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Leaked BLM Draft May Hinder Public Access to Chemical Information

On Feb. 8, *EnergyWire* released a leaked draft proposal from the U.S. Department of the Interior's Bureau of Land Management on natural gas drilling and extraction on federal public lands. If finalized, the proposal could greatly reduce the public's ability to protect our resources and communities. The new draft indicates a disappointing capitulation to industry recommendations.

Background

In his 2012 State of the Union address, President Obama pledged to require "all companies that drill for gas on public lands to disclose the chemicals they use" and to "develop this resource without putting the health and safety of our citizens at risk." In May 2012, the Bureau of Land Management (BLM) released a proposed rule to set standards for natural gas drilling and extraction (commonly referred to as fracking) on federal land and tribal land, which received more than 170,000 comments, including extensive input from the oil and gas industry and environmental and public interest

organizations. In December 2012, BLM announced that it was withdrawing the proposed rule and would issue a new proposal with changes based on comments received.

The draft rule affects oil and natural gas drilling operations on the 700 million acres of public land administered by BLM, plus 56 million acres of Indian lands. This includes national forests, which are the sources of drinking water for tens of millions of Americans, national wildlife refuges, and national parks, which are widely used for recreation.

The Department of the Interior estimates that 90 percent of the 3,400 wells drilled each year on public and Indian lands use natural gas fracking, a process that pumps large amounts of water, sand, and toxic chemicals into gas wells at very high pressure to cause fissures in shale rock that contains methane gas. Fracking fluid is known to contain benzene (which causes cancer), toluene, and other harmful chemicals. Studies link fracking-related activities to contaminated groundwater, air pollution, and health problems in animals and humans.

Hindering Public Access to Chemical Information

If the leaked draft is finalized, the changes in chemical disclosure requirements would represent a major concession to the oil and gas industry. The rule would allow drilling companies to report the chemicals used in fracking to an industry-funded website, called FracFocus.org. Though the move by the federal government to require online disclosure is encouraging, the choice of FracFocus as the vehicle is problematic for many reasons.

First, the site is not subject to federal laws or oversight. The site is managed by the Ground Water Protection Council (GWPC) and the Interstate Oil and Gas Compact Commission (IOGCC), nonprofit intergovernmental organizations comprised of state agencies that promote oil and gas development. However, the site is paid for by the American Petroleum Institute and America's Natural Gas Alliance, industry associations that represent the interests of member companies.

BLM would have little to no authority to ensure the quality and accuracy of the data reported directly to such a third-party website. Additionally, the data will not be accessible through the Freedom of Information Act since BLM is not collecting the information. The IOGCC has already declared that it is not subject to federal or state open records laws, despite its role in collecting government-mandated data.

Second, FracFocus.org makes it difficult for the public to use the data on wells and chemicals. The leaked BLM proposal fails to include any provisions to ensure minimum functionality on searching, sorting, downloading, or other mechanisms to make complex data more usable. Currently, the site only allows users to download PDF files of reports on fracked wells, which makes it very difficult to analyze data in a region or track chemical use. Despite some plans to improve searching on FracFocus.org, the oil and gas industry opposes making chemical data easier to download or evaluate for fear that the public "might misinterpret it or use it for political purposes."

When government agencies determine that information needs to be made public, they have an obligation to ensure the data is complete, accurate, and available. Farming out such responsibilities to an industry-funded site raises significant questions about the reliability of the data.

The Trade Secrets Loophole

In another significant concession to the oil and gas industry, drilling companies may not be required to disclose trade secret information to the BLM along with an explanation of why the information is confidential. The leaked draft specifically instructs companies **not** to disclose information considered to be confidential to the government or FracFocus. This amounts to giving drilling companies a free pass to decide what chemical information they want to label a trade secret, with no oversight or review.

The BLM must require a fast, secure, and transparent process for evaluating and challenging trade secrets claims that does not give undue advantages to industry. The burden of proof should be on the company making the trade secrets claim. For example, states such as Wyoming provide a record of their trade secrets decisions online, and Colorado's rule on chemical disclosure in fracking creates a new form for claiming data as a trade secret. The form requires submitters to substantiate and document the legitimacy of their claims.

Furthermore, under the BLM leaked draft, health professionals, such as emergency medical technicians, nurses, and doctors, would not have access to the identity of chemicals in products – including trade secrets. Several states, such as Montana, Pennsylvania, and Colorado, include provisions in their chemical disclosure rules on fracking to allow health professionals to access chemical information in cases of emergencies. Fast access to such information is another reason a government agency should hold chemical disclosure data – including those considered to be trade secrets. In emergencies, health professionals should not have to search for who has the needed data or negotiate to get access.

Pre-Drilling Disclosure

In addition to problematic provisions in the leaked draft, there are also troubling omissions of issues critical to protecting public health. For instance, baseline water testing should be required prior to any drilling. Also, well operators should be required to disclose the chemicals that will be used in fracking before a well is drilled. These components are essential to protecting water resources and the health of those living in the area and drinking the water. The leaked draft would give drillers up to 30 days *after* drilling to disclose chemicals being used.

Without such pre-drilling disclosure, public health officials cannot track changes in water and air quality and guard against toxics seeping into groundwater and/or threatening public health. The lack of such information also prevents communities and public inspectors from holding companies accountable if contamination occurs.

Conclusion

The hope was that the federal government would create a "best practices" standard to ensure safe drilling practices and to protect the purity of the water and land around the well sites, and that such a model might even serve as a template for state drilling laws and regulations going forward. However, the proposal, if finalized, would not only be much weaker than many state rules on fracking, it would hinder public access to health and environmental information, putting Americans at risk.

Once the new proposed rule is officially published, members of the public and representatives of public interest groups must make their voices heard that the concessions made to oil and gas companies are not in the public interest. The BLM needs to strengthen the rule to ensure safe oil and gas drilling with proper requirements for disclosure and accountability.

Sequestration Standoff

As March 1 approaches, across-the-board federal spending cuts, called sequestration, appear almost certain to occur. Republicans and Democrats are not negotiating to resolve the looming crisis. Neither seems sufficiently motivated to compromise.

The problem is not that sequestration is nothing to worry about. According to an analysis by the Center on Budget and Policy Priorities, sequestration will cut most domestic programs by about 5.3 percent and most defense spending by 7.7 percent. Moreover, these cuts will be compressed into a short, seven-month time frame, which will nearly double their impact for the rest of the year to nine and 13 percent respectively.

As a result of these cuts, federal agencies will be forced to furlough hundreds of thousands of employees at a time when the national unemployment rate stands at 7.9 percent. According to the Bipartisan Policy Center, sequestration may cost the nation at least a million jobs. Health research grants will be cut. Meat inspections will be curtailed. These are just a few of the many examples of damage that will be done.

Few in Washington think sequestration is a good thing. Even congressional Republicans, who generally support reduced government spending and who supported its creation as part of the Budget Control Act of 2011, are trying to pin blame on President Obama by referring to it as "the president's sequester."

So what's the problem? The key sticking point remains what it has been: a difference between Republicans and Democrats on taxes. President Obama and congressional Democrats are calling for sequestration to be replaced with a balanced package of tax loophole closures for corporations and the wealthy and selected cuts in defense and corporate welfare programs, while Republicans are calling for sequestration to be replaced with an alternative package of domestic spending cuts alone.

So how will this standoff be resolved? Where do we go from here?

Plan A: Embarrass Republicans into Supporting Revenue Increases

The White House is reportedly confident that the president will win this showdown, just as they believe he won a similar battle over raising taxes on the wealthy earlier this year as well as another faceoff with Republicans over raising the debt ceiling. In each case, they believe the president won not by negotiating with his opposition in Congress, but by going over their heads and appealing directly to the public.

This new strategy explains the administration's focus on public events that highlight the damage that sequestration would do. On Feb. 19, the president made his case forcefully while surrounded by first responders.

"That's the choice," he said. "Are you willing to see a bunch of first responders lose their job because you want to protect some special interest tax loophole? Are you willing to have teachers laid off, or kids not have access to Head Start, or deeper cuts in student loan programs just because you want to protect a special interest tax loophole that the vast majority of Americans don't benefit from?"

So far, the strategy seems to winning the battle for public opinion. A February poll by Pew Research Center/*USA Today* found that 49 percent of Americans would blame congressional Republicans if sequestration occurred. Only 31 percent would blame the president, while 11 percent would blame both.

Back in Washington, the president called Republican leaders in Congress on February 21, but no progress was made. Behind the scenes, no negotiations have been occurring at the staff level, either. Many in Congress believe the real negotiations will not begin until March, after sequestration has begun and pressure builds for a deal.

Meanwhile, Senate Democrats are preparing to move a bill, called the American Family Economic Protection Act, sometime this week. If enacted, the bill would end sequestration for the rest of the calendar year and replace it with a package of revenue increases and spending cuts.

On the revenue side, the bill would institute a 30 percent minimum tax rate on those making more than $1 million per year, a proposal commonly known as the Buffett Rule and named for the wealthy investor, Warren Buffett, who said he should not pay a lower tax rate than his secretary. The proposal would raise $54 billion over ten years. The bill also includes $55 billion in spending cuts, split equally between defense savings from drawing down the American military presence in Afghanistan after 2014 and an equal reduction in farm subsidies.

The bill is expected to be stopped by Senate Republicans, however, who will likely filibuster it. In April 2012, another bill on the Buffett tax came to a similar end, failing on a largely party-line vote of 51-45, well short of the 60 needed to overcome a filibuster. (The only two members to cross party lines were Republican Susan Collins of Maine, who voted against the filibuster, and Democrat Mark Pryor of Arkansas, who supported it.)

Why Republicans May Not Budge

With sequestration looking increasingly likely, the key question is whether Republicans will be more likely to negotiate once sequestration has begun. There are many reasons to think they may not.

First, some in the Republican Party want sequestration to occur. If anything, they think it is too small. Sen. Rand Paul (R-KY) epitomized this view when he gave the Tea Party response to President Obama's State of the Union Address on Feb. 12. "Not only should the sequester stand," he said, "many pundits say the sequester really needs to be at least $4 trillion to avoid another downgrade of America's credit rating."

Second, when President Obama agreed to enact the American Taxpayer Relief Act (ATRA) earlier this year, he agreed to sign into a law a permanent extension of 82 percent of the Bush-era tax cuts. While the bill raised over $600 billion over ten years from upper-income taxpayers, it also effectively deprived the president of further leverage in the ongoing budget debate. Extending those tax cuts was the top GOP priority. Making most of them permanent gave congressional Republicans most of what they wanted and little incentive to negotiate further.

Third, calling this a "victory" for the president has played into the hands of those in the Republican Party who are more determined than ever not to let the president "win" again. "The president got his higher taxes," wrote Speaker John Boehner (R-OH) in a *Wall Street Journal* op-ed. "The president's sequester is the wrong way to reduce the deficit, but it is here to stay until Washington Democrats get serious about cutting spending." (In reality, most of the deficit reduction that has occurred to date has been due to spending cuts.)

Fourth, much of the damage from sequestration is inflicted on government employees, not generally considered a GOP constituency, and much of it is concentrated in the metropolitan Washington, DC, area. As a result, national polls do not necessarily reflect the sentiments that most congressional Republicans face back home, especially when many are more worried about a potential primary challenge from the right than anything else.

And finally, although GOP messaging claiming that sequestration was the president's idea seems to be getting little traction in the national media, it does seem to be resonating in the conservative media. "Here's a tip. If you are reckless enough to create a crisis for the nation, you had better know how to fix it," said Fox News correspondent Greta Van Susteren on Feb. 20. The conservative echo chamber appears to be helping to insulate congressional Republicans from broader, mostly negative public opinion.

Plan B: A Government Shutdown?

With Republicans unwilling to bargain, some congressional Democrats may be considering ratcheting up the stakes. "Democrats no longer see the sequester as sufficient to force Republicans to cave on new revenues," wrote Greg Sargent at *The Washington Post*. "Rather, they increasingly see the looming government shutdown deadline of March 27th as the real means for them to force a GOP surrender."

This strategy would be particularly dangerous. So far, congressional Republicans have indicated that they would prefer to avoid a government shutdown by passing a "clean" budget bill that continues current levels of funding for federal agencies – minus the across-the-board sequestration cuts. If Democrats oppose this position, they risk being blamed for a government shutdown if it occurs, or at least sharing in the blame.

At this point, the end game is far from obvious, but this much is clear: the president deserves credit for using the bully pulpit to highlight the stark choices facing the nation, including tradeoffs between the nation's first responders and educators on the one hand, and tax loopholes for corporations and the wealthy on the other.

But he equally deserves blame for so easily signing off on permanently extending most of the Bush-era tax cuts. Doing that deprived him of much of the leverage he needed to achieve his policy goals.

Unfortunately, what's done is done. At this point, the best strategy is probably to put as much pressure on Washington policymakers as possible during the four weeks between March 1 and March 27, when a shutdown will occur without further action by Congress. One resource to help educate policymakers is a new web page called Sequestration Central, set to launch tomorrow on the Center for Effective Government's website. This page, which you'll be able to find at SequestrationCentral.org, will be constantly updated with the latest information about how sequestration is being implemented.

After March 27, however, if congressional Republicans refuse to budge, the best option may be to simply cancel sequestration outright, with no corresponding spending cuts or tax increases.

Austerity in a weak economy is a demonstrably bad idea. This has been shown to be true in Europe, where even the International Monetary Fund (IMF) is reconsidering its austerity policies. In the U.S., sequestration is expected to trim about 0.5 percent from the already weak level of growth expected this year.

Putting an end to sequestration would put an end to the destructive budget battles that have crowded out nearly every other issue in Washington over the past two years. It would clear the way for Congress to focus on a more important issue: fixing the nation's economy.

Anti-Regulatory Forces Target Agency Science to Undermine Health and Safety Standards

As committees of the 113th Congress begin to implement their agendas, it is increasingly apparent that environmental and health standards, and the science serving as the basis for these protections, will remain a favorite target of anti-regulatory legislators. Last session's industry-supported proposals to change scientific assessment programs would undermine environmental, health, and safety standards, yet they are likely to reappear. Meanwhile, new investigations underscore that these measures ignore the real impediments to improving the credibility and usefulness of agency science and risk assessments.

House Committees Continue to Question Environmental Science

On Feb. 14, the Environment Subcommittee of the House Committee on Science, Space, and Technology held a hearing, "The State of Environment: Evaluating Progress and Priorities," examining the state of environmental quality and the work of the U.S. Environmental Protection Agency (EPA). The theme set by Rep. Andy Harris (R-MD), chair of the subcommittee, was that environmental quality has improved, and current accounts of environmental harms are "doomsday predictions" and "hobgoblins." Harris claimed that "future progress will not likely be so easily identified, will be extremely costly, and benefits may be unquantifiable." Citing science demonstrating the significant achievements of environmental protections, Republican members of the committee and witnesses they invited to testify at the hearing contended that it may be too costly to address residual risks to the environment.

Dr. Bernard Goldstein, Professor Emeritus at the University of Pittsburgh Graduate School of Public Health, disputed these arguments and testified that scientific advancements reveal there is even more to do to improve public health and environmental protection. Dr. Goldstein explained that advances in toxicology, epidemiology, and other sciences have allowed us to identify new, unforeseen hazards and complex challenges to human and environmental health. Addressing these new challenges requires the use of scientific assessments and tools that help identify and understand changing and emerging risks.

Unfortunately, businesses opposed to regulation are pushing some so-called "improvements" to EPA risk assessments that could undermine the science EPA relies on to protect the public. Last year, the House Science and Energy and Commerce Committees commonly used their authority to criticize EPA's scientific assessment programs, challenge the scientific basis for agency action, and urge delay.

The Real Problems Facing Agency Science and Risk Assessments

While it is often true that new studies and analyses can be incorporated into EPA assessments and that, in many cases, including more information could improve the assessments, the reforms proposed by regulatory opponents and supported by industry lobbyists would only exacerbate existing weaknesses. The integrity and usefulness of agency science and risk assessments are routinely impaired by delay, conflicts of interest, and the constant second guessing of agency decisions based on studies backed by regulated industries.

The value of EPA's Integrated Risk Information System (IRIS) program has been significantly undercut by excessive delays and industry influence. The IRIS program conducts assessments of chemical hazards and is a critical source of information to the public and to decision makers about the risks posed by toxic chemicals. In fact, the Government Accountability Office (GAO) recently recognized that "[EPA's] ability to effectively implement its mission of protecting public health and the environment is critically dependent on credible and timely assessments of the risks posed by chemicals." Unfortunately, GAO also reported that IRIS is at risk of becoming ineffective because the program has failed to keep pace and complete assessments of the most important chemicals of concern. GAO first reported concerns with the effectiveness of the IRIS program in 2008 and, although EPA continues to improve transparency and timeliness, many important chemical

assessments remained bottlenecked in the lengthy process. An IRIS assessment involves a comprehensive literature review, multiple opportunities for public comment, rigorous peer review of draft background documents, and final review by independent experts and other agency staff. The entire process takes at least two years (and often longer).

EPA is working to improve IRIS by holding stakeholder meetings to gather outside views on the best reforms, but the "fixes" proposed by the chemical industry could undermine the program and delay or dilute its assessments. Industry groups and their allies in Congress consistently blocked EPA's IRIS assessments for formaldehyde and hexavalent chromium, known carcinogens. A common industry argument is that agency scientific assessments need more stakeholder input and peer review, but there are already numerous rounds of stakeholder review. Environmental groups and scientists contend that allowing additional opportunities for input are unnecessary and give the affected industry an advantage in influencing the outcome of the assessment. Stakeholder reviews should be consolidated to complete assessments more quickly, they argue, instead of increasing delay and giving industry yet another bite at the apple.

Industry and environmental groups also disagree on proposed reforms to EPA's Science Advisory Board, a committee of experts that advises the agency on the scientific aspects of environmental issues, including IRIS assessments. Legislation introduced in 2012 by majority members of the House Science Committee garnered support from the American Chemistry Council and other industry groups. The EPA Science Advisory Board [SAB] Reform Act of 2012, H.R. 6564, claims to enhance transparency and reduce conflicts of interest, but scientists at environmental organizations warn that the bill is another attack on government science and scientists who receive government research funding. This bill and other proposed changes to agency science programs are likely to reappear this session given that the House Science Committee plans to continue investigations of EPA science and risk assessments. The Senate has shown significantly less interest in these issues.

Recent reports of egregious examples of industry interference with environmental assessments illustrate the need shield science from industry influence. The Center for Public Integrity this month released a report revealing alarming industry ties to EPA's IRIS and peer review panels. More than two years ago, EPA scientists concluded, as other scientific bodies have, that hexavalent chromium, a compound found in drinking water that can also be inhaled, may cause cancer. The chemical industry immediately tried to block the assessment and urged the agency to withhold its findings until new studies paid for by big chemical companies were completed.

In agreeing to the delay, EPA relied on an ostensibly unbiased panel of scientists tasked with reviewing the chromium findings. The Center for Public Integrity's investigation revealed that a number of the EPA panelists urging delay had worked on behalf of PG&E, the company accused of contaminating drinking water with chromium in the film *Erin Brockovich*. These panelists conducted research for PG&E and served as defense experts in the lawsuit against the company. Another panelist who urged EPA to wait on new American Chemistry Council studies served as a consultant on those very studies.

The American Chemistry Council, whose members include Dow and ExxonMobil, also lobbies heavily on EPA chemical assessments. At the same time, the trade association funds research to inform

assessments in which it has a stake, and a staggering number of EPA review panelists have authored industry-backed research.

The chemical industry also uses the peer review panel process to delay and undermine assessments. By submitting endless comments refuting EPA's findings and questioning the agency's methods, industry can stall the assessments and submit its own studies. Industry lobbyists also employ the help of other government agencies to thwart potentially unfavorable chemical assessments.

There are real impediments to achieving scientific integrity. Sound, timely scientific assessments that identify risk are crucial to helping agencies fulfill their missions and protect the public. However, legislative reforms that further delay or weaken agency assessments will not improve these programs. Outgoing EPA Administrator Lisa Jackson may institute new rules to allow more public input on panelists for peer review committees, and the director of EPA's National Center for Environmental Assessment continues to seek recommendations for improvements. To significantly enhance the quality and value of IRIS, assessments must be completed in a timelier fashion, and EPA must protect its research and scientific findings from industry's influence and biased agenda.

Disclosure at the Office of Information and Regulatory Affairs: Written Comments and Telephone Records Suspiciously Absent

In 1981, President Reagan signed an executive order charging the Office of Information and Regulatory Affairs (OIRA) with reviewing all economically significant rules and rejecting those that did not pass a strict cost-benefit test. Supporters of environmental, consumer, and worker protection standards have long criticized the office for failing to make its analyses public. Moreover, the office has a reputation for meeting with industry interests behind closed doors and for engaging in intrusive back-and-forth exchanges with agencies over proposed rules. This often results in the office delaying, watering down, or blocking new standards and safeguards.

As a result of this criticism and congressional pressure, OIRA promised increased transparency in a 1986 memo. OIRA agreed to create a public record of individuals attending any meetings on pending rules, with a summary of any oral or written communications from outside parties on those rules. This policy was incorporated into an executive order signed by President Clinton in 1993. The order mandates that "OIRA shall maintain a publically available log that shall contain ... a notation of all written communications forwarded to an issuing agency ... [and] the dates and names of individuals involved in all substantive oral communication." In 2001, OIRA began posting summaries of its contacts on rules on its website.

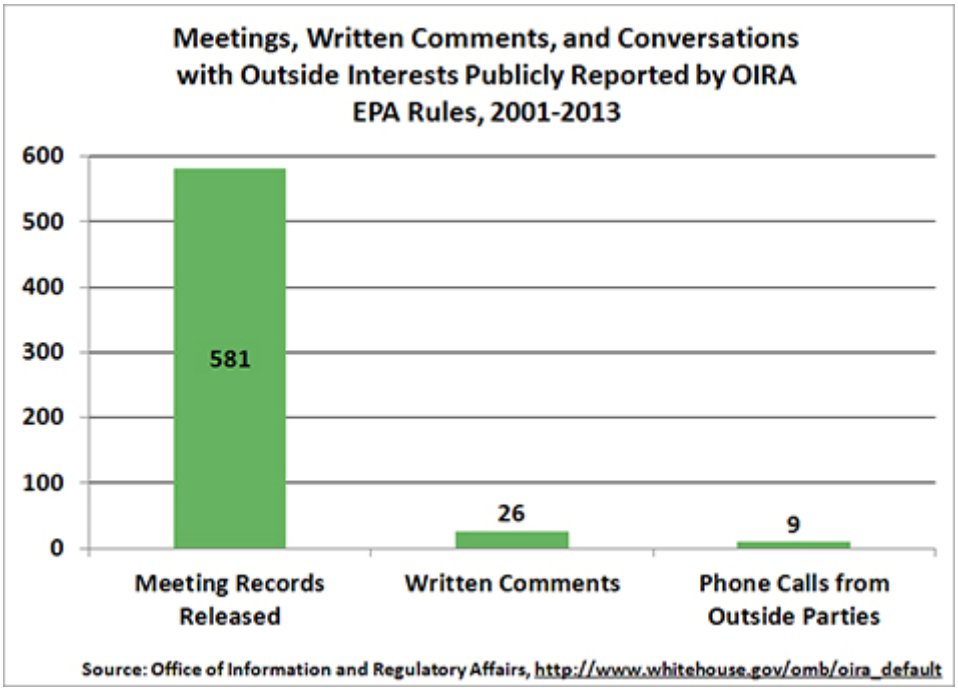
A review of the records of meetings and other communications listed on OIRA's website suggests that the office is not following its own disclosure policies. OIRA's website includes a list of "OIRA Communications with Outside Parties" classified as "Meeting Records," "Oral Communications," or "Public Comments." Oral communications are defined by executive order as including "telephone conversations between OIRA personnel and any person not employed by the executive branch," and public comments refer to written comments submitted to OIRA by outside parties. (The "public

comments" label is confusing because most people think of public comments as those submitted as part of the regulatory process under the Administrative Procedure Act.)

These records are organized by agency. We examined records for the Department of Transportation's National Highway and Traffic Safety Administration (NHTSA), the Department of Labor's Occupational Safety and Health Administration (OSHA), and all divisions of the U.S. Environmental Protection Agency (EPA). The staggering discrepancy among reported meetings, written comments, and substantive conversations suggests OIRA's review of rules remains unreasonably opaque despite its stated disclosure policy.

For the three agencies we reviewed, we found that OIRA made records available for 647 meetings between October 2001 and January 2013. For the same period, OIRA made only 28 written comments from outside parties available to the public, and staff reported only nine substantive phone calls from outside parties. It is hard to believe that OIRA staff had only nine substantive phone conversations with outside groups interested in OSHA, NHTSA, or EPA rules under review when it held 647 meetings on those rules.

This discrepancy is especially pronounced when looking at disclosed meetings and communications related to EPA rules. From 2001 to 2013, OIRA disclosed 581 meeting records, just 26 written comments from outside interests, and only nine phone conservations. While one does not expect an equal number of meetings, comments, and phone calls for every topic, discrepancies this large are suspicious.



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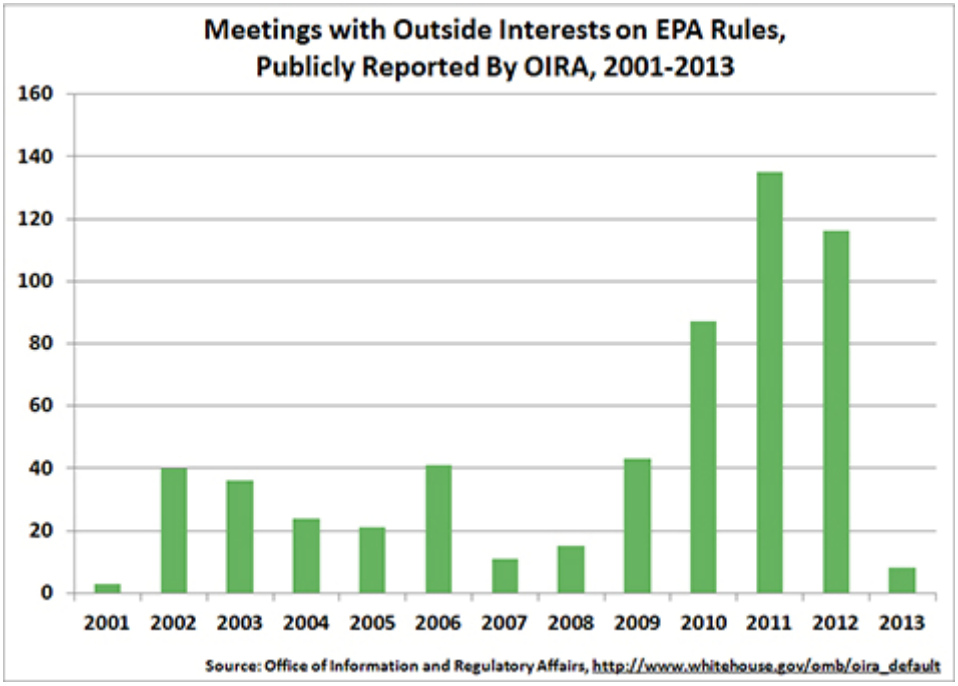
Here's another example, this one related to a specific EPA rule: from November 2009 to April 2010, OIRA met 43 times with outside stakeholders and EPA officials to discuss a topic identified simply as

"Coal Combustion Residuals," yet the office disclosed no written comments or oral communications with stakeholders. Such a scenario implies that not one person who came to any of those 43 meetings brought talking points for OIRA staff or followed up with an e-mail or phone call.

Disclosure related to transportation and worker safety rules followed a similar pattern. Over a 12-year period, OIRA disclosed 37 meetings, two written comments, and no phone calls on transportation safety rules. During the same 12 years, the office reported just 29 meetings on worker safety rules – with no reported phone calls or written comments. The most recent written comment, on an issue described only as "Tire Upgrade Rule," is dated June 4, 2003. While there is no direct evidence to the contrary, it is difficult to believe that in the past 10 years, there have been no written comments submitted to or phone calls taken by staff at OIRA on any of the rules related to highway, traffic, and occupational safety.

Disclosure of meetings seems to have improved since 2002. For example, in 2012, OIRA reported 116 meetings with outside groups on EPA rules. In contrast, the office reported only 40 such meetings in 2002. An alternative explanation is that, with an industry-sympathetic administration, outside groups didn't request as many meetings during the earlier years.



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Transparency and disclosure are crucial to the regulatory process. To ensure that this process serves the public and to avoid charges that its staff bend to industry pressure, OIRA needs to follow the disclosure requirements set by executive order almost two decades ago. Congress also has a role: the House and Senate should ensure the meetings and communications that influence the regulatory process are accurately documented and publicly available to all Americans.

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