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About Those Recovery Act Job Numbers

Prominently displayed in a large, green font on the front page of Recovery.gov is the number 640,329. That is the number of jobs created or saved as reported by the recipients of some $150 billion in Recovery Act funds. The placement, font size, and accompanying press release from the White House have drawn immense attention and copious media reports. However, questions about the number's accuracy degrade the count's usefulness as a gauge of the economic impact of the Recovery Act. The figure itself remains only a fragment of the information that describes how the act is improving the economy and helping unemployed workers.

Although media reports are quick to glom on to a few egregious overreporting errors, such as a 4,000-job overcount by one recipient in Colorado, a systematic analysis of the more than 150,000 recipient reports reveals not only hundreds of instances of potential overcounts, but also hundreds of instances of potential undercounts:

- 421 reports of zero job creation/retention for awards of more than $100,000 where the project was marked as "completed"
- 36 reports of less than two jobs created or retained for awards of more than $1 million where the project was marked as "completed"
- 2,691 reports of jobs created or retained where the project was marked as "not started"

Within the data, there are substantial inconsistencies in what recipients report as a job created or saved. A close reading of recipient reports makes it apparent that many recipients have not received clear instructions on how to count jobs created or saved, as several recipients wrote in narrative descriptions of Recovery Act project employment that differed from the reported number of jobs created or saved. For example, one recipient wrote that "[a]lthough no new jobs were created, employees were kept from being placed on lay off." Yet, the recipient reported zero jobs created or saved.

In another instance, the *Denver Post* noted that one recipient, the town of Frisco, CO, said its grant to purchase two laptop computers for the police "did not create any jobs. But it did make it easier for the existing officers to do their jobs properly." However, the town listed two jobs created or saved.

These inconsistencies and suspect reports indicate that there is great confusion among recipients about what they should be counting as a job created or saved by the Recovery Act. However, confusion about the definition of a "job created or saved" is not limited to those tasked with calculating and reporting the data.

Within hours of the latest release of Recovery Act recipient reporting data on Oct. 30, CNN's Wolf Blitzer was puzzled by a description of some of the jobs saved by the act.

> TOM FOREMAN, CNN CORRESPONDENT: It was a place called Wood Product Signs. They had a contract to create jobs -- to create signs for the Forest Service.... They said, they would have normally had to lay people off this summer because it's seasonal work. As it was, they were able to keep three of their regular employees and add two more, for a total of five employees for six weeks.
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> [...]
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> BLITZER: Yes. I assume, when they talk about jobs, they mean permanent jobs that people are going to have for a while, not just a temporary job.

Blitzer's assumption, while not uncommon, betrays unfamiliarity with the methodology by which job counts are to be calculated by recipients. According to Office of Management and

Budget (OMB) guidance on calculating the number of jobs created or saved, recipients must report the information as "full-time equivalents," or FTEs. FTEs are calculated by dividing the total number of hours worked on a Recovery Act project by the number of hours a full-time employee would work in a single quarter. For example, there are 520 hours in a forty-hour-per-week job in a single quarter. If a recipient paid two employees to work a total of 1,040 hours from July 1 to Sept. 30, the recipient would report two FTEs. If a recipient paid two part-time employees to work a total of 520 hours in that same time period, the recipient would report one FTE. Not included in reported data are the number of hours worked or the number of hours considered by the recipient to be full time, leaving the news media and the public to erroneously conclude that an FTE reported by one recipient is comparable to an FTE reported by another. Differing conceptions of what a "job" is, among recipients and the public, is only one factor obscuring the act's impact on the economy.

The information that OMB and the act require recipients to report does not describe the quality of the jobs created or saved or who is being employed by Recovery Act funds. As noted above, job counts are reported as full-time *equivalents*; that is, two half-time jobs would appear as one full-time job. Neither information on benefits nor wage data accompanies job counts, clouding the degree to which the act is creating employment sufficient to fully sustain families.

Additionally, skill levels of employed workers remain unknown. Nuclear waste cleanup jobs require more training and experience than custodial work, yet in the eyes of Recovery Act reporting, jobs created in both fields are equal. Also absent from reported employment is information on the race, income, geographic location, and previous employment status of employed workers.

Equally striking is that OMB advises recipients of Recovery Act funds to only count jobs saved if those employees were to be laid off. In other words, if an entity used Recovery Act money to continue employing existing workers, then no jobs would be created or saved, according to OMB. These myriad dimensions of the employment data are critical to understanding the Recovery Act's ultimate impact on the employment picture.

Facile dollars-per-job calculations ignore these elements of employment, and, crucially, neglect to account for jobs created or saved beyond the first-level subrecipient. Existing reporting guidelines require that only entities that receive funds directly from the federal government (prime recipients) and the entities who receive Recovery Act funds directly from those prime recipients (first-tier subrecipients) report job counts. Yet, it is probable that in many projects, those first-tier subrecipients will subcontract work and obtain goods and services to execute their projects.

For example, the Texas Department of Transportation (TxDOT) may receive road repair funds from the federal Department of Transportation (DOT) and subsequently re-grant those funds to the City of Dallas. Dallas will likely employ contractors to conduct road repairs. In this scenario, TxDOT (the prime recipient) will report the number of jobs it created or saved and the number of jobs created by the City of Dallas (first-tier subrecipient). Jobs created or saved by the contractors hired by Dallas will not be counted.

In addition to the jobs created or saved by Recovery Act fund recipients (direct jobs), the enhanced buying power of the directly employed will spur job growth in other sectors of the economy (indirect jobs). For example, a construction worker who was not laid off because his company received an award will have money to repair his car, buy a new pair of work boots, and maybe take his family out to dinner. The auto mechanic, shoe salesman, and waiters in the restaurant will be less likely to lose their jobs, yet those jobs are not included on the Recovery.gov homepage.[1]

The bottom-line jobs count is an unreliable indicator of the Recovery Act's success, not only because its calculation is less than scientific, but also because it is just one component of the act's impact on employment and lives of people in need. Excluded by the number are the hundreds of thousands of workers who are receiving unemployment insurance and can continue to provide for their families; the tens of thousands of individuals who can see a doctor because states have increased Medicaid funds; and the countless children who will have enough food to eat because of increased nutrition assistance funding. Also embedded in the economic effects of the act beyond employment and short-term ameliorations are the investments in infrastructure, green energy, and health care information technology that will enable decades of increased economic growth capacity.

The eye-catching number on Recovery.gov has clouded these important features of the Recovery Act, but it is just one indicator (and a rough one at that) of the ultimate impact of the act on the economy, and ultimately the families it was created to help.

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[1] They are, however, counted by the president's Council of Economic Advisors (CEA) and are reported on a quarterly basis. According to the Oct. 30 White House press release, the CEA estimates that one million jobs have been created to date by the Recovery Act. This total includes direct and indirect jobs created by Recovery Act contracts, grants, loans, and jobs created by tax cuts and direct aid to individuals such as unemployment insurance, Medicaid, and Food Stamps.

OMB Watch Submits Comments on Contractor Database

On Nov. 5, OMB Watch submitted comments and recommendations to the General Services Administration (GSA) on the new Federal Awardee Performance and Integrity Information System (FAPIIS). Required by the FY 2009 National Defense Authorization Act (NDAA), the database is supposed to help contracting officials make better award determinations by providing timely information on the honesty and reliability of contractors.

While OMB Watch has long supported the creation of a responsibility database, the group found several problems with the proposed rule. Problem areas included the planned structure of the database and its relationship to other contracting databases; the quality and display of the information; the lack of specified training for contracting officials on how to use the database; and the inability of the public to access the database.

According to the proposed rule in the *Federal Register*, Section 872 of the FY 09 NDAA calls for the GSA "to establish and maintain a data system containing specific information on the integrity and performance of covered Federal agency contractors and grantees." The provision also "requires awarding officials to review the data system and consider other past performance information when making any past performance evaluation or responsibility determination." Ideally, the performance database would provide contracting officers (CO) a one-stop shop with easily measurable findings that they could consult when attempting to choose between various contractors. The proposed rule falls short in several of these areas, according to OMB Watch's comments.

The proposal creates yet another separate performance database that combines some new performance information and some information already available in other databases. In fact, the proposed rule calls for contracting officials to consult both FAPIIS and the Past Performance Information Retrieval System (PPIRS), an already existing database, when making a bid determination. The comments to GSA noted that rather than having to search multiple databases, COs should be able to get all the pertinent data they require to make a sensible decision from a single interface that is fed by a system of distributed databases that are linked together, web-accessible, and fully searchable.

However, simply collecting all the contractor information stored in the government's many contracting databases and funneling it into one interface would not solve the problem of the lack of data coherence among the information collected. The contractor data collected by the government needs extensive revision and standardization before it can be useful to contracting officials, OMB Watch noted. In its comments, the group said the government should develop a quantified scoring system to help COs sift through the millions of compliance records that currently present different information in different ways, complicating an already difficult task and overburdening an overworked and understaffed government contracting corps. Making it even more important to standardize the information is the need for the government to broaden the scope of the information presented in the database.

The current proposal limits the amount of information a CO could view on any one contractor in several ways. While the language establishing FAPIIS requires the database to provide many types of performance data, it establishes a high threshold for the inclusion of information and an arbitrary time limit on that information populating the database. The rule requires contractors to report information on civil, criminal, and administrative actions only if the contractor settles the issue with an admission of fault, which rarely happens, as dispute settlements usually purposefully lack an admission of guilt. OMB Watch's comments make clear that the rule should require the database to include all civil, criminal, and administrative proceedings, regardless if the outcome includes an admission of guilt. The arbitrary time limit of five years for information to stay in the database should also change, the group said. While contracting officials should not necessarily hold past transgressions against a contractor, it is essential for a CO to gain perspective on a judgment by seeing a company's entire history.

Furthermore, there is no requirement for COs to go through any training or receive any detailed guidance on the appropriate use of the new database. Without knowledge of how to evaluate the

various findings provided through FAPIIS, contracting officials are likely to ignore the information in the new performance database or only pay it a cursory consultation. This is contrary to the purpose of the database, as the information provided should form the basis of a rigorous responsibility review. OMB Watch recommended that the proposal stipulate training for contracting officials on how to use the new database properly.

Lastly, the proposed rule allows only government contracting officials to access the new performance database. Public access to accurate and timely data about the federal contracting process is essential to efficient and effective implementation and oversight of federal contracting. Indeed, there is no reason to withhold from the public all information about how federal contractors are performing. OMB Watch's comments said the proposal should require public disclosure – with pertinent safeguards to protect sensitive business information and within the scope of applicable laws – of contractor performance information. This would foster better decisions from contracting officers and more competition between contractors, as both would become more responsive to increased public scrutiny of contracting decisions and processes.

Other watchdog groups are echoing OMB Watch's recommendations and are calling for sweeping improvements of the proposed rule to create FAPIIS, including the Project on Government Oversight and the Center for American Progress Action Fund. Without some implementation of these recommendations, the government may simply create another layer of bureaucracy that will at best become an annoyance to contracting officials or at worst stifle their important work.

House Passes Chemical Security Bill

More than eight years after the 9/11 terrorist attacks, the House approved legislation that seeks to greatly reduce the risks of terrorist attacks on chemical plants and water treatment facilities. The Chemical and Water Security Act of 2009, passed in a 230-193 vote, includes measures long sought by labor, environmental, and public interest groups, including greater worker participation and the authority for states to implement stronger security standards. However, the House bill lacks measures to ensure an accountable security program that is not hobbled by excessive secrecy.

The House-passed bill, H.R. 2868 (sponsored by Rep. Bennie Thompson (D-MS)), will require covered facilities to assess potentially safer chemicals or processes that could reduce the consequences of a terrorist attack. By removing a toxic substance that might poison thousands if released, a facility becomes less of a target to potential terrorists. Under certain circumstances, the bill gives the Department of Homeland Security (DHS) or the U.S. Environmental Protection Agency (EPA) the authority to require a facility to convert to a safer technology identified in the plant's assessment. If the facility would be forced to relocate or be hurt economically, it would avoid the requirement to convert.

Following months of work by several House committees, the bill passed on Nov. 6 without a single Republican vote. Members of the House Homeland Security Committee and the Energy and Commerce Committee worked out the bulk of the comprehensive security bill, with major contributions from both the Transportation and Infrastructure and Judiciary Committees.

During the House floor vote, Republicans continued attempts to remove key portions of the legislation and replace the measure with an extension of the current security program. The current program, known as the Chemical Facility Anti-Terrorism Standards, is regarded by many public interest advocates as fatally flawed and does not cover thousands of water treatment facilities.

Several compromises were negotiated in the weeks leading up to the floor vote, including the elimination of a citizen suit provision that had allowed citizens to sue individual companies for noncompliance. Instead, a petition process will be created, through which citizens may request the government to investigate a specific facility. Citizens may still sue the government for failing to implement the law.

Most concerning to open government advocates is the expansive definition of what types of information may be considered "protected," and thus not disclosed to the public. The bill grants the secretary of DHS and the EPA administrator discretion to conceal facility compliance information should they deem that the information places the facility in danger. This would prevent the public from even knowing what facilities are covered by the law, let alone whether a facility is in compliance or not. Government inspection histories and information on violations and penalties at specific facilities could also be concealed. Should DHS and EPA withhold these records, the lack of compliance information would create an immense barrier to public accountability. Some degree of transparency is necessary to ensure the effectiveness of the government program and to assure communities that nearby plants are safe.

Allowing the public to hold the government and the facilities accountable does not require the release of information that could threaten public safety. Public interest advocates have long acknowledged that information that poses a real threat should remain secret. However, open government advocates believe the disclosure of basic regulatory data would not reveal any specific vulnerabilities at chemical plants, nor would it increase the risk to those living around facilities.

Certifications, notices of violation, and other procedural materials are of no use to terrorists. On the other hand, such information can be used by the public to sustain continual improvements to security. The information would allow the public to stay several steps ahead of those planning an attack by using compliance data to push facilities and the government to improve their implementation of the law. An informed public is an engaged and vigilant public. Without public pressure, vulnerabilities may persist and worsen, increasing daily the threat to workers and communities. This basic accountability is crucial to ensuring that the program is accomplishing what it is designed to accomplish – the security of our plants, workers, and citizens.

Despite the lack of clear transparency or disclosure requirements, the bill greatly strengthens current security measures. The bill adds thousands of drinking water and waste water treatment plants to its scope. The EPA will work with DHS to develop similar security standards for these plants as those put in place for chemical plants. Additionally, the bill takes advantage of the technical expertise and creativity of thousands of plant workers by including them in the assessment of a site's security risks and the development of a site's security plan. Labor advocates also won protections for workers from excessive and exploitative background checks.

The focus now turns to the Senate, where no chemical security legislation has been introduced. Sen. Frank Lautenberg (D-NJ) and Sen. Susan Collins (R-ME) have both signaled their intentions to separately introduce such legislation this session.

House Committee Marks Up State Secrets Bill, Sends It to the Floor

On Nov. 5, the House Judiciary Committee began markups on a bill that would codify standards for when and how the executive branch may apply the state secrets privilege in civil litigation. Although the Obama administration has promised certain limitations on its own use of the privilege, civil liberties and open government groups continue to call for legislation to address the privilege. Ultimately, the committee approved the bill on an 18-12 vote and referred the legislation to the full House.

The State Secrets Protection Act of 2009 (H.R. 984) was introduced by Rep. Jerrold Nadler (D-NY). The purpose of the bill is to allow executive branch secrecy claims to be examined in a secure manner. The markup was the first time the committee had addressed the issue since the bill was referred to it in June.

The state secrets privilege was created by the U.S. Supreme Court's decision in *United States v. Reynolds* (1953). Historically, the privilege has typically been invoked to withhold specific pieces of evidence from being reviewed by a judge for possible introduction at trial. Officials in the Bush administration interpreted the privilege more broadly and repeatedly used it to pressure courts to dismiss entire cases, arguing that any and all records related to the government's defense would be state secrets. Despite the privilege's court origins, few judges have been willing to question or limit its use. Critics contend that the privilege has been misused to cover up violations of U.S. and international law, such as wiretapping programs, torture, and rendition. In addition, the public learned that the classified material in the original *Reynolds* case, once declassified in 2000, actually contained no secret information.

Judicial Review

Nadler stated that the bill was an effort to restore "appropriate balance between our three branches of government." The effort to ensure this balance through judicial review is a key part of Nadler's legislation.

The bill would prevent the outright dismissal of an entire lawsuit without an independent review of the evidence deemed privileged. The legislation would require the White House to submit the information it deems a state secret to a federal judge, who would conduct an independent review of the material. Further, if the court believes the executive branch claim is legitimate, then the court can require a non-privileged substitute of the evidence to be created, if possible. Refusal to submit evidence would result in a finding against the government.

Several witnesses, including federal judges and a former Central Intelligence Agency director, submitted testimony in June to the Subcommittee on Constitution, Civil Rights, and Civil Liberties that the courts have proven themselves competent to safeguard sensitive information while administering justice. Congress has provided guidance to the judiciary in the past for handling sensitive information in the Freedom of Information Act and the Classified Information Procedures Act.

During the markup process, judicial review turned out to be a point of contention. Rep. Adam Schiff (D-CA) put forward an amendment that would have required courts to give "due deference" to the government's assertion that disclosure would harm national security. This amendment would essentially codify the existing standard most commonly applied by the judicial branch, which usually accepts the state secrets claim without review of evidence. The amendment failed, however, on a vote of 12-17.

The Obama administration issued new policies and procedures for invoking the privilege in late September. While the administration's policy marked the first time a president has publicly clarified the Supreme Court decision in *Reynolds* and set certain boundaries, several groups have indicated concern that the administration left itself broad room to apply the privilege without sufficient oversight. Although Attorney General Eric Holder's press release on the policy discussed judicial review, the policy itself failed to address a court's ability to review evidence in a state secrets assertion. Particularly troubled by the administration's continued application of the privilege, the American Civil Liberties Union stated, "On paper, this is a step forward. In court however, the Obama administration continues to defend a broader view of state secrets put forward by the Bush administration."

Legislation on the state secrets privilege is currently pending in the Senate, as well. The Senate bill (S. 417) directs courts to weigh executive branch state secrets claims over the claims of the plaintiff. The House bill, however, takes an approach aimed at retroactively narrowing the application of the privilege. The House legislation seeks to reopen cases, as far back as 2002, in which the privilege was claimed.

Regardless of what promises or policies the Obama administration creates, legislation is key to preserving changes that apply to future administrations and enforcing them with proper oversight.

House Judiciary Committee Approves Strong PATRIOT Act Reform

In a 16-10 party-line vote on Nov. 5, the House Committee on the Judiciary approved H.R. 3845, the USA PATRIOT Amendments Act of 2009. The legislation contains several important reforms of controversial surveillance powers granted in the wake of the 9/11 terrorist attacks. Republicans on the committee claimed that "the legislation would hinder law enforcement and intelligence agencies in fighting terrorism."

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) was first passed by a landslide after the 9/11 terrorist attacks to provide law enforcement and intelligence agencies additional powers to thwart terrorist activities; it was reauthorized in 2005. The legislation has been criticized by many from across the ideological spectrum as "one of the most significant threats to civil liberties, privacy and democratic traditions in U.S. history" and as unconstitutional, with certain provisions violating the rights of innocent persons, especially under the First, Fourth, and Fifth Amendments.

Judiciary Chair John Conyers (D-MI), along with Reps. Jerrold Nadler (D-NY), and Robert Scott (D-VA), introduced H.R. 3845 to reevaluate the PATRIOT Act, as several of the law's provisions are due to expire at year's end. The bill contains several significant reforms of the powers granted under the original PATRIOT Act. Conyers described the goal of the legislation as "craft[ing] a law that preserves both our national security and our national values." The Obama Justice Department has encouraged the reauthorization of all provisions.

Among the most touted of the reforms provided by the bill, H.R. 3845 would permit the so-called "lone wolf" provision to sunset. This authority removed the requirement that an individual needed to be an agent of a foreign power to be placed under surveillance by intelligence officials and permitted surveillance of individuals with a much lower evidentiary threshold than allowed under criminal surveillance procedures. It was intended to allow the surveillance of individuals believed to be doing the bidding of foreign governments or terrorist organizations, even when the evidence of that connection was lacking. The Justice Department maintains the "lone wolf" authority is necessary, even though there is no evidence that it has been used. Others have likened it to "aim[ing] a Howitzer at a gnat," when pre-existing powers are more than adequate to monitor suspected terrorists. "[Law-enforcement and intelligence agencies] didn't need new 'lone wolf' powers; they needed to understand the powers they already had," said Julian Sanchez in a recent *Reason Magazine* commentary.

Opponents of the lone wolf provision also believe that existing Title III criminal surveillance and FISA authorities are more than sufficient to attain the goals of the lone wolf provision while more effectively protecting the rights of innocent Americans.

H.R. 3845 also restricts the use of national security letters. According to a Congressional Research Service report from Oct. 28, available through the Federation of American Scientists, "National security letters (NSL) are roughly comparable to administrative subpoenas.

Intelligence agencies issue them for intelligence gathering purposes to telephone companies, Internet service providers, consumer credit reporting agencies, banks, and other financial institutions, directing the recipients to turn over certain customer records and similar information."

Under current law, intelligence agencies have few restrictions on the use of NSLs, and in numerous cases, they overuse the authority. An FBI inspector general report in 2007 "found that the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies." The reform provisions seek to create greater judicial scrutiny of NSL use, as the relevant agency would need to demonstrate to a judge the connection to foreign actors, as well as the need for a gag order, prior to issuing the NSL.

In other reform provisions, the legislation would require the government demonstrate to a judge that the target of a roving wiretap is a single person in order to obtain a warrant. An even stricter evidentiary standard is mandated to obtain library and bookstore records. The roving wiretap and records seizure authorities are set to expire at the end of 2013 rather than in 2009.

The House bill also establishes new reporting and audit provisions to facilitate congressional oversight of surveillance.

With the committee stage completed, passage of strong reform legislation is likely in the House. However, the bill approved by the Senate Judiciary Committee in October contains much more modest reforms, would retain the lone wolf provision, and is, in general, much more in line with the wishes of the administration. Should both bills pass and go into conference to be reconciled, it is unclear which approach would prevail.

Conyers urged Congress to seize the opportunity that reauthorization presents to reform the law. He said, "With several provisions of the Patriot Act expiring at the end of this year, we have the opportunity to fix the most extreme provisions of that law and provide a better balance. Our legislation passed today preserves government legal powers where they are needed most, but reins in some of the most problematic aspects of existing law."

EPA to Overhaul Air Pollution Standards

The U.S. Environmental Protection Agency (EPA) will revise existing standards for six major air pollutants, according to top agency officials. The changes could yield major public health benefits.

Speaking at a conference Oct. 26, EPA Assistant Administrator for Air and Radiation Gina McCarthy pledged that the agency would review between 2008 and 2011 six major air pollution standards, including one updated late in 2008.

McCarthy emphasized the importance of a multi-pollutant strategy. She said a wholesale review is needed "to actually tell a whole picture, and not individual pollutant-by-pollutant stories," according to BNA news service (subscription required).

McCarthy's comments portend a flurry of rulemaking at EPA. Revising major air pollution standards is a significant undertaking: EPA must collect and distill clinical and epidemiological studies, seek out the advice of air pollution and public health experts, prepare a litany of legal and policy supporting documents, receive intra-administration clearance, and solicit comment from the public and regulated communities.

The complexity of the process is often well worth the effort, according to public health advocates. Clean air standards are among the most beneficial set by government agencies. Even modest improvements in air quality can dramatically reduce adverse health effects such as asthma attacks and heart attacks. Currently, however, the air standards are either out of date or too weak to generate significant new public health gains.

The Clean Air Act names six air pollutants under the National Ambient Air Quality Standards (NAAQS) program: ozone, particulate matter, lead, sulfur dioxide, nitrogen dioxide, and carbon monoxide. For each of the six pollutants, EPA must set standards sufficiently protective of both public health (called the primary standard) and public welfare (called the secondary standard). The Clean Air Act requires EPA to review and, if necessary, revise the standards every five years.

In the past, EPA repeatedly failed to abide by the five-year schedule, sometimes letting a decade or more pass before reviewing a specific pollutant. For example, EPA has not completed a review of the standards for sulfur dioxide since 1996 or for carbon monoxide since 1994. In both of those reviews, EPA chose not to change standards first set in the 1970s. Current reviews for both pollutants are in their early stages.

Early signs indicate the Obama administration will make the NAAQS program a higher priority. Although EPA has not completed a review for nitrogen dioxide since 1996, it proposed revisions to the standards on July 15. The agency is under a court order to set final standards by January 2010.

The new standards would target short-term emission spikes such as those near major highways. "People who live or go to school near these thoroughfares are particularly at risk," according to the American Lung Association (ALA). The ALA is asking EPA to set an even stricter standard for short-term nitrogen dioxide emissions than EPA proposed in July.

Although each of the standards for ozone, particulate matter, and lead has been revised since 2006, the Obama administration will continue to review them, EPA officials say. EPA may find additional revisions necessary because of interference by President Bush's White House.

EPA revised the ozone standards in March 2008. Although EPA tightened both the primary and secondary standards to 0.075 parts per million (ppm) from 0.084 ppm, EPA's scientific advisors

had recommended an even lower level. The 2008 revision to the ozone standard was the first since 1997.

EPA had originally sought to set a separate secondary standard tailored to higher ozone exposure levels seen during summer months but was undercut by the White House. During the customary White House review of the rule, conducted by the Office of Information and Regulatory Affairs (OIRA), then-OIRA administrator Susan Dudley asked President George W. Bush to overrule EPA on the secondary standard. Bush agreed with Dudley and forced EPA to abandon its original decision and make the secondary standard the same as the primary standard.

Although ozone is not scheduled for another review until 2013, reviewing the standards ahead of the five-year schedule has been an early priority for current EPA Administrator Lisa Jackson. The agency plans to propose revisions in December. If EPA chooses to lower the standard to the high end of the range proposed by its scientific advisors, 0.070 ppm, it could prevent at least an additional 300 premature deaths and 610 heart attacks annually, according to agency estimates. The proposal is currently under review at OIRA.

OIRA also interfered in EPA's 2006 revision to the air quality standards for fine particulate matter. As in the ozone case, EPA chose to lower the standards, but it ignored the advice of its scientific advisors who had called for an even lower exposure level. OIRA was accused of channeling industry objections into the final rule. The rulemaking docket also shows that OIRA edited the text of the final rule, removing a sentence that said reducing fine particulate matter exposure "may have a substantial impact on the life expectancy of the U.S. population."

Particulate matter is perhaps the most dangerous air pollutant to which humans are regularly exposed. According to BNA news service (subscription required), a recent EPA study found that "1.7 percent to 6.7 percent of all deaths in 2007 in 15 cities were attributable to long-term exposure to fine particulate matter." Lowering the standard "could reduce the risk of mortality from long-term exposure to the pollutant by as much as 89 percent in some urban areas, according to the assessment."

A federal court struck down the 2006 fine particulate matter standards, finding that EPA had not sufficiently justified its decision. EPA expects to propose new standards in July 2010 and finalize them by April 2011.

Lead is the only air quality standard EPA will not formally review during the Obama administration. The current standard for lead was finalized in November 2008. EPA tightened the exposure level to 0.15 $\mu g/m^3$ (micrograms per cubic meter), from 1.5 $\mu g/m^3$. The adjustment marked the first time EPA had revised the standard since it was first set in 1978.

However, EPA is in the process of reconsidering the national network of lead pollution monitors. In addition to setting a new lead standard in 2008, EPA announced it would add new pollution monitors to help regulators identify polluted areas. OIRA pressured the agency to double the emissions threshold for determining where monitors should be placed. The change

means state and local officials will not be required to place new lead pollution monitors near at least 124 facilities that emit lead. EPA announced July 22 that it would reconsider the threshold.

OSHA Levies a Record Fine against Oil Giant BP

On Oct. 30, the U.S. Occupational Safety and Health Administration (OSHA) announced it was issuing a proposed $87.4 million fine against BP Products North America Inc. (BP) for failure to remedy workplace hazards. The proposed fine is the largest ever issued by the agency and results from a 2005 explosion at an oil refinery that killed 15 workers.

In March 2005, safety violations at BP's Texas City, TX, refinery caused a massive explosion that killed 15 and injured 170 people, according to an OSHA press release announcing the fine. BP and OSHA agreed to a settlement in September 2005 that required the company to correct potential hazards to employees like those that had led to the explosion.

According to an Oct. 30 *New York Times* article, investigations of the cause of the explosion concluded BP drastically cut costs on safety, had antiquated equipment, and did not rest fatigued employees who had worked 29 days straight to meet production schedules. BP has settled more than 4,000 civil claims since the explosion and agreed to pay more than $21 million in penalties as part of the settlement with OSHA, according to the *Times*.

The announcement of the fine comes after a six-month investigation. OSHA issued the refinery 270 "notifications of failure to abate" the hazards that were part of the settlement, resulting in $56.7 million in proposed penalties. According to the press release, the agency found another 439 new "willful violations" of industry standards for safety management processes and systems. OSHA assessed another $30.7 million in proposed penalties for these additional violations.

Acting Assistant Secretary of Labor for OSHA Jordan Barab said, "BP was given four years to correct the safety issues identified pursuant to the settlement agreement, yet OSHA has found hundreds of violations of the agreement and hundreds of new violations. BP still has a great deal of work to do to assure the safety and health of the employees who work at this refinery."

BP has appealed the fine to the Occupational Safety and Health Review Commission, an independent administrative court that hears appeals of OSHA citations and penalties, according to a BP press release issued Oct. 30. The refinery manager said, “We continue to believe we are in full compliance with the Settlement Agreement, and we look forward to demonstrating that before the Review Commission. While we strongly disagree with OSHA’s conclusions, we will continue to work with the agency to resolve our differences.”

According to a *Dallas Morning News* article, criminal charges were sought against BP by blast victims in a separate action. As part of a plea agreement between BP and the Department of Justice (DOJ), the criminal charges against BP were settled if the company met the terms of the agreement with OSHA. In addition, BP pleaded guilty to one violation of the Clean Air Act, was

sentenced to three years probation, and was fined $50 million. The criminal plea agreement was approved in March by a federal court.

Brent Coon, an attorney for those injured, said that a finding by the review commission that BP did not comply with the OSHA agreement would mean that BP is not in compliance with the criminal settlement. According to the *Morning News* article, the attorney plans to ask DOJ to revoke BP's probation and allow the criminal cases to proceed.

The criminal plea agreement was reached over the objections of many of the blast victims. In July 2008, a safety investigation report filed as part of the criminal action against BP concluded that the safety violations at the plant "remain so serious that they could result in another major accident," according to a July 30, 2008, BNA article (subscription required). BNA quotes the report as arguing, "[t]here is not a valid engineering or practical excuse for such continued violations." The violations "include the same violations which caused the March 2005 explosion, 15 deaths and hundreds of injuries." The victims of the explosion were pressing for a $1 billion fine instead of the $50 million the DOJ agreed to in the plea agreement.

The 2005 explosion has already resulted in about $71 million in penalties against BP and even more in claims settlements. The most recent proposed penalties may be reduced by the review commission, and it is possible that BP will contest the resulting fines in court after the review. BP also incurs the costs of rebuilding the Texas City plant. These substantial costs make one wonder if BP made good business choices by not taking the time and effort to put in place programs to protect its workers and to comply with OSHA's health and safety requirements.

Nonprofits Play Role in Legislative Push to Remove Barriers to Voting

Nonprofits are playing a key role in a recent legislative push to remove barriers from the voting process. Various organizations have kept voting issues at the forefront by continuously informing the public about policies and tactics that disenfranchise voters. These organizations' efforts focus on military voting concerns, online voter registration, and election reform as a means to ensure that all citizens are able to vote as easily as possible.

On Oct. 28, President Barack Obama signed the Military and Overseas Voter Empowerment Act, which is designed to address barriers affecting military and overseas voters in federal elections by allowing them to access voter information online. It passed Congress with bipartisan support from legislators who "decried an antiquated voting system that left as many as one out of four overseas ballots uncounted," according to *Roll Call*.

This is a major victory for nonprofits that have been trumpeting this issue. Count US In, a nonprofit organization that addresses issues with absentee voting for military personnel, has been active in spreading awareness of problems that disenfranchise our men and women in uniform. The group provides website links to help service members find information on

candidates, voting organizations that can help address individual issues, and obtaining absentee ballots.

The Overseas Vote Foundation, another nonprofit organization, has also been active in ensuring that Americans overseas are able to exercise their right to vote. The organization provides nonpartisan voter registration, state-specific voter information guides, help desk services, an election official directory, and assistance with ballot requests for U.S. overseas citizens and military members and families. The group's goal is to help overseas citizens and military members vote easier, faster, and more accurately. Overseas Vote Foundation also keeps readers abreast of the latest news concerning absentee voting.

There has also been a major push to implement online voter registration. A bill currently before Congress would "require all states to offer online voter registration by 2012," according to *Roll Call*. This would be a major challenge for the vast majority of the country and would require most states to significantly upgrade their procedures. Currently, "only six states offer some form of online voter registration, while half allow voters to verify their registration online. For most states, the voting system is a hodgepodge of snail mail, voter registration drives and polling places," notes *Roll Call*.

The online voter registration bill would bring the voter registration process in line with the convenience of other aspects of daily living. "Many voters expect to be able to register to vote online as part of their normal routine," Rep. Zoe Lofgren (D-CA), the sponsor of the bill, told *Roll Call*. "They are used to the convenience of online tools in their daily life and registering to vote should be just as easy and accessible as banking and bill paying," Lofgren said.

Katie Blinn, the assistant director of elections in the state of Washington, told BNA (subscription required) that "[v]oters are eager to be able to register online." She said that "a link on the website of Washington's Secretary of State drew new voter registrations at the rate of 1,500 a day after the option for online registration was announced. In all, 158,000 new voters registered online in Washington last year, the first year that option was available."

There are also election reform efforts in localities around the nation. On Nov. 3, the City Council of the District of Columbia gave final approval on legislation that will implement no-excuse early voting and allow individuals to register to vote at the polls on Election Day. It will also encourage young people to vote by allowing 16-year-olds to pre-register and 17-year-olds who will be 18 by the general election to vote in the primary, according to Common Dreams, a nonprofit citizens' organization and media outlet.

FairVote, a nonprofit that seeks to provide universal access to electoral participation, was active in urging the D.C. Council to pass the legislation. The organization testified before the Council in support of the Omnibus Election Reform Act of 2009. FairVote told the Council that "this bill will ... lay the groundwork for a 21st Century voter registration system that anticipates participation as opposed to the current 19th Century system that places hurdles along the way to the ballot box."

Study Reveals the Focus on Lobbyists Could be Flawed

According to a study conducted by OMB Watch and the Center for Responsive Politics (CRP), 1,418 federally registered lobbyists "deregistered" with Congress in the second quarter of 2009 (between April and June). This is a considerably higher rate than that seen in the average reporting period, when a few hundred lobbyists terminate their active status. The groups cautioned that this finding does not necessarily mean that the Obama administration's policies on lobbyists are leading to fewer outside influences on government policy, or that those policies are creating more transparency.

The groups' joint press release states, "This drop occurred shortly after President Barack Obama issued Executive Order 13490, which created new restrictions on former lobbyists appointed to the executive branch." Lobbyists terminate their registrations for a variety of reasons, meaning that the data does not provide enough context to provide a direct correlation to the executive order, which Obama issued in January.

The president promised during his campaign to crack down on the influence of lobbyists in his administration. He followed through with his promise on his first day in office with the executive order, which, among other things, limits hiring federal lobbyists who have lobbied on a particular matter or specific agency during the previous two years. Some, however, have criticized the order as artificially reducing influence peddling. Instead, they argue that the order has had a perverse effect by forcing lobbyists to deregister and do their work under a different name.

To test the hypothesis that lobbyists were deregistering, OMB Watch and CRP conducted their analysis. Lee Mason, OMB Watch Director of Nonprofit Speech Rights, reiterated that the data are difficult to interpret but also emphasized that the timing of the increase in terminations needs to be more carefully considered. "While we can't draw a direct link between the president's executive order and the increased pace of terminations during the second quarter of 2009," he said, "we can say that they came at a most controversial time."

The study found that the number of terminations is higher than the number of new registrations. "All told, there have been 18,315 lobbyist termination reports filed since January 2008. Meanwhile, only 15,310 lobbyists reactivated their registrations after previously filing termination reports. This leaves a total of 3,005 lobbyists who have effectively 'de-registered,' of which more than half (1,691) have come since April 2009," according to the group's press release.

As part of their study, the groups also flagged a problem with terminology that often leads to confusion and decreases lobbying transparency. The term "deregistration" is often used in the media and by those in the lobbying community; however, on the disclosure forms of the Senate and the House, there is no such term.

OMB Watch and CRP determined that the most accurate way to gauge the number of active lobbyists terminating their registrations requires tracking lobbyists' names listed on line 23 of

the Lobbying Disclosure Act's (LDA) form (LD2, which tracks lobbying activity on behalf of a client) and standardizing the data for each individual lobbyist. "With no unique identifier per individual lobbyist and with no 'deregistration' field, verifying and enforcing compliance with the rules is made much more difficult," the groups noted.

The organizations also reinforced the view that the requirements for reporting lobbyist information are in desperate need of improvement. As asserted in the groups' press release, the shortcomings of the current disclosure system are leading to real-world problems. According to OMB Watch and CRP, "[T]housands of lobbyists who appear to have left their line of work may not have actually done so. At the federal level, many people working in the lobbying industry are not registered lobbyists, instead adopting titles such as 'senior advisor' or other executive monikers, thereby avoiding federal disclosure requirements under the Lobbying Disclosure Act."

Additional information disclosure that would allow the public to clearly identify registrations would include details such as: who is registering, who a lobbyist's client is, and when a lobbyist has truly ended his or her lobbying activities. In hopes of achieving greater lobbying disclosure and transparency, the study made three recommendations:

- Assign a unique identification number to each federally registered lobbyist
- Add a field for "deregistering" as a lobbyist
- Amend the LDA to codify these changes

The administration's January policy – as well subsequent limits on Recovery Act and Troubled Asset Relief Program (TARP) lobbying and limits on lobbyists on federal advisory committees – raises an important question for some: do the administration’s limits on lobbyists truly address potential corruption and influence in our government?

According to transparency and nonprofit speech rights advocates, limiting communications with government officials and limiting executive branch hiring has not had the desired affect of full transparency. In the meantime, lobbyists can easily maneuver around the current restrictions. Their work can be managed in a way to avoid meeting the threshold required to register under the LDA, but as noted earlier, they can continue to do similar work. As a consequence, what may be occurring is that the same level of money and influence, from the same big-moneyed special interests, is reaching decision makers through different, shadier channels while an illusion of transparency overlays reality.

Indeed, according to observers, despite efforts to limit lobbyists' abuses and put the public interest first, the role of special interests remains. For example, those who won Recovery Act contracts also spent millions lobbying the government. The Recovery Accountability and Transparency Board recently completed the release of the first round of quarterly disclosure reports by Recovery Act recipients. These reports appear to indicate that those who engaged in heavy lobbying also received the largest Recovery Act contracts. Phil Mattera of Good Jobs First details some specifics at the Dirt Diggers Digest.

In addition, advocates and observers say that the role of money in the entire public policy process must be considered as part of the special interest influence picture. As a recent *Wall Street Journal* opinion piece by Joel Jankowsky remarks, "This administration's treatment of lobbyists has only decreased openness in the policy-making system. [. . .] If the administration truly wants to address its stated concerns about the influence of special interests, it should focus on what the public actually cares about: the influence of money on the policy-making process."