program that requires industrial facilities to reduce emissions of hazardous air pollutants. The TRI was critical in passing the new clean-air program. As Tim Duncan of the Rubbertown Emergency Action Community Taskforce (REACT)explains, "the combination of the TRI numbers and local air monitor data provided a powerful combination of numbers for us to use to show that Hazardous Air Pollution levels were serious in our area."

- Phoenix, Arizona -- The Arizona Department of Environmental Quality (ADEQ) also uses the TRI to address Hazardous Air Pollutants (HAPs) emissions. The ADEQ used TRI data to identify facilities that had significantly increased their HAP releases from 2002 to 2003. The agency can then work with those facilities to better manage their air emissions. Alternate-year reporting would have missed these pollution increases.

- Green Bay, Wisconsin -- The Clean Water Action Council of North East Wisconsin recently told OMB Watch, "we use the TRI frequently to call attention to toxic releases, as the counties we work with are home to some of the state's top toxic sources and highest cancer rates. (The) TRI helps us understand the relative importance of various pollution sources, focus our public education efforts where they can make the most difference, and is the only comprehensive dataset of its kind, providing valuable insights which the public would otherwise be unaware of."

- Peoria, Illinois -- The Sierra Club Heart of Illinois Chapter uses TRI data in its efforts to get the Peoria County Board to close a hazardous waste landfill, owned by the private company located at the edge of town. The TRI data has revealed that the landfill -- less than three miles from 20,000 Peoria residents -- contains dangerously high levels of chromium and cadmium, and emits large amounts of air-born pollution. The landfill company has applied for a permit that would extend the landfill's life by 15 years.

- Dorchester, Massachusetts -- The JSI Center for Environmental Health Studies, based in Boston, conducted a project called, 'Informed Communities: Environmental Health Initiative.' With support from the National Network of Libraries of Medicine, they piloted training programs on using the TRI in Dorchester, which compelled health centers and community groups to use the TRI to address local environmental health concerns. The project was such a success that it is being disseminated to other New England communities.

- Modesto, California -- Haleh Niazmand, a recent transplant to Modesto, found out from TRI data that she and her family until recently lived between a quarter mile and four miles from several industrial facilities in Cedar Rapids, Iowa that released neurotoxins, including mercury into the air and water. Niazmand, whose three-year-old child has regressive autism, tells OMB Watch, "the TRI made it plain that these facilities were releasing poisons into the air. This information will help me make informed decision regarding my son's detox regime."

- Seattle, Washington -- The Washington Toxics Coalition used TRI data to track millions of pounds of toxic waste being turned into fertilizer and sent to farms. The coalition told OMB Watch that "in 1997, we found out the practice was occurring and then looked to TRI data to find that steel mills were sending millions of pounds of lead to be turned into fertilizer. Shedding light on this and taking regulatory action has basically put an end to the practice of bagging steel mill waste for fertilizer."

- Albion, New York -- Diane Heminway with the United Steelworkers Association (USWA) conducts trainings using the TRI to better inform workers of the health risks associated with the chemicals to which they are exposed. According to Heminway, the trainings teach workers to spot reporting violations or inconsistencies, and companies with formal employee participation programs are up to three times more successful at reducing pollution.

- Chicago, Illinois -- TRI data informed concerned residents of Chicago's Pilsen neighborhood that the nearby brass foundry was the city's largest emitter of airborne lead. In 2004, the residents formed the Pilsen Environmental Rights and Reform Organization and pushed for air testing, which found highly elevated levels of lead in the area. As a result the group was able to secure agreements from the company to reduce emissions.

- Homer, Alaska -- The Cook Inlet Keeper, a citizens' group that works to protect Alaska's Cook Inlet, uses the TRI to generate media coverage highlighting the pollution being released by industries into the inlet. The group uses the news coverage to make companies aware that their toxic pollution is being watched and to encourage them to make reductions. In this way, they act as an important check in an area that experiences almost 2 million pounds of toxic pollution each year.

Send your TRI stories to gsorvalis@ombwatch.org.

Industry Derails Labor Safety Rule with Data Quality Challenge

A coalition of mining companies and trade associations appears to have used the Data Quality Act to derail a Mine Safety Health Administration (MSHA) rule that would protect miners from harmful particulate matter in diesel exhaust. The challenge did not raise actual objections to data quality; instead it couched industry's disagreements with the rule in data quality language. The tactic, however, appears to have succeeded in impelling the agency to publish a modification to the rule that weakens the mine worker protections.

The Issue

Diesel engines are widely and increasingly frequently used in mining operations because of their high power output and mobility. Diesel-powered machines, from bobcats to loaders, are more powerful than most battery-powered equipment and can be used without electrical trailing cables which can restrict equipment mobility. The downside, especially in the underground mining environment, is the potential health effects -- both acute and long-term -- of exposure to various constituents of diesel exhaust, which consists of noxious gases and very small particles. The Center for Disease Control and Prevention (CDC) has determined that diesel exhaust is a potential human carcinogen.

In addition, acute exposures to diesel exhaust have been linked to health problems such as eye and nose irritation, headaches, nausea, and asthma. Currently, underground miners can be exposed to over 100 times the typical environmental concentration of diesel exhaust and over 10 times that measured in other workplaces. In addition, miner exposure to diesel emissions promises to become more widespread as diesel equipment becomes more popular within the mining community.

MSHA sets limits on miner exposure to a number of the gases in diesel emission (see Title 30 CFR Sect. 75.322 and Sect. 71.700 for underground and surface coal mines and Sect. 57.5001 and Sect. 56.5001 for underground and surface metal and nonmetal mines).

MSHA also addresses the particles in diesel emissions. Diesel particulate matter is small enough to be inhaled and retained in the lungs. Each particle has hundreds of chemicals from the exhaust adsorbed (attached) onto its surface. Accordingly, MSHA proposed a June 6 rule to limit workers' exposure to diesel exhaust particles by requiring mine operators to remain under a Total Carbon (TC) limit of 160 micrograms per cubic meter of air. MSHA had been working on the rule for years and had carried out extensive negotiations with the mining industry, which has long argued the rule is unnecessary and unenforceable. The TC limit was identical to provision originally proposed by MSHA in a 2001 rule, when the agency first attempted to address the issue.

The Challenge

MARG Diesel, an informal group of mining companies and trade associations, filed a data quality challenge on Aug. 10, arguing that the TC rule fails to meet the data quality standards laid out in the Data Quality Act and the Department of Labor's guidelines for implementing that law. The group claims the rule is based on data that is not transparent or reproducible and that it underwent a flawed peer review process. MARG Diesel claims that the only "correction" possible is for MSHA to either stay or entirely overturn the 160 TC limit rule until these issues can be resolved.

This challenge represents another industry abuse of the Data Quality Act, in order to impede the processes of government agencies. While the petition raises issues and concerns about the studies and data used to produce the new TC rule, the studies are not listed as the challenged information. Instead, MARG identifies the rule as the target of its challenge.

Transparency and Reproducibility
MARG Diesel claims that the two main studies heavily relied upon in the rulemaking (called the 31-Mine Study and the Estimator) fail to meet the reproducibility and transparency standards of Labor's data quality guidelines, which indicate that the research process should be transparent enough that another entity could conduct the study and reach the same outcomes. The group asserts that MSHA's study makes incorrect assumptions, regarding, among other things, air ventilation, that "continue to contradict reality, even if input emission measurements were representative, which they are not." Among the specific assumptions MARG disagrees with is the effectiveness of filters required to

become compliant with the 160 TC limit, arguing that some pieces of equipment cannot be fitted with filters, and therefore the particle limit is not achievable.

MARG clearly fails to raise a legitimate data transparency or reproducibility concern. Data is reproducible if it "is capable of being substantially reproduced, subject to an acceptable degree of imprecision," according to the data quality guidelines. Data is transparent if the source of the data is revealed along with the supporting data and models. The issues raised by MARG Diesel are not issues of reproducibility or transparency. The problems do not concern a hidden assumption or any undisclosed data or models. In fact, MARG Diesel, in an effort to disprove the MSHA results, conducted its own version of the study, thereby proving that the study was transparent.

Independent Peer Review
MARG Diesel also argues in its petition that the 31-Mine Study and the Estimator were not independently peer-reviewed, because the reviewers were "self selected personnel in its sister agency the National Institute for Occupational Safety and Health (NIOSH)," a division of the CDC. Additionally, MARG claims that, "a review of the Estimator for publication in a mining magazine does not constitute the needed independent peer review for use of the Estimator to determine feasibility of compliance for a mine or for the industry, due to the incorrect assumption in the Estimator described therein."

While MARG Diesel makes several assertions about the biased peer review, the group fails to provide any specific evidence or proof that the peer review process was not conducted objectively. The Department of Labor Information Quality Guidelines defines peer review as the "independent assessment of the technical and scientific merit of research by individuals knowledgeable in the particular subject interest and with no unresolved conflict of interest." NIOSH employees were clearly selected for their extensive knowledge of the material. The petition makes no mention of any specific conflict of interest or bias for the reviewers at NIOSH. It also makes little sense to claim that an independent peer review done by a mining magazine is insufficient, because the material they reviewed was flawed. The purpose of the review is to determine the merit of material and discover such flaws if they exist. MARG is challenging the peer review of the Estimator study, simply because it disagrees with its conclusions and the rule MSHA is basing on it.

The Result

The MSHA has not yet issued a formal reply to the MARG Diesel Coalition's challenge. However, the agency has already published a modification to the TC Rule. On Sept. 5, about one month after receiving the data quality challenge, the agency proposed to phasing in the 160 TC limit over six years, instead of requiring compliance next year.

Conclusion

The MARG Diesel coalition has failed to make a valid reproducibility, transparency, or independent peer review complaint. The other claims of the MARG Diesel challenge fall even further from the mark: the "feasibility" of complying with the TC rule, the "regulatory confusion" that the rule would cause, and the "significant loss of jobs" that instituting the rule would cause. None of these charges have anything to do with data quality, nor is the data quality mechanism the appropriate forum for MARG to make these complaints, which should be raised during the rulemaking process. Instead, MARG is misusing the data quality process to disagree with the policy of instituting the 160 TC rule.

The MARG Diesel petition does not constitute a valid data quality challenge, but rather a disingenuous complaint that divert agency resources and wastes agency time. The Department of Labor's own Data Quality Act guidelines acknowledge that, "Program efficiency must be a critical goal as DOL agencies carry out their responsibilities under these guidelines," MSHA, as the division of DOL responsible of miner safety, in the interest of program efficiency should reject such spurious industry tactics.

Nonprofit Gag Passes in House, Has Uncertain Future in Senate

A bill dealing with oversight of Fannie Mae and Freddie Mac that establishes a new affordable housing fund passed the House, but at the expense of nonprofits' rights to engage in, or affiliate with organizations that engage in, nonpartisan voter registration or lobbying activities.

On Oct. 26, H.R. 1461, the Housing Finance Reform Act, which would increase regulation of federal mortgage entities, passed the House 331-90 despite a provision offered as a manager's amendment by Rep. Michael Oxley (R-OH) that disqualifies nonprofits from receiving affordable housing grants if they have engaged in voter registration and other nonpartisan voter activities, lobbying, or produced "electioneering communications." Organizations applying for the funds are barred from participating in such activities up to 12 months prior to their application, and during the period of the grant even if they use non-federal funds to pay for them. Most troubling, affiliation with an entity that has engaged in any of the restricted activities also disqualifies a nonprofit from receiving affordable housing funds under the bill.

Much of the debate on the floor centered around whether nonprofits should have to make a choice between their right to freely associate, advocate and conduct voter registration, and their ability to provide much-needed services. Republicans argued that the bill did not limit political speech - as long as an organization did not want affordable housing fund monies. They also misrepresented the provision, claiming it is aimed at preventing federal funds being used for political purposes. According to Rep. Tom Feeney (R-FL), "They want to allow folks that engage in political activity, including voter registration, to have access to money that otherwise would go to low-interest loans or to help affordable housing builders at the local level that actually build bricks and mortar."

However, nonprofits are already barred from using federal funds to lobby or electioneer, and have long supported current laws and regulations that prohibit the use of federal funds for lobbying and partisan political activities. Additionally, investigations have shown no pattern of abuse by nonprofits.

The Rules Committee did not allow Rep. Barney Frank (D-MA) to offer his amendment to strike the anti-advocacy provision from the manager's amendment. In response to debate on the House floor that money is "fungible" and therefore housing grant funds indirectly help support nonprofit political speech, Frank argued:

> "We are talking about whether groups with their own money can do other things. People have said the money is fungible. Well, when we were debating faith-based groups, when we said if you give money for day care, is that going to go to religious activities, we were told, no, they will be segregated. I agreed with that. So the argument about fungibility, apparently, appears to be itself very fungible."

Frank also agued that this provision would hit faith-based groups the hardest. The provision restricts grants to those groups that have building houses as their "primary purpose." Since the "main purpose" of many faith-based groups is faith-related, they would likely be barred from receiving housing grants.

Frank urged other representatives to vote against the manager's amendment with the promise that his motion to recommit with instructions forthwith would include essentially the same manager's amendment, however, the "primary purpose" language would be changed to "among its primary purposes," and the restriction on nonpartisan voter registration and "get out the vote" work would be dropped. Such a motion to recommit forthwith, if adopted, would have forced the committee chairman to immediately report back to the House in conformity with the instructions and the bill to then automatically return to the House floor.

In an extremely close vote, the House voted 210-205 in favor of Oxley's manager's amendment, which contained the nonprofit gag provision.

After a number of other amendments were addressed, Frank moved to recommit with instructions forthwith to the Financial Services Committee. In another close vote, this motion failed 200-220.

The members who spoke on the floor largely avoided the "affiliation" restrictions in the provision.

Extremely far-reaching, the language creates "affiliations" between organizations that share resources, have overlapping boards or staff, or receive too much money from one entity. Once affiliated, the action of the affiliated entity can disqualify the nonprofit from receiving money under the Affordable Housing Fund. For example, if a private company donates office space or equipment to a housing group, the two entities are now affiliated. If the private company lobbies or endorses a candidate for federal office, the housing group would be barred from receiving money under the Affordable Housing Fund.

The legislation passed the House Financial Services Committee in May on a 65-5 vote, indicating strong bipartisan support. At that time, there was no gag provision. The legislation stalled, however, because of concerns voiced by the conservative House Republican Study Committee (RSC) that the Affordable Housing Fund provision would be used to "finance third- party advocacy groups that have agendas far beyond simply increasing affordable housing for low-income Americans." As RSC member Tom Feeney (R-FL) said, "I'd rather burn the money than give it to an advocacy group."

The RSC essentially blocked the bill from coming to the floor unless it contained the gag provision. At the same time, an ongoing dialogue was taking place between the sponsors of the legislation and some from the faith-based community. As the faith community learned of the restrictions on speech and voter engagement activities, it mounted a strongly opposition to the provision. Despite objections raised during drafts, the final version of the gag provision went further in the direction of restricting nonprofit speech and association rights than earlier drafts. While this further inflamed the issue for supporters of the affordable housing fund, it provided the poison pill the RSC sought, and the RSC thus allowed it to go the House floor for a vote.

The prospects of Senate passage this year are unclear. Reportedly, Senate Banking, Housing and Urban Affairs Committee Chairman Richard Shelby (R-AL) opposed an affordable housing fund. The Senate version, S. 190, which passed out of committee on July 28 by a party-line vote of 11-9, does not contain an affordable housing provision. The main debate in the Senate has not focused on the affordable housing fund, but rather on the main provisions in the legislation - the oversight of Fannie Mae and Freddie Mac. Some speculate that, if an agreement on the broader oversight issues can be worked out, a compromise could likely be reached on the affordable housing fund. There is also speculation that, while the Senate bill has stalled, it may pick up speed over the next month when two reports regarding Fannie Mae oversight are expected to become public. Nonetheless, considering the tightness of the Senate's schedule, it is unlikely the bill will reach the floor this year.

FEC Considers Broadcast Rule Change, Congress Mulls Internet Speech

On Oct. 20 the Federal Election Commission (FEC) heard testimony on its reconsideration of a rule on treatment of grassroots broadcasts by charities and religious organizations in campaign finance regulations. OMB Watch testified in support of an exemption for grassroots lobbying from the "electioneering communications" rule, which bans corporations, including nonprofits, from referring to federal candidates in broadcasts made 60 days before a general election or 30 days before a primary.

In 2003 the FEC approved an exemption for 501(c)(3) organizations from the "electioneering communications" rule. The new rulemaking is a response to a federal court order to reconsider the exemption because the court found the FEC did not provide adequate justification for it. The FEC appealed the ruling, but on Oct. 24 the U.S. Circuit Court for the District of Columbia turned down the FEC's request for full court review of that decision. FEC Commissioners have said they do not plan to pursue appeal to the Supreme Court but will move forward with revisions on this and over a dozen other rules rejected by the court.

At the same time, the Supreme Court recently accepted a case involving application of the "electioneering communications" rule to grassroots lobbying by a 501(c)(4) organization, Wisconsin Right to Life. At the FEC hearing Robert Bauer, an election law expert of the firm Perkins Coie, testified that the FEC should wait to approve a new rule until after the Supreme Court's decision, which is expected early next year. OMB Watch's testimony, delivered by former FEC Commissioner Karl Sandstrom, supported a nonprofit grassroots lobbying exemption to the electioneering communications rule. He emphasized the right of nonprofits to petition the government for redress of grievances, noting that next fall's appropriations legislation will be under consideration during the 60 day period prior to the general election, saying, "And the question is, will they have an exemption under your regulations to use television or radio to put forth to the public what is at stake, to

encourage the public to contact their legislators to tell them that something matters here?" Other nonprofits, such as the Alliance for Justice and Independent Sector supported continuation of the 501 (c)(3) exemption. The American Cancer Society's testimony supported the idea of a grassroots lobbying exemption, saying, "We certainly believe that legitimate lobbying communications for or against specific legislative proposals should be able to continue throughout the year, even if they include a call to action that mentions a lawmaker." They also noted that unpaid broadcasts, such as public service announcements, can be covered by the "electioneering communications" rule. Since broadcasters often repeat public service announcements on a schedule that is not under the control of the nonprofit that produced it, inadvertent violations could occur without some kind of FEC action.

Campaign reform think tanks, such as the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics testified that they oppose any exemptions to the "electioneering communications" rule in order to prevent potential abuse by those wishing to avoid campaign finance regulations.

OMB Watch Report on Charity and the War on Terror

Since the 9/11 terrorist attacks, federal measures intended to cut off terrorism funding have imposed undue burdens on the nonprofit sector. An OMB Watch report released at the end of October, Safeguarding Charity in the War on Terror, addresses the unbalanced anti-terrorist financing regulations and guidelines that, according to the report, "lack a basic understanding of how nonprofits function, and ultimately do not help -- and may even hinder -- the global war on terror." The report then goes on to call for improving the current system, so that nonprofit organizations and foundations can pursue legitimate charitable activities.

On June 14, 2005, a diverse panel sponsored by the Georgetown Public Policy Institute's Center for Public & Nonprofit Leadership convened to discuss U.S. regulations, laws, and guidelines that seek to curtail the financing of terrorism. Among the new and troubling anti-terrorism provisions discussed were President Bush's Executive Order 13224, which addresses terrorism financing and identifies lists of suspected terrorists, and the Treasury Department's *Anti-Terrorist Financing Guidelines, Voluntary Best Practices for U.S. Based Charities*.

'Safeguarding Charity in the War on Terror' focuses on the Treasury Department guidelines that, although voluntary, have led to troubling practices by grant-making institutions. Testimony from scholars and nonprofit practitioners during the panel, as well as the stories of nonprofits directly effected, expose three prevailing myths, explored in the report, that obscure the true nature and impact of current policy:

The myth of "voluntariness." The threat of government investigation and asset seizure make the government guidelines anything but voluntary.

The myth of utility. Policies such as the Treasury Department guidelines are ineffective as counter-terrorism measures and waste resources that could be more usefully channeled to other areas of the war on terror.

The myth of minimal impact. The consequences of current policy go far beyond administrative costs to threaten the nonprofit sector and its ability to deliver services.

The report finds "in the absence of clear, sensible guidance and information from government about what is legally required, confusion and fear are driving the response of the nonprofit sector in the campaign against terror financing." Foundations and grantees alike have widely adopted practices such as terror list checking and certification -- a process requiring signatures from grantees, employees, partner organizations, and even vendors -- without consideration of the consequences to civil liberties and without assurance that these steps will offer protection from legal sanction. Charities are also increasingly fearful that continuing to provide legitimate services and activities might cost them funding from either foundations or the government.

Charitable Reform and Giving Legislation For the Long Haul

Charitable reform and giving legislation is moving piecemeal in both the House and Senate, focusing on specific abuses of the sector and charitable giving incentives in the wake of Hurricanes Katrina and Rita.

In an Oct. 24 speech delivered to Independent Sector's 25th Anniversary Conference, Senate Finance Committee Chairman Charles Grassley (R-IA) explained the importance of "reform and oversight" of the sector to "safeguard the donors and taxpayers." He went on to say he would have liked a complete reform package to have been ready this fall, but "(Hurricane) Katrina has affected this and many other plans." Nonetheless, Grassley made clear that he will not give up his quest to bring greater accountability to the nonprofit sector, emphasizing that he is taking the "long view" on the issue.

Grassley noted that reforms he is considering focus on "better transparency and improving board governance, particularly on self-dealing and high salaries." He also highlighted three types of abuses he will target:

- Abuses with donor-advised funds, supporting organizations, and nonprofit credit counseling services (The abuses of concern in these institutions were not specified.);
- Abuses involving non-cash donations, such facade easements and other real estate transactions;
- Abusive transactions, such as those dealing with "life insurance and corporate tax shelters."

Grassley acknowledged that his reforms have met with some resistance, from both the nonprofit sector and within Congress. A number of charities have discouraged reform and found a partner in Sen. Rick Santorum (R-PA), a member of the Senate Finance Committee. These critics have raised concerns that enforcement of current laws is inadequate, and thus passage of new laws may not be the best solution. Instead, they emphasize providing adequate resources to ensure enforcement of existing laws. They have also expressed concern over the impact of reform proposals on smaller nonprofits.

Santorum has advocated for passage of his legislation to encourage charitable giving. That bill, the CARE Act, includes a non-itemizer deduction for charitable giving, an ability to rollover Individual Retirement Accounts to a charity, and other incentives. The non-itemizer, however, has not been universally embraced, particularly in the House.

In his speech, Grassley noted the importance of providing charitable incentives, and emphasized his role in enacting temporary incentives in recent Hurricane Katrina legislation. Most of these incentives expire at the end of the year.

Grassley hopes to include some nonprofit reforms or incentives in the upcoming reconciliation bill in the Senate. The House, however, has no such plans, making it uncertain whether such legislation will be part of any final package.

Grassley indicated there would be a second, broader phase of reforms that will be addressed in 2006. The details of these reforms remain unclear.

House Action

The House has not taken Grassley's active approach to nonprofit oversight and reform. Instead, the House seems more focused on addressing specific abuses by certain types of nonprofits.

In the post-Katrina environment, the House seems more focused on fraud by charities. H.R. 3675, the American Spirit Fraud Prevention Act, which would double the amount of fines that could be levied against individuals or groups that commit certain types of fraud during national emergencies, passed 399-to-3 on Oct. 25. Introduced by Rep. Charlie Bass (R-NH), H.R. 3675 would enable the Federal Trade Commission to double penalties -- up to $22,000 -- for individuals or organizations committing fraudulent acts.

The bill was previously passed by the House in the 107th and the 108th Congresses, but died each time in the Senate. It was originally introduced in response to reports of deceptive charity solicitations following the Sept. 11 terrorist attacks. Unfortunately, the generosity exhibited in the aftermath of Hurricane Katrina has spawned a similar wave of dishonest fundraising schemes and fraudulent solicitations.

Senate Uses Minimum Wage Increase to Push Anti-Regulatory Agenda

The recently revised unfunded mandates point of order was invoked in the Senate to kill dueling amendments to raise the minimum wage, one of which included a Republican counterproposal to "offset" the wage increase with several pro-business anti-regulatory provisions.

The exchange revealed dramatically the power of the recently revised point of order to stop legislation.

In a replay of events from last March, on Oct. 19, both Sens. Edward Kennedy (D-MA) and Michael Enzi (R-WY) offered amendments to the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act of 2006 (S. 3058) to raise the minimum wage by $1.10 over the next 18 months. Enzi's amendment (S. Amdt. 2115), however, included multiple lengthy provisions to ease regulations and paperwork requirements on small businesses in order to "offset" the costs of increasing minimum wage.

Both amendments were eventually defeated by an unfunded mandates point of order, but the amendments are likely to resurface in the future.

"Offsets" Translates as "Weakened Protections"

Enzi's amendment, which was more than 80 pages long, had dangerous anti-regulatory and anti-worker provisions. The amendment, for instance, would have increased the threshold for businesses to comply with minimum wage standards and other fair labor practices from those with sales of over $500,000 to those with sales over $1,000,000, thereby exempting many employers from minimum wage requirements just as it raised the wage. According to remarks on the floor by Sen. Richard Durbin (D-IL), the increase could "deny to more than 10 million workers across America the minimum wage, overtime pay, and equal pay rights."

The amendment also included anti-regulatory language that would have allowed small businesses to avoid punishment for failing to provide federally mandated information if the violation is a "first-time" offense. The amendment mirrored language of an amendment to the bankruptcy bill offered by Sen. Rick Santorum (R-PA) last March. Like Santorum's amendment, Enzi's amendment would have prohibited federal agencies from fining small businesses for "first-time" violations of paperwork requirements as long as the company complied within six months of notice of the violation (with some enumerated exceptions, such as tax collection paperwork).

The prevailing practice is that agencies almost always waive fines for first-time paperwork violations, but they retain the flexibility to fine first-time violators when circumstances warrant fines -- for example, when a business willfully violates a paperwork requirement, or when there is a need for rapid and timely compliance with an information collection requirement. The Enzi amendment would have eliminated this flexibility and actually could have encouraged even more violations by allowing small businesses to avoid reporting requirements without fear of fine until they were caught for the first time.

Businesses could have *many* "first-time" violations under the amendment. When determining whether a violator was eligible for the "first-time" exemption, an agency would have been allowed to count violations only of that agency's requirements and would not have been able to look at a business's violations of requirements from other agencies. A business could thus have failed to comply with a workplace safety requirement for the Occupational Safety and Health Administration, a toxic substance reporting requirement for the Environmental Protection Agency, and a pension fund reporting requirement under the Employee Retirement Income Security Act -- each time getting the "first-time" violator exemption.

In remarks on the senate floor, Sen. Chris Dodd (D-CT) reacted with surprise to the sweeping impact of this exemption: "That is a license, in my view, to go off and do anything, notwithstanding any other provision of law. It could wipe out all other Federal laws. Do my colleagues know which laws are being eliminated, notwithstanding any other provision of law? You could lie and cheat and steal. Am I reading this correctly?"

Kennedy went on to say that the amendment would effectively "preempt all 50 States from being able to enforce any of the Federal laws which they are mandated to enforce. I don't know where we get this idea. That could be on safe water, environmental, toxic substances. It could be on oil spills. It could be on any other matter. They preempt the States."

Like Santorum's amendment, Enzi's amendment posed a many other problems that could have threatened public protections and undermined state and federal regulations.

UMRA Foils Minimum Wage Hike

Kennedy's minimum wage amendment (S. Amdt 2063) went down in flames when Sen. Kit Bond (R-MO) raised an unfunded mandates point of order. The Unfunded Mandates Reform Act created a new point of order against any bill that would impose costs on state and local governments above a specific threshold, but the vote count required to overcome the point of order and allow a bill to move forward for a final vote was only a simple majority. Last April, Sen. Lamar Alexander (R-TN) snuck in an amendment to the Senate budget resolution that raised the vote count to a 60-vote supermajority.

Kennedy attempted to overturn the point of order raised to foil his minimum wage amendement, but the 47-51 vote to preserve the amendment fell short of the 60 votes needed. Fortunately, Enzi's amendment was also subject to an UMRA point of order and likewise failed.

As this case exemplifies, Alexander's alteration of UMRA procedures has transformed a relatively harmless procedural mechanism into an insurmountable roadblock to important protections for the public interest. Any improvements for workers, such as a real increase in the minimum wage, are at stake. If the costs to states of applying new safeguards for their own employees reach $62 million or more, bills creating those safeguards could be killed in the Senate by the UMRA point or order. In fact, since UMRA became law, one of the few statutes ultimately enacted that met the UMRA threshold was the minimum wage increase from the mid-1990s. New environmental protections, for example, which typically either rely on state and local governments as partners in enforcement activities or call on the local governments to modify their own behaviors (as polluters, as managers of water systems, sewers, and waste facilities, etc.) could be subject to an unfunded mandates point of order.

Nanotech, Genetically Modified Crop News Spotlights Regulatory Gaps

New evidence of long-term persistence of genetically modified crops and new concerns about gaps in monitoring of nanotechnology underscore the risks from failing to embed the Precautionary Principle in regulatory policy.

The first of the two developments is the stunning revelation from a British study that genetically modified crops "contaminate the countryside for up to 15 years after they have been harvested," according to the British newspaper *The Independent*. Researchers studied five sites across the UK in which genetically modified oilseed rape had been cultivated for one season but later turned over to conventional crops. The researchers found that the GM crops persisted in those fields years after they had been harvested: there were, on average, two GM rape plants per square meter nine years later and one plant per square meter 15 years later.

The second major development is a pair of announcements of gaps in the monitoring of nanoparticles at a recent Environmental Protection Agency nanotechnology workshop held Oct. 26-28, as reported by BNA's *Daily Report for Executives*:

- Federal agencies currently lack methods to monitor environmental releases of nanoparticles, declared Mihail Rocco, co-chair of the National Science and Technology Council, at the opening of the workshop. Although there are initial indications that some engineered nanoparticles may pose little risk to consumers because they are embedded so firmly into the final product, Rocco observed that environmental releases of the particles from the manufacturing process are not being monitored. "We do not even monitor" environmental releases of nanoparticles, Rocco added, "yet we know they can go to the brain" and potentially cause health damage equivalent to the known harms of ultrafine particles. Another participant added that "some companies are incinerating carbon nanotubes," some types of which have been shown to damage the lungs of laboratory rodents.

- Another workshop presentation covered developing research into the ways that nanoparticles can pass through skin, causing inflammation and potentially other health consequences. Nancy Monteiro-Riviere, a professor at North Carolina State University, presented results from an ongoing examination of a range of engineered nanoparticles and the conditions that affect the speed with which they enter the skin. Andrew Maynard, scientific advisor to the Woodrow Wilson International Center for Scholars' nanotechnology project, told BNA that toxicologists are not accustomed to studying "all aspects of nanoparticles, including their size, shape, and charge" but need to begin doing so. "If we can't characterize the material we're dealing with," he told BNA, "we can't say anything serious or significant about them." The finding that some nanoparticles can enter through the skin is alarming, given that some products meant to be applied on the skin, such as sunscreen and baby products, are on the market with nanoparticles.

Brave New World, Strange New Risks

Both new developments spotlight the new risks created by the emergence of advanced technologies and the insufficiency of current regulatory policy to address those risks. The potential harms to the public health and the environment may, in some cases, be irreversible.

Nanoparticles may, as was pointed out in the EPA workshop, pose risks similar to ultrafine particles released through combustion and welding, which are known to cause a range of health problems that include respiratory and cardiac ailments. Other potential risks and uncertainties include the following:

- "Once in the blood stream, nanoparticles can 'move practically unhindered through the entire body,' unlike larger particles that are trapped and removed by various protective mechanisms."
- "During pregnancy, nanoparticles would likely cross the placenta and enter the fetus."
- "In water, nanoparticles spread unhindered and pass through most available filters. So, for example, current drinking water filters will not effectively remove nanoparticles."
- "Even in soil, nanoparticles may move in unexpected ways, perhaps penetrating the roots of plants and thus entering the food chains of humans and animals."
- "The smaller the particle, the larger its surface in relation to its mass. . . . [T]heir large surface means nanoparticles are highly reactive in a chemical sense. . . . 'As size decreases and reactivity increases, harmful effects may be intensified, and normally harmless substances may assume hazardous characteristics.'"
- "Nanoparticles may harm living tissue, such as lungs, in at least two ways -- through normal effects of chemical reactivity, or by damaging phagocytes, which are scavenger cells that normally remove foreign substances."
- "Nanoparticles may disrupt the immune system, cause allergic reactions, interfere with essential signals sent between neighboring cells, or disrupt exchanges between enzymes . . . ."

Genetically modified crops likewise give rise to substantial concerns for public health and the environment. Different species and modifications pose specific risks of their own, but there are also several "clear reasons, a priori, to be concerned about GM crops," according to an article in the *International Journal of Occupational and Environmental Health*:

- **Gene spills:** GM crops could contaminate non-GM landraces through cross-breeding and thus "could potentially threaten biodiversity, destabilize important ecosystems, or limit the future agricultural possibilities in a given region." Such contamination could well be irreversible. Cases have already been observed in the United States, Mexico, and Australia.
- **Consequences for human health:** The risk of health hazard is "particularly [notable] when genetic engineering introduces the possibility of unpredictable physiologic or biochemical

effects in the target varieties." Such fears have increased with news of a secret industry study finding that "[r]ats fed on a diet rich in genetically modified corn developed abnormalities to internal organs and changes to their blood," harms that were "absent from another batch of rodents fed non-GM food as part of the research project."

- **Environmental harms:** Aside from biodiversity concerns, GM crops could result in secondary environmental effects, such as increased pesticide use following the planting of pesticide-resistant varieties, such as Monsanto's RoundUp Ready crops.

Yet more risks are posed by biopharming, or genetically modifying crops to produce specialty proteins for pharmaceutical and industrial uses -- essentially using crop fields as factories. Notes law professor Rebecca Bratspies, "Many such crops are currently being planted in small test plots throughout the country. Once they are fully developed and approved, these biopharm crops will be grown in the same agricultural fields that are currently devoted to producing traditional agricultural crops." Open-air field tests of biopharm crops in the Corn Belt put the food chain at risk of contamination by crops that produce substances intended for pharmaceutical or industrial uses but not human consumption.

Precaution and Obstacle

The monitoring gap in nanotechnology and the almost complete regulatory gap in GM crops are symptoms of a larger failure to adopt the Precautionary Principle as a guiding force in regulatory policy. The precautionary approach can be contrasted with the reactive approach. In the reactive approach, risk creators are generally free from regulation until it is certain or nearly certain that the risky activity results in harm; the people exposed to those risky actions are forced to bear those risks and the burden of proving the case for regulation. In the precautionary approach, by contrast, absolute certainty is not a condition precedent of regulation; inconclusive, uncertain, and preliminary scientific conclusions can be the basis of regulatory protections, and the companies undertaking the risky endeavors bear the burden of showing that their activities are appropriately safe.

The Precautionary Principle is just that -- a principle, not a system of decisional criteria that rigidly apply the same way in all cases. Because it is associated with regulation putting the public above the private interests of corporate special interests, the Precautionary Principle has become the target of a vigorous and unrelenting campaign opposing it. Critics argue, among other things, that the Precautionary Principle must be rejected because it is not ultimately dispositive of policy questions (even though many of those same critics argue that cost-benefit analysis deserves a primary role in regulatory policy, despite its lack of neutrality, on the ground that it is not meant to be ultimately dispositive but, instead, merely a *guide* to sound decisions).

Attacks on the Precautionary Principle are part of a larger campaign against regulation in the public interest, funded by corporate special interests which believe themselves to be under attack by the public's demand for protections. This larger campaign includes the use and abuse of scientific uncertainty and promotion of cost-benefit analysis as a government-wide implementation of the reactive approach.

The Precautionary Principle is often unfairly characterized as demanding an absolute ban on all emerging technologies, even though there are many precautionary approaches that can apply in any given policy setting, including the cases of nanotechnology and GM crops. For example, it is conceivable that a precautionary approach to biopharming would stop short of an absolute ban by barring open-air field testing and requiring safeguards to prevent contamination of the food chain. Similarly, precautionary approaches to the environmental release of nanoparticles could respond with monitoring requirements and treatment of nanoparticles as hazardous substances. (Stringent protective policies could even benefit the industry by stimulating innovation and developing green technologies that give the United States a competitive advantage once other countries follow the precautionary lead.)

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