



December 22, 2009

Board of Directors

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Via Facsimile

Mr. Cass Sunstein
Administrator, Office of Information and Regulatory Affairs
White House Office of Management and Budget
725 17th Street, N.W., Room 5228
Washington, D.C. 20503

Advisory Council

Patricia Bauman
Frances Beinecke
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John Podesta
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Re: Coal Ash Rules

Dear Cass:

I write to express my concern about OIRA's involvement in EPA's recent decision to delay action on potential regulation of coal ash. As you know, in November, your staff had a series of meetings with representatives of the electric utility industry to discuss the possibility of an EPA regulation. Then last week, EPA announced that it was delaying its decision on any potential regulation because the issues involved are "complex." Given OIRA's track record in previous administrations as a back door for industry efforts to stifle proactive regulatory proposals, the juxtaposition of these numerous meetings with industry representatives and EPA's decision to delay creates the unfortunate appearance that your office pressured the agency in some fashion. The only cure for this perception, as the Obama Administration rightly recognizes in so many contexts, is transparency. So I urge you to open up OIRA's records on the subject, going beyond the barebones listings of participants and dates of meetings and documents presented, to indicate what was discussed with industry representatives and any environmental groups, and to disclose any contacts OIRA may have had with EPA on the subject.

The coal ash controversy typifies the reasons why the Center for Progressive Reform (CPR) and other public interest groups have urged you to make fundamental changes in OIRA's policies regarding meetings with outside stakeholders:

- The ten meetings took place before an EPA decision covered by Executive Order 12,866 (or any previous presidential order concerning OIRA's role in regulatory review) was issued. This early intervention creates the unavoidable impression that OIRA is perpetually "open for business" with respect to any complaint by disgruntled industry stakeholders.

Recommendation: To signal its respect for the primary role of agencies like EPA in making such decisions, OIRA should adopt a policy of refusing to meet with any interested party until a decision covered by EO 12,866 (or the new version of the order we assume will soon be issued by the President) is before it for review.

- According to your website, OIRA held only one meeting with public interest stakeholders with respect to the coal ash controversy, as compared with ten meetings with industry representatives. You have made it clear to us in conversations we have had on regulatory policy that OIRA staff are equally willing to meet with public interest representatives, and you have urged us to help you “get the word out” that your door is equally open to those contacts. As we have noted, however, an open door policy unaccompanied by full disclosure of the positions taken by the stakeholders is unlikely to ensure balance, much less the appearance of fairness, in OIRA review for the simple reason that regulated industries have the funding to participate far more frequently than their public interest counterparts.

A 2005 study of registrations required by the Lobbying Disclosure Act shows that business or trade associations constituted more than 94 percent of the groups whose activities on Capitol Hill required them to file reports, while only about 3 percent of the registrants were public interest groups. The study also found that 73 percent of the clients listed by lobbying firms in the reports were business interests as compared to about 6 percent that were public interest groups. This dominance on Capitol Hill is mirrored by higher rates of industry participation in rulemakings.¹ A survey of Washington-based interest groups found that individual businesses participated in more than twice the number of rulemakings as other types of organizations. Business interests submitted many more comments on proposed regulations than other interests did. A study of 40 rules promulgated by four agencies from 1994 to 2001 found that of the total number of comments business interests filed 57 percent, governmental interests filed 19 percent, and non-business, nongovernmental interests submitted 22 percent.² Public-interest-group comments constituted only six percent of the total of comments submitted by non-business, nongovernmental interests.

Recommendation: We urge OIRA to adopt a policy that provides for equal and fully transparent access to its staff, much as notice-and-comment rulemaking ensures that any interested party may submit on-the-record comments. OIRA staff should work diligently to gain a comprehensive understanding of the issues at stake in a rulemaking, and should not depend on the groups with resources to flood its staff with meeting requests for such information and perspective.

¹ Scott R. Furlong and Cornelius M. Kerwin, “Interest Group Participation in Rule Making: A Decade of Change,” *Journal of Public Administration Research and Theory* 15 (2005): 353, 361; Furlong, “Exploring Interest Group Participation,” 289.

² Jason Webb Yackee and Susan Webb Yackee, “A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy,” *Journal of Politics* 68 (2006): 128, 131–33. The four agencies were OSHA, the Employment Standards Administration (ESA), the Federal Railroad Administration (FRA), and the Federal Highway Administration (FHWA). *Ibid.*, 131.

- A year ago, the Tennessee Valley Authority (TVA) was the source of a coal ash spill that adversely affected minority communities. Representatives of those communities participated in the only meeting you have held with public interest representatives on this issue. TVA is a federal agency and therefore enjoys unique access to OIRA. In fact, as you have explained to us in our previous meetings, several federal agency representatives have urged you to keep their communications with OIRA off the record so that they may share their views with complete candor. The coal ash situation typifies why this request is such bad policy because it involves a federal entity that could be regulated stringently by EPA and yet would enjoy the unwarranted privilege of secrecy under existing policy.

Recommendation: Transparency should apply to any communications between OIRA and any party, including federal agencies and departments that communicate with OIRA regarding a decision to be made by another agency.

Thank you for considering these views. I hope you enjoy the holidays.

Sincerely,

A handwritten signature in black ink that reads "Rena Steinzor". The signature is written in a cursive, flowing style.

Rena Steinzor
President, Center for Progressive Reform
Professor, University of Maryland School of Law