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Updates for Your Information

Technology Opportunities Grant Availability for FY 2003

The National Telecommunications and Information Administration (NTIA) released a notice of availability regarding the federal Technology Opportunities Program (TOP). Nonprofits are encouraged to apply for the more than $14 million in funds to help deliver the public interest promise of telecommunications technology to underserved areas and communities in America. Applications are due by **5 p.m. EDT April 23, 2003**. Application information is available on the TOP site, via e-mail at: top@ntia.doc.gov or by calling (202) 482-2048.

Federal Budget

House Passes Budget Resolution of Huge Tax Cuts, Program Cuts; Senate Votes Weds.

The House passed its FY 2004 budget resolution last week, officially kicking off the Congressional budget debates for the coming fiscal year. The Senate voted to preserve all but $100 billion of the President's tax cut, but won't complete work on the budget resolution until Wednesday, March 26. Though the budget resolutions of each chamber reflect much of the President's own budget proposals, and especially his $726 billion tax cut, neither resolution passed without a great deal of effort among Republican leaders to ensure that Congressional members voted together.

House Proposals
In the House, the budget resolution passed on a very tight vote of 215-212, following an effort by 11 Republican moderates to limit the size of the tax cuts. In a letter to House Speaker Denny Hastert (R-IL) and House Budget Committee Chair Jim Nussle (R-IA), the 11 noted that the "the resolution reflects a significant imbalance between tax cuts and spending for federal mandatory and discretionary programs" and does not adequately recognize "the value of the federal role in critical programs impacting millions of Americans." According to George Krumbhaar, of Gallery Watch's USBudget.com, despite these reservations, which did not even reference the massive costs of the war in Iraq and the rebuilding effort to follow, "Ultimately, the leadership persuaded enough members to support it on the grounds of patriotism, and that some of their concerns would be taken care of in conference."

The House Budget Committee's budget resolution, which provides for the President's $700 billion new "growth plan" of tax cuts by protecting it under special the Congressional budget reconciliation rules, all but guarantees that some very large tax cut will be enacted later this year. Included among the programs that the House proposes to cut to pay for these and other proposed tax breaks are veterans benefits, Medicaid, Food Stamps, and farm programs. This budget resolution also marks its effort to proceed to reduce the long-term budget deficits by eliminating one percent of spending that falls under the vague characteristics of "waste, fraud or abuse" in mandatory programs. (For more on these cuts, see the Center on Budget and Policy Priorities analysis.)

Support for this budget resolution defeated the 4 alternatives put forth by various House coalitions. The House Democrats proposed an alternative that would have included a much smaller tax cut – the $136 billion proposed for 2003 earlier this year as an alternative to the President's "Economic Growth" package – and funding for domestic security, the environment, and many other domestic programs that the Republican budget cut, as well as $528 billion for a prescription drug plan (compared to the Republicans' $400 billion). The proposal offered by the House Blue Dog Coalition (comprised of moderate to fiscally conservative Democrats), while maintaining spending levels suggested in the President's budget, would have accelerated tax cuts in the lower rates, provided "immediate estate tax relief," and delayed the tax

cuts in the upper brackets to allow for funds for the war in Iraq or domestic security. At opposite ends of the spectrum, the House Congressional Black Caucus and the Progressive Caucus (comprised mainly of liberal Democrats) offered a proposal to freeze all of the tax cuts, but include a $300 billion economic stimulus package, while the conservative House Republican Study Group actually provided for more guaranteed tax cuts (a full $1.6 trillion over the next 10 years) and proposed a 1-year freeze on discretionary spending.)

Senate Debate

Like the House budget resolution, the Senate Budget Committee's budget resolution provided for the protection of reconciliation rules for the President's $726 billion tax cut, while also including an additional $600 billion to provide for tax cuts (such as making the 2001 tax cuts permanent) outside of these rules. A bipartisan group, led by Sens. John Breaux (D-LA) and Olympia Snowe (R-ME), concerned about the impact on the deficit of these massive tax cuts, offered an amendment that would have limited the tax cuts to $350 billion. Arguing that the Senators were faced with a very different situation than in June 2001, when they passed the President's $1.35 trillion tax cut, Breaux reminded his colleagues that, "tax cuts are not free" and that "we do not reduce taxes in a time of war." Senate Budget Committee chair Don Nickles (R-OK) responded that reducing the tax cut down to a relatively smaller $350 billion would "take the growth out of the growth package." This effort to limit the damage caused by the President's tax cuts failed 38-62. As noted in the Washington trade publication BNA, however, the "lopsided final vote tally on the amendment was deceiving because several Democrats who originally favored it switched their votes to 'no' when it became clear the amendment would lose." Some senators, including John McCain (R-AZ), Fritz Hollings (D-NC), and Lincoln Chafee (R-RI) opposed any tax cuts and refused to support this smaller tax cut package, resulting in the passage of the Nickles plan. Had they voted for the $350 billion in tax cuts, the smaller tax cut package would have prevailed

The one successful effort to limit the $726 billion tax cut came in the form of an amendment offered by Sen. Russ Feingold (D-WI). Feingold's amendment, which passed in a 52-47 vote, sets aside $100 billion of the tax cut in a reserve fund "for possible military action and reconstruction in Iraq."

What's Wrong With This Vote?

During last week's debate in the Senate, two amendments were offered to help the government ensure it gets closer to providing the mandated level of 40 percent of the costs incurred by states in educating students with disabilities.

Sen. Kent Conrad's (D-ND) amendment -- to provide full funding for the Individuals with Disabilities Education Act (IDEA) grants over ten years by reducing tax breaks for the wealthiest tax payers was rejected by 47-52.

Two minutes later these same Senators voted overwhelmingly (89-10) to support Sen. Judd Gregg's (R-NH) amendment – to provide for a more immediate increase in funding, but just for the next 2 years by cutting spending on various unnamed government programs by the amount necessary. The Gregg amendment was an easy vote for the Senate, but it will not provide for the full funding needed for IDEA.

While we applaud the Senate for taking this step toward increasing funding for IDEA, we are troubled by the reluctance of these Senators to limit tax breaks for the wealthiest, most secure in this country while reducing funding in programs that try to ensure the well-being of some of the neediest.

On Wednesday, March 26, the Senate will resume voting on the remaining amendments and then will vote on the overall budget resolution. As noted in an op-ed in the Washington Post on March 23, there is great concern that many of the original opponents to the larger tax cut will support the budget resolution, huge tax cut and all, just to move the budget resolution along. These Senators must be reminded that the budget they are voting on will set the priorities of our nation for years to come and that we don't want and can't afford massive, unending and costly tax breaks at the expense of all the other needs that exist right now.

Estate Tax Repeal Supporters Losing Ground

In a move viewed by many as truly outrageous, Sen. Jon Kyl (R-AZ) introduced an amendment to the Senate Budget Committee's budget resolution on March 19 – the day the country committed itself to billions of dollars for the war and its aftermath in Iraq – to accelerate the repeal of the estate tax by one year.

Under current law, the estate tax is steadily phased out over the next 7 years, repealed in 2010 for one year, and reinstated on January 1, 2011. The cost of this amendment – to move the repeal to 2009 -- was estimated at $46 billion, or more than half of the $75 billion the President is expected to request for this first stage of war in Iraq. The amendment passed in a very close vote, 51-48. Typical of Washington's ways, however, Kyl actually suffered a major setback in his quest to repeal the tax.

Kyl's introduction of this amendment was especially untimely given the long history of the estate tax in this country – prior to its enactment in 1916 as a permanent part of the tax structure, the estate tax was used from the early founding of the U.S. to raise funds necessary in a time of war.

Now a permanent component of our tax system, the estate tax is by far the most progressive element, affecting less than 2 percent of the very wealthiest estates in this country, while providing the resources necessary for the country's well-being – in times of peace and in times of war. Though it touches only the wealthiest fortunes each year, the estate tax is estimated to bring in nearly $30 billion this year, with this amount continuing to rise each year. If estate tax repeal is made permanent or extended through 2013, the additional costs in lost resources will rise to more than $63 billion in 2013, alone.

Though Kyl's amendment did pass and may be included in the final form of the House and Senate budget resolution, the vote on the amendment suggests that the significance and irony of the vote were not lost on many Senators: though the vote was a "show" vote in that it only provided for one extra year of repeal (and thus offered a relatively inexpensive vote on estate tax repeal), repeal supporters actually lost votes from what was expected. Pro-repealers started with 57 votes, but ended up with 51 (plus one more from Sen. Zell Miller (D-GA), who was not present).

While the fact that the Kyl amendment passed is troubling, the good news is that this one year acceleration of the repeal is likely to be outside of the protections of the budget resolution's reconciliation rules. The budget resolution simply provides a blueprint – legislation must still be passed to implement this blueprint. This means that the final vote on repeal of the estate tax will still require 60 votes to pass. Nevertheless, since there is a chance that repeal advocates could try to swap out the one-year acceleration for another tax cut currently protected by these rules, it is important that Senators continue to get the message that estate tax repeal is a costly, unfair use of resources that will limit the country's ability to address its many domestic and international priorities.

For more information, see www.fairestatetax.org.

State Reports Show Job Losses in Last 18 Months

A new report issued by the Minority Staff of the House Appropriations Committee reveals the total number of jobs lost in each state since January 2001, when President Bush took office.

While approximately one-third of states have actually shown small increases in the number of jobs, all other states have shown drops in the last 2 years. States like Georgia, Missouri, and Massachusetts were hardest hit with 3.53 percent, 3.45 percent, and 3.22 percent of jobs lost since January 2001, respectively.

The authors of the report also calculate that the President would have to create 141,000 jobs per month "in order not to have the worst 4-year job record of any President in the last 60 years."

Information Policy

Senators Use Data Quality Challenge

On March 6, 2003, Sens. Jeffords (I-VT), Barbara Boxer (D-CA), Frank Lautenberg (D-NJ) and Paul Sarbanes (D-MD) submitted to the Environmental Protection Agency (EPA) a request for correction of information under the Data Quality Act. This is the first data quality challenge submitted by Members of Congress. The request addresses a Modification of National Pollutant Discharge Elimination System (NPDES) permit deadline for storm water discharges for oil and gas construction activity that disturbs one to five acres of land. The EPA proposed extending the deadline for storm water discharge permits for oil and gas construction for 2 years based upon information from the Department of Energy (DOE) about the oil and gas industry. The senators argue that the DOE information does not meet EPA's Data Quality standards and cannot be utilized in such an important decision, and, therefore, that EPA should maintain its original deadline.

The challenge questions the objectivity, accuracy and utility of DOE information concerning the number of oil and gas construction sites that are one to five acres in size and therefore required to comply with phase II storm water regulations. The information, produced by DOE's Energy Information Administration (EIA), estimates a much higher number of the annual new oil and gas construction sites may be required to comply with the regulation than initially projected. EPA originally considered that few of the new sites would exceed one acre and therefore would not incur compliance costs. Based upon the new EIA number of sites affected by the Phase II storm water regulations – 30,000 – EPA was proposing suspending the requirement that oil and gas facilities obtain a Phase II storm water permit for two years while the EPA studied the matter further.

The senators assert that the EIA information fails to comply with EPA's data quality standards on several points. In preparation for the challenge, the senators had previously requested that the General Accounting Office (GAO) conduct an evaluation of the information used in the proposal. In a briefing on February 24, 2003, GAO reported to the senators that a number of critical flaws in the information had been identified. The accuracy of the new figure is criticized on a number of points including that it is not recent data, it is an obviously skewed average, it includes offshore drilling operations which would not be affected by the regulation, and that no new information on site size has been presented. The letter challenges the objectivity of the information, noting that EIA does not collect drilling information but estimates figures based on partial data from the American Petroleum Institute. Apparently the EIA has noted previously that there have been problems with this data and that the "arms-length relationship with the basic data" makes it difficult to discover or remedy errors.

Based upon the numerous problems identified with the EIA data, the senators claim that the information cannot be used by EPA to justify postponing storm water Phase II requirements for oil and gas construction sites. The senators expect the EPA to address this request for correction of information before the issuance of a final rule. If the EPA reviews the request, agrees with its points, and "corrects" the information as the senators request, then it is likely that EPA would issue a final rule that would require oil and gas construction sites to comply with Phase II of the storm water regulations as originally scheduled.

This data quality challenge is the first one that many environmentalists and public interest groups would label a positive use of the Data Quality Guidelines. Some have asserted that the Data Quality Guidelines would be as useful to public interest groups pushing for stronger regulations and more decisive agency actions, as they would be to the regulated community opposing those regulations. However, the public interest community has held that the main outcome of data quality challenges can only be reduced information and delays and prevention of agency actions. Since public interest groups are almost always advocating for faster and more stringent action, these outcomes would rarely, if ever, serve those purposes. However, this challenge turns the process on its head by using the Data Quality Guidelines to

prevent a postponement -- this challenge actually demands faster action from the EPA on this matter. While this particular data quality challenge holds the possibility of serious environmental benefits, the Data Quality Guidelines remain a troubling new aspect for agencies as they are too likely to be misused by the regulated community to slow down and derail agency actions.

NRDC Comments Threatened with Industry Data Quality Challenge

The Center for Regulatory Effectiveness (CRE) has submitted comments to the Environmental Protection Agency (EPA) that threaten to challenge the data quality of comments submitted by the Natural Resources Defense Council (NRDC), should EPA use them. The NRDC submitted comments to EPA on its draft risk assessment for land-applied biosolids that stated the draft risk assessment underestimated risks from dioxin and related compounds. CRE claims that the NRDC comments contain substantial inaccuracies, omissions, and biases, and lack reproducibility. These comments are precedent-setting in two ways: it is the first effort to use the Data Quality Act to address third party submitted information; perhaps more troubling, this effort also challenges information before it is used or relied upon by the agency.

It is important to note that these comments by the CRE do not constitute a formal challenge under the Data Quality Act. The EPA's Data Quality Guidelines clearly state that they only apply to information that the agency had publicly endorsed and disseminated as part of an action or in support of an official agency opinion. Therefore, any attempt to challenge NRDC's comments under the data quality process would be dismissed immediately by EPA. However, the CRE slips around this problem by submitting comments that simply threaten to challenge the data if EPA were to utilize or rely on the information in its development of the risk assessment for land-applied biosolids.

The CRE is misusing the Data Quality Act in an effort to influence an agency decision. The EPA Data Quality Guidelines provide, as required by the original guidelines set out by the Office of Management Budget (OMB), administrative mechanisms for affected parties to request a correction of information for data officially used by the agency. By using the threat of a possible future challenge the CRE is attempting to insert itself and its views on NRDC's comments into internal EPA decisions. While the Data Quality Guidelines address the need for a pre-dissemination review of information, they do not include any official procedure for outside participation. Clearly, this was envisioned as an internal procedure, and while decisions could be questioned, the process should remain free of outside influence.

The CRE comments also threaten to taint the public comment process for every agency. The entire concept behind utilizing public comment periods is that a democratic government should be participatory in its decisions and actions. The public comment process is supposed to allow agencies to better understand and address issues before final agency action by encouraging any and all parties to freely and openly comment on proposed decisions, rules and policies. However, it is vital that submitters feel that their opinions and positions may be submitted freely and openly without any requirements or standards, and that their comments can be useful to the agency. While other submitters can and do refer to comments submitted by another party, either to support or contradict, the CRE comments go far beyond this. The CRE comments are just short of an official challenge and seem to call on the agency to use a standard to judge and eliminate the NRDC comments from its consideration. While it is clear that information, including submitted comments, should meet data quality standards if an agency directly relies on or utilizes that information, there should not be any standard for, or discouragement of, submitting comments. However, the CRE comments could deter others from submitting comments in the future and weaken the importance and effectiveness of the public comment process.

Multi-Agency Data Quality Challenge on Global Warming

The Competitive Enterprise Institute (CEI) has filed data quality petitions with the Environmental Protection Agency (EPA), the National Oceanic & Atmospheric Administration (NOAA), and the Office of Science and Technology Policy (OSTP) related to global climate change. The CEI Petitions seek withdrawal of the National Assessment on Climate Change (NACC), which is the inter-agency technical document that underlies most of the federal Government's recent statements about global climate change.

The challenges utilize the same information and arguments, although the 40-page EPA petition is much more detailed than the NOAA and OSTP petitions, which were each about 10 pages in length. The EPA petition was sent on February 10, 2003, followed by the NOAA petition on February 19 and the OSTP petition on February 20. The EPA petition actually represents a resubmission of CEI's previous data quality challenge submitted June 4, 2002, about four months prior to finalization of EPA's Data Quality Guidelines. The subsequent data quality petitions to NOAA and OSTP seem to be directly derived from the original EPA comments.

The global warming petitions question the objectivity, utility and reproducibility of the NACC. The CEI claims in the petitions that the agencies have improperly used computer model data to produce the NACC, selecting extreme models that violate the data quality guideline of objectivity. The petitions also contain assertions that due to political pressure, the NACC was not authentically peer reviewed and that a Congressionally requested scientific review went unperformed.

Much of the evidence CEI presents in its petitions seems to rest on the comments and opinions of individuals. While the comments are interesting and certainly support the CEI's position, it seems that they have not fulfilled their burden of proving the information does not meet the Data Quality Guidelines. The fact that some peer reviewers believed that the document needed major changes, does not make their views valid. CEI neither establishes that this was a majority view of reviewers or even a significant percentage. In any peer review process there is a wide variety of feedback, often contradictory. The feedback is considered and then incorporated or addressed to the extent possible.

A troubling aspect of these data quality challenges is that CEI seeks to "correct" this information by prohibiting the government from disseminating the NACC. Under the Data Quality Guidelines, the petitioner is required to submit the corrected information. CEI is not fulfilling this burden with its claim that the information is so "fatally flawed" that it cannot be corrected. These petitions represent the first of the data quality challenges that public interest groups warned would be filed. During the development of the Data Quality Guidelines, numerous public interest groups voiced their concern that the well intentioned principles of improving data quality would be misused to de-publish information, gag agencies and prevent the free discussion of information.

Model State Bills for Data Quality and Access

Apparently initial efforts have begun to develop data quality and data access legislation at the state level. OMB Watch has obtained model legislation for both bills that was reportedly drafted by the The Center for Regulatory Effectiveness (CRE), a strong supporter of both policy efforts at the federal level. Both state level model bills are clearly patterned after federal policies. The state data quality bill borrows heavily from the just recently completed Federal Data Quality Guidelines. The state data access bill has been developed from the Shelby Amendment, which required federal grant recipients to provide access to their underlying data through the Freedom of Information Act. Although no organizations seem to be openly advocating these model bills and no states have introduced them, it is disconcerting to be considering duplicating these hotly contested federal policies at the state level when they have not been implemented long enough to establish their benefits. Additionally the model bills are more detailed and restrictive then

the federal policies they build upon. OMB Watch has produced an in-depth analysis of the model state bills.

Nonprofit Issues

Istook-Type Gag on Advocacy in House Disability Education Bill

Once again legislation that would restrict nonprofit advocacy has reared its ugly head in the House of Representatives. The legislation is reminiscent of the Istook amendments that would have silenced the advocacy voice of charities, but was stopped by a firestorm of protest by nonprofits across the country. That firestorm may be needed once more.

Rep. Michael Castle (R-DE) has introduced legislation reauthorizing the Individuals with Disabilities Education Act (H.R. 1350), a law that requires the education of children with disabilities. Buried in the bill, which could be marked up in subcommittee as early as March 27, under a section that authorizes grants to parent and community training and information centers, is a provision that prohibits all advocacy of parent center grantees, even when that advocacy is paid for with private funds.

Section 672 of the bill prohibits a nonprofit organization from becoming a parent center if:

- That organization or an affiliated organization "conducts, in whole or in part, Federal relations;" or
- A board member or paid staff of the parent center serves on the board of directors of any organization (nonprofit or for-profit) that "conducts Federal relations in whole or in part."

The definition of "Federal relations" is not defined, but certainly would be very broad. This may include commenting on federal proposed regulations, meetings with federal government employees, attending federal hearings, or writing a newsletter piece about IDEA issues. It may also include encouraging others to do such activities. In fact, it is hard to imagine what type of activities would not constitute "federal relations."

The bill provides a specific prohibition on a parent center lobbying at the federal level on IDEA issues, even if such activities are paid for with private funds. Similarly, no board member or paid staff can serve on the board of directors of another organization that lobbies at the Federal level on IDEA issues. But this is small potatoes compared to the entire prohibition on "federal relations."

It has been reported that House subcommittee staff indicate that this restriction on free speech may be extended when reaching the full committee to cover more than grants to parent centers. At least one staff person has suggested that the full committee will extend these restrictions to all grants authorized under Part B of the IDEA.

Others in the nonprofit community are worried that this is a shot across the bow for all nonprofits. It was not long ago that Rep. Ernest Istook (R-OK) and former Reps. David McIntosh (R-IN) and Robert Ehrlich (R-MD) proposed restrictions on federal grantees such that they had to choose between receiving federal grants or speaking out on behalf of the people they serve. The various "Istook amendments," as they became known, would have prohibited use of private funds for "political advocacy," a term that was very broadly defined. The Istook amendments were defeated after thousands of nonprofits across the country joined in a coalition, Let America Speak, to stop them. Today, Rep. Istook, who remains in the House, is on the Appropriations Committee, which was the site of the last round of fights over the Istook amendments.

Disabilities rights advocates say H.R. 1350 contains a host of problematic provisions in addition to this direct attack on the right of federal grantees to spend their private dollars as they wish. The bill was introduced on March 19, 2003. A press release about the bill is available at here.

OMB Watch, along with other nonprofit leaders that fought the Istook amendments, such as Independent Sector, Alliance for Justice, National Committee for Responsive Philanthropy, National Council of Nonprofit Associations, and Charity Lobbying in the Public Interest, will be tracking this closely, and will provide more detailed information as the bill moves forward.

IRS Audits of Lobbying Prompt Response from Charities

Over the past few weeks several 501(c)(3) organizations in the midwest have been notified by the IRS that they will be audited in what appears to be selective targeting of charities that elect to use the expenditure test to measure their allowable lobbying budgets. While no written verification is yet available, three leading advocates of charity lobbying – the Alliance for Justice, Charity Lobbying in the Public Interest and OMB Watch – have written IRS Tax Exempt and Government Entities Director Evelyn Petschek "to express our grave concern and dismay."

The letter notes that the expenditure test, passed as Section 501(h) of the tax code, was intended to "provide clear standards for measuring permitted lobbying," and that the IRS issued an information letter in 2000, stating "the Internal Revenue Manual specifically informs our examination personnel that making the election will not be the basis for initiating an examination."

The IRS 2003 Workplan targets several "market segments" of exempt organizations for review in specific areas, including PACs and several other non-charitable types of exempt organizations. Social service organizations were also listed. The IRS website states the purpose of the market segment studies is to "enable EO to accurately assess the risks of noncompliance; identify education and outreach needs; and more efficiently use IRS resources." Organizations are selected by random sample, and asked about a variety of issues, including, but not limited to, lobbying.

Charity lobbying was not identified as a market segment. These audits appear to be the result of a "Non-Compliance Indicator" project. The IRS workplan states that, "The cases selected for examination under these projects will meet certain condition codes that are developed by Examination & Planning Programs and Classification." IRS agents have reportedly been directed to look at non-compliance with lobbying restrictions using charity spending of more than $10,000 on lobbying as a trigger, raising substantial questions about the validity of the process used in the Non-Compliance Indicator Project.

The letter to the IRS from the Alliance for Justice, Charity Lobbying in the Public Interest and OMB Watch requested a meeting to discuss "the implications of the situation and identify ways in which the Service can affirm that charities should make the 501(h) election and that it will not trigger an audit." See the full text of the letter to the IRS.

Faith-Based Initiative Update

The House of Representatives is continuing to move forward with its faith-based agenda despite the fact that the CARE Act is stalled in the Senate amid controversy over issues relating to hiring discrimination, protection of beneficiaries, preemption of state and local laws and the role of intermediary organizations. (See March 4, 2003 Watcher for background.) Draft amendments are still circulating, but the Administration has made it clear it will veto the bill if it passes with a prohibition on religious discrimination for hiring in program positions paid for with federal funds.

In the House of Representatives the 21st Century Competitiveness Subcommittee of the Education and Workforce Committee voted out a version of H.R. 1261, the Workforce Reinvestment and Adult Education Act, that stripped out a 23 year old prohibition on religious discrimination in hiring for program positions funded by the Act. It is expected to go before the full Committee some time during the week of March 24. Meanwhile, the Subcommittee on Select Education has scheduled a hearing on the Citizens Service Act for April 1, where a similar proposal is expected. One Republican aide was reported as saying the hiring discrimination language will be raised in all legislation relating to the faith-based initiative.

Regulatory Matters

Pentagon Seeks Exemptions From Key Environmental Laws

The Department of Defense(DOD) is seeking very broad legislative exemptions from a host of environmental laws, claiming that military readiness has been adversely impacted, while Deputy Defense Secretary Paul Wolfowitz is asking military leaders to submit cases in which President Bush could issue executive waivers.

The administration recently submitted a series of legislative proposals to Congress, including amendments creating military exemptions from the Endangered Species Act; the Marine Mammal Protection Act; the Clean Air Act; the Comprehensive Environmental Restoration, Compensation, and Liability Act (CERCLA); and the Resource Conservation and Recovery Act (RCRA). Congress rejected similar proposals pushed by the Pentagon last year, but the administration continues to argue that the threat of terrorism and now the war in Iraq necessitate such exemptions.

Meanwhile, in a memo obtained by Public Employees for Environmental Responsibility (PEER), Wolfowitz instructed the secretaries of the Army, Navy, and Air Force to abandon their "past restraint" in seeking environmental waivers from 10 of the nation's major environmental laws. "Under current law, many environmental statutes have exemptions for activities deemed by the President to be 'necessary' for reasons 'of national security' or in the 'paramount interest of the United States,'" according to PEER's announcement of the Wolfowitz memo. "These exemptions, however, have never been used."

A June 2002 investigation by the General Accounting Office (GAO) was unable to corroborate DOD claims that environmental laws hinder military preparedness, and in fact found training readiness to be high. EPA Administrator Christie Whitman concurred, telling the Washington Post, "I don't believe there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulation."

The administration's efforts, which imply that military preparedness must come at the expense of public health and the environment, could prevent enforcement of the aforementioned environmental laws on military bases; for example, under the proposed RCRA exemptions, officials could leave toxic substances lying exposed on the range, where they could leach into groundwater, surface waters or the air, according to the Natural Resources Defense Council.

The House and Senate committees on armed services have held hearings on the administration's proposals, but their future is unclear.

OSHA Issues Unenforceable Ergonomics Guidelines

The Occupational Safety and Health Administration (OSHA) recently issued final voluntary guidelines for the prevention of musculoskeletal disorders in the nursing home industry, reinforcing the administration's unwillingness to seriously address injuries caused by repetitive motion -- the most pressing health and safety issue confronting the workplace today.

OSHA unveiled its "comprehensive plan" for repetitive-motion injuries last spring, more than a year after Congress repealed mandatory Clinton-era ergonomics standards at the urging of President Bush. This feeble "replacement plan" called for a series of unenforceable guidelines targeted at specific industries, of which the nursing home guidelines are the first. Draft guidelines for grocery stores are expected to be available for public comment by the end of March.

Nursing home workers suffer from one of the highest workplace injury rates of any occupation, according to the AFL-CIO. The new guidelines offer tips on lifting and moving patients to avoid strain and repetitive stress injuries but do not require employers to take action. "Voluntary guidelines will not do enough to protect workers and residents from injury. Nursing home work is so crippling that safety guidelines need to be mandatory," according to the Service Employees International Union (SEIU).

OSHA's guidelines are being shaped by the newly-formed National Advisory Committee on Ergonomics, which has been stacked with seven management representatives.

Controversial Water Rule Withdrawn

The Environmental Protection Agency (EPA) recently withdrew a controversial rule that would have significantly altered the Total Maximum Daily Loads (TMDL) program, targeting clean up of polluted waters.

The TMDL program regulates the maximum amount of a pollutant that a body of water can receive and then allocates that amount among pollution sources. The recently withdrawn rule, finalized by the Clinton administration in July of 2000, was met with objections from the start, including federal legislation preventing its implementation and numerous court challenges from manufacturers, farm groups and others who argued the rule would impose a dire financial burden. Some environmental groups felt the rule would strengthen the TMDL program by targeting nonspecific pollution sources (such as runoff); others criticized it for allowing states up to 15 years to develop their own TMDLs.

EPA formally announced an 18-month delay of the rule in October of 2001. The rule would have taken effect next month had EPA not withdrawn the July 2000 action.

While environmental groups have been divided over the July 2000 rule, virtually all have recognized that its controversial nature prevented the rule from achieving its mission. Most groups now suggest that rather than making further changes to the TMDL program, EPA should instead focus on enforcing the current program, which operates under 1992 rules.

Right-to-Know

Audit finds mixed agency response to Ashcroft FOIA Memo

Federal agencies showed varied responses to Attorney General John Ashcroft's memo instructing agencies to withhold documents whenever legally possible under the Freedom of Information Act (FOIA). The audit concludes agencies' implementation of FOIA requests is in disarray, with agencies failing to

provide basic information to help the public file requests (such as agency FOIA contacts), failure to acknowledge requests within 20 days as FOIA requires, excessive delays and backlogs in responding to requests, and inconsistent appeals processes. The Ashcroft memo has impacted some agencies more than others.

The Department of the Interior joins the main branches of the military (Army, Navy and Air Force) in making significant changes to the way FOIA requests are handled in light of the Ashcroft memo. Agencies and departments taking some steps to address the Ashcroft memo include the departments of Commerce, Defense, Justice, and State, as well as the Environmental Protection Agency, National Aeronautics and Space Administration, Office of Management and Budget, and the Small Business Administration.

Researchers at The National Security Archive, which annually files thousands of FOIA requests, conducted the audit, which surveyed 33 federal departments and agencies.

As part of the project, The Archive plans an additional audit of agencies' responses to a memorandum from White House Chief of Staff Andrew Card instructing agencies to "safeguard" sensitive but nonclassified information. It is also gathering data on the oldest FOIA requests still pending at each of the 35 agencies surveyed.

Administration Denies Documents to Senate

Recently the Bush Administration asserted that numerous documents about changes in the Strategic Petroleum Reserve (SPR) fill policy being requested by the Senate Permanent Investigations Subcommittee would be withheld citing "deliberative process privilege."

Sen. Carl Levin (D-MI), the senior Democrat on the committee indicated that he would ask the Department of Energy (DOE) for more documents relating to its shift in SPR fill policy. Levin has also asked Energy Secretary Spencer Abraham the number of documents he was asserting deliberative process privilege over and warned of a subpoena if his agency didn't respond. White House communications on SPR fill policy are among the documents being withheld under the claim that “they constitute or reflect confidential White House communications."

Levin released a report this month exposing that the Bush administration radically altered the existing model for filling the SPR despite recommendations against the change by DOE staff. According to the report the policy change removed a tremendous amount of oil from the market last year and contributed to crude oil prices hitting a 12-year high.

FOIA, Access to Hearings at Greatest Risk from Secrecy

Two useful resources from journalists document efforts to close the doors of government as the public continues to worry about the safety of our communities.

In its third edition of its report on government secrecy in the name of fighting terrorists, The Reporters Committee for Freedom of the Press draws on the much-maligned color-coded system the federal government uses to inform the public about our nation's safety to identify the areas most threatened by the government's push for greater secrecy. Written for reporters, the report is an in-depth and up-to-date primer of the issues and obstacles reporters face in covering the war in Iraq, the rules recently established for press coverage of military tribunals, access to administrative and court proceedings related to terrorism and immigration cases, and other current issues of government secrecy. The report, "Homefront Confidential," provides a useful and detailed chronology of the federal government's drive to

expand secrecy since September 11 and reviews actions state governments have taken to limit the public's right to know.

The Reporters Committee also posts daily updates of threats to the public's right to know on its "Behind the Homefront" weblog at www.rcfp.org/behindthehomefront.

Government Lied in Landmark Secrecy Case

A recent declassification of documents indicates that the Government lied in a landmark secrecy case. Over 250 pages of declassified documents relating to a 1948 Air Force plane crash have revealed that the accident resulted from poor maintenance and training rather than some other cause that had to be kept secret for national security purposes as the government has claimed. Relatives of several of the men killed in the plane crash filed a lawsuit trying to get information about the crash immediately afterward. The case (United States v. Reynolds) was argued all the way to the Supreme Court and resulted in the records remaining sealed. The Reynolds decision has been used frequently to justify strict limits on the release of government information, including in recent homeland security cases.

After the crash, the federal government argued that it could not release the details of the crash as a matter of national security so sensitive that even the judges could not be allowed to review the documents. However, the unsealed documents now reveal that the government's case may have been built on fraud. Lawyers for the heirs of the original lawsuit filers recently filed a new petition asking the Supreme Court to acknowledge the alleged fraud and force the government to pay the heirs of the three victims the money they lost when the Supreme Court overturned a lower court judgment against the Air Force. That judgment, with a half-century of interest, would give the heirs $1.1 million.

If the military did lie to the Supreme Court about the nature of the accident documents, it would cast doubt on the landmark Supreme Court decision. The Reynolds decision effectively established the military and state secrets privilege in national security law. It has been used by the government to withhold information, block private companies from releasing documents in discovery, and has been used by the Bush administration to justify expanding the government's secrecy and homeland security powers.

The government used the Reynolds precedent to deny relatives of sailors killed on the USS Stark in 1987 by Iraqi missiles a civil trial against the defense systems. The government has also cited "grave national security concerns" as its reason for trying to prevent United Airlines from turning over documents in the first lawsuit filed by a family of a victim of the September 11 terrorist attacks. Additionally, the Bush administration uses the Reynolds precedent in many cases in which they argue for secrecy in the war on terrorism.

The current petition is not seeking to overturn Reynolds, but rather to correct the lie. However, the development may serve as a lesson to the public and judges that the courts have failed to maintain proper limits on the government's use of its secrecy powers.

Illegal Confiscation Prompts Concern Over Secrecy

The Associated Press recently discovered that a package sent between two reporters last September was illegally confiscated by the Customs Service and FBI, claiming it contained "sensitive" information. The document which prompted concern was an unclassified 1995 FBI lab report that has been made public in two open court cases. No warrant was obtained for the seizure and AP was never notified. This incident is alarming because the entire process of how and why the package was seized has been kept

secret. Federal Express, Customs, and the FBI all ignored protocols established to alert people when packages are sequestered.

The package was en route from Manila to Washington D.C., when it was stopped in Indianapolis for Customs inspections. Customs told AP the package was selected for routine inspection when they found the FBI report. Customs then alerted the FBI who in turn illegally acquired the package and incorrectly determined the already public document contained sensitive information that should not be made public. FedEx was unable to track the package after its arrival in Indianapolis and suggested to AP it had been lost during shipment. Although FedEx protocol requires the company to notify the customer if something is taken by Customs, this never occurred. Customs also did not notify AP, claiming that any notification was the FBI's responsibility. The AP did not learn the package was in the FBI's possession until they received a tip in January.

It appears that the reporter receiving the package, John Solomon, might have been particularly targeted because an identical package went to AP's United Nations office without a problem. Solomon has been the target of previous secret government investigations. In 2001, the Justice Department secretly subpoenaed Solomon's home phone records in order to unveil a confidential source for information on an investigation of Sen. Robert Torricelli (D-NJ).

Sen. Chuck Grassley (R-IA) stepped forward and demanded answers from the FBI and the Bureau of Customs and Border Protection regarding the seizure of the AP package. A letter sent on March 19, 2003, to Robert Mueller, Director of the FBI, and Robert Bonner, Commissioner of Customs, by Grassley demanded answers for "why the package was seized and kept, why no warrant was sought or obtained, and why no notification was made to the AP." His questioning of the agencies involved highlights the alarming nature of this unwarranted confiscation and attempt to censor the media and further promote an atmosphere of secrecy. Grassley was also very outspoken in his concern regarding freedom of the press and violation of privacy by the Justice Department in the 2001 subpoena of Solomon's phone records.

Press, Government "Dialogue" Eases Crackdown on Leaks

The Bush Administration has backed away from a crackdown on government leaks of classified information in part due to occasional behind-the-scenes meetings attended by government officials and press representatives.

In a white paper describing a nearly successful attempt in 2000 to criminalize unauthorized leaks, former Los Angeles Times Washington Bureau Chief Jack Nelson credits these meetings, dubbed simply the "dialogue," as easing tensions between an administration seemingly obsessed with controlling leaks of classified information and reporters who feel leaks are crucial to giving the public an understanding of government actions. Nelson concludes that, "the need for vigilance by the press is even greater today because of the Bush Administration's excessive reliance on secrecy."

New Website Comparing State Openness Laws

The Marion Brechner Citizen Access Project recently announced the launch of its new web site. The new website compares openness laws among all the states, with a strong focus on how states have limited access to information in response to terrorism and security concerns.

Visitors can easily examine and compare measures taken in different states to restrict access to information and meetings. The project uses legal research to examine individual statutory provisions controlling open meetings and open records in the 50 states. The project also evaluates relevant state

appellate court decisions and constitutional provisions. The website provides resources on each state including links to the text of specific state access laws, state audits, and analysis and books covering the state's access policies.

The Citizen Access Project hopes to eventually provide ratings, summaries, and the legal language of open meetings and public records of the 50 states and the District of Columbia. Users will be able to research the laws of individual states, as well as compare the laws of different states.

NM House Passes Resolution Boosting Hometown Liberties

New Mexico's House of Representatives this month passed a resolution critical of the federal government's strategies for fighting terrorism, strongly suggesting that the federal government's efforts to make Americans safer unnecessarily infringes on civil liberties and that federal secrecy impedes the state's ability to assess "the effect of federal antiterrorism efforts on" the public.

In a not-so-veiled criticism of the federal government's infringements on civil liberties and discriminatory actions to investigate terrorism threats, the state House of Representatives noted that "there is no inherent conflict between national security and the preservation of liberty and that Americans can be both safe and free." The resolution discourages the state police from targeting and tracking individuals and groups based solely on their political positions, race, religion, or ethnicity. It also directs libraries to inform patrons that federal law enforcement agencies may find out the materials that individuals access without those individuals' knowledge.

The resolution passed a committee vote in the Senate and is pending a full Senate vote.

View the status and text of House Joint Memorial 40.

Michigan Counties Use FOIA for Antiterror Plans

Five Michigan counties have been forced to file requests under the state’s Freedom of Information Act (FOIA) in order to obtain documents which the State Police are keeping secret. The efforts, led by Oakland County, aim to obtain state antiterrorism plans in order to strengthen their own emergency readiness plans. A number of requests for the information have been filed over the past year but have gone unfulfilled, prompting the counties to file under FOIA. While FOIA requests are usually filed by the public to gain access to government information, government can also utilize the laws.

The FOIA request, delivered March 3, 2003, has not been filled, although the State Police emergency management division has stated its department “is compiling the information.” The requested documents include a Statewide Domestic Preparedness Strategy Plan and a Michigan State Police Administration Plan, among other items. Several of the documents detail the distribution of federal money entering Michigan in order to prevent terrorist attacks. By operating under the now too common shroud of Homeland Security Secrecy, the State police are inhibiting counties from accessing critical information necessary to form effective emergency response plans. Secrecy in the name of security is stifling the critical flow of information even between state authorities and sabotaging their own goals of security and safety.

Secret Meeting in Florida

The Florida Senate held a secret meeting March 6, 2003, the first time in several decades that the press and public were unable to attend a Senate committee meeting. Senators were briefed about a state database called Threat-Net, a Florida Department of Law Enforcement (FDLE) counter-terrorism database. FDLE Commissioner Tim Moore asked for the closed meeting for security reasons, although senators attending had no special security clearance. Senate President Jim King (R) defended the meeting saying, “we're involved in some stuff that doesn't fit within the purview of normalcy. We are dealing with things that have to do with war, confidential information."

King invoked a Senate rule passed after September 11 that enables the Senate President to ban the public from meetings discussing terrorism, sabotage, and other emergencies. The House rejected a similar proposal. The House will also be asked to approve an expansion on the FDLE database, but the House is very reluctant to hold a secret meeting. The House Coordinating Committee on Public Security Chair, Rep. Dudley Goodlette (R), stated the House “rules don’t permit it and I wouldn’t favor it.”

Florida is a state that is well known for its tradition of open government and has one of the strongest Sunshine Laws in the country. The secret meeting prompted significant concern from a number of people including Senate and House members, Gov. Jeb Bush (R), and open-government advocates. Advocates fear this type of meeting could set a precedent establishing a more secretive atmosphere within the administration, compromising the public’s right-to-know.