REMAPPING DEBATE
Asking "Why" and "Why Not"

Regulators don't listen to us

Original Reporting | By James Lardner | Regulation

A massive 2008 coal ash spill in Tennessee was the catalyst for an Environmental Protection Agency effort to require improved storage practices.

February 16, 2011 — "We're listening" signs had been posted on all four walls of the hearing room where the House committee on Oversight and Government Reform began a long-promised probe of runaway regulation last week. The message was clear: Chairman Darrell Issa and his fellow-Republicans would be listening to the real-world concerns of "job creators" — businesses, as they used to be known — because the Obama administration and its rule-makers had not been doing so.

As the hearing unfolded, however, a surprising number of the cases introduced as evidence of official inattention to business also lent themselves to the opposite interpretation — as evidence of businesses being listened to quite a lot, even, in some instances, to a degree sufficient to cause consternation in the world of public interest advocates.

Issa had sent letters of inquiry to roughly 150 corporations and trade associations. Many had written back with tales of what Jay Timmons, president of the National Association of Manufacturers, called "unworkable and excessive regulations" developed "with little regard for their impact on job creation and the economy." But a great many of the examples cited by Timmons and seven more Republican-called witnesses turned out to involve preliminary proposals for regulations that had not actually been put into effect.

As Issa himself observed, more than half of the statements gathered by his committee had mentioned what he described as the "possibly unattainable" pollution standards for industrial boilers proposed by the Environmental Protection Agency in early 2010. The boiler rules had been developed under a court-ordered deadline; as a result, according to the EPA, important facts were not gathered until after the draft rules went out for comment.

"When the data [were] finally supplied, the agency rewrote the whole thing," David Doniger of the Natural Resources Defense Council said in a post-hearing interview. (EPA confirmed in an email response to Remapping Debate that "the standards will be significantly different than what we proposed in April

2010.") Doniger added that, in the view of many environmentalists, the agency had overreacted. It was "a perfect example of the EPA being responsive, maybe too much so," Doniger said.

OSHA and noise

Another oft-cited case involved a reinterpretation of OSHA's policy on workplace noise. Three witnesses (and several committee members) objected to the idea of employers being required to address some noise problems at the source, even if inexpensive earplugs or head protectors would be enough to protect workers against hearing loss.

As a general rule, that is already considered the preferable course, Deputy Assistant Secretary of Labor Jordan Barab said in a phone interview, when Remapping Debate raised the question. For several reasons, including the fact that earplugs are uncomfortable when worn for prolonged periods (and therefore are often not worn), OSHA rules have always called for an engineering approach rather than a personal-protection approach to noise levels of 100 decibels or higher, he said. The new policy would have extended that principle to noise in the 90 to 100 decibel range.

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The potential impact on employers, Barab added, has been much exaggerated. Businesses have been saying that "we will drive them to the verge of bankruptcy before we will show any mercy. What we would really do," Barab said, "is what we already do with cases over 100 decibels: first we cite [the workplace], and then we ask them to give us a plan within six months."

Coming up with the right noise remedy is a collaborative process in which OSHA and the affected company exchange ideas and brainstorm together. Answers can turn out to be surprisingly inexpensive, Barab said, sometimes costing less than $100. "It might be a different kind of saw blade or a plywood enclosure or muffler for a machine — or even noise-absorbing curtains," he said.

In any event, the new policy was just a proposal, "not a decision that we suddenly imposed on the business community. We put it out, and asked for comment." But because of what Barab described as a "furor all out of proportion," OSHA had decided to withdraw the proposal in favor of "more consultation and education." (Jay Timmons, speaking for the National Association of Manufacturers, praised that decision, viewing it as part of a broader Obama administration outreach to the business community. Like some of the other witnesses, though, Timmons was taking a wait-and-see attitude. "The fact that the proposal was promulgated in the first place gives us pause," he said.)

In the hierarchy of business discontent with federal regulatory agencies, EPA appears to hold the top spot nowadays, largely due to its plans to use the authority of the Clean Air Act to regulate greenhouse gas emissions, first from large, coal-fired power plants, and eventually from other stationary sources.

> Businesses have been saying that "we will drive them to the verge of bankruptcy before we will show any mercy," says OSHA's second-in-command, Jordan Barab. Noise remedies, though, can turn out to be surprisingly inexpensive, he adds, sometimes costing less than $100.

To judge by the frequency of mentions in last Thursday's testimony, though, OSHA is not far behind; yesterday, the agency became the subject of its own House probe — a hearing on "OSHA's Regulatory Agenda and Its Impact on Job Creation," held by the Education and Workforce Committee.

OSHA's rule-making process has been slow in the past, however, and not much faster recently. Over the past two years, the agency has issued just two new regulations; one, involving chromium, will affect a comparative handful of electronics plants; the other, involving crane-and-derrick safety, was issued with strong support from construction companies as well as equipment manufacturers. Heavy consultation with industry runs in OSHA's blood, according to Celeste Monforton, a former agency official who is currently a lecturer at the George Washington University School of Public Health. "From my experience with a number of different regulatory agencies, OSHA does much more outreach than others," Monforton said.

Some employers have objected to a recent pattern of more frequent inspections and higher penalties. One member of Issa's committee, Frank Guinta (R-NH), expressed concern that OSHA had become a "gotcha agency." Barab dismissed that idea. It was true that OSHA had "amped up the enforcement program," he said. But with just 2,200 federal and state safety inspectors covering a universe of nine million U.S. workplaces, stiff penalties are a necessary way "to leverage our resources. We take the deterrent value of penalties very seriously," he said, adding that the agency also remains committed to an array of voluntary and cooperative safety programs.

How much change from the Bush Administration?

James Gattuso, a senior research fellow at the Heritage Foundation, stood out as the only witness to offer hard evidence of what he said was an "unprecedented tide of red tape." His evidence took the form of an analysis of major rules issued in fiscal year 2009 — rules with a cumulative economic impact, he said, of $26.5 billion, which is the highest figure in the thirty years that such records have been kept by the nation's regulators.

Why, then, had the testimony of his fellow-witnesses leaned so heavily on proposals that the adminis-

tration had already decided to modify, delay, or shelve? Gattuso told Remapping Debate that it was only natural for businesses to air grievances over pending issues rather than settled ones: "The lobbying community tends to focus on the here and now," he said.

Jerry Ellig, a senior research fellow at George Mason University's Mercatus Center (which describes itself as "the world's premier university source for market-oriented ideas") had come to testify about the quality of the cost-benefit analysis that regulatory agencies are legally required to conduct. The quality was poor, he said, because the agencies did not take that responsibility very seriously. Ellig added, however, that this was no more true of Obama regulators than Bush regulators. "When we compare 2008 and 2009, there isn't a whole lot of difference," Ellig said.

Ellig added that he was not especially sympathetic to the "not listening" complaint. The same lack of sympathy was expressed, more emphatically, by Sidney Shapiro, the lone witness called by the committee's Democratic minority. Shapiro, a regulation authority and law professor at Wake Forest University, argued that businesses were upset not over lack of access or input — not because an agency "doesn't hear them, but because it sometimes disagrees with them."

Businesses are upset not because an agency "doesn't hear them, but because it sometimes disagrees with them," says Wake Forest law professor Sidney Shapiro. Compared to the Bush era, when they had "open access and friends galore," maybe it's "true that they've been getting less attention."

On one level, he added, their distress made sense, because major disagreements between regulators and businesses had been comparatively rare during the Bush years, when businesses and lobbyists had "open access and friends galore." "Against that baseline, I suppose it might be true that they've been getting less attention," Shapiro said. By any other standard, though, business influence and access remain strong, he said.

Ample opportunities for businesses to make their points

Under Democratic and Republican administrations alike, the rulemaking process abounds with "opportunities for businesses to make their points," Shapiro said. It happens through the formal notice-and-comment process, through public hearings, and through informal contacts at every stage; it happens at the agency level, and again, quite often, when the White House Office of Information and Regulatory Affairs gets involved in a final review process.

Health, safety, and environmental advocates were intensely critical of OIRA in the Bush years. Such criticism has let up only modestly since the appointment of Cass Sunstein, a Harvard law professor and Obama confidant, to the post sometimes known as "regulation czar." Sunstein took considerable flak

from environmentalists early last year, for example, when his office directed the EPA to reconsider a proposed rule requiring the safe disposal of coal ash, the sometimes toxic residue left by the burning of coal in electricity generation. Utilities generally store coal ash behind earthenware containment dams like one that broke three years ago, 40 miles west of Knoxville, Tennessee, inundating a wide swath of countryside with toxic sludge containing elevated levels of lead and thallium, which can lead to birth defects as well as neurological and reproductive problems.

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Environmentalists argued that it was long past time for the EPA to address the coal-ash problem. Sunstein angered them by faulting the agency for conducting a cost-benefit analysis that had not taken into account, as the industry had urged, the "stigma effect" of a hazardous-waste designation on the market for wallboard and other products made with recycled coal ash. The agency was then instructed to come up with two different plans, one treating coal ash as hazardous waste, the other as household waste.

Critics pointed out that, according to OIRA's own records, it had reached that judgment after meeting with 29 opponents of the EPA's proposal (representatives of refuse companies, power plants, and coal-mining interests), and only 13 supporters, according to a tally put together by the Center for Progressive Reform.

Such statistics are fairly typical, according to observers on both sides of these controversies. Businesses provide most of the input at the OIRA level, and at the agency level, too. A soon-to-be-published study of the deliberations behind EPA's hazardous air-pollution rules suggests that the agency's business contacts generally outnumber its public-interest group contacts by at least 20 to 1. "It's very lopsided," one of the study's co-authors, Wendy Wagner, a University of Texas law professor, told Remapping Debate.

But it would be rash, according to Wagner and others, to conclude that regulators are letting businesses call all the shots. In some cases, a steep imbalance could mean that public-interest groups are not trying as hard. In other cases, agencies could be making an extra effort to insulate themselves against industry litigation. "An agency like OSHA has to respond to every objection," Wake Forest's Shapiro said.

Why do businesses complain so much, despite all the evidence of extensive involvement and influence? Some of it may have to do with the Bush-Obama contrast, as Doniger and Shapiro suggested. But Celeste Monforton offered another reason. Businesses rely on lobbyists and trade associations to represent their interests in Washington, she said. The lobbyists and trade associations, in turn, have an economic motivation to overstate the perils that face them. "They need their members, and they need to

justify their existence," Monforton said. "If there are no terrible things going on, what are they there for?"

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