

**INFORMATION/BRIEFING MEMORANDUM  
FOR THE ASSISTANT SECRETARY – LAND AND MINERALS MANAGEMENT**

**DATE:** March 30, 2017

**FROM:** Tim Spisak, Acting Assistant Director, Energy, Minerals and Realty Management

**SUBJECT:** Venting & Flaring Rule

**BACKGROUND**

The “Venting & Flaring Rule” is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). These regulations are codified at new 43 CFR subparts 3178 and 3179. The recent rulemaking also includes provisions to make regulatory and statutory authority consistent with respect to royalty rates that may be levied on competitively offered oil and gas leases on Federal lands. This rule implements recommendations from several oversight reviews, including reviews by the Office of the Inspector General of the Department of the Interior (OIG) and the Government Accountability Office (GAO).<sup>1</sup> The OIG and GAO reports recommended that the Bureau of Land Management (BLM) update its regulations to require operators to augment their waste prevention efforts, afford the BLM greater flexibility in setting royalty rates, and clarify BLM policies regarding royalty-free, on-site use of oil and gas.

**DISCUSSION**

***Date of finalization:***

The final rule was published in the Federal Register on November 18, 2016, and took effect on January 17, 2017.

***Is it subject to the White House Directive to delay the effective date?***

No. The rule was in effect on January 17, 2017, prior to the President’s January 20 Order.

***Who, if anyone, has weighed in on the rule?***

The BLM received 330,000 public comments on the rule, including approximately 1,000 unique comments. Commenters included: State governments (including Wyoming, North Dakota, and New Mexico), local governments, tribal governments, members and representatives of the oil and gas production industry, and environmental/conservation groups. In general, industry groups and the commenting states were opposed to the rule; environmental/conservation groups supported the rule; and local governments and tribal governments were split (tribal governments expressed a desire to minimize waste, but also did not want to hinder production).

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<sup>1</sup> GAO, Oil and Gas Royalties: The Federal System for Collecting Oil and Gas Revenues Needs Comprehensive Reassessment, GAO-08-691, September 2008, 6; GAO, Federal Oil and Gas Leases: Opportunities Exist to Capture Vented and Flared Natural Gas, Which Would Increase Royalty Payments and Reduce Greenhouse Gases, GAO-11-34, (Oct. 2010), 2.

Industry groups and the states of Wyoming, Montana, and North Dakota have challenged the rule in court. Several environmental groups, as well as the states of New Mexico and California, have intervened in support of the rule.

Legislation has been filed in both houses of Congress disapproving the rule pursuant to the Congressional Review Act (CRA). Under the CRA, if both houses of Congress pass a joint resolution disapproving a rule, and the President signs the resolution, the rule will cease to have effect and the agency will be precluded from issuing “a new rule that is substantially the same,” unless authorized by new legislation. The House passed its resolution, H.J. Res. 36. The Senate’s resolution, S.J. Res. 11, is pending before the Committee on Energy and Natural Resources. The White House expressed support for H.J. Res. 36.

***The potential job impact of the rule:***

The Regulatory Impact Analysis (RIA) concluded that the rule is not expected to impact employment in any material way. It found that the anticipated additional gas production volumes represent only a small fraction of the U.S. natural gas production volumes. Additionally, the RIA noted that annualized compliance costs represent only a small fraction of the annual net incomes of the affected companies, and that economic exemptions in the rule would reduce costs for the most impacted companies. Finally, the RIA predicted that companies would require new labor to comply with the rule.

In the litigation, North Dakota has asserted that it will lose “more than 1,000 jobs” as a result of the rule. An economist hired by industry petitioners asserted that the rule could result in the loss of as many as 3,850 jobs. Economists hired by the environmental groups offered a rebuttal to these claims, concluding that the rule will likely have a neutral or positive effect on employment.

**NEXT STEPS**

***What options do we have at our discretion/potential paths forward:***

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**To:** Kathleen Benedetto[kathleen\_benedetto@ios.doi.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-06T15:21:14-04:00  
**Importance:** Normal  
**Subject:** Updated Doc  
**Received:** 2017-04-06T15:22:01-04:00  
[4-6-17 VF CRA Briefing.docx](#)

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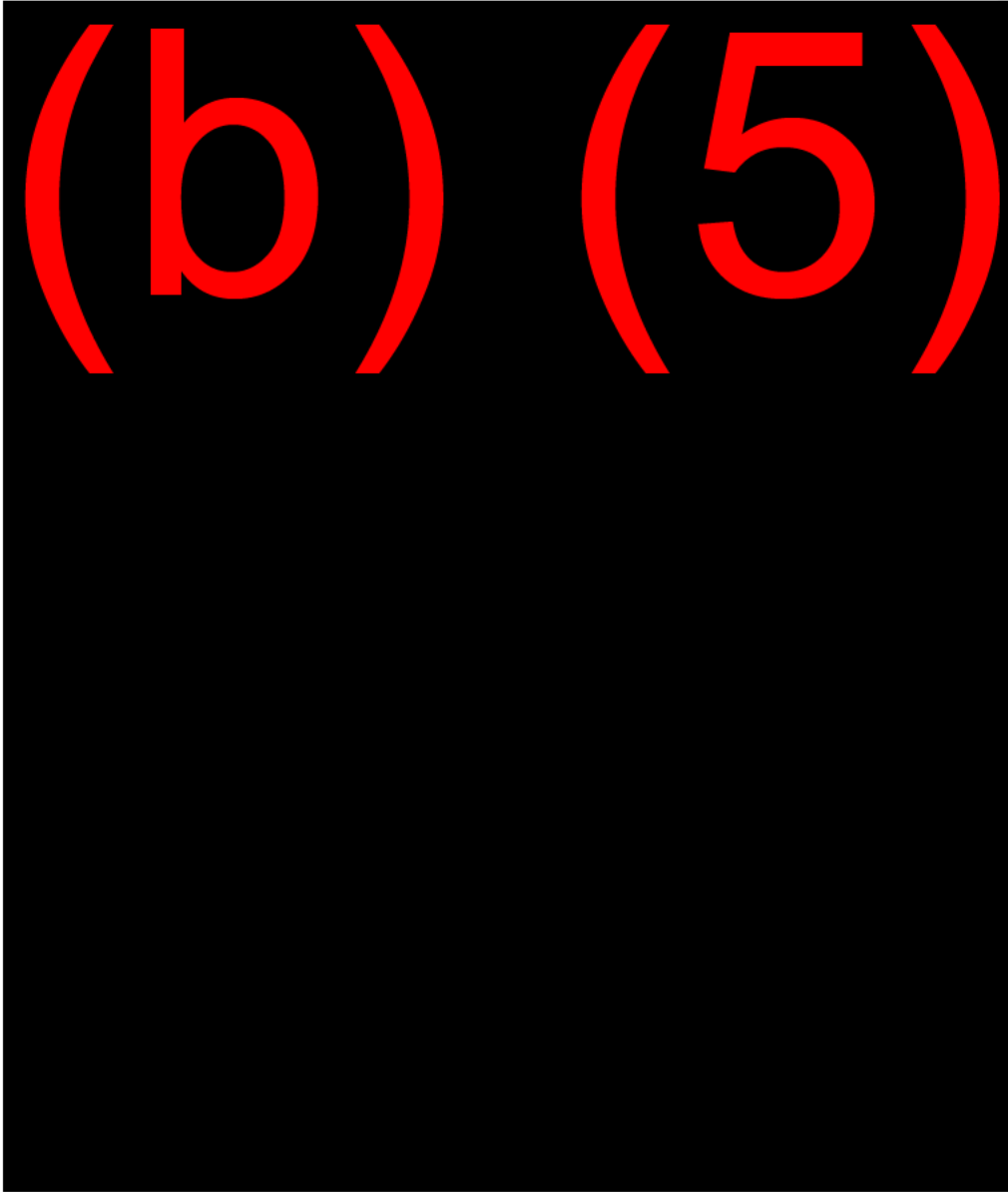
Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

BLM Venting & Flaring Rule  
Department of the Interior  
Office of Congressional & Legislative Affairs

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**To:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-06T16:37:29-04:00  
**Importance:** Normal  
**Subject:** BLM V/F Docs  
**Received:** 2017-04-06T16:38:17-04:00  
[4-6-17 VF CRA Briefing.pdf](#)

Pat. Here it is. Expanded bullet points from the attached document are below.

- Encouraging beneficial use of oil or gas on lease
  - Under the Mineral Leasing Act, oil or gas that is used on lease for production purposes is not subject to royalties. NTL-4A provided guidance as to the particular uses of oil or gas termed “beneficial purposes” that would not be subject to royalties. NTL-4A’s “beneficial purposes” included heating oil or gas to condition it for market, compressing gas to place in marketable condition, and fueling drilling rig engines.
  - A non-controversial part of the Venting & Flaring Rule (43 C.F.R. subpart 3178) replaced NTL-4A’s “beneficial purposes” with an expanded and clarified list of “royalty-free uses.” Following a repeal of the Rule, the BLM would consider how the beneficial-use policies of NTL-4A could be strengthened, either through internal guidance or additional rulemaking, in order to encourage conservation through beneficial use of oil or gas on lease.
- Regulating flaring of unmarketable gas from oil wells
  - Oftentimes, especially in tight oil formations like the Bakken, oil production is accompanied by a extensive amounts of gas production, termed “associated gas.” Depending on the value of the associated gas and the availability of gas pipelines, it may not be economical for an oil-well operator to capture the gas, leading the operator to dispose of the gas through flaring.
  - NTL-4A required BLM approval for the routine flaring of associated gas. Such approval could be obtained upon a showing that capture of the gas is not economically justified and that conservation of the gas would lead to a premature abandonment of recoverable oil reserves and ultimately to a greater loss of energy than if the gas were flared. Following a repeal of the Rule, the BLM could consider how NTL-4A’s restrictions on routine flaring could be strengthened, either through internal guidance or through additional rulemaking.

- Conserving unsold gas by injection
  - Operators may find the subsurface injection of gas to be an attractive means of disposing of gas that cannot be economically captured for market. Gas may be injected into the reservoir to enhance oil recovery, or it could be injected with the intent to recover it later. The viability of injecting unsold gas is dependent on the local geology as to whether it is suitable for accepting gas for reinjection to conserve it for future needs.
  
- Improving ROW timelines and removing obstacles to timely approval for pipeline infrastructure.
  - An important factor driving the flaring of associated gas is the lack of access to gas pipelines. Operators complain that pipeline construction is being delayed by the BLM's failure to approve rights-of-way (ROW) in a timely manner. ROW approvals are impacted by coordination with other surface managing agencies (BIA/USFS/FWS/BOR/ArmyCOE).
  
- Recognizing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana
  - Many states with Federal oil and gas production already have regulations addressing flaring. North Dakota, for example, requires operators to submit waste minimization plans with their APDs and requires operators to capture a certain percentage of the gas they produce. Wyoming and Utah place volumetric limits on flaring, and Colorado has detailed LDAR requirements. The BLM could consider avoiding a duplicative, one-size-fits-all rule that ignores effective regulations already imposed by the states.

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior



## BLM Venting & Flaring Rule

### Summary of the Final Rule:

The “Venting & Flaring Rule” (the Rule) is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). Currently, only 12 percent of operators have reported flared gas from oil well production. The Rule is codified in 43 CFR subparts 3178 and 3179 and became effective on January 17, 2017.

### Statutory Authority and Regulatory History:

The Mineral Leasing Act of 1920 (MLA) (30 U.S.C. §§ 188–287) subjects federal oil and gas leases to the condition that lessees will “use all reasonable precautions to prevent waste of oil and gas developed in the land . . . .” 30 U.S.C. § 225. Further, the MLA requires lessees to exercise “reasonable diligence, skill, and care” in their operations and requires lessees to observe “such rules for the health and safety of the miners and for the prevention of undue waste as may be prescribed by [the] Secretary [of the Interior].” 30 U.S.C. § 187. The Federal Oil and Gas Royalty Management Act (FOGRMA) makes lessees liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence or the failure to comply with applicable rules or regulations. 30 U.S.C. § 1756. Both the MLA and FOGRMA authorize the Secretary of the Interior to prescribe rules and regulations necessary to carry out the purposes of those statutes. 30 U.S.C. § 189; 30 U.S.C. § 1751.

Before promulgation of the Venting and Flaring Rule, the Bureau of Land Management (BLM) regulated the venting, flaring, and beneficial use of gas pursuant to NTL-4A, which placed limits on the venting and flaring of gas and defined when gas was “unavoidably lost” and therefore not subject to royalties. The BLM’s Venting & Flaring Rule included many regulatory changes, including emissions-focused requirements that did not appear in NTL-4A. Multiple states and industry groups believe that these new requirements are actually within the jurisdiction of the Clean Air Act (CAA) and therefore outside the Department’s authority to regulate.

### If the Rule is Not Repealed under the Congressional Review Act (CRA):

Although the Venting & Flaring Rule went into effect in January 2017, many of the Rule’s more onerous requirements are not yet operative. Although operators are not yet obligated to comply with these requirements, they will need to expend time and resources to prepare for compliance dates. Presently, the Rule requires operators to submit a waste minimization plan with their applications for permits to drill (APDs), imposes restrictions on venting, and clarifies that when gas is “avoidably lost” and it is therefore subject to royalties. Operators must comply with the Rule’s flaring (or “gas capture”) requirements, equipment upgrade/replacement requirements, and leak detection and repair (LDAR) requirements beginning on January 17, 2018.

The BLM expects industry’s annual compliance costs from 2017 to 2026 to be between \$114 and \$279 million, with first year compliance costs estimated to be \$113 million (\$84 million for LDAR alone).

The Rule will continue in effect unless the BLM rescinds or replaces the Rule through the rulemaking process outlined below, or the Rule is overturned in pending litigation. Any new rule that the BLM promulgates would likely be challenged in court with a minimum litigation cost of \$500,000. If the new rulemaking is overturned in litigation, the Venting and Flaring Rule would come back into effect.

If the Rule is Repealed under the CRA:

If the Rule is repealed under the CRA, NTL-4A would come back into effect immediately. The BLM retains its existing authority under the MLA and FOGRMA to make effective updates to NTL-4A while ceding some of the more duplicative regulatory provisions to states/EPA under the CAA.

The BLM could consider policy actions to curb waste and focus on revisions to NTL-4A to address the following:

- Encouraging beneficial use of oil or gas on lease
- Regulating flaring of unmarketable gas from oil wells
- Conserving unsold gas by reinjection
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**Table: Rulemaking Schedule**

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**Sent:** 2017-04-06T16:39:32-04:00  
**Importance:** Normal  
**Subject:** V/F Doc  
**Received:** 2017-04-06T16:40:20-04:00  
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Here they are. Please keep close hold for right now.

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neil\_chatterjee@mccconnell.senate.gov[neil\_chatterjee@mccconnell.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-06T16:59:34-04:00  
**Importance:** Normal  
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[4-6-17 VF CRA Briefing.pdf](#)  
[4-6-17 VF CRA VF Expanded Bullet List.docx](#)

Neil and Kate. Thank you both for chatting. I've attached the docs that have been sent to Portman's office for your reference. I will also be sending to Heller's. Both Senators will be doing a call with the Secretary tomorrow. Glad to talk about either if needed.

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Micah Chambers  
Special Assistant / Acting Director  
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- Improving ROW timelines and removing obstacles to timely approval for pipeline infrastructure.
  - An important factor driving the flaring of associated gas is the lack of access to gas pipelines. Operators complain that pipeline construction is being delayed by the BLM’s failure to approve rights of way (ROW) in a timely manner. ROW approvals are impacted by coordination with other surface managing agencies (BIA/USFS/FWS/BOR/ArmyCOE).
- Recognizing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana
  - Many states with Federal oil and gas production already have regulations addressing flaring. North Dakota, for example, requires operators to submit waste minimization plans with their APDs and requires operators to capture a certain percentage of the gas they produce. Wyoming and Utah place volumetric limits on flaring, and Colorado has detailed LDAR requirements. The BLM could consider avoiding a duplicative, one size fits all rule that ignores effective regulations already imposed by the states.

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## BLM Venting & Flaring Rule

### Summary of the Final Rule:

The “Venting & Flaring Rule” (the Rule) is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). Currently, only 12 percent of operators have reported flared gas from oil well production. The Rule is codified in 43 CFR subparts 3178 and 3179 and became effective on January 17, 2017.

### Statutory Authority and Regulatory History:

The Mineral Leasing Act of 1920 (MLA) (30 U.S.C. §§ 188–287) subjects federal oil and gas leases to the condition that lessees will “use all reasonable precautions to prevent waste of oil and gas developed in the land . . . .” 30 U.S.C. § 225. Further, the MLA requires lessees to exercise “reasonable diligence, skill, and care” in their operations and requires lessees to observe “such rules for the health and safety of the miners and for the prevention of undue waste as may be prescribed by [the] Secretary [of the Interior].” 30 U.S.C. § 187. The Federal Oil and Gas Royalty Management Act (FOGRMA) makes lessees liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence or the failure to comply with applicable rules or regulations. 30 U.S.C. § 1756. Both the MLA and FOGRMA authorize the Secretary of the Interior to prescribe rules and regulations necessary to carry out the purposes of those statutes. 30 U.S.C. § 189; 30 U.S.C. § 1751.

Before promulgation of the Venting and Flaring Rule, the Bureau of Land Management (BLM) regulated the venting, flaring, and beneficial use of gas pursuant to NTL-4A, which placed limits on the venting and flaring of gas and defined when gas was “unavoidably lost” and therefore not subject to royalties. The BLM’s Venting & Flaring Rule included many regulatory changes, including emissions-focused requirements that did not appear in NTL-4A. Multiple states and industry groups believe that these new requirements are actually within the jurisdiction of the Clean Air Act (CAA) and therefore outside the Department’s authority to regulate.

### If the Rule is Not Repealed under the Congressional Review Act (CRA):

Although the Venting & Flaring Rule went into effect in January 2017, many of the Rule’s more onerous requirements are not yet operative. Although operators are not yet obligated to comply with these requirements, they will need to expend time and resources to prepare for compliance dates. Presently, the Rule requires operators to submit a waste minimization plan with their applications for permits to drill (APDs), imposes restrictions on venting, and clarifies that when gas is “avoidably lost” and it is therefore subject to royalties. Operators must comply with the Rule’s flaring (or “gas capture”) requirements, equipment upgrade/replacement requirements, and leak detection and repair (LDAR) requirements beginning on January 17, 2018.

The BLM expects industry’s annual compliance costs from 2017 to 2026 to be between \$114 and \$279 million, with first year compliance costs estimated to be \$113 million (\$84 million for LDAR alone).

The Rule will continue in effect unless the BLM rescinds or replaces the Rule through the rulemaking process outlined below, or the Rule is overturned in pending litigation. Any new rule that the BLM promulgates would likely be challenged in court with a minimum litigation cost of \$500,000. If the new rulemaking is overturned in litigation, the Venting and Flaring Rule would come back into effect.

If the Rule is Repealed under the CRA:

If the Rule is repealed under the CRA, NTL-4A would come back into effect immediately. The BLM retains its existing authority under the MLA and FOGRMA to make effective updates to NTL-4A while ceding some of the more duplicative regulatory provisions to states/EPA under the CAA.

The BLM could consider policy actions to curb waste and focus on revisions to NTL-4A to address the following:

- Encouraging beneficial use of oil or gas on lease
- Regulating flaring of unmarketable gas from oil wells
- Conserving unsold gas by reinjection
- Improving ROW timelines and removing obstacles to timely approval for pipeline infrastructure
- Recognizing existing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana

If a court overturns any replacement or revision of NTL-4A, NTL-4A would come back into effect.

**Table: Rulemaking Schedule**

Activity	Description	Timing
Advanced Notice of Proposed Rulemaking (ANPR)	OPTIONAL. The BLM would solicit input from the public on whether, and how, NTL-4A should be revised.	1 month to publish 2 months for public comment
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Final rule is published	The BLM publishes the final rule in the Federal Register	After publishing, 2 months until effective
Total time to publish		13 months (for NPR) 16 months (including ANPR)
Total cost		\$1.2 2.1 million

**To:** Harrell, Jeremy (Heller)[Jeremy\_harrell@heller.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-06T17:00:43-04:00  
**Importance:** Normal  
**Subject:** Fwd: BLM V/F Docs  
**Received:** 2017-04-06T17:01:33-04:00  
[4-6-17 VF CRA Briefing.pdf](#)

Jeremy. Thanks for chatting and appreciate the quick response today for the call. The doc is attached and expanded bullet points from the attached document are below.

- Encouraging beneficial use of oil or gas on lease
  - Under the Mineral Leasing Act, oil or gas that is used on lease for production purposes is not subject to royalties. NTL-4A provided guidance as to the particular uses of oil or gas termed “beneficial purposes” that would not be subject to royalties. NTL-4A’s “beneficial purposes” included heating oil or gas to condition it for market, compressing gas to place in marketable condition, and fueling drilling rig engines.
  - A non-controversial part of the Venting & Flaring Rule (43 C.F.R. subpart 3178) replaced NTL-4A’s “beneficial purposes” with an expanded and clarified list of “royalty-free uses.” Following a repeal of the Rule, the BLM would consider how the beneficial-use policies of NTL-4A could be strengthened, either through internal guidance or additional rulemaking, in order to encourage conservation through beneficial use of oil or gas on lease.
- Regulating flaring of unmarketable gas from oil wells
  - Oftentimes, especially in tight oil formations like the Bakken, oil production is accompanied by a extensive amounts of gas production, termed “associated gas.” Depending on the value of the associated gas and the availability of gas pipelines, it may not be economical for an oil-well operator to capture the gas, leading the operator to dispose of the gas through flaring.
  - NTL-4A required BLM approval for the routine flaring of associated gas. Such approval could be obtained upon a showing that capture of the gas is not economically justified and that conservation of the gas would lead to a premature abandonment of recoverable oil reserves and ultimately to a greater loss of energy than if the gas were flared. Following a repeal of the Rule, the BLM could consider how NTL-4A’s restrictions on routine flaring could be strengthened, either through internal guidance or through additional rulemaking.

- Conserving unsold gas by injection
  - Operators may find the subsurface injection of gas to be an attractive means of disposing of gas that cannot be economically captured for market. Gas may be injected into the reservoir to enhance oil recovery, or it could be injected with the intent to recover it later. The viability of injecting unsold gas is dependent on the local geology as to whether it is suitable for accepting gas for reinjection to conserve it for future needs.
  
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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Total cost		\$1.2 2.1 million



**To:** Mitchell, Amy[amy\_mitchell@ios.doi.gov]  
**Cc:** Megan Bloomgren[megan\_bloomgren@ios.doi.gov]  
**From:** Mashburn, Lori  
**Sent:** 2017-04-06T17:33:26-04:00  
**Importance:** Normal  
**Subject:** Re: U.S. Department of the Interior News Briefing for Friday, March 31, 2017  
**Received:** 2017-04-06T17:34:15-04:00

No, I was more concerned with the clips chosen. Heather addressed most of questions last week though. Thanks for following up.

Lori K. Mashburn  
White House Liaison  
Department of the Interior  
202.208.1694

On Thu, Apr 6, 2017 at 11:49 AM, Mitchell, Amy <[amy\\_mitchell@ios.doi.gov](mailto:amy_mitchell@ios.doi.gov)> wrote:

Lori,  
This is apparently done by an outside contractor. Are they missing things?

Amy.

On Fri, Mar 31, 2017 at 1:11 PM, Mashburn, Lori <[lori\\_mashburn@ios.doi.gov](mailto:lori_mashburn@ios.doi.gov)> wrote:

Ladies,

Just a quick question. Are y'all involved in the review stage for these clips that go out? Was just curious if there was a standard or protocol for what warrants inclusion for distribution.

Thanks,  
Lori K. Mashburn  
White House Liaison  
Department of the Interior  
202.208.1694

----- Forwarded message -----

**From:** **Bulletin Intelligence** <[Interior@bulletinintelligence.com](mailto:Interior@bulletinintelligence.com)>  
**Date:** Fri, Mar 31, 2017 at 7:00 AM  
**Subject:** U.S. Department of the Interior News Briefing for Friday, March 31, 2017  
**To:** [Interior@bulletinintelligence.com](mailto:Interior@bulletinintelligence.com)

**Mobile version and searchable archives available [here](#). Please [click here](#) to subscribe.**

**DATE: FRIDAY, MARCH 31, 2017 7:00 AM EDT**  
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- Late Night Political Humor.

**DOI In The News**

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## **Secretary Zinke Speaks At Event On Eve Of Transfer Day Centennial Celebration.**

The [Virgin Islands Daily News](#) (3/31) reports that Interior Secretary Ryan Zinke spoke at a Government House reception in Christiansted, which "marked the eve of the territory's Transfer Day centennial celebration on Thursday." Zinke said, "The president said, 'Remind the territory that it's not just a celebration of the past 100 years, but a celebration of what the next 100 years will be.'" Zinke "also spoke of Trump's plan to develop infrastructure and how important that plan could be to the territories." He added, "I pledge that the Park Service is going to be friendly, we're going to be helpful, we're going to be collaborative. We're going to work with local communities because it's the right thing to do and we all share the same goals."

## **Democratic Senators Introduce Bill To Block Trump's Energy Order.**

The [Durango \(CO\) Herald](#) (3/30, Stein) reports that Sen. Michael Bennet and "30 other Democratic senators have introduced a bill to rescind President Donald Trump's executive order that reversed Obama-era initiatives to combat climate change." The legislation, the Clean Air, Healthy Kids Act, "would block all federal agencies from implementing actions from Trump's executive order." Bennet and "nine other Democratic senators from Western states also sent a letter to Trump urging him to rescind his executive order."

***Daines Lauds "All-Of-The-Above" Energy Policy.*** In an op-ed for the [Helena \(MT\) Independent Record](#) (3/30, Daines), Sen. Steve Daines welcomes "the start of a new era in energy production and job creation." Daines says that all Montanans "want clean water and clean air but we don't want Washington, D.C., dictating how we should do business or which of natural resources we should prefer." He adds that "Montanans are very fortunate we truly are an all-of-the-above energy state." Daines notes that "in Montana we have it all – an unparalleled quality of life and an abundance of natural resources: coal, natural gas and oil, as well as renewables such as hydro, wind, biomass and solar opportunities." He argues that "there shouldn't be a false choice renewable and non-renewables: Montanans choose both."

***Trump's Energy Order Welcomed.*** For the "Pundits" blog of [The Hill](#) (3/30, Neily, Contributor). Nicole Neily, the president of the Franklin Center for Government and Public Integrity, writes that welcomes President Trump's actions to help coal communities. She acknowledges that "the fracking-led natural gas boom created more competition in the energy industry than existed previously," but argues "that alone wasn't what put tens of thousands of American workers out of work." Instead, Neily asserts that "what wrought the most damage was that both the federal government and environmental activists were bent on undermining all forms of fossil fuels for the last eight years."

***Additional Coverage.*** Additional coverage was provided by the [Washington \(DC\) Post](#) (3/30, Fears, Eilperin), the [Summit County \(CO\) Citizens Voice](#) (3/30, Berwyn), and the [Huffington Post](#) (3/30, Negin, Contributor).

## **GOP Lawmakers Using “Obscure” 1996 Law To Reverse Obama Administration Regulations.**

On its website, [CBS News](#) (3/30, Shabad) reports GOP lawmakers “have been using an obscure law from 1996 to take an ax to rules finalized by federal agencies toward the end of the Obama administration – and their elimination could have long-lasting effects.” The article says congressional Republicans have “been relying on the power of the Congressional Review Act (CRA) to nullify regulations that, for example, would have provided communities with information about how to protect surface water from coal mining operations – or one that would have directed the Social Security Administration to report the records of people with severe mental illnesses to the background check system used by licensed firearms dealers.” The piece explains that GOP lawmakers have been “aggressively” using CRA “because they only have 60 days in session, from the start of the new Congress, to take advantage of the law’s authority to expedite the reversal process.”

Meanwhile, [E&E Publishing](#) (3/30, King, Gilmer) reports that “efforts to repeal the Bureau of Land Management’s methane rule under the Congressional Review Act are not dead following President Trump’s ‘energy independence’ executive order, the American Council for Capital Formation said yesterday.” According to the article, “as the CRA resolution stalled in the Senate, ACCF this month launched a campaign to strike from the books BLM’s regulation curbing natural gas venting, flaring and leakage from production sites on public lands.”

## **Environmental Groups Seek To Intervene In Suit Challenging Northeast Canyons And Seamounts Marine National Monument.**

The [AP](#) (3/30, Whittle) reports that “environmental groups that want to save” the Northeast Canyons and Seamounts Marine National Monument are “asking to intervene in a federal lawsuit that challenges its creation.” They say the monument area has “extraordinary scientific and ecological importance.” Brad Sewell, an attorney for the National Resources Defense Council, said Thursday, “It’s an extraordinarily important ocean park, and the first such monument in the Atlantic, and we want to have a role in defending it.”

## **Beachhead Teams Include “Mystery Workers”.**

[E&E Publishing](#) (3/30) reports that the Trump Administration has “largely refused to discuss the hundreds of employees who make up the so-called beachhead teams.” The article highlights those on agency beachhead teams that are “new and unknown, with names and backgrounds that are impossible to reliably pin down.” Those linked to the Interior Department include Timothy Williams, Natalie Davis, Wadi Yakhour, and Virginia Johnson.

## **Columnist: Boise “Ideal” Place For Interior Headquarters.**

In his column for the [Idaho Statesman](#) (3/30, Barker), Rocky Barber suggests moving “the entire Department of Interior to the region where most of its management takes place.” Barber says Interior Secretary Ryan Zinke should

seriously consider Boise, Idaho as that place. He notes that the city is “the home of the National Interagency Fire Center, the government organization that basically invented breaking down agency barriers to coordinate wildland firefighting nationwide.” Barber adds that “Boise’s location on the southern edge of the Northern Rockies, on the northwest edge of the Great Basin and in the heart of the Pacific Northwest make it ideal.”

### **Additional Coverage Of “Doggy Days At Interior” Initiative.**

Additional coverage of the “Doggy Days at Interior” initiative was provided by [Parade Magazine](#) (3/30, Ingram).

### **America’s Great Outdoors**

#### ***National Park Service***

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### **District Of Columbia Mayor Seeks Approval To Upgrade Federally Owned Properties.**

The [Washington Post](#) (3/30, O’Connell) reports that District of Columbia Mayor Muriel Bowser “is asking President Trump for approval to make major upgrades to federally owned properties – the Robert F. Kennedy Memorial Stadium site, Franklin Square downtown and the city’s three golf courses – currently controlled by the Interior Department.” The request “could advance the idea of building a new 65,000-seat stadium for the Washington Redskins when they depart FedEx Field or a 20,000-seat arena capable of hosting the Washington Capitals and Wizards should they leave the Verizon Center in the future.”

Additional coverage was provided by the [AP](#) (3/30), the [Washington \(DC\) Post](#) (3/30, Davis, Jamison), [WTOP-FM Washington \(DC\)](#) Washington (3/30), [WRC-TV Washington \(DC\)](#) Washington (3/30, Sherwood), and [WTTG-TV Washington \(DC\)](#) Washington (3/30).

### **Groups Say Maintenance Backlog Not As Large As It Seems.**

The [Arizona Daily Sun](#) (3/30, Cowan) reports that “conservation groups are worried” that the maintenance backlog at national parks is “being used as an argument to increase privatization of national parks and as a reason to defund other Interior Department programs to free up money for deferred maintenance.” However, “after analyzing Park Service deferred maintenance data, the left-leaning Center for American Progress and the Center for Western Priorities say that nearly \$12 billion backlog isn’t what it seems and a significant portion shouldn’t be weighing down the Park Service’s balance sheet.” The groups “stated that \$389 million of the agency’s deferred maintenance total is supposed to be performed by the concessionaires.” Also, “another \$5.9 billion is needed for paved roads projects, which should be funded through transportation funding bills not the Park Service, the organizations stated.” The Center for American Progress Maintenance concluded that “projects that are both critical and the direct responsibility of the Park Service total a much smaller \$1.3 billion, which is not an ‘indomitable task’ to address.”

### **Drivers Warned About Desert Tortoises Following Three Deaths In Joshua Tree National Park.**

The [AP](#) (3/30) reports that "people driving in Joshua Tree National Park are being asked to watch out for wildlife after the deaths of three desert tortoises in the past week." The National Park Service "said Wednesday that factors contributing to the deaths include a big increase in visitors to Joshua Tree in recent years and the spring bloom that has drawn animals like the tortoise out to feed."

Coverage by the AP was also picked up by the [Los Angeles \(CA\) Times](#) (3/30, Press, Press), the [Boston \(MA\) Herald](#) (3/30), the [Chicago \(IL\) Tribune](#) (3/30), the [Minneapolis \(MN\) Star Tribune](#) (3/30), [Philly \(PA\)](#) (3/30), the [San Francisco \(CA\) Chronicle](#) (3/30), [U.S. News & World Report](#) (3/30), the [Washington \(DC\) Post](#) (3/30, Press), and the [Daily Mail](#) (3/30).

Additional coverage was provided by [KERO-TV Bakersfield \(CA\)](#) Bakersfield, CA (3/30).

### **Legislation Would Allow Expansion Of John Muir National Historic Site.**

The [Los Angeles Times](#) (3/30, Wire) reports that California's senators and Rep. Mark DeSaulnier "filed legislation Thursday to add 44 acres to the John Muir National Historic Site." The John Muir Heritage Land Trust has "offered to donate the additional land to the National Park Service, which operates the site, and the bill would authorize the agency to accept the parcel."

### **Medgar Evers Home Could Join NPS.**

The [Jackson \(MS\) Clarion Ledger](#) (3/30, Mitchell) reports that "a Senate committee approved a study Thursday that could clear the way for the home of slain civil rights leader Medgar Evers to become a National Park Service site." The full Senate is "now expected to vote on the measure introduced by U.S. Sens. Thad Cochran and Roger Wicker and approved by the Senate Energy and Natural Resources Committee."

Additional coverage was provided by the [Jackson \(MS\) Clarion Ledger](#) (3/30).

### **NPS Says High Levels Of Rat Poison Found In Dead Bobcat.**

[Southern California Public Radio](#) (3/30, Bloom) reports that "a bobcat that died last December in the Simi Valley area ingested rat poison, the National Park Service has determined." In a statement released Thursday, the NPS "said it suspected the presence of rat poison even before the animal died, based on its appearance." Later, a necropsy "revealed that the liver of the bobcat known as B-332 contained an unusually large mixture of toxic compounds and internal bleeding."

### **NPS To Burn 66 Acres At Gettysburg National Military Park.**

[WGAL-TV Lancaster, PA](#) (3/30) reports that the National Park Service will be "burning more fields on the Gettysburg Battlefield." According to the article,

"fifty-two acres will be burned on the west slope of Little Round Top." Also, 14-acres at Pardee Field will be "burned as part of an effort to keep the landscape as close to it was during the Civil War battle."

Additional coverage was provided by [WPMT-TV Harrisburg, PA](#) (3/30).

### ***Fish and Wildlife Service***

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#### **West Indian Manatee Reclassified From Endangered to Threatened.**

The [AP](#) (3/30) reports that the U.S. Fish and Wildlife Service has downlisted the West Indian manatee to "threatened" from "endangered," but "it also says the gentle giant could be in danger of extinction in the future without continued protections." The FWS "said in a news release Thursday that challenges remain to ensuring the species' long-term future, even though the manatee population has increased over the years." According to the article, "the new status won't diminish existing federal protections and the manatee will continue to be protected under the Marine Mammal Protection Act."

[The Hill](#) (3/30, Wheeler) reports that Florida Rep. Vern Buchanan is "slamming" the reclassification, calling the agency announcement Thursday a "huge disappointment." Buchanan said in a statement, "The decision to weaken protections under the Endangered Species Act threatens the survival of the manatee, one of Florida's most beloved animals. It needs to be reversed." Buchanan said "he is planning to reach out to the secretary of the Interior to reconsider and overturn the decision."

[Politico](#) (3/30, Ritchie) reports that "some environmentalists say the change isn't warranted because the species remains at risk." Jaclyn Lopez, Florida director of the Center for Biological Diversity, "said in response to the announcement that manatees remain in danger." Lopez said in a statement, "Thanks to the safety net of the Endangered Species Act, broad public support and conservation efforts by the state, manatee numbers have improved over the past few decades. With ongoing threats posed by boat strikes and habitat loss, we don't support reducing protections through down-listing yet."

Additional coverage was provided by the [Wall Street Journal](#) (3/30, Campo-Flores), [TIME](#) (3/30, Worland), [Reuters](#) (3/30, Simpson), [AFP](#) (3/30), the [Florida Times-Union](#) (3/30, Patterson), the [Tallahassee \(FL\) Democrat](#) (3/30, Eppers), the [Tampa Bay \(FL\) Times](#) (3/30, Pittman), the [Palm Beach \(FL\) Post](#) (3/30, Salisbury), the [Tampa \(FL\) Tribune](#) (3/30, Pittman), the [Bradenton \(FL\) Herald](#) (3/30, Nealeigh), the [Sarasota \(FL\) Patch](#) (3/30, Lonon), the [Saint Peters \(FL\) Blog](#) (3/30, Perry), and [WFOR-TV Miami \(FL\) Miami](#) (3/30).

Coverage by the AP was also picked up by [ABC News](#) (3/30), the [Minneapolis \(MN\) Star Tribune](#) (3/30), [Philly \(PA\)](#) (3/30), [U.S. News & World Report](#) (3/30), the [Washington \(DC\) Post](#) (3/30, Press), and the [Daily Mail](#) (3/30).

#### **Judge Orders FWS To Review Protected Status For Pygmy Owl.**

The [AP](#) (3/30) reports that "a federal judge in Arizona has ruled the federal government must reconsider endangered species protection for the cactus ferruginous pygmy owl." Wednesday's holding "came in response to a lawsuit



brought by the Center for Biological Diversity and Defenders of Wildlife over a 2011 decision by the U.S. Fish and Wildlife Service that denied endangered species protection for the reddish-brown owl that burrows in Sonoran Desert cactuses and trees." Environmentalists claim "the owl is threatened by urban sprawl, invasive species, fire, drought and other factors across the Sonoran Desert."

Coverage by the AP was also picked up by the [Albuquerque \(NM\) Journal](#) (3/30) and [U.S. News & World Report](#) (3/30).

### **Protection For Preble's Meadow Jumping Mouse Challenged Again.**

The [AP](#) (3/30) reports that a petition filed with the U.S. Fish and Wildlife Service Thursday asks the federal agency "to lift wildlife protections for a long-tailed mouse found in Colorado and Wyoming." The petition "revives a claim that the Preble's meadow jumping mouse is not a distinct species but essentially the same as other, more plentiful mice." The FWS has "90 days to respond."

Coverage by the AP was also picked up by the [Albuquerque \(NM\) Journal](#) (3/30), the [Bristol \(VA\) Herald Courier](#) (3/30), [U.S. News & World Report](#) (3/30), [Denverite \(CO\)](#) (3/30), and [WRAL-TV Raleigh \(NC\)](#) Raleigh, NC (3/30).

### **Wildlife Advocates File Lawsuit To Halt Minnesota Mine.**

[Courthouse News](#) (3/30, CORDELL-WHITNEY) reports that "environmentalists accuse the federal government of ignoring the effects of proposed mining operations on the Superior National Forest's designated habitats for the threatened Canada lynx, northern long-eared bat and gray wolf." The Center for Biological Diversity, Earthworks and Save Our Sky Blue Waters filed a lawsuit against the U.S. Fish and Wildlife Service "in Minnesota federal court on Tuesday, claiming the agency violated the Endangered Species Act."

### **Environmental Groups Challenging Proposed Montanore Mine.**

The [Missoulian \(MT\)](#) (3/30, Chaney) reports that "the question of whether a proposed mine on the edge of the Cabinet Mountains Wilderness should be judged on its predicted impact or its ongoing development went before a federal judge Thursday." Montanore Minerals Corp. "wants to build its copper and silver mine on the edge of the Cabinet Mountains Wilderness." However, "a coalition of environmental groups including Save Our Cabinets, Earthworks and Defenders of Wildlife have challenged the project." The groups "want the FWS biological opinion that OK'd the project overturned."

### **FWS Plans To Build Low Sea Wall off Lido Beach.**

[Newsday \(NY\)](#) (3/30, Asbury) reports that the U.S. Fish and Wildlife Service is "seeking to build a low sea wall off Lido Beach in an effort to slow waves and preserve salt marshes and wildlife habitats in Reynolds Channel." FWS officials "submitted an application to the New York Department of Environmental Conservation this month for the Lido Beach Wildlife Management Area."

### **Mexican Wolf Captured On Ranch Land In Arizona.**

Tucson News Now (AZ) (3/30, Walton) reports that "crews with the Interagency Field Team (IFT) captured a female Mexican Gray Wolf on private ranch land in southeastern Arizona." The wolf is "part of the ongoing reintroduction effort." The animal was "relocated to the Sevilleta Wolf Management Facility in New Mexico where it is reported she is in good health." U.S. Fish and Wildlife Service Southwest Regional Director Benjamin Tuggle said, "We were decisive in our management actions because this wolf was young, alone, genetically important, and not affiliated with another pack. Future management actions may differ based on the circumstances of each scenario."

### **FWS Finds Error In Pocket Gopher Soil Maps.**

The Centralia (WA) Chronicle (3/30, Perednia) reports that "the soil type maps used to determine if a Mazama pocket gopher review is needed on Thurston County properties has an error in the range of 300 feet." According to County Manager Romero Chavez, "the error occurred when the hand-drawn maps of soil types maintained by United States Department of Agriculture were integrated into the mapping software known as geographic information system." The error was found by the U.S. Fish and Wildlife Service.

### **Additional Coverage: Appeals Court Restores Federal Protections For Prairie Dog.**

Additional coverage that the 10th Circuit Court of Appeals restored protections for the Utah prairie dog was provided by the AP (3/30, McCombs).

### ***Bureau of Land Management***

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### **Plaintiffs In Red River Dispute Ask For Summary Judgment.**

The Wichita Falls (TX) Times Record News (3/30, Ingle) reports that "the plaintiffs in a case to decide a land dispute between Texas landowners and the federal government have asked the judge presiding over the matter to make a decision before the case goes to trial in July." Robert Henneke, general counsel and director of the Center for the American Future at the Texas Public Policy Foundation, "said the goal of the motion is to get his clients their day in court before a July trial date, given the facts that have been presented." Henneke said in a release, "The evidence filed with the court makes clear that BLM disregarded the law on where the private boundary falls along the Red River. We hope the court will affirm that private property rights extend to where the Red River flows now, not where it flowed 100 years ago."

### **BLM Seeks Public Input On Proposed Cortez Expansion.**

The Elko (NV) Daily Free Press (3/30) reports that the Bureau of Land Management is "seeking input regarding issues to be analyzed in the environmental impact statement for a proposal by Barrick to expand its existing open pit and underground gold mine operations at Cortez."

## **Securing America's Energy Future**

### ***Offshore Energy Development***

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#### **BSEE Authorizes Use Of Sercel's QuietSea System.**

The [Oil & Gas Financial Journal](#) (3/30) reports that "Sercel's QuietSea™ Passive Acoustic Monitoring (PAM) system, which can be integrated into seismic streamers to detect the presence of marine mammals during seismic operations," has been authorized by the Bureau of Safety and Environmental Enforcement "for use in the US waters of the Gulf of Mexico." According to the article, "Sercel's QuietSea marine mammal monitoring system was specifically designed to provide clear and accurate mammal detection and localization information to PAM operators having to make rapid and well-informed decisions during seismic surveys."

### ***Onshore Energy Development***

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#### **Environmental Groups Sue Approval Of Keystone XL Permit.**

[Reuters](#) (3/30) reports six environmental groups filed a lawsuit on Thursday against the Trump Administration in a federal court in Montana to challenge the approval of the Keystone XL pipeline. The groups allege the State Department, when granting the permit to cross the border, relied on an "outdated and incomplete environmental impact statement" when making the decision. [Bloomberg News](#) (3/30, Harris, Dlouhy) reports the Sierra Club and five other conservation filed the lawsuit just days after two other groups filed a similar complaint in the same court. According to Bloomberg intelligence analysts Rob Barnett and Brandon Barnes, the best case scenario for the pipeline coming online would be the second half of 2019, but legal and administrative challenges in Montana and Nebraska could delay progress. The Sierra Club alleges that government officials violated federal environmental laws and "ignored significant new information that bears on the project's threats to the people, environment and national interests of the US." The [AP](#) (3/30, Funk) reports the coalition of environmental groups also include the Natural Resources Defense Council, "the Northern Plains Resource Council, Bold Alliance, Friends of the Earth and the Center for Biological Diversity." Nebraska regulators in the Public Service Commission must still review and approve the proposed route through the state. The [Washington Times](#) (3/30, Wolfgang) reports Michael Brune, executive director of the Sierra Club, said, "The Keystone XL pipeline is nothing more than a dirty and dangerous proposal that's time has passed. It was rightfully rejected by the court of public opinion and President Obama, and now it will be rejected in the court system." He went on to say, "It has never been a question of whether a pipeline will spill, but rather a question of when, and Keystone XL is no different. This tar sands pipeline poses a direct threat to our climate, our clean water, wildlife, and thousands of landowners and communities along the route of this dirty and dangerous project, and it must and will be stopped." [The Hill](#) (3/30, Henry) reports the Indigenous Environmental Network and North Coast Rivers Alliance

sued Trump over the pipeline on Monday.

***Nebraska PUC Afraid Thousands Of Keystone XL Emails Treated As Spam.***

The AP (3/30) reports a Nebraska Public Service Commission spokeswoman said that tens of thousands of emails sent to the board about the Keystone XL pipeline are being treated as spam, rather than as communications sent by people. Spokeswoman Deb Collins said the commission is working with the state's Office of the Chief Information Officer to manage the emails, because the commission is not able to differentiate between emails sent by the public and those generated by a computer program. Commissioner Crystal Rhoades said, "People have a right to write to us and for that to get to us. ... I don't want them to be discounted."

***Dakota Access Opponents Turn Attention To Keystone XL, ACP.*** Bloomberg News (3/30, Crawford) reports environmentalists, having lost the battle against the Dakota Access Pipeline, are turning their attention to other pipeline projects, including the Keystone XL Pipeline and the Atlantic Coast Pipeline. The article reports opponents will first target financiers of the projects, then will likely petition the courts to block the projects.

Smith: Pipeline Fills An Urgent Need. Rep. Adrian Smith writes in the Congress Blog for The Hill (3/30, Rep. Adrian Smith (r-Neb.)) saying that it is time to move forward with construction of the Keystone XL pipeline. Smith says that millions of Americans rely on affordable energy in their daily lives and the pipeline continues to receive bipartisan support as a long-term energy solution to meet growing demand. He argues, "Years of debate and study have led to one conclusion — Keystone XL is a safe and beneficial infrastructure investment."

***McKibben: Multiple Factors Stand In Way Of Construction.*** Bill McKibben, founder of 350.org, writes in the Los Angeles Times (3/30, McKibben) that construction on the Keystone XL pipeline will not begin anytime soon. The pipeline still needs to have its route approved in Nebraska, where organizers, citizens and landowners are preparing to resist. However, McKibben says the broader problem with constructing the pipeline is that the fundamental economics have changed. Oil prices have halved and investor interest in Alberta's oil sands has eroded. Further, renewable energy technology is significantly cheaper, and the environmental dangers have solidified with more heat records and the Arctic sea ice diminishing.

**Navajo Nation Leaders Ask To Keep Mine, Power Plant Open.**

The AP (3/30) reports political leaders of the Navajo Nation plan "to ask the federal government for subsidies to keep a mine and generating station in northern Arizona open." The owners of the Navajo Generating Station "say it is not currently profitable and voted recently to run it until the end of 2019 and then give up ownership." But even for the plant "to remain open that long, the Navajo Nation must approve a new lease agreement." If the lease is not extended, "the plant must close this year so that the Salt River Project can begin decommissioning it to meet the 2019 lease expiration."

The Arizona Republic (3/30) reports the plant's closure "would mean

closure for the Kayenta Mine, which feeds it with hundreds of millions of dollars worth of coal a year." Closing the plant "would devastate the economies of the Navajo and Hopi tribes, whose members depend on the two facilities for jobs, government revenues and smaller services such as free coal to heat homes." Thus far, "no solid plan has developed to keep the facilities open, though representatives of the tribes and other stakeholders met March 1 with officials from the U.S. Department of the Interior to explore possibilities."

### **Bill Would Give Congress Final Say On Future Coal Moratoriums.**

The Casper (WY) Star-Tribune (3/30, Richards) reports that Rep. Liz Cheney on Wednesday "introduced a bill to hinge future coal moratoriums on joint approval by Congress." In a statement Thursday, "Cheney called Wyoming coal a national treasure" and praised Interior Secretary Ryan Zinke and President Trump "for their work." She said, "(Trump's executive order) was an important first step in repairing the damage done to Wyoming during the last eight years. Obama-era energy policies focused on destroying our fossil fuel industry, killing jobs and devastating communities across Wyoming."

### **Sources: Major Coal Producers Tacitly Approve Staying In Paris Accord To Gain Economic Leverage.**

According to Politico (3/30, Restuccia), the tacit approval of the 2015 Paris climate change agreement by Peabody Energy, Arch Coal, and Cloud Peak Energy, which mine more than 42 percent of coal produced in the US, "marks a significant shift." Industry officials and sources close to the Administration said the trio indicated in recent meetings with White House officials that they would not oppose the accord if the Administration is able to secure increased financial support for technology that reduces pollution from the use of coal. While such an approach faces stiff resistance from others in the industry, Politico says there are some White House officials who agree with the top coal producers and have been looking to find other energy companies who support weakening and rewriting President Obama's 2015 emissions reduction pledge.

### ***Renewable Energy***

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### **BOEM Seeks Public Comments On Cape Wind Project.**

reNews (3/29) reports that the Bureau of Ocean Energy Management is "seeking comments on a draft supplemental environmental impact statement (SEIS) for the 468MW Cape Wind offshore project off the US east coast." According to the article, "the supplement to the 2009 final EIS has been prepared in response to a 2016 order from the US Court of Appeals for the District of Columbia to provide more adequate geological surveys of the project site." The comment period ends May 15.

Additional coverage was provided by the Cape Cod (MA) Times (3/30, Bragg) and North American Windpower (3/30, Lillian).

### **Empowering Native American Communities**

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## **BIE Director Meets With Navajo Nation Leaders..**

The [Navajo Times \(AZ\)](#) (3/30, Pineo) reports that on Tuesday, Bureau of Indian Education Director Tony L. Dearman "met with the vice president and education leaders of the Navajo Nation at the Department of Diné Education." The meeting came "a day after President Donald Trump signed a resolution of disapproval that scrapped two key sets of regulations under the Every Student Succeeds Act." According to the article, "the Diné School Accountability Plan promoted under DoDE Superintendent Tommy Lewis had begun under NCLBA and continued development with ESSA standards in mind."

## **Office Of Insular Affairs**

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### **OIA Approves \$204K For Managing Two CUC Projects.**

The [Saipan \(MNP\) Tribune](#) (3/31, De La Torre) reports that the Office of Insular Affairs has "authorized the release of \$204,000 for the management and administration of two Commonwealth Utilities Corp. projects." According to the article, "with OIA's approval, along with its two preceding authorizations for CUC Tank 103 repairs in the amount of \$4,019,000 and the development of a facility waste management plan for CUC's power plants 1 and 2 in Lower Base in the amount of \$777,000, the CNMI has met its CUC projects' funding obligation for 2017."

## **Tackling America's Water Challenges**

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### **BOR To Release Rio Grande Water From Caballo Reservoir.**

The [AP](#) (3/30) reports that the Bureau of Reclamation on Friday will release "the first Rio Grande water of 2017" from the Caballo Reservoir. According to the article, "water could fill the riverbed near Las Cruces as soon as Saturday."

Coverage by the AP was also picked up by [U.S. News & World Report](#) (3/30) and [KCBD-TV Lubbock \(TX\)](#) Lubbock, TX (3/30).

Additional coverage was provided by the [Albuquerque \(NM\) Journal](#) (3/30, Soular).

## **Top National News**

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### **Media Analyses: Trump "Declared War" On House Conservatives With Tweets.**

President Trump's Thursday morning [tweet](#) stating that "the Freedom Caucus will hurt the entire Republican agenda if they don't get on the team, & fast," and [two tweets](#) a bit after 5 p.m. singling out Reps. Jim Jordan, Raul Labrador, and Mark Meadows are interpreted by reports and analyses as indicative of a rift within the GOP that could imperil the President's agenda and that a frustrated Trump is widening; more than one source said Trump "declared war" on his party's right wing. Coverage primarily focuses on the back-and-forth, with House Freedom Caucus members defiant in their response. The Freedom Caucus [tweeted](#) a quote from Jordan: "The Freedom Caucus is trying to change Washington & do what we told the voters we would do." Labrador [tweeted](#) to Trump, "Freedom Caucus stood with u when others ran. Remember who your

real friends are. We're trying to help u succeed."

ABC World News Tonight (3/30, story 3, 2:20, Muir) reported on the President's "tweet storm, naming names, after his failure on healthcare. ... President Trump is making it clear who he blames: some conservative Republicans who did not vote for the President's plan. Is this a warning shot with the midterms next up?" ABC's Cecilia Vega: "This threat to throw down in the midterm elections comes after the President said last week the loss taught him exactly who his friends are in Washington." Trump: "We all learned a lot. We learned a lot about loyalty." Vega: "But fighting his own party?" White House press secretary Sean Spicer: "I'm going to let the tweet speak for itself. It would be improper of me to discuss the election or defeat of any candidate from this podium." Vega: "Some Freedom Caucus members now fighting back." Rep. Justin Amash: "I mean, it's constructive in fifth grade." Vega: "Congressman Justin Amash tweeting, 'It didn't take long for the swamp to drain'" the President.

NBC Nightly News (3/30, story 4, 2:15, Holt) reported that "the revolt by members of his party...had the President lashing out today at the group of conservative Republicans. He warned unless they fall into line, he would help defeat them in the next election, but there was more defiance today." NBC's Kristen Welker: "Less than a week after praising conservatives in the House Freedom Caucus that rejected his Obamacare repeal, President Trump now casting blame, intensifying his attacks in a new tweet this morning suggesting he might back primary challengers. ... But it isn't getting conservatives on board." Amash: "Most people don't take well to being bullied."

The CBS Evening News (3/30, story 3, 2:00, Pelley) reported, "Today, rather than healing the divisions in the GOP," the President "issued a threat to the party's most conservative members." CBS' Chip Reid: "A week ago, the House Freedom Caucus gave President Trump a standing ovation and even after they helped kill the Republican healthcare bill, the President didn't seem angry." Trump: "I'm disappointed, but they're friends of mine." Reid: "But today he declared political war on his 'friends.'" John Roberts said on Fox News' Special Report (3/30) that Trump "is trying to advance his agenda at the expense of the House Freedom Caucus." Trump, he added, is "hoping to divide and conquer, peel off Freedom Caucus members like Texas Congressman Ted Poe, who quit the caucus after the healthcare debacle."

The AP (3/30, Lemire) reports that Trump "trained his fire on members of his own party," the tweets highlighting "the growing schism in a Republican party that controls the White House and both branches of Congress yet appears to be teetering on the precipice of a civil war. ... Trump's anger at the Freedom Caucus for posing as a stubborn impediment to his governing runs the risk of alienating the conservative base that fueled his rise."

The Wall Street Journal (3/30, Radnofsky, Ballhaus, Andrews) says on its front page that Trump tried to return to an offensive tack, but the New York Times (3/30, Martin, Steinhauer) says that the conservatives were "hardly cowering in fear" on Thursday, and they "returned fire." Rep. Tom Garrett tweeted, "Stockholm Syndrome?" above "a copy of Mr. Trump's taunting post,

suggesting the president had become captive to the Republican establishment he gleefully flayed during the campaign." USA Today (3/30, Jackson) says Trump's "threatening" of the Freedom Caucus raises "the specter of intraparty opposition in next year's midterm elections."

The New York Times (3/30, A1, Thrush) reports that Trump "declared war on the conservatives of the House Freedom Caucus" after "lurch[ing] between battering and buttering up conservatives" over the past few days. McClatchy (3/30, Harrell) reports that Rep. Mark Sanford said "the series of tweets send contradictory messages that may ultimately prove unproductive both with bipartisan outreach and with outreach among different GOP factions."

The Los Angeles Times (3/30, Memoli, Mascaro) says that "the tenuous nature of the bonds between Trump and the GOP are increasingly on public display." The Washington Post (3/30, A1, Rucker, Wagner, Debonis) also says Trump "declared war." House Speaker Ryan told reporters, "I understand the President's frustration. It's very understandable that the President is frustrated we're not going where he wants to go." But the Washington Times (3/30, McLaughlin) reports that Tea Party Patriots leader Jenny Beth Martin "said Mr. Trump's frustration with the legislative process...should be aimed [at] House GOP leaders" like Ryan.

Politico (3/30, Cheney, Bade) says that the "crossfire left a sour taste for lawmakers as they left town for the weekend without resolving any of the differences that ruptured health care deliberations the week before." Rep. Trent Franks "decried the GOP bent toward 'cannibalization' that led Trump to attack conservatives." The Hill (3/30, Fabian) reports that "even some of the president's most loyal supporters say his broadsides against the Freedom Caucus could endanger the rest of his legislative agenda." Laura Ingraham tweeted, "Attacking the Freedom Caucus won't win @POTUS any plaudits from Dems; could alienate those R's who stood by him when so many others ran."

Karen Tumulty of the Washington Post (3/30) writes, "There was more than a little irony in President Trump's tweeted demand Wednesday that the hard-line conservative faction in the House that stymied him on health care 'get on the team, & fast.' ... As the president should understand better than most, partisan politics has long ceased to operate as a team sport, one in which a coach calls the plays." In his Washington Post (3/30) column, Eugene Robinson asks, "Will anyone be left standing when the Republican circular firing squad runs out of ammunition? Or will everybody just reload and keep blasting away, leaving Democrats to clean up the bloody mess?"

Michael Gerson writes in his Washington Post (3/30) column, "A party at the peak of its political fortunes is utterly paralyzed. A caucus in control of everything is itself uncontrollable. ... Republicans got a leader who is impatient and easily distracted - by cable news on the Russian scandal or by Arnold Schwarzenegger's TV ratings" - and an Administration that is "empty, easily distracted, vindictive, shallow, impatient, incompetent and morally small. This is not the profile of a governing party."

**NYTimes Report Says White House Officials Helped Provide Nunes With**



## **Intel.**

A [New York Times](#) (3/30, Rosenberg, Haberman, Goldman) report that two White House officials helped provide House Intelligence Committee Chairman Devin Nunes with "the intelligence reports that showed that President Trump and his associates were incidentally swept up in foreign surveillance by American spy agencies" dominates coverage of the ongoing investigations into possible ties between the Trump campaign and Russia. The Times report and other aspects of the story garner extensive coverage in print and online, as well as more than 16 minutes of total coverage on the network news broadcasts, all of which led with the story. Coverage of the Times report – which overshadows other elements of the investigation coverage – is largely negative toward the White House and Nunes.

The [New York Times](#) (3/30, Rosenberg, Haberman, Goldman) report says the officials were identified by "several current American officials" as "Ezra Cohen-Watnick, the senior director for intelligence at the National Security Council, and Michael Ellis, a lawyer who works on national security issues at the White House Counsel's Office and was previously counsel to Mr. Nunes's committee." The Times calls the revelation "the latest twist of a bizarre Washington drama," and says it is "likely to fuel criticism that the intelligence chairman has been too eager to do the bidding of the Trump administration while his committee is supposed to be conducting an independent investigation." The [Washington Post](#) (3/30, Miller, Deyoung) says that "US officials" have confirmed that "three senior officials at the National Security Council," Cohen, Ellis, and NSC lawyer John Eisenberg, "played roles in the collection and handling of information shared with Nunes." According to the Post, Cohen, after "assembling reports that showed that Trump campaign officials were mentioned or inadvertently monitored by U.S. spy agencies targeting foreign individuals," tool the information to Eisenberg, who, along with Ellis, reports to White House counsel Donald McGahn.

A separate [Washington Post](#) (3/30, Phillip, Johnson) report says White House press secretary Sean Spicer "repeatedly refused to confirm or deny the Times report," but "suggested that questions about 'process' were not as important as the substance of the information that Nunes reviewed." Spicer said, "Your obsession with who talked to whom and when is not the answer here." Major Garrett said in the lead story for the [CBS Evening News](#) (3/30, lead story, 2:20, Pelley) Spicer said last week that "White House staffers were not Nunes' source," but on Thursday, "the White House would neither confirm nor deny the 'Times' report."

Jim Acosta said on [CNN's The Lead](#) (3/30) that Trump aides "are reeling from questions about whether they provided information to the chairman." Acosta added that the White House "danced around" the New York Times report. Similarly, [Politico](#) (3/30, Conway) says Spicer "dodged questions" about the report. The [Huffington Post](#) (3/30, Fang) also said Spicer "dodged questions" and "bizarrely claim[ed] it was not his job to answer them." While Spicer argued that reporters asking questions about the story "assumes that the reporting is correct," he "did not deny the report outright."

To USA Today (3/30, Korte), Spicer "was careful not to address the Times story directly." Spicer told reporters, "In order to comment on that story would be to validate things that I'm not at liberty to do." USA Today adds that if the report is true, it "would further call into question the independence of the House investigation into Russian efforts to interfere in the 2016 presidential campaign." The AP (3/30, Pace, Sullivan) says the White House's refusal "to say whether it secretly fed intelligence reports to a top Republican lawmaker, fuel[ed] concerns about political interference in the investigation into possible coordination between Russia and the 2016 Trump campaign."

Chuck Todd was asked on NBC Nightly News (3/30, story 2, 1:20, Holt) about the potential fallout if the White House "was involved in secretly giving out this information." Todd said, "The fallout is big. It's a classic case where is the cover-up worse than the crime itself? Although, what's being investigated obviously is very serious here, but the fact of the matter is this would be an indication that the White House is now interfering an investigation. And the fact is, it is amazing that the White House essentially now is being consumed by this Russia story. ... This is a situation where they have had a bad problem on their hands in Russia...and their own actions have made it worse."

The Washington Times (3/30, Miller) predicts that the story is likely to "intensify Democrats' calls for Mr. Nunes to step down from his committee's investigation into Russian meddling in the election and possible collusion by Trump campaign officials," and the New York Post (3/30, Fredericks) says the revelation "will add to the controversy surrounding" Nunes. In a piece for the Washington Post (3/30, Ignatius) "Post Partisan" blog, David Ignatius argues that Nunes "needs to demonstrate that he's the chairman of a bipartisan oversight panel trusted with the nation's secrets, rather than a conduit for information from the Trump White House."

The Hill (3/30, Kamisar) cites a "brief statement" issued by Nunes spokesman Jack Langer after the Times report. In it, Langer said, "Chairman Nunes will not confirm or deny speculation about his source's identity, and he will not respond to speculation from anonymous sources." In a piece for Bloomberg View (3/30, Lake), columnist Eli Lake calls the Times story "a body blow for Nunes, who presented his findings last week as if they were surprising to the White House." Lake adds that "the merits of this case are undermined by how the White House and Nunes have made it." Nunes, he writes, "is better than this. By misrepresenting how he obtained information worthy of investigation he has handed his opposition the means to discredit it."

In the lead story for ABC World News Tonight (3/30, lead story, 3:45, Muir) correspondent Mary Bruce called the Times report a "bombshell." Bruce asked House Intelligence Committee Ranking Member Adam Schiff, "Why would Nunes brief the President on information he got from Trump's own White House staffers?" Schiff said, "And they can present it to the White House staff and the President himself at any time. So, why all the cloak and dagger stuff? And that's something we need to get to the bottom of." Peter Alexander said in the lead story for NBC Nightly News (3/30, lead story, 3:30, Holt) that Schiff "question[ed] the White House's transparency." Schiff: "Is this instead a case

where they wish to effectively launder information through our committee to avoid the true source of the information? That question the White House really needs to answer.”

Sen. Diane Feinstein was asked on [MSNBC MTP Daily](#) (3/30) whether what the New York Times is reporting rises to “obstruction of justice” if it is true. Feinstein said, “I can’t comment on that but it rises to a level of protocol in the handling of information. This is not the way it should be done. ... I don’t know whether it is political or whether this was,” but Nunes “ought to clear this up, because it sort of casts a pall over all of us, House and Senate, and it is not the way this would happen over in the Senate. This would not have happened.”

***Administration Invites Nunes, Schiff To Review Documents At White House.***

Spicer also said Thursday that the Nunes and Schiff have been invited to the White House to review information concerning the unauthorized disclosure of classified information about Americans. The [Washington Post](#) (3/30, Phillip, Johnson) reports that according to Spicer, national security aides discovered the information “in the ordinary course of business.” The documents, he said are in response to a letter from the committee “seeking information about whether classified information collected about U.S. persons was leaked or mishandled.” The [Wall Street Journal](#) (3/30, Lee) says Spicer was not specific about how the material relates to the committee probe, other than to suggest that it demonstrates how intelligence was mishandled in ways that resulted in leaks concerning the identities of people in the intel reports.

The [Washington Times](#) (3/30, Boyer, Miller) also says Spicer “declined to specify what was in the documents but said that President Trump remains convinced that he and his associates were improperly targeted for surveillance by the Obama administration.” To [Politico](#) (3/30, Wright), the White House’s description of the material as “documents showing the improper handling of intelligence on American citizens,” appears to be “a reference to documents viewed on the White House grounds last week by Nunes,” although Spicer “did not say this explicitly.”

The [Los Angeles Times](#) (3/30, Cloud) says the invitation raises “new questions about whether the president’s staff previously leaked details about the classified documents it is now offering Congress,” and “seemed to confirm that the initial disclosure of the reports to Nunes alone was at some level a White House effort to shift attention away from the president’s discredited claim that then-President Obama ordered him to be wiretapped.”

Schiff said Thursday that he has accepted the White House invitation. However, the [Washington Times](#) (3/30, Miller) says he “vowed not to be distracted from the investigation into alleged Russian meddling in the election and possible collusion by Trump campaign officials.” Schiff told reporters, “This issue is not going to distract us from doing our Russia investigation. ... We are not going to be deterred. We are not going to be distracted.” In the lead story for [ABC World News Tonight](#) (3/30, lead story, 3:45, Muir) correspondent Mary Bruce asked Schiff, “How can the American public still have confidence in this investigation?” Schiff said, “Well, there’s no question that there is a cloud over the investigation. We are determined to go forward, whatever obstacles

are put in our way.” Meanwhile, in her Wall Street Journal (3/30, Strassel) column, Kimberly Strassel is critical of Schiff, arguing that he and other Democrats have been fomenting false outrage over Nunes’ efforts.

Politico (3/30, McCaskill) reports that in an interview with MSNBC Thursday, Rep. Ted Yoho defended Nunes saying, “You gotta keep in mind who he works for. ... He works for the president. He answers to the president.” Asked if Nunes works “for the constituents of his district,” Yoho said, “Well, you do both. ... But when you’re in that capacity — you know, if you’ve got information — I’m OK with what he did.” Later Thursday, Yoho’s communications director Brian Kaveney “clarified,” saying in a statement, “He knows that every member is here because of the people that voted them into office,” Yoho communications director Brian Kaveney said in a statement. “Members work for their constituents, whether they are rank and file or if they have the honor of serving as a committee chairman. The congressman stated that he works for his constituents and not for the President. The same reasoning is applied to all members.”

***Burr, Warner Project Bipartisan Image As Senate Intel Panel Begins Its Investigation.*** Senate Intelligence Committee Chairman Richard Burr and Ranking Member Mark Warner on Wednesday “put on the sort of bipartisan display that used to be common on Capitol Hill, particularly in the oversight of the nation’s sprawling intelligence community,” the Washington Post (3/30, Kane) reports. As House Intelligence Committee Chairman Devin Nunes “has come under fire for having an unplanned classified briefing on White House grounds and refusing to share his information with committee members,” Burr and Warner “set out to send the exact opposite message in previewing their own investigation.” The Post says that if they are successful, they “will have beat the odds in this partisan era. That they even have a chance is based largely on a personal relationship that is now rare in today’s Senate.”

As the Senate panel opened its first hearing into the matter on Thursday, Burr said that the American public “deserves to hear the truth about possible Russian involvement in our elections,” the Washington Times (3/30, Taylor) reports. Burr continued, “How they came to be involve, how we may have failed to prevent that involvement, what actions were taken in response, if any, and what we plan to do to ensure the integrity of future, free elections at the heart of our democracy” will all be examined. Warner “followed by saying that ‘Russia’s strategy and tactics are not new, but their brazenness certainly was.’” The Times says the “calm, bipartisan opening” of the hearing “appeared to be a calculated move by the two senators to inject a degree of sobriety into the ongoing probe.”

Politico (3/30, Nelson) reports that Sen. Angus King told MSNBC’s Morning Joe (3/30) Thursday that he and his colleagues on the panel feel a responsibility to conduct a fair investigation and “avoid some of the infighting that you’ve seen on the other side.” King said, “I think we feel that responsibility. And that’s why we’re really working at making this a nonpartisan investigation. ... We’re going to try to do it and avoid some of the infighting that you’ve seen on the other side.” King, who appeared on the show with Sen.

James Lankford, added, "You know, you're seeing an independent and Republican standing here. You saw our chair and ranking member yesterday. It's not going to be easy. ... I mean, I don't want to pretend that there aren't going to be some conflicts. This is a difficult issue and has partisan overtones. But I think most of our members realize it's too important to fall into that." Lankford said on [MSNBC's Morning Joe](#) (3/30), "We are definitely going where the facts lead and the commitment from both sides of the aisle is wherever the facts go, that's where we go on this. We have got to be able to pull politics away from this."

Sen. Susan Collins said on [MSNBC's Morning Joe](#) (3/30), "If you look at the way the Senate Intelligence Committee has proceeded, there has been an excellent relationship between the Chairman Richard Burr and the Vice Chairman Mark Warner. They've worked together to make sure that the committee members are involved. This has been a nonpartisan investigation, not just a bipartisan investigation. At the end of our work, I believe that the American public will know what happened, will be on alert for additional Russian efforts to sew the seeds of doubt about our democracy and will be able to accept our findings and recommendations."

In an op-ed for the [Washington Post](#) (3/30, Spaulding), Suzanne Spaulding, a former general counsel for the Senate Intelligence Committee, minority staff director for the House Intelligence Committee, executive director of two independent commissions, and undersecretary in the Department of Homeland Security, argues that the Senate Intelligence Committee offers "the best prospect for a timely, fair, bipartisan and independent investigation."

However, Senate Minority Whip Dick Durbin was less sanguine in an interview on [MSNBC's Morning Joe](#) (3/30) during which he argued that a special prosecutor is "the right thing to do. We're talking about an overall investigation by Congress but also whether there will be any prosecution for criminal activity. We're early in the investigation. The FBI is committed to it. But a special prosecutor would give that effort credibility."

Jeff Pegues reported on the [CBS Evening News](#) (3/30, story 2, 3:00, Pelley) that the Senate panel "heard details today about Russia's vast information warfare campaign, which involves at least 15,000 operatives worldwide, writing and spreading false news stories and conspiracy theories online." Pierre Thomas reported on [ABC World News Tonight](#) (3/30, story 2, 3:00, Muir) that the takeaway from Thursday's hearing was that "Russia not only tried to hijack the last US election, but will try again." Warner said, "The Russians employed thousands of paid internet trolls and bot nets to push out disinformation and fake news at a high volume, focusing this material onto your Twitter and Facebook feeds."

Clint Watts, who the [Washington Post](#) (3/30, Demirjian) describes as "an expert in terrorism forecasting and Russian influence operations from the Foreign Policy Research Institute," told the committee that House Speaker Ryan and Sen. Marco Rubio "may have been targets of Russian social-media campaigns to discredit them as recently as this past week." This increases "the scope of politicians who have become the subject of Russian smear campaigns

carried out on social media, a central part of the Kremlin's alleged strategy of spreading propaganda in the United States and undermining its democratic institutions." [McClatchy](#) (3/30, Schofield) reports that Watts told the panel that "the one constant of the Russian campaign was 'pumping up Trump.'" A brief story in the [Washington Times](#) (3/30, McLaughlin) also reports on Watts' testimony.

***Putin Denies Interfering In US Election.*** Hours before the Senate committee hearing Thursday, Putin "flat-out denied interfering" in the 2016 presidential race, the [Washington Times](#) (3/30, Blake) reports. Putin "rejected the allegations of election meddling." Speaking at the International Arctic Forum in Arkhangelsk, Putin said in Russian, "All those things are fictional, illusory and provocations, lies. ... All these are used for domestic American political agendas. The anti-Russian card is played by different political forces inside the United States to trade on that and consolidate their positions inside." [USA Today](#) (3/30, Durando) quotes Putin as saying after being asked if Russia interfered in the race, "Read my lips: No." Lester Holt said on [NBC Nightly News](#) (3/30, story 3, 0:40) that Putin issued a "flat denial."

The [Washington Post](#) (3/30, Deyoung) reports that Putin argued that "Trump was being 'barred from implementing his agenda,' including improved relations with Moscow, by false accusations about Russian interference in the U.S. political process." Putin also "suggested that the upheaval in Washington eventually will die down and he will meet personally with Trump," possibly "in July, at the G-20 summit in Germany, or at a summit of the Arctic Council scheduled for September in Finland."

***Flynn Offers To Testify In Exchange For Immunity.*** A front-page story in the [Wall Street Journal](#) (3/30, Harris, Lee, Barnes) reports that former National Security Adviser Flynn has told the FBI and congressional investigators that he will be interviewed in the investigation of possible ties between the Trump campaign and Russia if he is given immunity from prosecution. Citing the Journal report on its "Blog Briefing Room," [The Hill](#) (3/30, Seipel) says that "the FBI and the House and Senate Intelligence committees that are investigating Russia's attempts to interfere in the U.S. election have not taken his lawyers up on the offer."

The [AP](#) (3/30, Day, Sullivan, Pace) reports that Flynn's attorney Robert Kelner said that Flynn is "in discussions with the House and Senate intelligence committees on receiving immunity from 'unfair prosecution'" in exchange for being questioned.

However, [Reuters](#) (3/30, Beech) says the House committee "denied the Journal report," and the [Washington Post](#) (3/30, Entous, Nakashima) reports that officials "said the idea of immunity for Flynn – who is considered a central figure in the probes because of his contacts with the Russian ambassador to the United States – was a 'non-starter,'" particularly at such an early stage of the investigations." The [New York Times](#) (3/30, Mazzetti, Rosenberg) similarly cites "a congressional official" who "said investigators were unwilling to broker a deal with Mr. Flynn." The [Los Angeles Times](#) (3/30, Cloud) and the [Washington Examiner](#) (3/30, Pappas) also report on Flynn's offer.

### **Schumer: Avoiding Filibuster Fight Over Gorsuch “Virtually Impossible.”**

The Washington Post (3/30, O’Keefe) reports that Senate Minority Leader Schumer “warned on Thursday that it is unlikely Democrats and Republicans can reach a deal by next week to avoid a bitter showdown over the confirmation of Neil Gorsuch, President Trump’s first choice to serve on the U.S. Supreme Court. ‘I don’t think they’ll be able to come to any kind of agreement,’” Schumer said in an interview with the Post, adding, “It’s virtually impossible.” The Post notes that Schumer’s warning “came at a critical moment for Trump and lawmakers still reeling from last week’s decision to abruptly end debate on a Republican plan to rewrite health-care policy,” which “has upended the political dynamic on Capitol Hill.” However, the Post points out that “Democratic senators can only slow, not stop, Republicans from confirming Gorsuch,” whose nomination “has united GOP lawmakers behind Trump as nothing else so far this year.”

As Politico (3/30, Schor) reports, Sens. Joe Manchin and Heidi Heitkamp on Thursday “became the first Democrats to publicly back” Gorsuch. Although Manchin and Heitkamp’s announcements “are not expected to spare Gorsuch a Democratic filibuster that appears increasingly assured next week when his nomination comes to the Senate floor,” the “red-state duo’s support gives Democrats who remain undecided about blocking Gorsuch some measure of political cover as they make their own verdicts.”

The Hill (3/30, Carney) reports that Heitkamp said in a statement, “After doing my due diligence by meeting with Judge Gorsuch and reviewing his record and testimony before the Senate Judiciary Committee, I’ve decided to vote in favor of his confirmation,” adding that Gorsuch is “balanced, meticulous, and [a] well-respected jurist who understands the rule of law.” Heitkamp’s announcement “came moments after Manchin became the first Senate Democrat publicly backing Gorsuch. ‘I will vote to confirm Judge Neil Gorsuch to be the ninth justice on the Supreme Court,’ Manchin tweeted.” The Hill notes that 33 Senate Democrats “have come out against Gorsuch’s nomination, according to The Hill’s Whip List, with Republicans signaling that they are willing to change Senate rules to confirm him with a simple majority if eight Democrats or Independents don’t back him.”

The Washington Times (3/30, Swoyer) reports that Manchin said in a statement, “After considering his record, watching his testimony in front of the Judiciary Committee and meeting with him twice, I will vote to confirm him to be the ninth justice on the Supreme Court.” Manchin “praised Judge Gorsuch’s extensive education and legal career, having clerked for two Supreme Court justices and worked at the Justice Department under President George W. Bush,” and “he also said he found the judge to be ‘an honest and thoughtful man.’”

The Wall Street Journal (3/30, Tau) reports that Manchin said “I hold no illusions that I will agree with every decision Judge Gorsuch may issue in the future, but I have not found any reasons why this jurist should not be a Supreme Court Justice.” The Journal notes that Manchin is considered one of the most vulnerable Democrats in the Senate, facing reelection in 2018 in a

state that President Trump won by more than 40 points. Heitkamp faces a similarly difficult reelection in North Dakota, which Trump won by more than 30 points. [Reuters](#) (3/30, Hurley) reports that another Democrat, Sen. Maria Cantwell (WA), who is "seen as on the fence," said on Thursday that "she would back an effort to block Gorsuch's confirmation."

[Politico](#) (3/30, Everett) reports that Sen. Claire McCaskill "says she is so in the 'vortex' of the battle to confirm" Judge Gorsuch "that she's essentially stopped talking publicly about her thought process on how she'll vote next week," but "behind closed doors back in Missouri, she said she is mortified about where the Senate is headed if Gorsuch is blocked and Senate Majority Leader Mitch McConnell changes the Senate rules to kill the 60-vote threshold on Supreme Court nominees, according to audio obtained by the Kansas City Star." McCaskill, "who faces a tough reelection campaign in 2018, reasoned that the Gorsuch nomination will not change the balance of the court, and is a 'Scalia for Scalia' substitution," but "if McConnell changes the rules for Gorsuch, McCaskill worries that one of the more liberal justices will be replaced by a conservative and alter the balance of the court forever."

The [Wall Street Journal](#) (3/30) editorializes that if Senate Republicans cut a deal with Democrats to avoid a Democratic filibuster of Gorsuch's nomination to the high court, it will effectively give the Democrats leverage over judicial nominees, which the Journal argues would be a judicial and political disaster.

***Politico Analysis: Gorsuch Remains "Cagey" In Written Answers To Senate.*** [Politico](#) (3/30, Gerstein, Kim) reports that "with a confirmation vote nearing," Gorsuch "is continuing to dodge Democratic senators' questions about his views on the Constitutional protection of privacy that undergirds court decisions protecting abortion rights and about the jurisprudence surrounding key rulings on gay rights." According to Politico, Gorsuch submitted 76 pages of answers on Thursday "to written questions senators asked after the conclusion of the nominee's Senate Judiciary Committee hearings last week," and "in his newly-issued answers, Gorsuch remained cagey about his personal views of most of the legal questions raised, often repeating boilerplate phrases contending that it would be 'improper' and 'risk violating my ethical obligations as a judge' to opine on matters that could come before the court."

## **Editorial Wrap-Up**

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### **New York Times.**

***"North Carolina's Bait-And-Switch On Transgender Bathroom Law."*** In an editorial, the [New York Times](#) (3/30) says that North Carolina lawmakers "rashly settled on a terrible compromise," repealing the state's transgender restroom law "in name but not in substance. ... All those who have taken a principled stance against the law, known as H.B. 2, should stand firm. The law's revision would deprive North Carolinians of protection from discrimination for years, and retains the odious notion that transgender people are inherently dangerous."

***"Iraqi And Syrian Civilians In The Crossfire."*** The [New York Times](#) (3/30) says in an editorial that the "disturbing number of casualties" from US



airstrikes against ISIS “raises concerns that President Trump’s approach to counterterrorism puts too many civilians at risk and ultimately leads more people to side with the terrorists.” Highlighting what it describes as Trump’s “fast and loose” talk “about bombing ISIS, killing not just the terrorists but also their families,” and “reviving torture,” the Times says that “reckless attitude has raised questions about whether Mr. Trump has removed constraints on how the Pentagon wages war.” The Times adds that “there is little evidence that the president has a strategy to foster long-term stability in a postwar Iraq and Syria.”

*“The Complex Cost Of Brexit Gets Clearer.”* The New York Times (3/31) in an editorial on Brexit, says that despite any resentment on either side Britain and the EU should work to benefit each other and to maintain relations in such a way as to “do the least harm to each other and the world.”

### **Washington Post.**

*“Virginia Republicans’ Position On Medicaid Expansion Is Indefensible.”* The Washington Post (3/30) says in an editorial that 400,000 more Virginians “could get health-care coverage, quickly and at minimal cost to the state. All that’s needed is for anti-Obamacare dead-enders in the General Assembly finally to put the well-being of their people over partisanship” and approve a “totally reasonable” Medicaid expansion for “people who desperately need it. ... The benefits are so clear, the costs to states are so low, the reasons to continue resisting are so insubstantial.”

*“Congress Voted To Repeal Web Privacy Rules. Now, Congress Should Replace Them.”* The Washington Post (3/30) says in an editorial that while “some of the criticism” of federal online privacy rules “was fair,” House Republicans have now “axed the rules along partisan lines with no effort to replace them. ... Users deserve a say in how their sensitive information is used. Congress will have to take this on.”

*“To Solve An Opioid ‘State Of Emergency,’ Maryland Starts Very Small.”* In an editorial, the Washington Post (3/30, Board) writes that the version of the legislation the Maryland General Assembly is considering in response to the opioid epidemic is only an “incremental change” to the status quo that Gov. Larry Hogan called a “state of emergency.” A previous version of the bill included a provision that limited initial opioid prescriptions to seven days, except for cancer, terminal illness, and substance abuse treatment, but the vagueness of the current version makes it difficult to punish physicians because it only requires them to follow “an evidence-based clinical guideline” in their “clinical judgment.”

### **Wall Street Journal.**

*“Senate Republican Suicide.”* The Wall Street Journal (3/30) editorializes that if Senate Republicans cut a deal with Democrats to avoid a Democratic filibuster of Judge Neil Gorsuch’s nomination to the high court, it will effectively give the Democrats leverage over judicial nominees, which the Journal argues would be a judicial and political disaster.

***“Betsy DeVos’s Many Choices.”*** The [Wall Street Journal](#) (3/30) lauds Education Secretary DeVos’ Wednesday remarks at the Brookings Institution in an editorial, saying that she presented clear evidence that school choice works.

***“A Right-Left Cure For Disabilities Torts.”*** The [Wall Street Journal](#) (3/30) editorializes that the number of lawsuits brought under the Americans with Disabilities Act (ADA) has doubled in the last five years, and notes that six law firms are responsible for filing 81 percent of those suits. The Journal also notes that nearly 40 percent of those suits are filed in Miami and Los Angeles, and it argues that the large number of minority-owned businesses in those cities make easy targets as immigrant owners may be less knowledgeable about the law and more reluctant to dispute claims. The Journal backs proposals in the California legislature to impose additional procedural hurdles for such lawsuits brought by “extremely high-frequency litigants” who have filed 15 or more complaints in the prior year, and to give businesses 120-days to remedy ADA violations.

## **Big Picture**

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### **Headlines From Today’s Front Pages.**

#### ***Wall Street Journal:***

[There’s A Party In The Stock Market, And Banks Aren’t Invited](#)

[Trump, After Setbacks, Tries To Go On Offense](#)

[Mike Flynn Offers To Testify In Exchange For Immunity](#)

[Fracking 2.0: Shale Drillers Pioneer New Ways To Profit In Era Of Cheap Oil](#)

#### ***New York Times:***

[2 White House Officials Helped Give Nunes Intelligence Reports](#)

[‘We Must Fight Them’: Trump Goes After Conservatives Of Freedom Caucus](#)

[Trump Eases Combat Rules In Somalia Intended To Protect Civilians](#)

[Venezuela Muzzles Legislature, Moving Closer To One-Man Rule](#)

[Bathroom Law Repeal Leaves Few Pleased In North Carolina](#)

[Number Of Women Coaching In College Has Plummeted In Title IX Era](#)

#### ***Washington Post:***

[Trump Warns GOP Hard-Liners To Obey Or Else](#)

[3 White House Officials Linked To Nunes Visit](#)

[NC Repeals ‘Bathroom’ Law But Riles Rights Groups Anew](#)

[As Diplomacy Falters, Nso Tries To Spread Harmony](#)

[An Uneasy Atmosphere At State Under Tillerson Mistrust Festers Between](#)

[Tillerson, State Staffers](#)

#### ***Financial Times:***

[Venezuela’s Top Court Takes Power Away From Parliament](#)

[Upbeat Mood Drives Record EM Sovereign Debt Sales](#)

[Shutdown Feared If Trump Spending Plans Hit Wall](#)

[Watchdog Messages Back Over Banker’s WhatsApp Boast](#)

#### **Washington Times:**

[White House Invites House, Senate Intelligence Committees To View Spy Documents](#)

[Senate Passes Bill To Let States Strip Funding From Planned Parenthood Convicted Terrorist Rasmea Odeh's Status As Leftist Icon Untarnished By Plea Deal](#)

[Putin's Pull Looming Over Serbian Presidential Vote](#)

[Transgender Activists Blast N.C. 'Bathroom Bill' Repeal As Discriminatory Nationals Open At Home Monday With Optimism, High Expectations](#)

***Story Lineup From Last Night's Network News:***

**ABC:** Nunes-White House Connection; Russian Cyber Attack Investigation; Trump-Failed Healthcare Reform; Weather Forecast; Texas-Bus Crash; North Carolina-Bathroom Bill; Planned Parenthood-Senate Bill; Oklahoma-Home Defense; American Airline-Mid-Air Pilot Death; Oklahoma Officer Murdered; Serial Killer-Prison Death; McDonald-Fresh Beef; Teacher-Gift For Class.

**CBS:** Nunes-White House Connection; Russian Cyber Attack Investigation; Trump-Failed Healthcare Reform; North Carolina-Bathroom Bill; Tillerson-Turkey Visit; South Sudan-Famine; Rising Pedestrian Deaths; Texas-Bus Crash; Severe Weather; SpaceX Recycled Rocket.

**NBC:** Nunes-White House Connection; Nunes Connection-Expert Comment; Putin-Hacking Denial; Trump-Failed Healthcare Reform; Planned Parenthood-Senate Bill; North Carolina-Bathroom Bill; Texas-Bus Crash; Rising Pedestrian Deaths; Severe Weather; American Airline-Mid-Air Pilot Death; Restaurant Worker-Crowd Funding.

***Network TV At A Glance:***

Nunes-White House Connection – 9 minutes, 35 seconds  
Trump-Failed Healthcare Reform – 6 minutes, 35 seconds  
Russian Cyber Attack Investigation – 6 minutes  
North Carolina-Bathroom Bill – 4 minutes, 50 seconds  
Rising Pedestrian Deaths – 3 minutes, 55 seconds  
Texas-Bus Crash – 3 minutes, 40 seconds  
Weather – 1 minute, 40 seconds  
Planned Parenthood-Senate Bill – 45 seconds

***Story Lineup From This Morning's Radio News Broadcasts:***

**ABC:** Georgia-Overpass Collapse; North Carolina-Bathroom Bill; Russian Cyber Attack Investigation; Trump-Commerce Orders; Wall Street News.

**CBS:** Michael Flynn Seeks Immunity; North Carolina-Bathroom Bill; Georgia-Overpass Collapse; SpaceX Recycled Rocket.

**FOX:** Michael Flynn Seeks Immunity; Trump-Commerce Orders; North Carolina-Bathroom Bill; Cincinnati Shooting-Arrests.

**NPR:** North Carolina-Bathroom Bill; Michael Flynn Seeks Immunity; SpaceX Recycled Rocket; Cincinnati Shooting-Arrests; Georgia-Overpass Collapse; Trump-Commerce Orders; Brazilian Fmr. President-Trial; Venezuela Political Crisis.

## Washington Schedule

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### Today's Events In Washington.

#### **White House:**

PRESIDENT TRUMP — Meets with former Secretary of State Condoleezza Rice; makes an announcement with the National Association of Manufacturers; meets with the Director of the National Institutes of Health; meets with the Director of the Office of Management and Budget.

VICE PRESIDENT PENCE — Participates in a phone call with EU High Representative and Vice President Federica Mogherini; meets with former Secretary of State Condoleezza Rice; joins the President for an announcement with the National Association of Manufacturers; meets with U.S. Navy Submarine Junior Officers and their spouses.

**US Senate:** 3:00 PM Washington, DC, kids visit senators to complain about the way Congress treats the city – 'My First Lobby Day' (aka 'We Want Senators Too'), co-sponsored by DC Vote and Resist and Rise, with children from Washington, DC, visiting senators with messages and art work to let them know that they are not happy with how Congress treats their city \* Because the kids don't have senators to visit who can vote, they instead visit senators from states with full voting representation Location: lobby, Hart Senate Office Bldg, Washington, DC [www.dcvote.org](http://www.dcvote.org) [https://twitter.com/DC\\_Vote](https://twitter.com/DC_Vote)

**US House:** No votes scheduled in the House of Representatives

**Other:** 7:30 AM WWI Centennial Commemorative exhibit ribbon-cutting at Arlington National Cemetery – Ribbon-cutting ceremony for World War I Centennial Commemorative exhibit, created by Arlington National Cemetery and the American Battle Monuments Commission, focusing on the American experience in the war and how ANC and ABMC were focal points for remembrance and commemoration of WWI \* 6 Apr marks the 100th anniversary of the U.S. entering the Great War Location: ANC Welcome Center, 1 Memorial Dr, Arlington, VA [www.arlingtoncemetery.org](http://www.arlingtoncemetery.org) <https://twitter.com/ArlingtonNatl>

White House makes financial disclosure reports from high-level officials available to the public – White House begins making U.S. Office of Government Ethics Form 278 financial disclosure reports filed by high-level White House officials in the available to the public, 'fulfilling President Donald Trump's commitment to ensure an ethical and transparent govt' Location: TBD <http://www.whitehouse.gov/> <https://twitter.com/whitehouse>

### Last Laughs

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#### **Late Night Political Humor.**

**Stephen Colbert:** "Late Show Intelligence Committee will follow our investigation of Trump and Russia wherever it leads. Usually it's to James Corden in about an hour. But wherever."

**Stephen Colbert:** "So [Trump has] hired his daughter as assistant to the President, his son-in-law as his senior adviser, and put Eric and Donald Jr. in charge of the national hair gel reserve."

**Stephen Colbert:** "Let's talk about someone who has no power in Washington, Mike Pence."

**Stephen Colbert:** "North Carolina lawmakers announced a deal to repeal the 'Bathroom Bill.' Sounds like some people have been holding it for about six months."

**James Corden:** "Michael Flynn, President Trump's former National Security Adviser, announced today that he is willing to testify to the FBI on the Russian investigation in exchange for immunity, which is big news. When she heard about this, Ivanka Trump picked up her box of belongings and started slowly backing out of the White House."

**James Corden:** "[It] has been a bad week for Trump because the Gallup poll has just been released that shows that Donald Trump's approval rating has fallen to a historic first-year low of 35 percent. Or as Kellyanne Conway calls it, just one more example of Trump beating Obama."

**James Corden:** "Donald Trump actually spoke to a Women's Empowerment Panel. ... He really did, he spoke to a Women's Empowerment Panel. His opening remarks were 'Shush, babe, a man's talking.'"

**James Corden:** "In other Trump Administration news, an office within the Department of Energy has been told not to use the phrase 'climate change' any more. So they did it, guys. They fixed it. No more climate change."

**Trevor Noah:** "Freedom Caucus guy is accusing Donald Trump of being an establishment politician. It's like calling Godzilla a city planner."

**Trevor Noah:** "Also, Donald Trump, it's not enough that he's fighting with the Democrats, the FBI, the federal court, and Mexico. Now he's also fighting the Republicans. He's like a political Jackie Chan."

**Jimmy Fallon:** "The White House says President Trump will not throw out the first pitch at the Washington Nationals game. Apparently Trump was afraid of hurting his tweeting arm."

**Jimmy Fallon:** "Actually, they said Trump had to cancel because of a scheduling conflict. When asked if they could change the date of the game, the Nationals said, 'We already did so he wouldn't come.'"

**Seth Meyers:** "Vice President Mike Pence today cast a tie-breaking vote to eliminate a rule that blocks states from defunding Planned Parenthood because Mike Pence approves of only one type of birth control: his personality."

**Seth Meyers:** "According to Gallup, on Tuesday, Trump's approval rating hit a record low, 35 percent. And this is supposed to be the honeymoon period. And Trump should be good at those. He's had three of them."

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**To:** Memmott, Justin (EPW)[justin\_memmott@epw.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-07T13:22:14-04:00  
**Importance:** Normal  
**Subject:** V/F Docs  
**Received:** 2017-04-07T13:22:57-04:00  
[4-6-17 VF CRA Briefing.pdf](#)  
[4-6-17 VF CRA VF Expanded Bullet List.docx](#)

These were delivered to Portman yesterday.

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

## BLM Venting & Flaring Rule

### Summary of the Final Rule:

The “Venting & Flaring Rule” (the Rule) is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). Currently, only 12 percent of operators have reported flared gas from oil well production. The Rule is codified in 43 CFR subparts 3178 and 3179 and became effective on January 17, 2017.

### Statutory Authority and Regulatory History:

The Mineral Leasing Act of 1920 (MLA) (30 U.S.C. §§ 188–287) subjects federal oil and gas leases to the condition that lessees will “use all reasonable precautions to prevent waste of oil and gas developed in the land . . . .” 30 U.S.C. § 225. Further, the MLA requires lessees to exercise “reasonable diligence, skill, and care” in their operations and requires lessees to observe “such rules for the health and safety of the miners and for the prevention of undue waste as may be prescribed by [the] Secretary [of the Interior].” 30 U.S.C. § 187. The Federal Oil and Gas Royalty Management Act (FOGRMA) makes lessees liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence or the failure to comply with applicable rules or regulations. 30 U.S.C. § 1756. Both the MLA and FOGRMA authorize the Secretary of the Interior to prescribe rules and regulations necessary to carry out the purposes of those statutes. 30 U.S.C. § 189; 30 U.S.C. § 1751.

Before promulgation of the Venting and Flaring Rule, the Bureau of Land Management (BLM) regulated the venting, flaring, and beneficial use of gas pursuant to NTL-4A, which placed limits on the venting and flaring of gas and defined when gas was “unavoidably lost” and therefore not subject to royalties. The BLM’s Venting & Flaring Rule included many regulatory changes, including emissions-focused requirements that did not appear in NTL-4A. Multiple states and industry groups believe that these new requirements are actually within the jurisdiction of the Clean Air Act (CAA) and therefore outside the Department’s authority to regulate.

### If the Rule is Not Repealed under the Congressional Review Act (CRA):

Although the Venting & Flaring Rule went into effect in January 2017, many of the Rule’s more onerous requirements are not yet operative. Although operators are not yet obligated to comply with these requirements, they will need to expend time and resources to prepare for compliance dates. Presently, the Rule requires operators to submit a waste minimization plan with their applications for permits to drill (APDs), imposes restrictions on venting, and clarifies that when gas is “avoidably lost” and it is therefore subject to royalties. Operators must comply with the Rule’s flaring (or “gas capture”) requirements, equipment upgrade/replacement requirements, and leak detection and repair (LDAR) requirements beginning on January 17, 2018.

The BLM expects industry’s annual compliance costs from 2017 to 2026 to be between \$114 and \$279 million, with first year compliance costs estimated to be \$113 million (\$84 million for LDAR alone).



The Rule will continue in effect unless the BLM rescinds or replaces the Rule through the rulemaking process outlined below, or the Rule is overturned in pending litigation. Any new rule that the BLM promulgates would likely be challenged in court with a minimum litigation cost of \$500,000. If the new rulemaking is overturned in litigation, the Venting and Flaring Rule would come back into effect.

If the Rule is Repealed under the CRA:

If the Rule is repealed under the CRA, NTL-4A would come back into effect immediately. The BLM retains its existing authority under the MLA and FOGRMA to make effective updates to NTL-4A while ceding some of the more duplicative regulatory provisions to states/EPA under the CAA.

The BLM could consider policy actions to curb waste and focus on revisions to NTL-4A to address the following:

- Encouraging beneficial use of oil or gas on lease
- Regulating flaring of unmarketable gas from oil wells
- Conserving unsold gas by reinjection
- Improving ROW timelines and removing obstacles to timely approval for pipeline infrastructure
- Recognizing existing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana

If a court overturns any replacement or revision of NTL-4A, NTL-4A would come back into effect.

**Table: Rulemaking Schedule**

Activity	Description	Timing
Advanced Notice of Proposed Rulemaking (ANPR)	OPTIONAL. The BLM would solicit input from the public on whether, and how, NTL-4A should be revised.	1 month to publish 2 months for public comment
Notice of Proposed Rulemaking (NPR)	The BLM would develop a NPR based on previous rule experiences or comments received from ANPR process. The Office of Management and Budget (OMB) needs to review and clear the proposal.	3 months to draft NPR 3 months for OMB review
NPR comment period	The NPR is published in the Federal Register for notice-and-comment period.	2 months
Comment review/ Drafting final rule	The BLM reviews the comments and revises the rule in light of those comments. The BLM sends the revised/final rule to OMB for review.	2 months review/drafting 3 months OMB review
Final rule is published	The BLM publishes the final rule in the Federal Register	After publishing, 2 months until effective
Total time to publish		13 months (for NPR) 16 months (including ANPR)
Total cost		\$1.2 2.1 million

- Encouraging beneficial use of oil or gas on lease
  - Under the Mineral Leasing Act, oil or gas that is used on lease for production purposes is not subject to royalties. NTL 4A provided guidance as to the particular uses of oil or gas—termed “beneficial purposes”—that would not be subject to royalties. NTL 4A’s “beneficial purposes” included heating oil or gas to condition it for market, compressing gas to place in marketable condition, and fueling drilling rig engines.
  - A non controversial part of the Venting & Flaring Rule (43 C.F.R. subpart 3178) replaced NTL 4A’s “beneficial purposes” with an expanded and clarified list of “royalty free uses.” Following a repeal of the Rule, the BLM would consider how the beneficial use policies of NTL 4A could be strengthened, either through internal guidance or additional rulemaking, in order to encourage conservation through beneficial use of oil or gas on lease.
- Regulating flaring of unmarketable gas from oil wells
  - Oftentimes, especially in tight oil formations like the Bakken, oil production is accompanied by a extensive amounts of gas production, termed “associated gas.” Depending on the value of the associated gas and the availability of gas pipelines, it may not be economical for an oil well operator to capture the gas, leading the operator to dispose of the gas through flaring.
  - NTL 4A required BLM approval for the routine flaring of associated gas. Such approval could be obtained upon a showing that capture of the gas is not economically justified and that conservation of the gas would lead to a premature abandonment of recoverable oil reserves and ultimately to a greater loss of energy than if the gas were flared. Following a repeal of the Rule, the BLM could consider how NTL 4A’s restrictions on routine flaring could be strengthened, either through internal guidance or through additional rulemaking.
- Conserving unsold gas by injection
  - Operators may find the subsurface injection of gas to be an attractive means of disposing of gas that cannot be economically captured for market. Gas may be injected into the reservoir to enhance oil recovery, or it could be injected with the intent to recover it later. The viability of injecting unsold gas is dependent on the local geology as to whether it is suitable for accepting gas for reinjection to conserve it for future needs.
- Improving ROW timelines and removing obstacles to timely approval for pipeline infrastructure.
  - An important factor driving the flaring of associated gas is the lack of access to gas pipelines. Operators complain that pipeline construction is being delayed by the BLM’s failure to approve rights of way (ROW) in a timely manner. ROW approvals are impacted by coordination with other surface managing agencies (BIA/USFS/FWS/BOR/ArmyCOE).
- Recognizing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana
  - Many states with Federal oil and gas production already have regulations addressing flaring. North Dakota, for example, requires operators to submit waste minimization plans with their APDs and requires operators to capture a certain percentage of the gas they produce. Wyoming and Utah place volumetric limits on flaring, and Colorado has detailed LDAR requirements. The BLM could consider avoiding a duplicative, one size fits all rule that ignores effective regulations already imposed by the states.

Deleted: not insignificant

Deleted: would

Deleted: .

Deleted: wishes to

**To:** Micah Chambers[micah\_chambers@ios.doi.gov]  
**From:** Kaster, Amanda  
**Sent:** 2017-04-07T15:23:44-04:00  
**Importance:** Normal  
**Subject:** DRAFT  
**Received:** 2017-04-07T15:24:10-04:00  
4-7-17 - DRAFT -- Venting Flaring BLM.docx

(b) (5), so edit as you see fit.

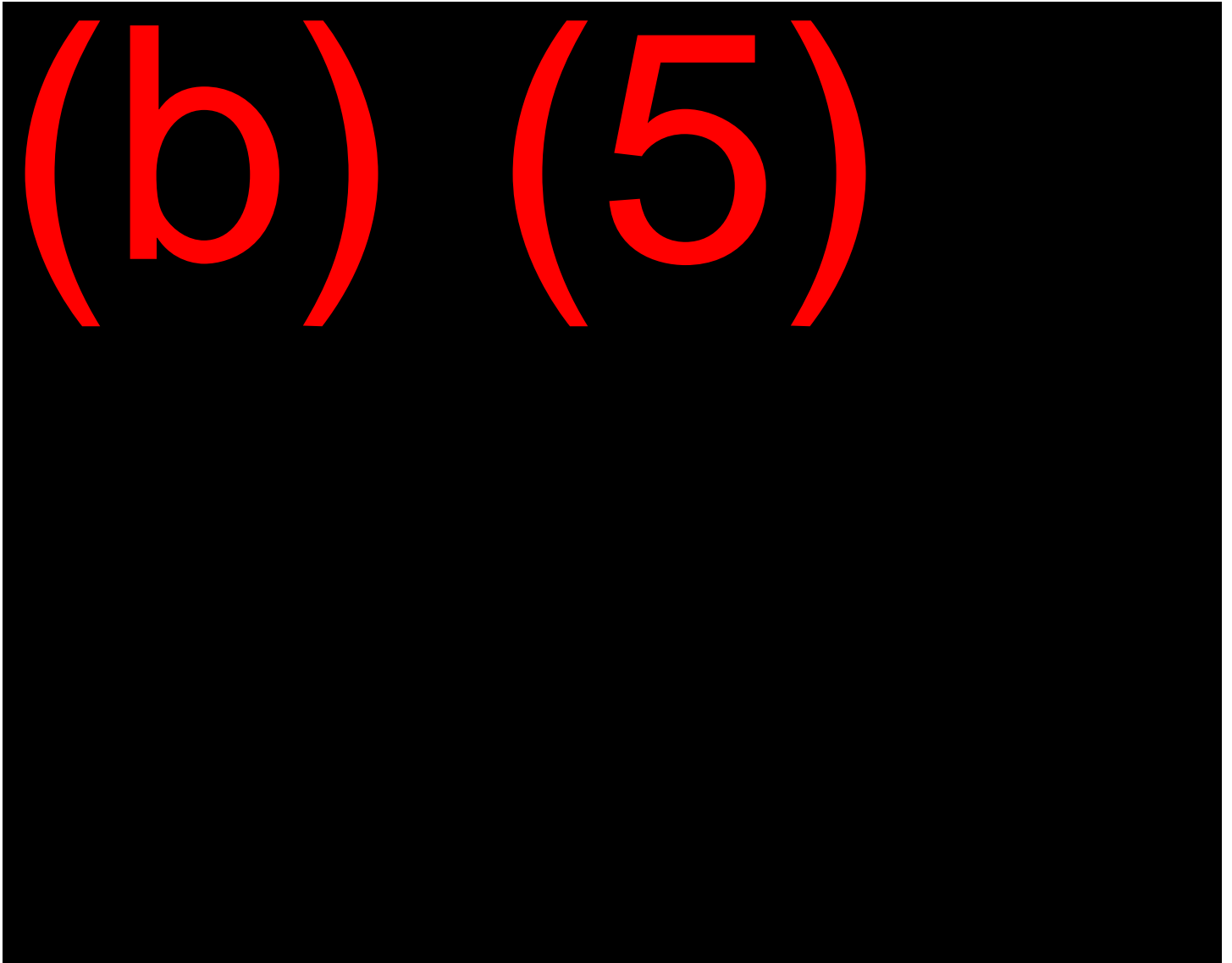
--

Amanda Kaster Averill  
Special Assistant  
Office of Congressional and Legislative Affairs  
U.S. Department of the Interior  
(202) 208 3337  
[amanda\\_kaster@ios.doi.gov](mailto:amanda_kaster@ios.doi.gov)

The Honorable Robert Portman  
United States Senator  
448 Russell Senate Office Building  
Washington, D.C. 20510

April xx, 2017

Dear Senator Portman:



Sincerely,

Secretary Ryan Zinke

**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Orth, Patrick (Portman)  
**Sent:** 2017-04-11T14:19:41-04:00  
**Importance:** Normal  
**Subject:** Draft letter  
**Received:** 2017-04-11T14:19:49-04:00

Dear Secretary Zinke,

Over the last decade, advancement in technology and engineering has enabled an unprecedented opportunity for the production of oil and natural gas from underground shale formations. As a result of this increased production, the United States has become more energy secure and states like Ohio have seen an increase in direct and indirect oil and gas investments.

The Department of the Interior, through the Bureau of Land Management (BLM), plays an integral role in the responsible development of the vast energy resources owned and managed by the federal government. The BLM, through the Mineral Leasing Act, is responsible for preventing the waste of methane emitted during the oil and natural gas production process. It is important that the Department minimize the waste of methane through a pragmatic approach that prevents waste but does not discourage investment. I have been encouraged by your comments during your confirmation process and in your time as Secretary that you have made public comments about your desire to reduce methane waste in a similar approach.

As you know, a Congressional Review Act (CRA) resolution currently sits before the Senate that would repeal the previous Administration's Methane and Waste Prevention Rule. I have concerns with the rule as it was written but also believe that there are actions that you can take to reduce methane waste than the previous status quo. As I consider whether or not I will vote for the CRA resolution it would be helpful to know what actions you can commit to taking should the CRA pass.

I look forward to working with you to reduce the waste of our natural resources.

Sincerely,  
RP

Patrick Orth  
Legislative Assistant  
Office of Senator Rob Portman  
Phone: 202-224-3353  
Email: [Patrick\\_orth@portman.senate.gov](mailto:Patrick_orth@portman.senate.gov)

**To:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-11T16:09:43-04:00  
**Importance:** Normal  
**Subject:** Re: Draft letter  
**Received:** 2017-04-11T16:10:29-04:00

THanks Pat. looks good and we'll chat later.

On Tue, Apr 11, 2017 at 2:19 PM, Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov> wrote:

Dear Secretary Zinke,

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RP

Patrick Orth

Legislative Assistant

Office of Senator Rob Portman

Phone: 202-224-3353

Email: [Patrick\\_orth@portman.senate.gov](mailto:Patrick_orth@portman.senate.gov)

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Amanda Kaster[amanda\_kaster@ios.doi.gov]; Megan Bloomgren[megan\_bloomgren@ios.doi.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-11T16:09:54-04:00  
**Importance:** Normal  
**Subject:** Fwd: Draft letter  
**Received:** 2017-04-11T16:10:41-04:00

----- Forwarded message -----

**From:** **Orth, Patrick (Portman)** <patrick\_orth@portman.senate.gov>  
**Date:** Tue, Apr 11, 2017 at 2:19 PM  
**Subject:** Draft letter  
**To:** "Chambers, Micah" <micah\_chambers@ios.doi.gov>

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RP

Patrick Orth

Legislative Assistant

Office of Senator Rob Portman

Phone: 202-224-3353

Email: [Patrick\\_orth@portman.senate.gov](mailto:Patrick_orth@portman.senate.gov)

--

Micah Chambers

Special Assistant / Acting Director

Office of Congressional & Legislative Affairs

Office of the Secretary of the Interior

**To:** Ryan Ullman[rullman@ipaa.org]  
**From:** Chambers, Micah  
**Sent:** 2017-04-12T12:01:47-04:00  
**Importance:** Normal  
**Subject:** BLM V/F Memo  
**Received:** 2017-04-12T12:02:34-04:00  
[4-6-17 VF CRA Briefing.pdf](#)

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

## BLM Venting & Flaring Rule

### Summary of the Final Rule:

The “Venting & Flaring Rule” (the Rule) is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). Currently, only 12 percent of operators have reported flared gas from oil well production. The Rule is codified in 43 CFR subparts 3178 and 3179 and became effective on January 17, 2017.

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**Table: Rulemaking Schedule**

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# Conversation Contents

Interior Cab Aff report for 3/17/17

**Attachments:**

/19. Interior Cab Aff report for 3/17/17/1.1 DOI DAILY UPDATE FOR CABINET AFFAIRS 3-17-17.docx

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Fri Mar 17 2017 11:29:41 GMT-0600 (MDT)  
"Mashburn, John K. EOP/WHO"  
**To:** <(b) (6) gov>, "Flynn, Matthew"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Cab Aff report for 3/17/17  
**Attachments:** DOI DAILY UPDATE FOR CABINET AFFAIRS 3-17-17.docx

## DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/17/17

Doug Domenech, Senior Advisor

### Status of the Secretary

The Secretary is on travel to Montana and Wyoming.

Friday March 17: Bozeman/Yellowstone. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues. Political event with Senator Daines.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area and attend a dinner with Senator Daines.

Sunday March 18: Fly to DC

### Media Announcements Today

NOTE: Interior will be releasing 800 pages from the NPS related to the inauguration in response to a FOIA.

**DOI Announces \$3.47 Million to 12 States for Species Recovery:** Nine projects on 12 national wildlife refuges across the United States are receiving more than \$3.74 million through the Cooperative Recovery Initiative (CRI). The CRI is an internal competitive grant program that funds on-the-ground conservation projects to help recover threatened or endangered species on national wildlife refuges and surrounding lands. These projects often provide related conservation benefits to other imperiled species and encourage partnerships with state and private groups. Outreach is planned.

### **Executive Orders**

EO on Energy looking like next week.

### **Congressional Action Under the CRA** (No change)

**CRAs:** Pending WH Action.

- BLM Planning 2.0 Rule. When will the President sign?

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

### **Secretary Meetings and Schedule**

Further out.

3/30-4/1: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

Waiting on Resolution of these items: (working with IGA)

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. Interior has provided a draft.

### **Speaking Invitations**

## Accepted

3/23 Address to the American Petroleum Institute's Board of Directors Meeting (DC, Trump Hotel)

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/27 NRA Leadership Forum, George World Congress Center in Atlanta, GA.

## Regretted

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

## Outstanding Invitations in Process

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

3/28 Address to the Public Lands Council Legislative Conference (DC)

4/3 North America's Building Trades Unions National Legislative Conference (DC, Washington Hilton)

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)

4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

## **Emergency Management**

Nothing significant to report.

## **Media of Interest**

### **Secretary Zinke Confident Interior Can Maintain Mission In Face Of Budget Cuts.**

The Huffington Post (3/16, D'angelo) reports that on March 3, Interior Secretary Ryan Zinke "addressed his staff at the agency's Washington headquarters" and "vowed to 'fight'

his boss, President Donald Trump, on the looming Interior Department budget cuts.” At that time, the Trump Administration was “looking to slash 10 percent of the agency’s budget,” according to E&E News. But after “the White House unveiled its ‘America First’ budget proposal, which calls for cutting the Interior Department’s budget from \$13.2 billion to \$11.6 billion — a 12 percent decrease,” Zinke’s tone has “suddenly improved.” He said in a statement, “America’s public lands are our national treasures and the President’s budget sends a strong signal that we will protect and responsibly manage these vast areas of our country ‘for the benefit and enjoyment of the people.” Zinke added, “I can say for certain that this budget allows the Interior Department to meet our core mission and also prioritizes the safety and security of the American people. From supporting tribal sovereignty and self-determination across Indian country to investing more than \$1 billion in safe and reliable water management in the western U.S., to budgeting for wildland fire preparedness and suppression, and streamlining access to the energy resources America needs, this budget enables the Department to meet its core mission and prioritizes programs that will put Americans’ security first.”

**Trump Proposes \$120M Cut To LWCF.** The [McClatchy](#) (3/16, Leavenworth) reports that on Thursday, President Trump proposed a \$120 million cut to the Land and Water Conservation Fund and “other federal land acquisition programs, calling them ‘lower priority activities.’” According to Matt Lee-Ashley, “a former Interior Department official, the \$120 million figure represents at least a 70 percent cut in the Land and Water Conservation Fund over current spending levels, already reduced by congressional sequestration.” Whit Fosburgh, president and CEO of the [Theodore Roosevelt Conservation Partnership](#), said that “Trump’s cuts could also make it harder for hunters and anglers to access public lands.” He said that the proposed cuts are “no way to support the rural and local economies that need outdoor recreation dollars most.”

**Legislation Filed To Recoup Money For Swain.** The Waynesville (NC) Smoky Mountain News (3/15, Stone) reports state Rep. Mike Clappitt has introduced a measure meant to “help Swain County recoup millions of dollars” it is owed by the federal government, which failed to uphold a 1943 agreement to rebuild a road that was destroyed when TVA built Fontana Dam. The county agreed to a monetary settlement in 2010 and “did receive the first installment of \$12.8 million, but hasn’t received a dime since” because Congress has not appropriated the necessary funding. Specifically, the measure would “direct Attorney General Josh Stein to investigate legal methods available to Swain County and the state to ensure the federal government holds up it’s end of the bargain” before the agreement expires in 2020.

### **Study Looks At Substance Harvest of Polar Bears Under Climate Change.**

The Ketchikan (AK) SitNews (3/16) reports that research from the University of Washington, the U.S. Fish and Wildlife Service and the U.S. Geological Survey investigates what changes in the Arctic Ocean “could mean for subsistence harvest of polar bears – a practice that has cultural, nutritional and economic importance to many Northern communities.” A study published in the Journal of Applied Ecology “addresses this question using an improved model of how polar bear populations function.” According to the article, “the authors identify ways to maintain subsistence harvest without compounding the negative effects of habitat loss, as long as there is accurate population



data and the harvest is responsive to changes in the environment.”

## **Energy Media**

### **BOEM Takes Bids On Development Rights Off North Carolina.**

The Raleigh (NC) News & Observer (3/16, Murawski) reports the Bureau of Ocean Energy Management received offers Thursday from four bidders who want to build an offshore wind farm on the 191-square-mile Kitty Hawk area off North Carolina. Bidding rose to \$6 million by mid-afternoon and will continue until one bidder emerges with the highest offer. The auction is not expected to draw a high price amid low renewable energy mandates in the region. Katharine Kollins, president of the Southeastern Wind Coalition, said, “Right now the cost of offshore wind is not in line with Southeast electricity prices.”

### **Additional Coverage: Interior Approves Greens Hollow Coal Lease Sale.**

Additional coverage that the Interior Department announced on Wednesday that it “had finalized a \$22 million Greens Hollow coal lease, which was awarded to the owner of Sufco mine” was provided by the AP (3/16) and KSL-TV Salt Lake City (3/16, O'Donoghue).

### **Eni Requests Extension Of Arctic Drilling Program.**

Bloomberg News (3/16, Dlouhy) reports the Interior Department is considering Eni's request to explore for oil in north Alaskan waters, which may give President Trump the opportunity to curtail President Obama's Arctic drilling ban. Eni is hoping to expand Spy Island, in which Shell and Repsol are partners, into a launching pad for extended-reach drilling that would target oil in federal waters. While Eni's exploration would not be covered by Obama's executive order because it is in an area previously leased from the federal government, approving the plan could encourage more company's to consider Arctic exploration.

### **Oil Industry Welcomes Fracking Regulatory Rollbacks.**

The Bismarck (ND) Tribune (3/16, Holdman) reports that “industry cheered Trump administration action to repeal Obama era standards for hydraulic fracturing used in crude oil drilling on federal land.” The rule, “which had been stayed, was under appeal by the Bureau of Land Management, with oral arguments scheduled for later this month, but the Trump administration asked the appeal be canceled as plans are made for regulatory repeal.”

### **White House Communications Report** (sent to WH Comms yesterday, Thursday)

## **Inquiries**

POLITICO (Esther Whieldon) – REQUEST - Jason Hairston, head of Kuiu, has told me he's been offered the role of a liaison between Interior/Zinke and the White House and Donald Trump Jr. on conservation, sportsman issues and that Donald Jr. is the one who set it up since he couldn't play the role himself (since he's taken over Trump empire). Please confirm asap. Any comment? – RESPONSE – On background, there's been no discussion of creating of a new role like this at Interior.

Responded to most of the inquiries below with the statement from Zinke or NPS. Provided background that more details would come out in May where necessary.

### **Secretary Zinke statement**

"America's public lands are our national treasures and the President's budget sends a strong signal that we will protect and responsibly manage these vast areas of our country 'for the benefit and enjoyment of the people'," Secretary Zinke said. "Before serving in government, I served on the front lines for 23 years as a military officer. I can say for certain that this budget allows the Interior Department to meet our core mission and also prioritizes the safety and security of the American people. From supporting tribal sovereignty and self-determination across Indian country to investing more than \$1 billion in safe and reliable water management in the western U.S., to budgeting for wildland fire preparedness and suppression, and streamlining access to the energy resources America needs, this budget enables the Department to meet its core mission and prioritizes programs that will put Americans' security first."

### **National Park Service statement**

"The President's budget released today provides necessary resources for the National Park Service to meet its core mission of protecting and conserving America's public lands and beautiful natural resources, providing access for the next generation of outdoor enthusiasts and ensuring visitor safety. It also funds an increasing investment in deferred maintenance projects at the parks. While some details of the 2018 budget are still being developed and will be released later this spring, today's first step in the FY2018 budget process signals strong support for America's public lands and national parks."

- Ben Geman, Axios - REQUEST – Statement and details on the budget
- Corbin Hiar, E+E News - REQUEST – Statement and details on the budget
- Matthew Daly, AP - REQUEST – Statement and details on the budget
- Esther Whieldon, Politico - REQUEST – Statement and details on the budget

- Elvina Nawaguna, CQ Roll Call - REQUEST – Statement and details on the budget
- Kirk Siegler, NPR- REQUEST – Statement and details on the budget
- Kurt Repanshek, National Parks Traveler – REQUEST - Can deferred maintenance be tackled if spending on major maintenance is reduced? Wouldn't the latter just lead to more maintenance backlog? How much of a budget cut does the Interior secretary think the NPS can handle?
- Hillary Chesson, Del Mar Now (Gannett - VA) – REQUEST - 1) How would the elimination of the National Wildlife Refuge fund affect the Blackwater National Wildlife Refuge, Eastern Shore National Wildlife Refuge and the Chincoteague National Wildlife Refuge? 2) What programs utilize this funding? 3)How much of this funding would be cut from their budgets, specifically?
- Keith Norman, Jamestown Sun (ND) – REQUEST- Trying to get an idea how the new budget would effect the department of interior operations in North Dakota. Particularly the wildlife refuges and the elimination of the National Wildlife Refuge fund payments to local governments.
- Pamela King, E&E News – REQUEST - Any additional details you can share on how this budget priority affects Interior's balance of conservation and development?
- Dylan Brown, E&E News – REQUEST - Quick question about this line in press release: “discretionary Abandoned Mine Land grants that overlap with existing mandatory grants...” Does this mean payments to certified states?
- Mark Harrington, Newsday – REQUEST – Will the Trump administration continue to prioritize offshore wind?
- Bill Holland, S&P Global Market – REQUEST - Can you quantify how much of increase in funding for energy programs is in the budget? What is the current budget of the Office of Natural Resources Revenue?
- Dan Radel, Asbury Park Press (NJ) – REQUEST – How will eliminating the National Wildlife Refuge Fund impact wildlife refuges in NJ?
- Jim Day, HIS The Energy Daily – REQUEST – Numbers by specific agency/bureau and program.
- Gary Gentile, S&P Global – REQUEST – Wants more information and numbers on specific cuts
- Stuart Leavenworth, McClatchy – REQUEST - a \$120 million reduction in federal land acquisitions. To put that reduction in perspective, I wanted to find out what Interiors current funding level is for land acquisition.
- Kurt Repanshek, National Parks Traveler – REQUEST - emailed WASO, Yellowstone NP and Great Smoky Mountains NP
- WPHL TV 17 in Philadelphia – REQUEST - contacted both Independence National Historical Park and the Northeast Region Office.
- Boston Magazine – REQUEST - contacted Frederick Law Olmsted in Boston with budget query.

- Denver Fox 31 – REQUEST - contacted Rocky Mountain National Park with budget query.
- Washington Post – REQUEST - contacted Great Smoky Mountains National Park with budget query.

### **Top Stories**

- IJR: Yes, Secretary Ryan Zinke Actually Carries an 'ISIS Hunting License ...
- Casper Star Tribune: Trump admin halts Obama-era rule on fracking on public land
- E&E News: Trump budget calls for 12% cut
- Daily Caller: Trump's Budget Proposal Slashes Funding For Interior Dept
- USA Today: Wilderness Society, Ocean Conservancy say Trump's budget cuts ...
- Forbes: Trump's Budget Would Be A Disaster For Anglers And Hunters
- Washington Post: Trump budget would gut science, environment programs

### **Top Issues and Accomplishments**

- Today we issued a press release on the budget
- Today, the Bureau of Ocean Energy Management and Interior announced a successful offshore wind sale
- Launching a “Travels with Z” blog on our website that is Secretary Zinke’s travel blog going to America’s public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)
- On Friday, Zinke will meet with leadership and staff at Yellowstone National Park. No press planned.

### **Federal Register Notices Cleared for Publishing (None Significant)**

The following items were cleared for the Federal Register on Thursday.

REG0006847      BIA      Cowlitz Indian Tribe Liquor Ordinance      The liquor ordinance regulates and controls the possession, sale, manufacture and distribution of alcohol in conformity with the laws of the State of Washington. The notice must publish in advance of the opening of the new tribal casino in April. This is not controversial.      Notice  
03/16/2017

REG0006850 BIA Federal Register Notice - Tribal-State Gaming Compact Rosebud Sioux and South Dakota The Indian Gaming Regulatory Act requires that Class III gaming activities must be conducted in conformance with a Tribal State gaming compact that is in effect. Department regulations provide that a simple extension of the compact term does not require approval but does require notice of the new expiration date to be published in the Federal Register. This Notice extends the compact expiration date to July 31, 2017. Notice 03/16/2017

REG0006851 BIA Federal Register Notice: Tribal-State Gaming Compact Crow Creek Tribe and South Dakota The Indian Gaming Regulatory Act requires that Class III gaming activities must be conducted in conformance with a Tribal State gaming compact that is in effect. Department regulations provide that a simple extension of the compact term does not require approval but does require notice of the new expiration date to be published in the Federal Register. This Notice extends the compact expiration date to June 28, 2017. Notice 03/16/2017

REG0006841 BLM Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Caldwell Canyon Mine and Reclamation Plan, Caribou County, Idaho This is a notice of intent for and EIS for a proposed phosphate mine and reclamation plan in Caribou County, Idaho. At issue is a proposed 40 year mine plan that will result in a total of 1,530 acres of disturbance, including an anticipated disturbance to 68.7 acres of general habitat for greater sage-grouse. Notice 03/16/2017

REG0006853 BOE Notice of Availability (NOA) for the Draft Supplemental Environmental Impact Statement (SEIS) for the Cape Wind Energy Project. On July 5, 2016, the United States Court of Appeals vacated the 2009 Final Environmental Impact Statement (EIS) for the Cape Wind Energy Project due to a deficiency regarding the determination as to whether the sea floor could support wind turbine structures at the time the lease was issued. The draft SEIS only reanalyzes geotechnical data to demonstrate that the ability of the sea floor to support wind turbine structures. BOEM has committed to the Court that a final version of this document to be published within the next seven months, by August 2017. To meet this deadline, the draft version of the SEIS for public comment should be published by March 14, 2017, or as soon thereafter as possible, to allow for the 45 day comment period and time to respond to comments. Notice 03/16/2017.

REG0006804 FWS Environmental Assessment and Habitat Conservation Plan; Heart of Texas Wind Project; McCulloch County, Texas (Black-Capped Vireo take) Heart of Texas Wind, LLC, (applicant) applied to FWS for an incidental take permit under the Endangered Species Act. If granted, the permit would be in effect for 30 years and would authorize incidental take of the black-capped vireo during construction, operation, and maintenance of the proposed wind energy facility. The incidental take authorization would be covered within 10,808 acres in McCulloch County, Texas, approximately 125 northwest of Austin. Notice 03/16/2017

REG0006840 FWS Orange County Transportation Authority M2 Natural Community Conservation Plan/Habitat Conservation Plan, Orange County, CA; Final Environmental Impact

Report/EIS and Habitat Conservation Plan FWS is considering the issuance of a 40-year incidental take permit to the Orange County Transportation Authority (OCTA). The permit would accommodate freeway improvement projects by authorizing incidental take and providing assurances for 13 listed and unlisted species. Notice 03/16/2017

REG0006843 FWS NOA: Habitat Conservation Plan for Pacific Gas and Electric Company's San Francisco Bay Area Operations and Maintenance If issued, the permit would authorize incidental take of 32 federally listed species from continued operations and maintenance-related work (both gas and electrical transmission facilities) in 9 San Francisco Bay Counties for a period of 30 years. Notice 03/16/2017

REG0006844 FWS Endangered Species; Wild Bird Conservation; Receipt of Application for Permit (first applicant: Ruth Linsky, Ellensburg, WA) This is a weekly batched notice announcing the receipt of permit applications received by FWS for Endangered Species Act and Wild Bird Conservation Act activities. Notice 03/16/2017

REG0006825 OSM Notice of Intent to Initiate Public Scoping and Prepare an Environmental Impact Statement for the San Juan Mine Deep Lease Extension Mining Plan Modification OSMRE is notifying the public that we intend to prepare a draft environmental impact statement (EIS) to evaluate the impacts of alternatives relating to the San Juan Coal Company's proposed mining plan modification for the Deep Lease Extension (DLE). Notice 03/16/2017

Doug Domenech  
Senior Advisor  
US Department of the Interior

# Conversation Contents

Interior Report 2/14/17

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Tue Feb 14 2017 10:59:49 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report 2/14/17

DOI UPDATE FOR CABINET AFFAIRS – 2/14/17

Doug Domenech

## Status of the Nominee

Rep. Zinke waiting Senate floor vote. We anticipate he may be confirmed Thursday.

The Hill reports Democratic Sen. Jon Tester and Republican Sen. John Cornyn “predicted” yesterday that Zinke and Energy nominee Rick Perry “could come up this week.”

## Zinke Schedule for first week.

Friday, 2/17 Day One in the building. Various employee meetings, Ethics Briefing, Travel Briefing. Meeting with Sportsmans Groups.

## Key Announcements/Secretarial Orders:

- Overturning the FWS Director’s decision to ban lead ammo
- Renew charter for Wildlife Hunting Heritage Conservation Council
- Expand opportunities for outdoor recreation on public lands
- Issue Employee Letter on Ethic Standard

Saturday, 2/18 Day Two in the building.

- Briefing on budget
- Briefing on law enforcement and emergency management.

## **Secretarial Travel**

Subject to change, Secretary Zinke will travel as follows:

Monday 2/19: Travel to Salt Lake City then immediately fly to Bears Ears. Meeting the Governor, delegation and Navajo leaders. Flight back to Salt Lake. Reception with State Legislators. NOTE Cabinet Affairs has asked up to cancel this day.

Tuesday 2/21: Flight to Juneau, AK. Meeting with AK Federation of Natives.

Wednesday 2/22: Meeting with State legislators, Governor, and attend Sen. Murkowski's address to the State Legislature. Flight to Anchorage, AK.

Thursday 2/23: Anchorage, visit with DOI leadership and all-hands employees (1000+ in Anchorage). Key Announcements:

- Zinke will sign an order reestablishing the Office of the Senior Advisor for Alaskan Affairs.
- Memo directing FWS to review issues related to building a road to serve the people of King Cove.
- Possible action on National Petroleum Reserve Alaska to overturn the last administration's decision to remove 11,000 acres from the NPRA.

Friday 2/24: Flight to San Jose, CA. Reception at the Steamboat Institute.

Saturday: 2/25: Visit to National Parks in San Francisco. Speaks at Steamboat Institute Conference.

Sunday 2/26: Flight to Washington.

## **Energy Executive Orders**

### **Stream Protection Rule (At the White House)**

- Apparently early reports that a planned trip for President Trump to Ohio "to sign into law a bill undoing an Obama-era coal mining rule" has been canceled by the White House.
- According to the media, the trip was never "formally announced" by the White House, "though the administration issued a notice last week suggesting he would stop in Vienna, Ohio, according to the Cleveland Plain Dealer." Trump, during the stop, "was set to sign into law a Congressional Review Act resolution undoing the Office of Surface Mining's Stream Protection Rule to protect waterways from the effects of coal mining, according to the report." It is unknown when "Trump will sign the Stream



Protection Rule resolution, or a separate one ending a financial disclosure rule for mining and drilling firms.”

· REPEAT: This action helps restore coal protection in the US. **(Let us know if you want anyone from the Department to attend.)**

### **BLM Venting and Flaring Methane Rule (Passed the House)**

· E&E Daily reports the Senate, after a week of Cabinet confirmations, may take up a House-passed resolution to repeal the Bureau of Land Management’s regulation that seeks to limit natural gas flaring, venting and leakage on public and tribal lands.

### **BLM Planning 2.0 Rule (Passed the House)**

-

### **More CRAs On the Horizon**

· Rep. Don Young introduced a resolution of disapproval that seeks to undo an Interior Department rule requiring tougher safety measures for oil and gas drilling in the arctic.

Blocking a revision of the Office of Natural Resources Revenue’s mineral valuation rule, is expected to be introduced soon. “The ONRR’s new rule ostensibly sought to simplify and clarify the process for valuing oil, gas, and coal production on federal and Indian lands in order to provide ‘certainty’ to industry and to ensure all royalties due to ONRR have been paid. In fact, it did the opposite. The rule didn’t simplify the process, disallows common cost deductions, and added burdensome and redundant reporting requirements.”

· The BLM’s Onshore Order 3, a rule implemented to address measuring oil and gas production on public land, is also being targeted for repeal.

## **News**

### **Judge Rejects Tribes’ Request To Halt Dakota Access Pipeline Construction.**

Reuters (2/13, Gardner) reports US District Court Judge James Boasberg rejected the request of the Standing Rock Sioux and Cheyenne River Sioux tribes, who argued that the Dakota Access pipeline would prevent them from practicing religious ceremonies at a lake surrounded by sacred ground.

### **Navajo Generating Station will continue operating for now.**

#### **Owners Vote on Navajo Coal Plant Lease**

Agree to Work with Navajo Nation to Keep Plant Running through 2019 Rather than close the plant later this year, the utility owners of Navajo Generating Station (NGS) voted today to extend operations of the facility near Page, Ariz., to the December 2019 end of its lease if an agreement can be reached with the Navajo Nation.

This measure would preserve, for almost three years, continued employment at the plant, additional revenues for the Navajo Nation and the Hopi Tribe. It also provides the Nation or others with the potential to operate the plant beyond 2019 should they so choose – although the current non-governmental owners do not intend to be participants at that time.

The decision by the utility owners of NGS is based on the rapidly changing economics of the energy industry, which has seen natural gas prices sink to record lows and become a viable long-term and economical alternative to coal power.

The four utility owners of NGS include Salt River Project (SRP), Arizona Public Service Co., NV Energy and Tucson Electric Power.

## **Emergency Management**

In California, water flow over the Oroville Dam auxiliary spillway has ceased, and the threat of spillway collapse due to erosion has diminished. Flash Flood and Flood Warnings remain in effect for areas downstream of the dam. Mandatory evacuations remain in effect for approximately 190,000 people in Butte, Sutter, and Yuba counties as upcoming weather systems may continue to impact the Dam.

## **White House Communications Report**

### Inquiries

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CNN (Sonam Vashi) Request: Fact checking figures about domestic energy production. Deadline Noon Monday 2/13. – Response: "The President's plan to rebuild American infrastructure, responsibly develop our natural resources, and put the American people back to work is a bold path forward and is exactly the reason the American people elected Donald J. Trump. The previous administration took off the table nearly every option for responsible energy development both on and offshore, killing revenues and jobs. By comparison, in 2008, the Department of the Interior disbursed \$23.4 billion in revenue from energy production on offshore and onshore federal and American Indian lands. This past year, the Department disbursed a fraction of that at \$6.2 billion. Energy production on federal lands, and thus economic activity, are at record lows for the modern era due in large part to the regulatory stranglehold of the past administration. By developing our energy resources, including those under federal ownership, in responsible and environmentally sensitive ways under reasonable regulation, trillions of dollars will pour back into the United States' economy." Plus a good deal of background info.

E&E News: Members of the Ute tribe mentioned that they are meeting with Interior

officials to discuss a possible settlement to the tribe's ongoing legal challenge to BLM's fracking rule. Can you confirm the meeting or give any further details? My story is running tomorrow morning, so any information before then would be useful. – Response: Gathering info from solicitor and BLM.

### Top Stories

East Valley Times: Public safety closure of Sacramento River due to high water levels (Bureau of Reclamation has a lot of responsibility regarding the dam and flooding)

Fox News: Officials won't lift evacuations for 188,000 as flood danger around Calif. dam eases (Bureau of Reclamation)

EE News: Court declines to halt construction on pipeline

EE News: Grijalva encourages whistleblowers to contact committee Dems

Phoenix Business Journal: Community garden shut down by federal government finds new home

KJZZ Phoenix: Navajo Generating Station Owners Vote Not To Renew Lease After ...

### Top Issues and Accomplishments

Working with our policy shop to establish secretary's early priorities and messaging

Writing Day 1 content for various web platforms and finalizing Secretary's events

Continuing to outline Days 1-100 and 1-year plan for Secretary

Senior Advisor  
US Department of the Interior

# Conversation Contents

Interior Report for 2/7/17

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Tue Feb 07 2017 11:06:07 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report for 2/7/17

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Doug Domenech

## **Status of the Nominee**

Rep. Zinke waiting Senate floor vote. We are now hearing his confirmation may be postponed again. We are concerned with the delay from a planning perspective, especially since a number of travel commitments were made with Senators during the Congressional recess.

170 so-called environmental fake news groups wrote the Senate opposed to the confirmation of Zinke.

NOTE: Tomorrow at 8PM the History Channel will air a special on SEAL Team Six. Zinke is interviewed. Promo Youtube link: <https://www.youtube.com/watch?v=D-0jppq-Ds0E>

## **Invitation to Speak**

The Congressional Western Caucus has requested that someone from Interior speak briefly at their meeting on Friday. The event is closed to the media. I have been asked to do this. I am seeking guidance if I should accept.

## **Congressional Review Act – POTUS ACTION**

The Stream Protection Act CRA has passed both the House and Senate and is awaiting the President's signature. We are prepared to assist in providing miners for a signing ceremony.

We are awaiting Senate action on the Bureau of Land Management's methane venting and flaring rule CRA.

## **Navajo Generating Station (NGS)**

(Media attention to this issue is rising.)

The Navajo Generating Station is a 2250 megawatt coal-fired powerplant located on the Navajo Indian Reservation, near Page, Arizona, United States. This plant provides electrical power to customers in Arizona, Nevada, and California.

The current lease for the plant with the Navajo Nation expires in 2017. If the plant owners are not going to keep running the plant and don't negotiate a lease extension, they would need to start tearing it down for decommissioning by the end of this year to be done by the end of 2019. On February 13 the owners are supposed to vote on extending this deadline. Interior has, or will, meet with all of the major parties.

The NGS is a power station located in owned by the DOI's Bureau of Reclamation, the Salt River Project, Arizona Public Service Co., NV Energy and Tucson Electric Power. The Los Angeles Department of Water and Power recently withdrew from the plant, and NV Energy plans to do the same.

The plant employs about 500 people on land owned by the Navajo Nation. Another 330 people work at the Kayenta Mine, 80 miles away, on Navajo and Hopi land. The jobs and royalties paid to the tribes are pillars of the economy for the Navajo and Hopi people.

The President of the United Mine Workers of America union chapter that represents 253 miners at the Kayenta Mine that supplies the Navajo Generating Station, said Thursday, "I hope [President Trump] comes through," she said of Trump. "He made promises to a lot of people. We are willing to put up a good fight if we have to."

### **Dakota Pipeline Action**

Impending floods within the next few weeks in the area where protesters are encamped may require the triggering of an emergency declaration under the Stafford Act which says, "an emergency is "any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State, tribal, and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States."

Doug Domenech  
Senior Advisor  
US Department of the Interior

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**"Uli, Gabriella M. EOP/WHO" <(b) (6)> gov>**

**From:** "Uli, Gabriella M. EOP/WHO"  
<(b) (6)> gov>  
**Sent:** Tue Feb 07 2017 11:43:06 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>,  
"Mashburn, John K. EOP/WHO"  
<(b) (6)> gov>  
**Subject:** RE: Interior Report for 2/7/17

Received. Thank you, Doug.

**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Tuesday, February 7, 2017 1:06 PM  
**To:** Mashburn, John K. EOP/WHO <(b) (6) gov>; Uli, Gabriella M. EOP/WHO <(b) (6) gov>  
**Subject:** Interior Report for 2/7/17

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Doug Domenech  
Senior Advisor  
US Department of the Interior

### **Douglas Domenech <douglas\_domenech@ios.doi.gov>**

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**From:** Douglas Domenech <douglas\_domenech@ios.doi.gov>  
**Sent:** Tue Feb 07 2017 12:14:02 GMT-0700 (MST)  
**To:** "Uli, Gabriella M. EOP/WHO"  
<(b) (6) gov>  
**Subject:** Re: Interior Report for 2/7/17

Can you see if John is ok with me speaking to the Western Caucus? See below.

Sent from my iPhone

On Feb 7, 2017, at 1:45 PM, Uli, Gabriella M. EOP/WHO  
<(b) (6) gov> wrote:

Received. Thank you, Doug.

**From:** Domenech, Douglas [[mailto:douglas\\_domenech@ios.doi.gov](mailto:douglas_domenech@ios.doi.gov)]  
**Sent:** Tuesday, February 7, 2017 1:06 PM  
**To:** Mashburn, John K. EOP/WHO <(b) (6) gov>; Uli, Gabriella M. EOP/WHO <(b) (6) gov>  
**Subject:** Interior Report for 2/7/17

DOI UPDATE FOR CABINET AFFAIRS 2/7/17  
Doug Domenech

**Status of the Nominee**



Rep. Zinke waiting Senate floor vote. We are now hearing his confirmation may be postponed again. We are concerned with the delay from a planning perspective, especially since a number of travel commitments were made with Senators during the Congressional recess.

170 so-called environmental fake news groups wrote the Senate opposed to the confirmation of Zinke.

NOTE: Tomorrow at 8PM the History Channel will air a special on SEAL Team Six. Zinke is interviewed. Promo Youtube link: <https://www.youtube.com/watch?v=D-0jppq-Ds0E>

### **Invitation to Speak**

The Congressional Western Caucus has requested that someone from Interior speak briefly at their meeting on Friday. The event is closed to the media. I have been asked to do this. I am seeking guidance if I should accept.

### **Congressional Review Act – POTUS ACTION**

The Stream Protection Act CRA has passed both the House and Senate and is awaiting the President's signature. We are prepared to assist in providing miners for a signing ceremony.

We are awaiting Senate action on the Bureau of Land Management's methane venting and flaring rule CRA.

### **Navajo Generating Station (NGS)**

(Media attention to this issue is rising.)

The Navajo Generating Station is a 2250 megawatt coal-fired powerplant located on the Navajo Indian Reservation, near Page, Arizona, United States. This plant provides electrical power to customers in Arizona, Nevada, and California.

The current lease for the plant with the Navajo Nation expires in 2017. If the plant owners are not going to keep running the plant and don't negotiate a lease extension, they would need to start tearing it down for decommissioning by the end of this year to be done by the end of 2019. On February 13 the owners are supposed to vote on extending this deadline. Interior has, or will, meet with all of the major parties.

The NGS is a power station located in owned by the DOI's Bureau of Reclamation, the Salt River Project, Arizona Public Service Co., NV Energy and Tucson Electric Power. The Los Angeles Department of Water and Power recently withdrew from the plant, and NV Energy plans to do the same.

The plant employs about 500 people on land owned by the Navajo Nation. Another 330 people work at the Kayenta Mine, 80 miles away, on Navajo and Hopi land. The jobs and royalties paid to the tribes are pillars of the economy for the Navajo and Hopi people.

The President of the United Mine Workers of America union chapter that represents 253 miners at the Kayenta Mine that supplies the Navajo Generating Station, said Thursday, "I hope [President Trump] comes through," she said of Trump. "He made promises to a lot of people. We are willing to put up a good fight if we have to."

## **Dakota Pipeline Action**

Impending floods within the next few weeks in the area where protesters are encamped may require the triggering of an emergency declaration under the Stafford Act which says, "an emergency is "any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State, tribal, and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States."

Doug Domenech  
Senior Advisor  
US Department of the Interior

## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/20/17**

Doug Domenech, Senior Advisor

### **Status of the Secretary**

The Secretary will be in Washington this week.

### **Media Announcements Today**

#### **Executive Orders**

EO on Energy looking like this week. We are told it may be Tuesday or more likely Friday. We assume the Secretary would participate in any signing ceremony.

#### **Congressional Action Under the CRA**

The BLM Planning 2.0 Rule CRA is pending at the White House. We assume that the Secretary would participate in any signing ceremony. (Target is Wednesday or Thursday).

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

#### **Secretary Meetings and Schedule**

Further out.

3/30-4/1: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

Waiting on Resolution of these items: (working with IGA)

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. Interior has provided a draft.

#### **Speaking Invitations**

Accepted

3/23 Address to the American Petroleum Institute's Board of Directors Meeting (DC, Trump Hotel)

3/28 Public Lands Council Legislative Conference Luncheon Keynote 12:00-1:00 Liaison Hotel in DC

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

4/3 North America's Building Trades Unions National Legislative Conference Remarks at the Washington Hilton & Towers Hotel, timing TBD.

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/27 NRA Leadership Forum, George World Congress Center in Atlanta, GA.

Regretted

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

Outstanding Invitations in Process

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)  
4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

### **Emergency Management**

Nothing significant to report.

### **Media of Interest**

#### **Secretary Zinke Visits Yellowstone Park.**

The Livingston (MT) Enterprise (3/17) reports that Interior Secretary Interior Ryan Zinke visited Yellowstone National Park last Friday. Park spokeswoman Linda Veress “confirmed Zinke was scheduled to meet with Park Superintendent Dan Wenk and other managers...as well as attend an employee meeting and tour the park.”

#### **White House Budget Pushes Interior To Advance Energy Production.**

EnergyWire (3/17, King) reports that President Trump’s budget, cutting the Interior Department by 12 percent, “includes scant specifics” but may suggest “tension” between Interior Secretary Ryan Zinke’s “conservation goals and Office of Management and Budget Director Mick Mulvaney’s financial priorities.”

#### **Donald Trump Jr. Recruits Hunting Friend For Interior Liaison. (FAKE NEWS)**

Politico (3/17, Whieldon) reports that Donald Trump Jr. is “still exerting influence at the Interior Department and has tapped a hunting buddy to serve as a go-between for the agency, sportmen’s groups and his father’s White House.” President Trump’s “eldest son is an avid hunter and played a key role in picking Interior Secretary Ryan Zinke, who is also a hunter and fisherman.” Now, Donald Trump Jr. has asked Jason Hairston, “a former San Francisco 49ers linebacker and founder of hunting gear company Kuiu, to serve as a liaison among himself, Zinke, sportsmen’s groups and the White House on conservation and public lands issues, Hairston said on Thursday.”

#### **American Forest Resource Council CEO Says Expansion Of Oregon Monument Is Unconstitutional.**

Travis Joseph, president and CEO of the American Forest Resource Council, opines in the Medford (OR) Mail Tribune (3/19, Joseph) that President Obama’s expansion of the Cascade-Siskiyou National Monument in Southern Oregon and Northern California is invalid because the lands were previously designated by the O&C Act to support local governments through sustainable forest management. Joseph says this means “the O&C Lands are required by law to produce timber,” which directly conflicts with the expansion’s explicit prohibition of harvesting timber on the lands. By overriding Congress with an unilateral executive action, it would “violate the separation-of-powers doctrine that provides the very foundation of our Constitution.”

#### **White House Communications Report** (sent to WH Comms yesterday, Friday.)

##### **Inquiries**

- The Hill (Tim Cama) EE News (Streeter) REQUEST Confirm POLITICO reports that Don Jr’s friend has a job at Interior RESPONSE On the record, the Interior does not have any new personnel announcements at this time. On background from an administration source note he is being considered for various boards.
- Washington Post, NY Times, E&E News, High Country News REQUEST Hearing at 2PM POTUS will rescind Bears Ears and all Obama monuments today and that Zinke is in Utah for the announcement.

Is this true? What is Zinke's plan on Bears Ears? RESPONSE Not True. Zinke is in Yellowstone, POTUS is meeting with Chancellor Merkel.

- EnviroNews USA and Energy Daily REQUEST More details on yesterday's wind lease sale  
RESPONSE Confirmed numbers and history of lease sales.

### **Top Stories**

- Fox News: Philadelphia's national historic sites shut down amid Trump's hiring freeze
- E&E News: Agency denies Trump Jr.'s pal will be sportsmen liaison
- Oregon Live: Trump halts Obama-era rule on fracking on public land
- Washington Times: Tribal group says elimination of Bears Ears would be tragic
- Oil & Gas 360: US Issues Coal Lease in Utah: "The Interior Department is in the ...

### **Top Issues and Accomplishments**

- Today we issued a press release on species recovery
- Launching a "Travels with Z" blog on our website that is Secretary Zinke's travel blog going to America's public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)
- Today, Zinke met with leadership and staff at Yellowstone National Park. No press invited.

### **Federal Register Notices Cleared for Publishing (None Significant)**

No items were cleared for the Federal Register on Friday.

## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/17/17**

Doug Domenech, Senior Advisor

### **Status of the Secretary**

The Secretary is on travel to Montana and Wyoming.

Friday March 17: Bozeman/Yellowstone. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues. Political event with Senator Daines.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area and attend a dinner with Senator Daines.

Sunday March 18: Fly to DC

### **Media Announcements Today**

NOTE: Interior will be releasing 800 pages from the NPS related to the inauguration in response to a FOIA.

**DOI Announces \$3.47 Million to 12 States for Species Recovery:** Nine projects on 12 national wildlife refuges across the United States are receiving more than \$3.74 million through the Cooperative Recovery Initiative (CRI). The CRI is an internal competitive grant program that funds on-the-ground conservation projects to help recover threatened or endangered species on national wildlife refuges and surrounding lands. These projects often provide related conservation benefits to other imperiled species and encourage partnerships with state and private groups. Outreach is planned.

### **Executive Orders**

EO on Energy looking like next week.

### **Congressional Action Under the CRA** (No change)

**CRAs:** Pending WH Action.

- BLM Planning 2.0 Rule. When will the President sign?

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

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Further out.

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### Accepted

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### Outstanding Invitations in Process

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4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)  
4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

## Emergency Management

Nothing significant to report.

## Media of Interest

### **Secretary Zinke Confident Interior Can Maintain Mission In Face Of Budget Cuts.**

The Huffington Post (3/16, D'angelo) reports that on March 3, Interior Secretary Ryan Zinke "addressed his staff at the agency's Washington headquarters" and "vowed to 'fight' his boss, President Donald Trump, on the looming Interior Department budget cuts." At that time, the Trump Administration was "looking to slash 10 percent of the agency's budget," according to E&E News. But after "the White House unveiled its 'America First' budget proposal, which calls for cutting the Interior Department's budget from \$13.2 billion to \$11.6 billion – a 12 percent decrease," Zinke's tone has "suddenly improved." He said in a statement, "America's public lands are our national treasures and the President's budget sends a strong signal that we will protect and responsibly manage these vast areas of our country 'for the benefit and enjoyment of the people.'" Zinke added, "I can say for certain that this budget allows the Interior Department to meet our core mission and also prioritizes the safety and security of the American people. From supporting tribal sovereignty and self-determination across Indian country to investing more than \$1 billion in safe and reliable water management in the western U.S., to budgeting for wildland fire preparedness and suppression, and streamlining access to the energy resources America needs, this budget enables the Department to meet its core mission and prioritizes programs that will put Americans' security first."

**Trump Proposes \$120M Cut To LWCF.** The [McClatchy](#) (3/16, Leavenworth) reports that on Thursday, President Trump proposed a \$120 million cut to the Land and Water Conservation Fund and "other federal land acquisition programs, calling them 'lower priority activities.'" According to Matt Lee-Ashley, "a former Interior Department official, the \$120 million figure represents at least a 70 percent cut in the Land and Water Conservation Fund over current spending levels, already reduced by congressional sequestration." Whit Fosburgh, president and CEO of the [Theodore Roosevelt Conservation Partnership](#), said that "Trump's cuts could also make it harder for hunters and anglers to access public lands." He said

that the proposed cuts are “no way to support the rural and local economies that need outdoor recreation dollars most.”

**Legislation Filed To Recoup Money For Swain.** The Waynesville (NC) Smoky Mountain News (3/15, Stone) reports state Rep. Mike Clampitt has introduced a measure meant to “help Swain County recoup millions of dollars” it is owed by the federal government, which failed to uphold a 1943 agreement to rebuild a road that was destroyed when TVA built Fontana Dam. The county agreed to a monetary settlement in 2010 and “did receive the first installment of \$12.8 million, but hasn’t received a dime since” because Congress has not appropriated the necessary funding. Specifically, the measure would “direct Attorney General Josh Stein to investigate legal methods available to Swain County and the state to ensure the federal government holds up it’s end of the bargain” before the agreement expires in 2020.

#### **Study Looks At Substance Harvest of Polar Bears Under Climate Change.**

The Ketchikan (AK) SitNews (3/16) reports that research from the University of Washington, the U.S. Fish and Wildlife Service and the U.S. Geological Survey investigates what changes in the Arctic Ocean “could mean for subsistence harvest of polar bears – a practice that has cultural, nutritional and economic importance to many Northern communities.” A study published in the Journal of Applied Ecology “addresses this question using an improved model of how polar bear populations function.” According to the article, “the authors identify ways to maintain subsistence harvest without compounding the negative effects of habitat loss, as long as there is accurate population data and the harvest is responsive to changes in the environment.”

#### **Energy Media**

##### **BOEM Takes Bids On Development Rights Off North Carolina.**

The Raleigh (NC) News & Observer (3/16, Murawski) reports the Bureau of Ocean Energy Management received offers Thursday from four bidders who want to build an offshore wind farm on the 191-square-mile Kitty Hawk area off North Carolina. Bidding rose to \$6 million by mid-afternoon and will continue until one bidder emerges with the highest offer. The auction is not expected to draw a high price amid low renewable energy mandates in the region. Katharine Kollins, president of the Southeastern Wind Coalition, said, “Right now the cost of offshore wind is not in line with Southeast electricity prices.”

##### **Additional Coverage: Interior Approves Greens Hollow Coal Lease Sale.**

Additional coverage that the Interior Department announced on Wednesday that it “had finalized a \$22 million Greens Hollow coal lease, which was awarded to the owner of Sufco mine” was provided by the AP (3/16) and KSL-TV Salt Lake City (3/16, O'Donoghue).

##### **Eni Requests Extension Of Arctic Drilling Program.**

Bloomberg News (3/16, Dlouhy) reports the Interior Department is considering Eni’s request to explore for oil in north Alaskan waters, which may give President Trump the opportunity to curtail President Obama’s Arctic drilling ban. Eni is hoping to expand Spy Island, in which Shell and Repsol are partners, into a launching pad for extended-reach drilling that would target oil in federal waters. While Eni’s exploration would not be covered by Obama’s executive order because it is in an area previously leased from the federal government, approving the plan could encourage more company’s to consider Arctic exploration.

##### **Oil Industry Welcomes Fracking Regulatory Rollbacks.**



The Bismarck (ND) Tribune (3/16, Holdman) reports that "industry cheered Trump administration action to repeal Obama era standards for hydraulic fracturing used in crude oil drilling on federal land." The rule, "which had been stayed, was under appeal by the Bureau of Land Management, with oral arguments scheduled for later this month, but the Trump administration asked the appeal be canceled as plans are made for regulatory repeal."

### **White House Communications Report** (sent to WH Comms yesterday, Thursday) **Inquiries**

POLITICO (Esther Whieldon) REQUEST - Jason Hairston, head of Kuiu, has told me he's been offered the role of a liaison between Interior/Zinke and the White House and Donald Trump Jr. on conservation, sportsman issues and that Donald Jr. is the one who set it up since he couldn't play the role himself (since he's taken over Trump empire). Please confirm asap. Any comment? RESPONSE On background, there's been no discussion of creating of a new role like this at Interior.

Responded to most of the inquiries below with the statement from Zinke or NPS. Provided background that more details would come out in May where necessary.

### **Secretary Zinke statement**

"America's public lands are our national treasures and the President's budget sends a strong signal that we will protect and responsibly manage these vast areas of our country 'for the benefit and enjoyment of the people'," Secretary Zinke said. "Before serving in government, I served on the front lines for 23 years as a military officer. I can say for certain that this budget allows the Interior Department to meet our core mission and also prioritizes the safety and security of the American people. From supporting tribal sovereignty and self-determination across Indian country to investing more than \$1 billion in safe and reliable water management in the western U.S., to budgeting for wildland fire preparedness and suppression, and streamlining access to the energy resources America needs, this budget enables the Department to meet its core mission and prioritizes programs that will put Americans' security first."

### **National Park Service statement**

"The President's budget released today provides necessary resources for the National Park Service to meet its core mission of protecting and conserving America's public lands and beautiful natural resources, providing access for the next generation of outdoor enthusiasts and ensuring visitor safety. It also funds an increasing investment in deferred maintenance projects at the parks. While some details of the 2018 budget are still being developed and will be released later this spring, today's first step in the FY2018 budget process signals strong support for America's public lands and national parks."

- Ben Geman, Axios - REQUEST Statement and details on the budget
- Corbin Hiar, E+E News - REQUEST Statement and details on the budget
- Matthew Daly, AP - REQUEST Statement and details on the budget
- Esther Whieldon, Politico - REQUEST Statement and details on the budget
- Elvina Nawaguna, CQ Roll Call - REQUEST Statement and details on the budget
- Kirk Siegler, NPR- REQUEST Statement and details on the budget
- Kurt Repanshek, National Parks Traveler REQUEST - Can deferred maintenance be tackled if spending on major maintenance is reduced? Wouldn't the latter just lead to more maintenance backlog? How much of a budget cut does the Interior secretary think the NPS can handle?

- Hillary Chesson, Del Mar Now (Gannett - VA) REQUEST - 1) How would the elimination of the National Wildlife Refuge fund affect the Blackwater National Wildlife Refuge, Eastern Shore National Wildlife Refuge and the Chincoteague National Wildlife Refuge? 2) What programs utilize this funding? 3) How much of this funding would be cut from their budgets, specifically?
- Keith Norman, Jamestown Sun (ND) REQUEST- Trying to get an idea how the new budget would effect the department of interior operations in North Dakota. Particularly the wildlife refuges and the elimination of the National Wildlife Refuge fund payments to local governments.
- Pamela King, E&E News REQUEST - Any additional details you can share on how this budget priority affects Interior's balance of conservation and development?
- Dylan Brown, E&E News REQUEST - Quick question about this line in press release: "discretionary Abandoned Mine Land grants that overlap with existing mandatory grants..." Does this mean payments to certified states?
- Mark Harrington, Newsday REQUEST Will the Trump administration continue to prioritize offshore wind?
- Bill Holland, S&P Global Market REQUEST - Can you quantify how much of increase in funding for energy programs is in the budget? What is the current budget of the Office of Natural Resources Revenue?
- Dan Radel, Asbury Park Press (NJ) REQUEST How will eliminating the National Wildlife Refuge Fund impact wildlife refuges in NJ?
- Jim Day, HIS The Energy Daily REQUEST Numbers by specific agency/bureau and program.
- Gary Gentile, S&P Global REQUEST Wants more information and numbers on specific cuts
- Stuart Leavenworth, McClatchy REQUEST - a \$120 million reduction in federal land acquisitions. To put that reduction in perspective, I wanted to find out what Interiors current funding level is for land acquisition.
- Kurt Repanshek, National Parks Traveler REQUEST - emailed WASO, Yellowstone NP and Great Smoky Mountains NP
- WPHL TV 17 in Philadelphia REQUEST - contacted both Independence National Historical Park and the Northeast Region Office.
- Boston Magazine REQUEST - contacted Frederick Law Olmsted in Boston with budget query.
- Denver Fox 31 REQUEST - contacted Rocky Mountain National Park with budget query.
- Washington Post REQUEST - contacted Great Smoky Mountains National Park with budget query.

### **Top Stories**

- IJR: Yes, Secretary Ryan Zinke Actually Carries an 'ISIS Hunting License ...
- Casper Star Tribune: Trump admin halts Obama-era rule on fracking on public land
- E&E News: Trump budget calls for 12% cut
- Daily Caller: Trump's Budget Proposal Slashes Funding For Interior Dept
- USA Today: Wilderness Society, Ocean Conservancy say Trump's budget cuts ...
- Forbes: Trump's Budget Would Be A Disaster For Anglers And Hunters
- Washington Post: Trump budget would gut science, environment programs

### **Top Issues and Accomplishments**

- Today we issued a press release on the budget
- Today, the Bureau of Ocean Energy Management and Interior announced a successful offshore wind sale
- Launching a "Travels with Z" blog on our website that is Secretary Zinke's travel blog going to America's public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)

· On Friday, Zinke will meet with leadership and staff at Yellowstone National Park. No press planned.

**Federal Register Notices Cleared for Publishing (None Significant)**

The following items were cleared for the Federal Register on Thursday.

REG0006847 BIA Cowlitz Indian Tribe Liquor Ordinance The liquor ordinance regulates and controls the possession, sale, manufacture and distribution of alcohol in conformity with the laws of the State of Washington. The notice must publish in advance of the opening of the new tribal casino in April. This is not controversial. Notice 03/16/2017

REG0006850 BIA Federal Register Notice - Tribal-State Gaming Compact Rosebud Sioux and South Dakota The Indian Gaming Regulatory Act requires that Class III gaming activities must be conducted in conformance with a Tribal State gaming compact that is in effect. Department regulations provide that a simple extension of the compact term does not require approval but does require notice of the new expiration date to be published in the Federal Register. This Notice extends the compact expiration date to July 31, 2017. Notice 03/16/2017

REG0006851 BIA Federal Register Notice: Tribal-State Gaming Compact Crow Creek Tribe and South Dakota The Indian Gaming Regulatory Act requires that Class III gaming activities must be conducted in conformance with a Tribal State gaming compact that is in effect. Department regulations provide that a simple extension of the compact term does not require approval but does require notice of the new expiration date to be published in the Federal Register. This Notice extends the compact expiration date to June 28, 2017. Notice 03/16/2017

REG0006841 BLM Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Caldwell Canyon Mine and Reclamation Plan, Caribou County, Idaho This is a notice of intent for and EIS for a proposed phosphate mine and reclamation plan in Caribou County, Idaho. At issue is a proposed 40 year mine plan that will result in a total of 1,530 acres of disturbance, including an anticipated disturbance to 68.7 acres of general habitat for greater sage-grouse. Notice 03/16/2017

REG0006853 BOE Notice of Availability (NOA) for the Draft Supplemental Environmental Impact Statement (SEIS) for the Cape Wind Energy Project. On July 5, 2016, the United States Court of Appeals vacated the 2009 Final Environmental Impact Statement (EIS) for the Cape Wind Energy Project due to a deficiency regarding the determination as to whether the sea floor could support wind turbine structures at the time the lease was issued. The draft SEIS only reanalyzes geotechnical data to demonstrate that the ability of the sea floor to support wind turbine structures. BOEM has committed to the Court that a final version of this document to be published within the next seven months, by August 2017. To meet this deadline, the draft version of the SEIS for public comment should be published by March 14, 2017, or as soon thereafter as possible, to allow for the 45 day comment period and time to respond to comments. Notice 03/16/2017.

REG0006804 FWS Environmental Assessment and Habitat Conservation Plan; Heart of Texas Wind Project; McCulloch County, Texas (Black-Capped Vireo take) Heart of Texas Wind, LLC, (applicant) applied to FWS for an incidental take permit under the Endangered Species Act. If granted, the permit would be in effect for 30 years and would authorize incidental take of the black-capped vireo during construction, operation, and maintenance of the proposed wind energy facility. The incidental take

authorization would be covered within 10,808 acres in McCulloch County, Texas, approximately 125 northwest of Austin. Notice 03/16/2017

REG0006840 FWS Orange County Transportation Authority M2 Natural Community Conservation Plan/Habitat Conservation Plan, Orange County, CA; Final Environmental Impact Report/EIS and Habitat Conservation Plan FWS is considering the issuance of a 40-year incidental take permit to the Orange County Transportation Authority (OCTA). The permit would accommodate freeway improvement projects by authorizing incidental take and providing assurances for 13 listed and unlisted species. Notice 03/16/2017

REG0006843 FWS NOA: Habitat Conservation Plan for Pacific Gas and Electric Company's San Francisco Bay Area Operations and Maintenance If issued, the permit would authorize incidental take of 32 federally listed species from continued operations and maintenance-related work (both gas and electrical transmission facilities) in 9 San Francisco Bay Counties for a period of 30 years. Notice 03/16/2017

REG0006844 FWS Endangered Species; Wild Bird Conservation; Receipt of Application for Permit (first applicant: Ruth Linsky, Ellensburg, WA) This is a weekly batched notice announcing the receipt of permit applications received by FWS for Endangered Species Act and Wild Bird Conservation Act activities. Notice 03/16/2017

REG0006825 OSM Notice of Intent to Initiate Public Scoping and Prepare an Environmental Impact Statement for the San Juan Mine Deep Lease Extension Mining Plan Modification OSMRE is notifying the public that we intend to prepare a draft environmental impact statement (EIS) to evaluate the impacts of alternatives relating to the San Juan Coal Company's proposed mining plan modification for the Deep Lease Extension (DLE). Notice 03/16/2017

# Conversation Contents

Senate passed the CRA opposing the BLM 2.0 Rule. Headed to the WH.

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Tue Mar 07 2017 14:59:12 GMT-0700 (MST)  
"Mashburn, John K. EOP/WHO"  
**To:** <(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Senate passed the CRA opposing the BLM 2.0 Rule. Headed to the WH.

Doug Domenech  
Senior Advisor  
US Department of the Interior

## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/8/17**

Doug Domenech, Senior Advisor

### **Status of the Nominee**

Today Secretary Ryan Zinke will:

- Meet with Justin Clark from WH IGA.
- Phone call with the Canadian Minister for the Environment
- Testify before the Senate Indian Affairs Committee.
- Meet with the President and the Alaska Delegation.

In addition, the Secretary is planning to call Senators Portman, Gardner, Heitkamp, and Graham to ask support for the CRA on Venting and Flaring.

### **EO on Energy/Interior Related**

The Media is reporting that the President is poised to sign an EO on energy.

**NOTE:** Interior has prepared 10 Secretarial Orders and announcements ready to react to the President's action. All depends on the content of the EO and whether you are OK with us releasing the other ones.

### **EO on National Monuments**

An EO related to National Monuments Review appears to be eminent.

### **Congressional Action Under the CRA.**

**CRAs :** Pending WH Action.

- BLM Planning 2.0 Rule. The Secretary would like to participate in any signing ceremony.

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

### **Congressional Correspondence**

Senator Cantwell, Ranking on Senate Energy wrote to the Secretary to complain an action taken by the Department to delay a last minute valuation rule put into place by the Obama administration (before Zinke arrived). As I understand, we will not be responding.

### **Secretary Meetings and Schedule**

3/8: The Secretary will testify before the Senate Indian Affairs Committee.

3/8: The Secretary will meet with the President.

8/10-18: TRIP

Released today: Secretary Zinke to Visit Regional DOI Offices, Meet with Local Stakeholders (WASHINGTON) On Friday, March 10, 2017, thru Friday, March 17, Department of the Interior Secretary Ryan Zinke will travel to Montana and Colorado to tour regional and local offices and facilities within the Department. Zinke will meet with leadership from the National Parks Service, Bureau of Land

Management, Fish, Wildlife and Parks, and other agencies, as well as local and Tribal governments and stakeholders.

#### Friday, March 10

Tribal Blessing by the Blackfeet Nation at Glacier National Park

Location: Glacier National Park (RSVP for more info)

Secretary Zinke will be honored with a traditional Tribal blessing by members of the Blackfeet Nation at Glacier National Park. Open to Press: RSVP to [interior\\_press@ios.doi.gov](mailto:interior_press@ios.doi.gov) for more details

Meeting with Glacier National Park leadership and staff

Secretary Zinke will meet with GNP leadership and staff to learn about challenges, opportunities, and the maintenance backlog. Closed to press

#### Monday, March 11

Special Joint Session of the Montana State Legislature

Location: State Capitol in Helena, MT

Secretary Zinke will address a Special Joint Session of the Montana State Legislature

Open to Press: RSVP to [interior\\_press@ios.doi.gov](mailto:interior_press@ios.doi.gov) for more details.

#### Tuesday, March 12

Site visit to the BLM's Lewistown Field Office

Location: Lewistown, MT

Secretary Zinke will meet with employees at the BLM's Field Office. Closed to press.

Special announcement by Secretary Zinke

Location: BLM Montana/Dakotas Regional Office Billings, MT

Secretary Zinke will make important announcements regarding the future of coal

Open to Press: RSVP to [interior\\_press@ios.doi.gov](mailto:interior_press@ios.doi.gov) for more details

#### Wednesday, March 13

Secretary Zinke will travel to Colorado to make site visits

Further details pending

3/14: Fly to Denver. Visit Interior Denver Service Center.

3/15: Tenta Visit Denver BLM and FWS facilities. BUDGET media.

3/16: Fly to Bozeman. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

3/18: Meeting with Sen. Murkowski in Bozeman area.

3/19: Fly to DCA.

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate. NOTE: Need to discuss this event with Cabinet Affairs.

#### **Emergency Management**

In North Dakota, a U.S. District Judge denied the Cheyenne River Sioux Tribe motion for a preliminary injunction to stop construction of the Dakota Access Pipeline. The court will make an additional ruling on

the ultimate merits of the case at a future unspecified date. Demobilization of non-BIA law enforcement officers has begun; however, BIA Office of Justice Services will continue to provide additional officers for Standing Rock until March 31.

A significant explosive eruption began at Bogoslof Volcano at 2:36 a.m. EST, as indicated by seismic, lightning, and infrasound data. The Alaska Volcano Observatory (AVO) also noted ash cloud extending to 35,000 feet in satellite images and has raised the Volcano Alert and Aviation Color Code levels to Warning and Red, respectively. The National Weather Service has issued a Special Weather Statement for trace amounts (less than 1 mm) of ashfall on Unalaska Island, including the community of Dutch Harbor/Unalaska, based on ash fallout modeling by the AVO.

## **Media**

### **Secretary Zinke Looking To Strike Balance.**

The Huffington Post (3/7, D'Angelo) reports on the challenge facing Interior Secretary Ryan Zinke to “strike a balance.” According to the article, “with environmental activists becoming increasingly set against any development on public lands, a Republican Party with a platform that calls for transferring control of federal lands to states and a boss who enthusiastically promotes the fossil fuel industry, Zinke has his work cut out for him.” Although “Zinke has largely managed to retain the support of sportsmen, who are hopeful he will follow through on his promises to protect and expand hunting, fishing and recreation access,” the article says that “even his most loyal supporters say they plan to keep a close eye on how President Donald Trump’s pick approaches the job.”

### **Fishermen Sue Administration Over Obama-Era Marine Monument.**

A coalition of fisherman sued the Administration Tuesday over the Northeast Canyons and Seamounts Marine National Monument, which was designated by President Obama last year. The Washington Times (3/7, Wolfgang) reports the fisherman argue that “the monument will crush the commercial fishing industry and devastate communities on the New England coast.” The Times says the case “will offer clues as to whether President Trump will revoke some of his predecessor’s most controversial national monuments.” While “conservative lawmakers and others” have pushed Trump “to revoke some of those more controversial designations, including the New England monument,” it is “unclear whether the administration is willing to go to court to defend Mr. Obama’s monuments.”

### **Secretary Zinke Urged To Address Illegal Border Crossings.**

In an op-ed for the Washington Times (3/7), Ian Smith, an attorney with the Immigration Reform Law Institute, urges Interior Secretary Ryan Zinke to tackle the problems created by illegal border crossing on public lands. According to Smith, “the trash, waste and discarded vehicles brought in” by “illegal border-crossers” is “so large federal land management agencies have admitted it has altered the ecological processes and degraded habitats in these areas.” Smith urges Zinke to “call on our immigration agencies to turn off the main magnets of illegal immigration (employment, welfare, birthright citizenship) and ensure that we have the strongest fence possible to keep out the cartels.”

## **White House Communications Report**

### DAILY COMMUNICATIONS REPORT (From Friday)

#### **Inquiries**

POLITICO (Anthony Adragna) REQUEST: I saw Secretary Zinke will testify tomorrow before the Senate Indian Affairs Committee. Was hoping you might be able to share some of what he’d like to get across.



Also, any additional deeds you can share on the personal items he mentions here?  
<https://twitter.com/SecretaryZinke/status/839181351538544645>

RESPONSE: Hold tight on the hearing, will get you something soon. On the personal items:

1. The sextant was a retirement gift from the Navy
2. The telescope was a gift when he left one of the SEAL Teams
3. The patches are each from different SEAL Teams he was on
4. The flag was the flag worn on his uniform
5. Teddy Roosevelt lithograph he found at an estate sale in Indiana
6. The infamous knives <https://www.youtube.com/watch?v=3cx4SSb-EPg>

- Seattle Times (Hal Berton) REQUEST: The letter was sent today from Washington Sen. Maria Cantwell to Interior Secretary Zinke requesting that he lift the stay on a coal royalty valuation rule that was put in place during the final weeks of the Obama administration. RESPONSE: The Department is reviewing the letter.
- Washington Times (Benjamin Wolfgang) REQUEST: Comment on a lawsuit that challenges the Northeast Canyons and Seamounts Marine National Monument, established last September by former President Obama. Interior Secretary Zinke is named in the suit. I'm trying to determine whether Interior intends to defend this monument in court? Why or why not? Just looking for some clarity here on how the administration may handle this. RESPONSE: Refer the matter to DOJ.
- POLITICO (Esther Whieldon) REQUEST: Sen. Daines said Zinke has indicated he's mulling moving more DC staff/offices out West as part of his reorganization. Please confirm. Any additional details you can provide such as which offices and which agencies are under consideration and what could be gained by doing so would be helpful. Would appreciate a response by early tomorrow. RESPONSE: Will get back to her before deadline
- Law360 (Adam Lidgett) REQUEST: My name is Adam Lidgett and I'm a reporter with Law360. I'm doing a story on a Ninth Circuit panel today ruling that a district court was right to dismiss for lack of standing and ripeness a suit from the Desert Water Agency against the Department of the Interior and Bureau of Indian Affairs challenging a federal regulation that DWA believed might preempt certain taxes and fees DWA assessed against non-Indians who leased lands within an Indian reservation. RESPONSE: Referred to DOJ

### **Top Stories**

- Indianz: Interior Secretary Zinke focuses on tribes in first Capitol Hill appearance
- AL.com Feds opening 73 million acres off Alabama, Gulf states for oil and ...
- Daily Caller: Trump Opens 'All Available' Gulf Of Mexico Waters To Oil Drilling
- E&E News: Top Democrat urges Zinke to lift stay of Obama royalty rule

### **Top Issues and Accomplishments**

- Tomorrow: Zinke will testify before the Senate Indian Affairs Committee at 2:15PM

- Travel to Montana and Colorado: Zinke at Glacier National Park on Friday 3/10, address to MT State Legislature on public lands/energy on 3/13, site visit at BLM Field Office in Billings, MT on 3/14, Denver DOI Service Center on 3/15 and 3/16, and Yellowstone National Park on 3/17

### **Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Tuesday.

REG0006805 FWS Notice of Availability: Applications for American Burying-Beetle Amended Industry Conservation Plan Participation Under the Endangered Species Act, FWS invites the public to comment on an incidental take permit application for the federally listed American burying beetle in Oklahoma. 03/07/2017

REG0006807 NPS Notice of Inventory Completion - Department of Anthropology, The University of Tulsa, Tulsa, OK N2723. Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains under the control of the Department of Anthropology, The University of Tulsa, in Tulsa, Oklahoma. Notice 03/07/2017

REG0006811 FWS Massasoit National Wildlife Refuge, Plymouth, MA; Draft Comprehensive Conservation Plan and Environmental Assessment The National Wildlife Refuge System Improvement Act of 1997 requires us to develop a CCP for each NWR. CCPs provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the Refuge System mission, consistent with sound principles of fish and wildlife conservation, legal mandates, and FWS policies. Notice 03/07/2017

REG0006812 NPS Notice of Inventory Completion - U.S. Fish and Wildlife Service, Southeast Region, Hardeeville, SC N2732 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this is a notice of completion of an inventory of human remains and associated funerary objects removed from Limestone and Morgan Counties, Alabama, and Decatur County, Tennessee, between 1953 and 1997. The U.S. Fish and Wildlife Service, Southeast Region (USFWS-SER) has control of the remains and objects. Notice 03/07/2017

REG0006813 NPS Notice of Inventory Completion - Human Remains Repository, Department of Anthropology, University of Wyoming, Laramie, WY N2741 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains under the control of the Department of Anthropology, University of Wyoming, in Laramie, Wyoming. The remains were removed from Kodiak Island, Alaska, prior to 1991. Notice 03/07/2017

REG0006814 NPS Notice of Inventory Completion - Human Remains Repository, Department of Anthropology, University of Wyoming, Laramie, WY N2746 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains and associated funerary objects under the control of the Department of Anthropology, University of Wyoming, in Laramie, Wyoming. The remains were removed from an unknown location near Julesburg, Sedgwick County, Colorado, prior to 1995. Notice 03/07/2017

REG0006821 NPS Notice of Inventory Completion - Nebraska State Historical Society, Lincoln, NE N2748 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this is a Notice that the Nebraska State Historical Society (NSHS) has completed an inventory of human remains

and determined that there is a cultural affiliation between the remains and a present-day Indian tribe. The remains were removed from the Linwood site in Butler County, Nebraska, at some time before 1973. Notice 03/07/2017

REG0006823 NPS Notice of Inventory Completion - Nebraska State Historical Society, Lincoln, NE N2747 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces that the Nebraska State Historical Society (NSHS) has completed an inventory of human remains and associated funerary objects removed from the Woodcliff site in Saunders County, Nebraska, in the 1960s and in 2002. The site is a Native American village and cemetery complex that was occupied around 1700-1800. Notice 03/07/2017

REG0006815 NPS Notice of Inventory Completion - U.S. Department of Agriculture, Forest Service, Ouachita National Forest, Hot Springs, AR N2688 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains and associated funerary objects under the control of the U.S. Department of Agriculture, Forest Service, Ouachita National Forest in Hot Springs, Arkansas. The remains and objects were removed from McCurtain County, Oklahoma, between 1997 and 2005. Notice 03/07/2017

REG0006816 FWS Draft environmental assessment; Export Program for Certain Native Species under the Convention on International Trade in Endangered Species of Wild Fauna and Flora FWS is announcing the availability of a draft environmental assessment under the National Environmental Policy Act for the CITES Export Program (CEP) for certain native furbearer species. Some native furbearers are listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), including bobcat, river otter, Canada lynx, gray wolf, and brown bear. Notice 03/07/2017

REG0006817 NPS Notice of Inventory Completion - Museum of Northern Arizona, Flagstaff, AZ N2736 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains under the control of the Museum of Northern Arizona in Flagstaff, Arizona. The remains were removed from the Van Liere Site, a Hohokam settlement in Maricopa County, Arizona, in 1978. Notice 03/07/2017

REG0006818 NPS Notice of Inventory Completion - San Diego Museum of Man, San Diego, CA; Correction N2721 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the correction of an inventory of human remains and associated funerary objects under the control of the San Diego Museum of Man in San Diego, California. The remains and objects were removed in the La Jolla area of San Diego, and the inventory was announced in a Notice published on Jan. 27, 2016. Notice 03/07/2017

REG0006819 NPS Notice of Inventory Completion - Museum of Northern Arizona, Flagstaff, AZ; Correction N2735 This Notice corrects an inventory of human remains and associated funerary objects completed by the Museum of Northern Arizona in Flagstaff, Arizona, and published on Sept. 11, 2006 (71 FR 53469). The remains and objects were removed from the Cashion site in Maricopa County, Arizona. Notice 03/07/2017

REG0006820 NPS Notice of Intent to Repatriate Cultural Items - Denver Museum of Nature & Science, Denver, CO N2745 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this is a Notice of Intent to Repatriate Cultural Items under the control of the Denver

Museum of Nature & Science in Denver, Colorado. The six cultural items, masks from the Onondaga Reservation in New York, meet the definition of sacred objects. Notice 03/07/2017

## **DOI UPDATE FOR CABINET AFFAIRS – 3/1/17**

Doug Domenech

### **Status of the Nominee**

The Senate confirmed Rep. Zinke today as Secretary of the Interior. The vote was 68-31. Zinke has resigned his seat in Congress and will be sworn-into office by the VP in a 6 pm event at the WH.

### **Secretary's Schedule**

Day one in the office is Thursday 3/2.

As part of the Secretary's Day One activities he will:

- Greet employees.
- Attend an Ethics and Records Retention Briefings.
- Issue an email to all employees concerning high ethics.
- Meet with his Security Detail.
- Meeting with Sportsman/Hunting Groups, including the NRA.
- Sign Order overturning the prohibition on lead ammo on wildlife refuges.
- Sign Order on Conservation Stewardship (Hunting and Fishing).

### Meeting with Sportsmens Groups

Participants: Jeff Crane (Congressional Sportsmen's Foundation)

Chris Cox (National Rifle Association)

Larry Keane (National Sports Shooting Foundation)

Margaret Everson (Ducks Unlimited)

David Anderson (Boone & Crockett Club)

Mitch Butler (Mule Deer Foundation)

Greg Schildwachter (Wild Sheep Foundation)

Whit Fosberg (Theodore Roosevelt Conservation Partnership)

Mike Nussman (American Sportfishing Association)

Glenn Le Munyon (Dallas Safari Club)

Gary Taylor (National Wild Turkey Foundation)

Jay Mac Aninch (Archery Trade Association)

Ron Reagan (Association of Fish and Wildlife Agencies)

Collin O'Mara (National Wildlife Foundation)

Anna Seidman (Safari Club International)

Steve Williams (Wildlife Management Institute)

Derrick Crandall (American Recreation Council)

Miles Moretti (Mule Deer Foundation)

Dave Nomsen (Pheasants Forever)

Donald Peay (Sportsmen for Fish and Wildlife)

Jeff Trandahl (National Fish and Wildlife Foundation)

Thursday 3/2: The Secretary has been asked to attend a meeting at the WH on Thursday on infrastructure. Scott Hommel DOI COS (Acting) will be the plus 1. A number of other briefings are scheduled.

### **Energy/Interior Related Executive Orders**

White House Energy Executive Order We received the proposed EO and are suggesting a few tweaks.

CRA's NO CHANGE: Passed the House

- BLM Venting and Flaring Methane Rule  
OPED API: Senate Must Move To Repeal BLM Methane Rule.  
Erik Milito at the American Petroleum Institute writes for The Hill (2/28) in its "Congress Blog" that methane emissions associated with natural gas development have declined 18.6 percent since 1990 while natural gas production increased by over 45 percent. Industry and "effective state and federal regulations" make BLM's new Methane and Waste Prevention rule "redundant" and "counterproductive." BLM "lacks the statutory authority and expertise to regulate air quality," and the rule's compliance costs "could make as many as 40 percent of federal wells that flare uneconomical to produce." Milito urges the Senate to follow the House and repeal the rule under the Congressional Review Act.
- BLM Planning 2.0 Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

## **MEDIA**

### **NYT: For Interior, Montanan With Deep Roots and Inconsistent Record**

[https://www.nytimes.com/2017/03/01/us/for-interior-montanan-with-deep-roots-and-inconsistent-record.html?\\_r=0](https://www.nytimes.com/2017/03/01/us/for-interior-montanan-with-deep-roots-and-inconsistent-record.html?_r=0)

### **New Group Forms To Support Katahdin Woods And Waters National Monument.**

The AP (2/28) reports that a nonprofit group has been created "to preserve and protect" the Katahdin Woods and Waters National Monument. The private group, called Friends of Katahdin Woods and Waters, plans to work together with the National Park Service. The group's president, Lucas St. Clair, "says its initial focus will be on organizing volunteer opportunities, developing education programs and advocating for the monument."

### **Flake Reintroduces Bill To Revise Mexican Gray Wolf Recovery Plan.**

Grand Canyon (AZ) News (2/28) reports that Sen. Jeff Flake has reintroduced the Mexican Gray Wolf Recovery Plan Act. The legislation would require the U.S. Fish and Wildlife Service "to collaborate with states, county governments, and local stakeholders to sustain viable wild wolf populations without adversely impacting livestock, wild game or recreation." The bill would require the FWS "to draft an updated recovery plan for the Mexican gray wolf in Arizona and New Mexico," and "if the agency's director does not comply with this new recovery plan, state wildlife authorities would be empowered to supplement or assume management of the Mexican gray wolf in accordance with the Endangered Species Act."

### **Montana Lawmakers Clear Grizzly Resolution Urging Removal Of Protections.**

The Bozeman (MT) Daily Chronicle (2/28, Wright) reports that "Montana lawmakers gave the initial OK to a resolution urging the wholesale removal of Endangered Species Act protections from all Montana grizzly bears, including those in areas where the federal government has not recommended delisting." House Joint Resolution 15, sponsored by Rep. Steve Gunderson, "cleared its first vote of the full House 63-37 on Tuesday." The resolution, "which amounts to a policy letter and not a change in law, asks

Congress to lift protections for bears in the state and return management to the state wildlife agency, a move that could eventually lead to the hunting of grizzlies.”

## **Infrastructure**

### **TransCanada Suspends \$15B Challenge Against US.**

The Hill (2/28, Cama) reports Keystone XL pipeline developer, TransCanada Corp., “has suspended an international arbitration challenge that sought \$15 billion from the United States government for blocking the project.” On Monday, the company “filed a notice of the suspension” with “the World Bank’s International Centre for Settlement of Investment Disputes, just over a month after President Trump wrote a memo to restart the federal consideration of the project, a decision that could make the arbitration moot.” On Tuesday, “TransCanada spokesman Terry Cunha confirmed the filing” but didn’t “offer any additional comments.”

### **BLM Considering Drilling Near Zion National Park.**

KTVX-TV Salt Lake City (2/28, Higgins) reports that “more than 40,000 people emailed the Bureau of Land Management as the agency considers leasing land for oil drilling near Zion National Park.” BLM St. George Field Manager Brian Tritle said, “It isn’t a done deal. We are definitely open to public comment. But where there is oil, it’s not a surprise that someone would be interested in it. We just have to figure out if it makes sense.” The comment period closes March 9.

## **Meetings**

Interior is meeting today with all the stakeholders involved in the Navajo Generating Station Wednesday.

### **RELATED: Texas Public Policy Foundation VP Says Arizona Coal Plant, Mine Must Be Kept Open.**

Writing an op-ed for the Daily Caller (2/28, Devore), Texas Public Policy Foundation Vice President Chuck DeVore defends Arizona’s coal-fired Navajo Generating Station and the coal mine that supplies it against “a federal report” that “now threatens” the jobs associated with the plant, “755 good-paying jobs, about 90 percent of which are [filled by] Native Americans.” DeVore expresses hope that President Trump will help keep NGS open, given his campaign promises related to the coal industry, although “unnamed Trump administration officials at the Department of the Interior urged otherwise.” DeVore also notes criticism of the Bureau of Reclamation for its assessment of Arizona’s projected power needs and capacity and the support NGS has from both of Arizona’s senators.

## **Emergency Management**

In North Dakota, the BIA maintained an active presence in the Sacred Stone Camp, where an estimated 30 protesters remain. There has been no active resistance to law enforcement, and most protesters are attempting to comply with eviction orders.

In central Arizona, many streamgages have exceeded flood stage in response to recent heavy rain. The USGS Arizona Water Science Center deployed 8 crews in response to this event on Monday, with planned deployments throughout the duration of the flood event.

Significant river flooding is likely along the Wapsipicon and Mississippi Rivers in portions of northwestern Illinois and eastern Iowa.

## **White House Communications Report**

### **DAILY COMMUNICATIONS REPORT**

## **Inquiries**

Bloomberg asked about the Budget (response off the record, nothing to add at this time)

Roll Call (Toth) Can the agency comment on the ONRR's decision to delay the royalty valuation rulemaking? Has the agency received Rep. Raul Grijalva's letter detailing concerns over the legality of the agency's action? RESPONSE "DOI extended the effective date of the Office of Natural Resource Revenue rule to allow the administration time to conduct a detailed review of the rule and the compliance burden it puts on job creators. The Department will make a definitive decision in the future." (also from Associated Press)

## **Top Stories**

E&E: Senate to push Zinke vote to tomorrow

Helena IR: Interior nominee Zinke clears Senate hurdle on way to confirmation

The Hill (oped): National Wildlife Federation and Colorado Wildlife Federation: Zinke ...

## **Top Issues and Accomplishments**

Zinke confirmation vote scheduled for 10:30 AM EST Wednesday

Zinke swearing in Wednesday at 6:00 PM EST

Drafting an op-ed for the Houston Chronicle (or Denver Post) to amplify POTUS speech

Preparing for Zinke to arrive at DOI

The NY Times is in Whitefish, MT, (Zinke's hometown) interviewed a number of locals about Zinke. Profile about his conservation/public lands philosophy. Interviews were done with Zinke's best friend since kindergarten, his high school civics teacher, high school football coach, the ranger at Glacier National Park (who knows Zinke in a personal capacity for a number of years, their kids were on the wrestling team together) and a number of locals in town. Story preview expected online Monday or Tuesday with the full piece going live following his confirmation. Print version to follow digital. Expect a neutral to positive tone but it's the Times so....

Working with our policy shop to establish secretary's early priorities and messaging

Writing Day 1 content for various web platforms and finalizing Secretary's events

Continuing to outline Days 1-100 and 1-year plan for Secretary

## **Federal Register Notices Cleared for Publishing (None Significant)**

On Tuesday DOI cleared these items for publishing in the FR.

REG0006713 FWS Incidental Take Permit Application and Environmental Assessment for Commercial Mixed-Use Development; Miami-Dade County, Florida (Coral Reef Commons). The proposed Habitat Conservation Plan and Incidental Take Permit would authorize incidental take of the covered species for a 30-year term on a 138-acre tract. In addition to on-site conservation of 51 acres, there would be a 50-acre off-site conservation area. Notice 02/28/2017

REG0006734 FWS Notice of Availability: Technical/Agency Draft Recovery Plan for the Yellowcheek Darter. The draft recovery plan includes specific recovery objectives and criteria that must be met in order for FWS to reclassify this species to threatened status and ultimately to delist. Notice 02/28/2017

REG0006771 FWS Endangered Species Recovery Permit Applications (for the Louisville zoo and others). This is a batched notice of the receipt of recovery permit applications under the Endangered



Species Act. All permit requests are time-sensitive with the majority of projects ensuing mid-March 2017. Notice 02/28/2017

REG0006772 BLM Notice of Public Meeting, North Slope Science Initiative - Science Technical Advisory Panel, Alaska The BLM announces a meeting of the North Slope Science Initiative - Science Technical Advisory Panel to be held in Fairbanks, Alaska, on March 20 and 21, 2017. Notice 02/28/2017

REG0006775 BLM Notice of Public Meeting, Southwest Resource Advisory Council, Colorado. Pursuant to the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the BLM announces a Mar. 31, 2017, meeting of the Southwest Resource Advisory Council (RAC) in Montrose, Colorado. The meeting will be open to the public. Notice 02/28/2017

REG0006778 USGS National Geospatial Advisory Committee Meeting Notice. Pursuant to the Federal Advisory Committee Act (FACA), this Notice announces a meeting of the National Geospatial Advisory Committee (NGAC) on March 21 and 22, 2017, at the Main Interior Building in Washington, DC. The meeting is open to the public. Notice 02/28/2017

REG0006789 BIA Indian Child Welfare Act; Designated Tribal Agents for Service of Notice. The regulations implementing the Indian Child Welfare Act (ICWA or Act) provide that Indian Tribes may designate an agent other than the Tribal chairman for service of notice of proceedings under the Act. This Notice provides the updated, current list of designated Tribal agents for service of notice. Notice 02/28/2017

## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/9/17**

Doug Domenech, Senior Advisor

### **Status of the Nominee**

Last night, after returning from the Oval, the Secretary met with Rick Dearborn, Justin Clark, and Billy Kirkland to discuss various matters.

Today Secretary Zinke held meetings, briefings, and interviews in the office. Calls are scheduled with Senators Portman, Flake, and Collins to ask support for the CRA on Venting and Flaring. He departed for travel.

**HEADS UP:** DOI will clear a FOIA related to activity on 1/20 and 1/21 related to the shutdown of the National Park Service Twitter account. The FOIA involves official email related to direction to suspend the account until we know what was happening.

### **EO on Energy/Interior Related**

The Media is reporting that the EO on energy is now delayed to next week or the week after.

### **Trump Order On Clean Power Plan, Coal Leasing “Unlikely” This Week.**

The Hill (3/8, Cama) reports that President Trump’s executive order to instruct EPA Administrator Scott Pruitt to start the process of repealing the Clean Power Plan is “unlikely” to be signed this week, according to a White House official. The official told Greenwire that the order “may be pushed to next week.” Trump’s order “is also expected to instruct Interior Secretary Ryan Zinke to undo the Obama administration’s moratorium on new coal mining leases on federal land,” The Hill reports.

### **List of Interior Planned Energy related Actions**

- Secretarial Orders and Memoranda on:
- Secretarial Order: Revocation of the Federal Coal Moratorium
- Reopening National Petroleum Reserve Alaska
- Reinitiating Quarterly Onshore Leasing Program
- Lifting Moratoriums on Offshore Energy
- Restarting a new Five Year OCS Plan
- Financial Assurance Notice to Leasees (NTL) Policy Review
- Well Control Rule Withdrawal
- Offshore Air Rule
- Atlantic Seismic Survey Activities
- Endangered Species Act Review and Reform
- Reverse Compensatory Mitigation
- National Monuments: Review

### **EO on National Monuments**

An EO related to National Monuments Review appears to be eminent.

### **Congressional Action Under the CRA.**

**CRAs :** Pending WH Action.

- BLM Planning 2.0 Rule. The Secretary would like to participate in any signing ceremony.

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

### **Secretary Meetings and Schedule**

On Friday, March 10, 2017, U.S. Department of the Interior Secretary Ryan Zinke will travel to Montana to tour regional and local offices and facilities within the Department. Secretary Zinke will meet with leadership from the National Park Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and other agencies, as well as local and Tribal governments and stakeholders. More stops may be announced.

Friday, March 10: Tribal Blessing by the Blackfeet Nation at Glacier National Park, Meeting with Glacier National Park leadership and staff.

Saturday March 11: Meeting on Bison Management in Missoula, MT

Monday, March 13: Speake at a Special Joint Session of the Montana State Legislature, State Capitol in Helena, MT. Meeting with the Governor. Approved political event with candidate for Congress.

Tuesday, March 14: Site visit to the BLM Lewistown Field Office, Lewistown, MT, Secretary Zinke will meet with employees at the BLM's Field Office. Also Site visit to the BLM Regional HQ for Montana and the Dakotas, Billings, MT.

Wednesday, March 15: Secretary Zinke will travel to Colorado to visit employees with the Denver Service Center. Further details pending

Thursday, March 16: Visit to Rocky Mountain National Park. Potential BUDGET media.

Friday, March 17: Fly to Bozeman. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area.

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

### **ASSISTANCE NEEDED FROM CABINET AFFAIRS:**

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration.

### **Emergency Management**

In North Dakota, a bomb threat was received at the Standing Rock Middle School yesterday afternoon after all students and staff had already vacated the premises. BIA, NPS, and USPP personnel responded, and K-9s were used in the search of the building with negative results. As demobilization continues, the Incident Command Post will relocate to the Fort Yates BIA Police Department.

Many protesters are traveling to newly-established anti-pipeline camps throughout the country, with a stop in Washington, DC for a scheduled 4-day protest march. In conjunction with the protest in Washington, DC, there is a scheduled protest at the North Dakota State Capitol on March 10, where a forecast of snow and 12-degree temperatures may impact turnout.

In Oklahoma, the Irate Fire, located northeast of Lamar, OK, began on March 6 and has burned 2,000 acres. The fire is 40-percent contained and managed by a Type-4 Incident Management Team (IMT) with 8 DOI personnel assigned. There are 15 residential and 30 commercial structures threatened. The containment date has been set for March 11.

Also in Oklahoma, the Spocogee Fire, located south of Mannford, OK and in the vicinity of the Osage Reservation, began on March 1 and has burned 6,478 acres. The fire is 50-percent contained and managed by a Type-4 IMT with 8 personnel assigned, including 5 DOI personnel. The containment date for this fire has been set for March 15.

## **Media**

### **Trump Meets With Secretary Zinke, Alaska Senators.**

E&E Daily (3/8) reports on President Trump's planned meeting with Interior Secretary Ryan Zinke and Alaska Sens. Lisa Murkowski and Dan Sullivan. A spokeswoman for Murkowski "plans to discuss the wide array of federal regulations and restrictions ... that are harming Alaska's economy by preventing the state from responsibly accessing its lands and resources." Sullivan's spokesman said the senator plans to talk about growing Alaska's economy by cutting regulations and reforming federal permitting. The meeting comes as "Trump is reportedly preparing to sign an executive order lifting the Obama administration's moratorium on coal leasing on federal lands." The AP (3/8) reports that in a joint statement, Murkowski and Sullivan said "they discussed everything from responsible resource development to national security."

### **Archaeology Groups Ask Secretary Zinke To Protect Bears Ears.**

The Fronteras (3/8, Morales) reports that "seven archaeology groups in the southwest have asked the new Interior secretary to support the Bears Ears national monument designation." Carrie Heinonen, director of the Museum of Northern Arizona, "said the Obama administration extensively vetted this site." Heinonen said, "The risk to future understanding of cultures that came before us is significant in this particular national monument due to the extraordinarily rich nature of the number of objects housed there."

### **Cantwell Asks Secretary Zinke To Lift Suspension Of Valuation Rule.**

The Seattle Times (3/8, Bernton) reports that Sen. Maria Cantwell, in a letter sent Tuesday to Interior Department Secretary Ryan Zinke, "accused the Trump administration of unlawfully putting on hold an Obama-era rule regulating oil, gas and coal valuations on federal lands." Cantwell claimed that the Interior Department "lacked the authority for the Feb. 22 suspension of the rule." She requested that Zinke "lift the stay on the rule."

### **Ivanka Trump's Landlord Involved In Dispute With US Government Over Proposed Mine.**

The Wall Street Journal (3/8, Maremont, Grimaldi) reports that Ivanka Trump and Jared Kushner are renting their DC home from Chilean billionaire Andrónico Luksic, who bought the home following the November election and whose company is involved in a dispute with the US government over its plan to build a copper-and-nickel mine next to a Minnesota wilderness area. The Obama Administration blocked the plan in its final days and the company is now urging the Trump Administration to reverse the decision.

### **White House Communications Report**

DAILY COMMUNICATIONS REPORT (From Wednesday evening 6:15 pm)

#### **Inquiries**

- Axios (Jonathan Swan) REQUEST: As part of that story I will be reporting on an interaction between Sec Zinke and the President. The way it's been described to me by a senior administration source: "Zinke on his first day went right to the President and tried blowing him up saying I need my people in here right now. And the President said, 'look we'll get your people in so long as they're our people.'" RESPONSE: "The only thing Ryan Zinke has ever blown up was on the SEAL Teams. He is however working hand in hand with the president on top Interior priorities."
- E&E News (Brittany Patterson) REQUEST: BIA and other Interior agencies have in recent years doled out a lot of grant money and staff support to tribes to craft climate change mitigation plans. What is the new Secretary's position on helping tribal nations plan for the impacts of climate change? Is the Secretary of the Interior's Tribal Climate Resilience Program expected to continue on? RESPONSE: "the Secretary addressed the questions that were asked by the Senators. Concerning any other projects at BIA the Secretary is just a week into the job and still learning from the agencies all the different programs they have."
- POLITICO, E&E, Bloomberg, AP and Others REQUEST: readout from POTUS/DOI/Alaska meeting. RESPONSE: TBD
- CNN (Gregory Wallace) REQUEST: "Do you have any information you can provide on the status of the Twin Metals Minnesota mining lawsuit and matter? This question is in regards to a Wall Street Journal report today: <https://www.wsj.com/articles/ivanka-trumps-landlord-is-a-chilean-billionaire-suing-the-u-s-government-1489000307>" RESPONSE: Referred the reporter to DOJ

#### **Top Stories**

Not a lot of news today from DOI. Expecting articles on the Secretary's testimony at Indian Affairs this evening and tomorrow morning.

#### **Top Issues and Accomplishments**

Zinke testified before the Senate Indian Affairs Committee at 2:30PM

Planning: Zinke's trip to Glacier National Park, Yellowstone National Park, address to MT State Legislature, Denver DOI Service Center

#### **Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Wednesday.

REG0006805 FWS Notice of Availability: Applications for American Burying-Beetle Amended Industry Conservation Plan Participation Under the Endangered Species Act, FWS invites the public to

comment on an incidental take permit application for the federally listed American burying beetle in Oklahoma. Notice 03/07/2017

REG0006807 NPS Notice of Inventory Completion - Department of Anthropology, The University of Tulsa, Tulsa, OK N2723 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains under the control of the Department of Anthropology, The University of Tulsa, in Tulsa, Oklahoma. Notice 03/07/2017  
REG0006811 FWS Massasoit National Wildlife Refuge, Plymouth, MA; Draft Comprehensive Conservation Plan and Environmental Assessment The National Wildlife Refuge System Improvement Act of 1997 requires us to develop a CCP for each NWR. CCPs provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the Refuge System mission, consistent with sound principles of fish and wildlife conservation, legal mandates, and FWS policies. Notice 03/07/2017

REG0006812 NPS Notice of Inventory Completion - U.S. Fish and Wildlife Service, Southeast Region, Hardeeville, SC N2732 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this is a notice of completion of an inventory of human remains and associated funerary objects removed from Limestone and Morgan Counties, Alabama, and Decatur County, Tennessee, between 1953 and 1997. The U.S. Fish and Wildlife Service, Southeast Region (USFWS-SER) has control of the remains and objects. Notice 03/07/2017

REG0006813 NPS Notice of Inventory Completion - Human Remains Repository, Department of Anthropology, University of Wyoming, Laramie, WY N2741 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains under the control of the Department of Anthropology, University of Wyoming, in Laramie, Wyoming. The remains were removed from Kodiak Island, Alaska, prior to 1991. Notice 03/07/2017

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REG0006815 NPS Notice of Inventory Completion - U.S. Department of Agriculture, Forest Service, Ouachita National Forest, Hot Springs, AR N2688 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains and associated funerary objects under the control of the U.S. Department of Agriculture, Forest Service, Ouachita National Forest in Hot Springs, Arkansas. The remains and objects were removed from McCurtain County, Oklahoma, between 1997 and 2005. Notice 03/07/2017

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REG0006817 NPS Notice of Inventory Completion - Museum of Northern Arizona, Flagstaff, AZ N2736 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains under the control of the Museum of Northern Arizona in Flagstaff, Arizona. The remains were removed from the Van Liere Site, a Hohokam settlement in Maricopa County, Arizona, in 1978. Notice 03/07/2017

REG0006818 NPS Notice of Inventory Completion - San Diego Museum of Man, San Diego, CA; Correction N2721 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the correction of an inventory of human remains and associated funerary objects under the control of the San Diego Museum of Man in San Diego, California. The remains and objects were removed in the La Jolla area of San Diego, and the inventory was announced in a Notice published on Jan. 27, 2016. Notice 03/07/2017

REG0006819 NPS Notice of Inventory Completion - Museum of Northern Arizona, Flagstaff, AZ; Correction N2735 This Notice corrects an inventory of human remains and associated funerary objects completed by the Museum of Northern Arizona in Flagstaff, Arizona, and published on Sept. 11, 2006 (71 FR 53469). The remains and objects were removed from the Cashion site in Maricopa County, Arizona. Notice 03/07/2017

REG0006820 NPS Notice of Intent to Repatriate Cultural Items - Denver Museum of Nature & Science, Denver, CO N2745 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this is a Notice of Intent to Repatriate Cultural Items under the control of the Denver Museum of Nature & Science in Denver, Colorado. The six cultural items, masks from the Onondaga Reservation in New York, meet the definition of sacred objects. Notice 03/07/2017

# Conversation Contents

Interior Cabinet Affairs Report for 3/8/17

**Attachments:**

/38. Interior Cabinet Affairs Report for 3/8/17/1.1 DOI Daily Report to the Secretary 3-8-17.docx

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Wed Mar 08 2017 12:09:34 GMT-0700 (MST)  
**To:** "Flynn, Matthew" <(b) (6) gov>, "Mashburn, John K. EOP/WHO" <(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Cabinet Affairs Report for 3/8/17  
**Attachments:** DOI Daily Report to the Secretary 3-8-17.docx

Copied and Attached below.

## DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/8/17

Doug Domenech, Senior Advisor

### Status of the Nominee

Today Secretary Ryan Zinke will:

- Meet with Justin Clark from WH IGA.
- Phone call with the Canadian Minister for the Environment
- Testify before the Senate Indian Affairs Committee.
- Meet with the President and the Alaska Delegation.

In addition, the Secretary is planning to call Senators Portman, Gardner, Heitkamp, and Graham to ask support for the CRA on Venting and Flaring.

### EO on Energy/Interior Related

The Media is reporting that the President is poised to sign an EO on energy.



**NOTE:** Interior has prepared 10 Secretarial Orders and announcements ready to react to the President's action. All depends on the content of the EO and whether you are OK with us releasing the other ones.

### **EO on National Monuments**

An EO related to National Monuments Review appears to be eminent.

### **Congressional Action Under the CRA.**

**CRAs** : Pending WH Action.

- BLM Planning 2.0 Rule. The Secretary would like to participate in any signing ceremony.

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

### **Congressional Correspondence**

Senator Cantwell, Ranking on Senate Energy wrote to the Secretary to complain an action taken by the Department to delay a last minute valuation rule put into place by the Obama administration (before Zinke arrived). As I understand, we will not be responding.

### **Secretary Meetings and Schedule**

3/8: The Secretary will testify before the Senate Indian Affairs Committee.

3/8: The Secretary will meet with the President.

8/10-18: TRIP

Released today: Secretary Zinke to Visit Regional DOI Offices, Meet with Local Stakeholders

(WASHINGTON) On Friday, March 10, 2017, thru Friday, March 17, Department of the Interior Secretary Ryan Zinke will travel to Montana and Colorado to tour regional and local offices and facilities within the Department. Zinke will meet with leadership from the

National Parks Service, Bureau of Land Management, Fish, Wildlife and Parks, and other agencies, as well as local and Tribal governments and stakeholders.

Friday, March 10

Tribal Blessing by the Blackfeet Nation at Glacier National Park

Location: Glacier National Park (RSVP for more info)

Secretary Zinke will be honored with a traditional Tribal blessing by members of the Blackfeet Nation at Glacier National Park. Open to Press: RSVP to [interior\\_press@ios.doi.gov](mailto:interior_press@ios.doi.gov) for more details

Meeting with Glacier National Park leadership and staff

Secretary Zinke will meet with GNP leadership and staff to learn about challenges, opportunities, and the maintenance backlog. Closed to press

Monday, March 11

Special Joint Session of the Montana State Legislature

Location: State Capitol in Helena, MT

Secretary Zinke will address a Special Joint Session of the Montana State Legislature

Open to Press: RSVP to [interior\\_press@ios.doi.gov](mailto:interior_press@ios.doi.gov) for more details.

Tuesday, March 12

Site visit to the BLM's Lewistown Field Office

Location: Lewistown, MT

Secretary Zinke will meet with employees at the BLM's Field Office. Closed to press.

Special announcement by Secretary Zinke

Location: BLM Montana/Dakotas Regional Office Billings, MT

Secretary Zinke will make important announcements regarding the future of coal

Open to Press: RSVP to [interior\\_press@ios.doi.gov](mailto:interior_press@ios.doi.gov) for more details

Wednesday, March 13

Secretary Zinke will travel to Colorado to make site visits

Further details pending

3/14: Fly to Denver. Visit Interior Denver Service Center.

3/15: Tenta Visit Denver BLM and FWS facilities. BUDGET media.

3/16: Fly to Bozeman. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

3/18: Meeting with Sen. Murkowski in Bozeman area.

3/19: Fly to DCA.

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate. NOTE: Need to discuss this event with Cabinet Affairs.

## **Emergency Management**

In North Dakota, a U.S. District Judge denied the Cheyenne River Sioux Tribe motion for a preliminary injunction to stop construction of the Dakota Access Pipeline. The court will make an additional ruling on the ultimate merits of the case at a future unspecified date. Demobilization of non-BIA law enforcement officers has begun; however, BIA Office of Justice Services will continue to provide additional officers for Standing Rock until March 31.

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A significant explosive eruption began at Bogoslof Volcano at 2:36 a.m. EST, as indicated by seismic, lightning, and infrasound data. The Alaska Volcano Observatory (AVO) also noted ash cloud extending to 35,000 feet in satellite images and has raised the Volcano Alert and Aviation Color Code levels to Warning and Red, respectively. The National Weather Service has issued a Special Weather Statement for trace amounts (less than 1 mm) of ashfall on Unalaska Island, including the community of Dutch Harbor/Unalaska, based on ash fallout modeling by the AVO.

## **Media**

## **Secretary Zinke Looking To Strike Balance.**

The Huffington Post (3/7, D'Angelo) reports on the challenge facing Interior Secretary Ryan Zinke to “strike a balance.” According to the article, “with environmental activists becoming increasingly set against any development on public lands, a Republican Party with a platform that calls for transferring control of federal lands to states and a boss who enthusiastically promotes the fossil fuel industry, Zinke has his work cut out for him.” Although “Zinke has largely managed to retain the support of sportsmen, who are hopeful he will follow through on his promises to protect and expand hunting, fishing and recreation access,” the article says that “even his most loyal supporters say they plan to keep a close eye on how President Donald Trump’s pick approaches the job.”

## **Fishermen Sue Administration Over Obama-Era Marine Monument.**

A coalition of fisherman sued the Administration Tuesday over the Northeast Canyons and Seamounts Marine National Monument, which was designated by President Obama last year. The Washington Times (3/7, Wolfgang) reports the fisherman argue that “the monument will crush the commercial fishing industry and devastate communities on the New England coast.” The Times says the case “will offer clues as to whether President Trump will revoke some of his predecessor’s most controversial national monuments.” While “conservative lawmakers and others” have pushed Trump “to revoke some of those more controversial designations, including the New England monument,” it is “unclear whether the administration is willing to go to court to defend Mr. Obama’s monuments.”

## **Secretary Zinke Urged To Address Illegal Border Crossings.**

In an op-ed for the Washington Times (3/7), Ian Smith, an attorney with the Immigration Reform Law Institute, urges Interior Secretary Ryan Zinke to tackle the problems created by illegal border crossing on public lands. According to Smith, “the trash, waste and discarded vehicles brought in” by “illegal border-crossers” is “so large federal land management agencies have admitted it has altered the ecological processes and degraded habitats in these areas.” Smith urges Zinke to “call on our immigration agencies to turn off the main magnets of illegal immigration (employment, welfare, birthright citizenship) and ensure that we have the strongest fence possible to keep out the cartels.”

## **White House Communications Report**

DAILY COMMUNICATIONS REPORT (From Friday)

### **Inquiries**

POLITICO (Anthony Adragna) REQUEST: I saw Secretary Zinke will testify tomorrow before the Senate Indian Affairs Committee. Was hoping you might be able to share some of what he'd like to get across. Also, any additional deeds you can share on the personal items he mentions here?

<https://twitter.com/SecretaryZinke/status/839181351538544645>

RESPONSE: Hold tight on the hearing, will get you something soon. On the personal items:

1. The sextant was a retirement gift from the Navy
2. The telescope was a gift when he left one of the SEAL Teams
3. The patches are each from different SEAL Teams he was on
4. The flag was the flag worn on his uniform
5. Teddy Roosevelt lithograph he found at an estate sale in Indiana
6. The infamous knives <https://www.youtube.com/watch?v=3cx4SSb-EPg>

- Seattle Times (Hal Berton) REQUEST: The letter was sent today from Washington Sen. Maria Cantwell to Interior Secretary Zinke requesting that he lift the stay on a coal royalty valuation rule that was put in place during the final weeks of the Obama administration. RESPONSE: The Department is reviewing the letter.

- Washington Times (Benjamin Wolfgang) REQUEST: Comment on a lawsuit that challenges the Northeast Canyons and Seamounts Marine National Monument, established last September by former President Obama. Interior Secretary Zinke is named in the suit. I'm trying to determine whether Interior intends to defend this monument in court? Why or why not? Just looking for some clarity here on how the administration may handle this. RESPONSE: Refer the matter to DOJ.

- POLITICO (Esther Whieldon) REQUEST: Sen. Daines said Zinke has indicated he's mulling moving more DC staff/offices out West as part of his reorganization. Please confirm. Any additional details you can provide such as which offices and which agencies are under consideration and what could be gained by doing so would be helpful. Would appreciate a response by early tomorrow. RESPONSE: Will get back to her before deadline

- Law360 (Adam Lidgett) REQUEST: My name is Adam Lidgett and I'm a reporter with Law360. I'm doing a story on a Ninth Circuit panel today ruling that a district court was right to dismiss for lack of standing and ripeness a suit from the Desert Water Agency against the Department of the Interior and Bureau of Indian Affairs challenging a federal regulation that DWA believed might preempt certain taxes and fees DWA assessed against non-Indians who leased lands within an Indian reservation. RESPONSE: Referred to DOJ

## Top Stories

- Indianz: Interior Secretary Zinke focuses on tribes in first Capitol Hill appearance
- AL.com Feds opening 73 million acres off Alabama, Gulf states for oil and ...
- Daily Caller: Trump Opens 'All Available' Gulf Of Mexico Waters To Oil Drilling
- E&E News: Top Democrat urges Zinke to lift stay of Obama royalty rule

## Top Issues and Accomplishments

- Tomorrow: Zinke will testify before the Senate Indian Affairs Committee at 2:15PM
- Travel to Montana and Colorado: Zinke at Glacier National Park on Friday 3/10, address to MT State Legislature on public lands/energy on 3/13, site visit at BLM Field Office in Billings, MT on 3/14, Denver DOI Service Center on 3/15 and 3/16, and Yellowstone National Park on 3/17

## Federal Register Notices Cleared for Publishing (None Significant)

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Doug Domenech  
Senior Advisor  
US Department of the Interior



# Conversation Contents

Interior Report for 2/9/17

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Thu Feb 09 2017 11:11:33 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report for 2/9/17

DOI UPDATE FOR CABINET AFFAIRS – 2/9/17

Doug Domenech

## Status of the Nominee

Rep. Zinke waiting Senate floor vote. Latest is late next week. We are planning his first 10 days. (Let me know if you need detail on the plan.)

## Energy Executive Orders

Interior is anxious to have a sense when, and if, the President will issue Executive Orders related to facilitating energy development. Or, whether we can have permission to proceed on our own.

## Heads Up

On February 11-12, the NPS anticipates upwards of 20,000 "Trump Must Go – Now" protesters at Ocean Beach in Golden Gate National Recreation Area. This is a First Amendment permit event.

## Congressional Review Act – POTUS ACTION

- REPEAT: The Stream Protection Act CRA has passed both the House and Senate and is awaiting the President's signature. We are prepared to assist in providing miners for a signing ceremony. If Mr. Zinke is confirmed next week, he obviously should participate.

- REPEAT: BLM Methane Rule: We are awaiting Senate action on the Bureau of Land Management's methane venting and flaring rule CRA.

- REPEAT: BLM 2.0 Rule: The House passed H.J. Res. 44 which would nullify the final rule relating to the BLM Resource Management Planning. The White House blog stated that, "This rule, also known as the BLM Planning Rule 2.0, would prioritize regional and national considerations over state and local interests in land use planning for activities on public lands. The BLM manages over 245 million acres of Federal lands, located mostly in the western States, for multiple uses, including grazing, timber, recreation, and energy and mineral development. Given its regional approach to planning, the Administration believes the rule does not adequately serve the State and local communities' interests and could potentially dilute their input in planning decisions."

Doug Domenech  
Senior Advisor  
US Department of the Interior

**Label: "FOIA/OS-2017-00367"**

**Created by:douglas\_domenech@ios.doi.gov**

Total Messages in label:226 (113 conversations)

Created: 04-13-2017 at 08:45 AM

# Conversation Contents

Interior Report 2/6/17

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Mon Feb 06 2017 11:21:31 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report 2/6/17

DOI UPDATE FOR CABINET AFFAIRS 2/6/17  
Doug Domenech

## **Status of the Nominee**

Rep. Zinke waiting Senate floor vote. Likely week of 2/13.

## **Congressional Review Act – POTUS ACTION**

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Doug Domenech  
Senior Advisor  
US Department of the Interior

**"Uli, Gabriella M. EOP/WHO" <(b) (6) gov>**

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**From:** "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Sent:** Mon Feb 06 2017 11:43:16 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>, "Mashburn, John K. EOP/WHO" <(b) (6) gov>  
**Subject:** RE: Interior Report 2/6/17

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**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Monday, February 6, 2017 1:22 PM  
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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Mon Feb 06 2017 11:49:17 GMT-0700 (MST)  
**To:** "Uli, Gabriella M. EOP/WHO"  
<(b) (6) gov>  
**Subject:** Re: Interior Report 2/6/17

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**From:** "Uli, Gabriella M. EOP/WHO"  
<(b) (6) gov>  
**Sent:** Mon Feb 06 2017 12:22:54 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Subject:** RE: Interior Report 2/6/17

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Mon Feb 06 2017 13:29:36 GMT-0700 (MST)  
**To:** "Uli, Gabriella M. EOP/WHO"  
<(b) (6) gov>  
**Subject:** Re: Interior Report 2/6/17

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US Department of the Interior

## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/21/17**

Doug Domenech, Senior Advisor

### **Status of the Secretary**

The Secretary will be in Washington this week.

### **Media Announcements Today**

No press releases but the Department did allow the **Rusty Patched Bumble Bee** to go on the endangered species list after the 60-day review. This is notable because it's the first pollinator to go on the ESA list. Here is our statement - "FWS previously delayed the effective date of the final listing determination for the rusty patched bumble bee under the Endangered Species Act from February 10, 2017 to today (March 21, 2017) to allow for standard review. Fish and Wildlife Service scientists have noted that the brief delay is not expected to have an impact on the conservation of the species since FWS is still developing a recovery plan to guide efforts to bring this species back to what they believe is a healthy and secure condition. We will work with stakeholders to ensure collaborative conservation among landowners, farmers, industry, and developers in the areas where the species is native."

### **Executive Orders**

Latest news is that I understand EO on Energy is next week (perhaps on Monday). Of note, the Secretary is on travel Thursday and Friday next week.

### **Congressional Action Under the CRA**

The BLM Planning 2.0 Rule CRA is pending at the White House. We assume that the Secretary would participate in any signing ceremony. Asking when this will happen.

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska". Understand this is headed to the Senate floor perhaps as early as today.

### **Secretary Meetings and Schedule**

3/30-4/1: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

Waiting on Resolution of these items: (working with IGA)

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. Interior has provided a draft.

### **Speaking Invitations**

Accepted

3/23 Address to the American Petroleum Institute's Board of Directors Meeting (DC, Trump Hotel)

3/28 Public Lands Council Legislative Conference Luncheon Keynote 12:00-1:00 Liaison Hotel in DC

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

4/3 North America's Building Trades Unions National Legislative Conference Remarks at the Washington Hilton & Towers Hotel, timing TBD.

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/14 Montana State Meeting of the Society of American Foresters (Missoula, MT)

4/19 American Forest Resource Council 2017 Annual Meeting (Stevenson, WA)

4/27 NRA Leadership Forum, George World Congress Center in Atlanta, GA.

#### Regretted

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

#### Outstanding Invitations in Process

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)

4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

#### Emergency Management

The Parliament Fire, which began March 18 on Big Cypress National Preserve in Florida (NPS), has burned 4,275 (+1,275) acres and is 0 (-5)-percent contained. The fire is being managed by a Type-4 Incident Management Team with 24 (+15) personnel assigned, including 8 (+6) DOI personnel. There are 14 (+10) residential structures threatened. In addition to the residential structures, the fire is threatening endangered species habitat and other private holdings. Major concerns for this reporting period are smoke impacting highway movement and access for firefighters. The containment date for this fire remains March 26.

The U.S. Bureau of Reclamation (USBR) reports that the Dickinson Dam, in North Dakota, has entered into a Response Level 1. The rising reservoir level is due to snowmelt and recent rainfall in the area; however, at Response Level 1, there is no immediate risk to the downstream population. USBR and the Interior Operations Center will continue to monitor the situation and provide updates as warranted.

The USGS Post Falls and Boise offices in Idaho deployed crews in response to a warming trend and multiple storms bringing rain to high elevation snowpack. Rapid Deployment gages have been installed along the Boise River in southwestern Idaho and Big Canyon Creek in north-central Idaho. USGS is also working with the National Weather Service, USBR, and the Idaho Department of Transportation to ensure un-gaged river and stream reaches are monitored for public safety.

#### Media of Interest

##### **Budget Losses Could Point To Secretaries' Lack Of Influence.**

E&E Publishing (3/20) reports that "despite publicly vowing to fight proposed budget cuts and to defend certain programs, the heads of U.S. EPA and the Interior and Energy departments lost their battles with the White House." Notably, Interior Secretary Ryan Zinke "promised to fight and win against the White House's initially floated 10 percent slash, but the budget blueprint proposed a 12 percent cut."

##### **Eisenhower Memorial Could Break Ground As Early As September.**

Roll Call (3/21, Akin) reports that "construction could begin as early as September on a proposed memorial for President Dwight D. Eisenhower," according to the Dwight D. Eisenhower Memorial Commission and the chairman of the House committee that oversees the funding for the project. Rep. Ken Calvert, the chairman of the House Appropriations Subcommittee on Interior, Environment, and Related Agencies, said, "I don't think there are any obstacles in front of us. We need to get it done. Our

World War II heroes are leaving us very quickly.” However, “completing the project would require a significant commitment from Congress at a time when it is being asked by the Trump administration to make deep and painful cuts to federal funding for domestic programs.”

#### **House Committee Subpanel To Hold hearing On Shortcomings At BSEE.**

The Hill (3/20, Cama, Henry) reports that “a House Natural Resources Committee subpanel will hold a hearing on an imminent Government Accountability Office (GAO) report on shortcomings at the Interior Department’s Bureau of Safety and Environmental Enforcement.” GAO’s energy director Frank Rusco will testify, as will Richard Cardinale, Interior’s acting secretary for lands and minerals.

#### **Trump Says He Is Keeping Promises To Kentucky’s Miners.**

In an interview with WDRB-TV Video Louisville, KY (3/20, 10:01 p.m. EDT), President Trump was asked why he was focusing on Kentucky. Trump said, “Well, I’ve been with them and they’ve been with me. Kentucky has been one of our great states and I love the people of Kentucky. The miners, we are putting them back to work. We’ve already signed legislation environmentally that allows the mines to start reopening and keep open. And I made a lot of promises to the miners, and I’m keeping those promises, so I wanted to come back here and tell them that.” Reuters (3/20) briefly reported on the interview.

#### **Flagging for Special Interest**

##### **Birmingham Civil Rights National Monument Dedication To Be Held In April.**

Alabama Live (3/20, Garrison) reports that the National Park Service and “local partners will host a celebration of the new Birmingham Civil Rights National Monument next month.” The dedication will be held Saturday, April 15 outside the Birmingham Civil Rights Institute. Stan Austin, regional director for the National Park Service, said, “We look forward to dedicating the new Birmingham Civil Rights National Monument with our partners who were central the park’s establishment. The park preserves and interprets an important chapter in America’s modern civil rights movement.”

#### **White House Communications Report** (sent to WH Comms yesterday, Monday.)

##### **Inquiries**

- POLITICO (Anthony Adragna) EE News (Dylan Byers) Axios (Ben German) S&P Platts (Brian Scheid) REQUEST Comment on claims made by Senators Cardin and Luger that the U.S. is withdrawing from the international Extractive Industries Transparency Initiative (EITI). RESPONSE - "The Department remains committed to the principles and goals of EITI including transparency and good governance of the extractive sectors and are institutionalizing and mainstreaming EITI goals into how the Department manages its revenues. No decision has been made on applying for validation under the EITI standard and the U.S. is not even scheduled to begin the validation process until April of 2018 (per the EITI International Board schedule published regularly). The United States has led the global initiative in providing revenue-related data and information from the extraction of oil, natural gas, coal and other minerals on federal land in an interactive, open-source data portal and regularly engaging with other implementing countries to share our best practices."
- CNN REQUEST Hearing Zinke will fly to Utah this week for an announcement regarding Bears Ears. Is this true? RESPONSE Not True.
- Great Falls Tribune (MT) ABC/Fox Montana and NBC Montana REQUEST would like a statement on the President’s budget cuts to BLM and DOI in Montana. RESPONSE Directed reporters to the press release for DOI and supplied this comment from BLM, "The President's budget blueprint supports the Bureau of Land Management's multiple use mandate and prioritizes energy and minerals development. Details of the budget are expected in the coming weeks, but the blueprint demonstrates the Administration's strong fiscal responsibility and support for America's public lands."



## Top Stories

- AP: Bears Ears Commission Seeks Meeting With Secretary Zinke.
- Livingston Enterprise (MT) Secretary Zinke visits Yellowstone Park
- EE News: Lease foes vow to be 'scrappier than ever' post-moratorium
- E&E News: U.S. opts out of transparency effort for oil, coal firms
- E&E News: Trump vetting picks for assistant secretary, NPS and FWS
- KPAX TV (MT): Montanans voice concerns over proposed Interior Dept. budget cut ...

## Top Issues and Accomplishments

- Preparing to support Coal/Climate EOs
- FYIs The Department will issue press releases this week on the following American Energy activity
  - o March 20-23 - DOI will release a number of small coal lease sales in Utah, Ohio, ND.
  - o Offshore oil/gas sale
  - o Offshore wind energy
- Tomorrow the endangered species listing of the Rusty Patched Bumblebee will go into effect. The effective date was delayed for the Priebus memo. This was a very controversial delay, DOI is being sued by two environmental groups about it.
- Launching a "Travels with Z" blog on our website that is Secretary Zinke's travel blog going to America's public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)

## Federal Register Notices Cleared for Publishing (None Significant)

No items were cleared for the Federal Register on Monday.

REG0006854 BLM Notice of Public Meeting for the Southeast Oregon Resource Advisory Council  
The Southeast Oregon RAC meeting will be held on Monday, April 10, 2017, and Tuesday, April 11, 2017  
in Ontario, OR. Notice 03/20/2017

REG0006855 BLM Notice of Public Meeting, Boise District Resource Advisory Council, Idaho  
The 15-member RAC advises the Secretary of the Interior on a variety of planning and management issues  
associated with public land management in Idaho. The Boise District RAC meeting will be held on April  
5, 2017, at the BLM Boise District Office. Notice 03/20/2017

## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/14/17**

Doug Domenech, Senior Advisor

### **Status of the Nominee**

The Secretary will be in the office Tuesday and Wednesday.

The Secretary will resume his travel in Montana and Wyoming Thursday, Friday, and Saturday.

### **Executive Orders**

The Department is awaiting:

EO on Energy (several): Understand looking like next week.

EO on National Monuments

**Potential Announcement:** “Secretary Zinke Reverses Decision that Denied Atlantic Seismic G&G Permits -- New Directive Allows Consideration of Permit Applications to Continue.”

Will this conflict with any upcoming EO?

### **Congressional Action Under the CRA** (No change)

**CRAs:** Pending WH Action.

- BLM Planning 2.0 Rule. When will the President sign?

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

### **Secretary Meetings and Schedule**

Tuesday March 14: DC

Wednesday 15: DC.

Thursday March 16: Travel to Bozeman, MT. Potential BUDGET media.

Friday: Bozeman/Yellowstone. Press conference in front of arch announcing historic park visitation.

Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area.

Sunday: Fly to DC

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

### **ASSISTANCE NEEDED FROM CABINET AFFAIRS:**

Status?

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. The agency is drafting this.

## Speaking Invitations

Regretted.

3/14 National Conference of State Historic Preservation Officers (DC, Liaison Hotel)

3/15 Canadian Minister of Environment and Climate Change, Catherine McKenna (DC)

3/16 National Park Foundation Board Meeting (DC, Hay-Adams Hotel).

Outstanding in Process

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

3/23 Address to the American Petroleum Institute's Board of Directors Meeting (DC, Trump Hotel)

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

4/3 North America's Building Trades Unions National Legislative Conference (DC, Washington Hilton)

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

Accepted

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

## Emergency Management

Nothing significant to report.

## Media of Interest

### **Army Corps Completes \$1.1 Million Dakota Access Protest Camp Cleanup.**

According to the Washington Times (3/13, Richardson), the US Army Corps of Engineers declared its \$1.1 million cleanup of the Dakota Access pipeline protest camps finished Thursday. Corps Capt. Ryan Highnight said in an email that the Florida sanitation company which cleaned the area removed 835 dumpsters of trash, a total of 8,170 cubic yards of debris, from the three camps. Furry Friends Rockin' Rescue of Bismarck-Mandan said in an online post that it has rescued 12 dogs since the protesters evacuated.

### **Senate Urged To Repeal BLM Methane Rule.**

Javier Palomarez, president and CEO of the United State Hispanic Chamber of Commerce, writes in the Pundits Blog for The Hill (3/13, Palomarez) that the energy sector, which helps small businesses expand and hire more workers through cheaper gasoline and utility prices, is threatened by the BLM methane rule. Palomarez says the rule "is unnecessary and adds yet another layer of bureaucratic scrutiny." He argues that the rule will "stifle growth" and jeopardize the 9.8 million jobs supported by the oil and gas industry. The rule is a reach of BLM's jurisdiction because the Clean Air Act gives the authority to regulate clean air to the EPA and individual states. Palomarez ends the piece by urging the Senate to repeal the regulation.

### **Garfield County Votes In Favor Of Downsizing Grand Staircase-Escalante National Monument.**

The Salt Lake (UT) Tribune (3/13, Maffly) reports that advocates and opponents of the Grand Staircase-Escalante National Monument "faced off Monday inside and outside the Garfield County Courthouse, where county commissioners fielded public comments then passed a controversial resolution calling for downsizing the 1.9 million-acre monument." The commission received "comments of up to two minutes from 12 speakers on each side before unanimously voting to approve the resolution, based nearly

verbatim on a successful resolution before the Utah Legislature, sponsored by Rep. Mike Noel." The proceedings "highlighted a growing disconnect between entrepreneurs who have moved to Garfield County and elected leaders who claim the monument has undermined the county's customs and heritage, based largely on ranching and natural resource extraction."

### **Interior Director Displayed A "Pattern Of Unprofessional Behavior".**

Additional coverage of the Interior Department inspector general's report that found that "a director at the Department of Interior is alleged to have 'behaved inappropriately' toward six of his female employees" was provided by the Federal Soup (3/13) and Federal News Radio (DC) (3/13, Thornton).

### **White House Communications Report** (sent to WH Comms yesterday)

#### **Inquiries**

- WSJ (Jim Carlton) REQUEST writing on efforts by Utah politicians to get President Trump to rescind or greatly reduce the new Bears Ears National Monument. I just spoke with Congressman Chaffetz and he said he has put that request in to the president personally, and has invited Secretary Zinke out to Utah to tour the land and meet. Can I get a comment on what Mr. Zinke thinks of this issue? Does he plan to visit Bears Ears and, if so, when? Response: will draft statement and circulate.  
RESPONSE TBD
- Washington Times (Ben Wolfgang) REQUEST - Are there any plans at Interior to revisit the King Cove road issue? As far as I know, this whole thing has been dormant since former Secretary Jewell decided against the road in December 2013. Is the Secretary open to re-examining it? Why or why not?  
RESPONSE TBD
- Reuters (Dena Aubin) REQUEST I am writing a story for Westlaw today about a lawsuit filed Friday against the Interior Department seeking to block designation of the Rogue River as a wild and scenic river. Do you have a comment on the lawsuit? RESPONSE Still coordinating to get an answer.
- EE News (Daniel Cusick) REQUEST working on a story about this week's scheduled offshore lease sale in North Carolina (March 16). I have communicated with the Bureau of Ocean Energy Management and know that the sale is proceeding as scheduled. I am reaching out to see if I can get comment from Interior HQ about the role that offshore wind power is expected to have in the department's energy leasing program under the Trump administration. RESPONSE Crafted w/ Kelly Love: "Secretary Zinke and President Trump are committed to creating public lands jobs that provide affordable and reliable energy for America. The administration supports a comprehensive energy solution and renewable energy will play a role so long as that energy is affordable and reliable."
- POLITICO (Darren Samuelson) to National Parks Service REQUEST asking if NPS will use salt to treat the streets we are responsible for managing. An article in the Boston Globe indicated that President Trump does not like the use of salt to treat roads because it is corrosive. RESPONSE NPS Public affairs specialist, "The parks in the region have pre-treated all of our managed roadways in anticipation of the storm. Salt is one of several types of materials we use to treat the roads, but that depends on the condition of each road."

#### **Top Stories**

- Seattle Times (Editorial) Give Interior secretary with a Western perspective a chance
- Flathead Beacon (MT) On First Trip as Interior Secretary, Zinke Vows to Reorganize ...

- Ravalli Republic (MT) Zinke pledges big changes at Department of the Interior
- EE News Zinke hails 3rd straight year of record-breaking visits
- EE News Zinke cancels Mont. visits for Cabinet meeting (Discusses reorganization)
- National Review: Trump's Skeletal Crew

### **Top Issus and Accomplishments**

- Tomorrow Secretary Zinke will do a ride along with U.S. Park Police as they respond to winter weather emergencies. The USPP patrol much of Washington, D.C., including the GW Parkway, Memorial Bridge, Roosevelt Bridge and I395. They also have jurisdiction over much of D.C. because of proximity to various National Parks sites. Benny Johnson at IJR is covering. Zinke is focused on the front lines and empowering the law enforcement officers on the ground.
- On Friday, Zinke and the National Park Service announced record visitation at National Parks Service locations in 2016. In an interview at Glacier National Park, Zinke touted the numbers, their economic impact, and the future of the NPS.
- Later this week, the Bureau of Ocean Energy Management will recommend approval of permits to conduct seismic studies on the potential of Atlantic Ocean energy resources.
- Launching a "Travels with Z" blog on our website that is Secretary Zinke's travel blog going to America's public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)

### **Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Monday.

REG0006837 BLM Notice of Public Meeting; Central Montana Resource Advisory Council. The meeting is scheduled for March 29, 2017 in Glasgow, Montana. Notice 03/13/2017

# Conversation Contents

## Cabinet Affairs Interior Report 3/3/17

### Attachments:

/50. Cabinet Affairs Interior Report 3/3/17/1.1 DOI Daily Report to the Secretary 3-3-17.docx

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**Sent:** Fri Mar 03 2017 11:38:56 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO"  
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Doug Domenech, Senior Advisor

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USA Today (3/2, Estepa) reports that Zinke was “greeted by more than 350 federal employees,” including former acting Interior secretary Jack Haugrud. According to the article, “a veterans song was played on a hand drum by a Bureau of Indian Affairs employee, who is from Montana’s Northern Cheyenne tribe.” The Washington Times (3/2, Wolfgang) reports that Zinke “later tweeted that he was ‘humbled by the warm welcome’ that he received on his first day.”

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### **Issues of Note**

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A number of individuals in the department have been interviewed about photos provided to the White House.

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US Department of the Interior

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**Sent:** Fri Mar 03 2017 15:11:29 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Subject:** RE: Cabinet Affairs Interior Report 3/3/17

Thanks!!

**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
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**Label: "FOIA/OS-2017-00367"**

**Created by:douglas\_domenech@ios.doi.gov**

Total Messages in label:226 (113 conversations)

Created: 04-13-2017 at 08:36 AM

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### **Energy/Interior Related Executive Orders/Announcements**

**Today Secretary Zinke Announces Proposed 73-Million Acre Oil and Natural Gas Lease Sale for Gulf of Mexico:** All available areas in federal waters will be offered in first region-wide sale under new Five Year (Obama) aProgram.

U.S. Secretary of the Interior Ryan Zinke today announced that the Department will offer 73 million acres offshore Texas, Louisiana, Mississippi, Alabama and Florida for oil and gas exploration and development. The proposed region-wide lease sale scheduled for

August 16, 2017 would include all available unleased areas in federal waters of the Gulf of Mexico.

“Opening more federal lands and waters to oil and gas drilling is a pillar of President Trump’s plan to make the United States energy independent,” Secretary Zinke said. “The Gulf is a vital part of that strategy to spur economic opportunities for industry, states and local communities, to create jobs and home-grown energy and to reduce our dependence on foreign oil.”

Proposed Lease Sale 249, scheduled to be livestreamed from New Orleans, will be the first offshore sale under the new Outer Continental Shelf Oil and Gas Leasing Program for 2017-2022 (Five Year Program). Under this new program, ten region-wide lease sales are scheduled for the Gulf, where the resource potential and industry interest are high, and oil and gas infrastructure is well established. Two Gulf lease sales will be held each year and include all available blocks in the combined Western, Central, and Eastern Gulf of Mexico Planning Areas.

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Doug Domenech  
Senior Advisor  
US Department of the Interior

## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/6/17**

Doug Domenech, Senior Advisor

### **Status of the Nominee**

Secretary Ryan Zinke will be attending briefings at Interior. He will travel to EEOB to have meetings with PPO and Cabinet Affairs.

### **Energy/Interior Related Executive Orders/Announcements**

**Today Secretary Zinke Announces Proposed 73-Million Acre Oil and Natural Gas Lease Sale for Gulf of Mexico:** All available areas in federal waters will be offered in first region-wide sale under new Five Year (Obama) aProgram.

U.S. Secretary of the Interior Ryan Zinke today announced that the Department will offer 73 million acres offshore Texas, Louisiana, Mississippi, Alabama and Florida for oil and gas exploration and development. The proposed region-wide lease sale scheduled for August 16, 2017 would include all available unleased areas in federal waters of the Gulf of Mexico.

“Opening more federal lands and waters to oil and gas drilling is a pillar of President Trump’s plan to make the United States energy independent,” Secretary Zinke said. “The Gulf is a vital part of that strategy to spur economic opportunities for industry, states and local communities, to create jobs and home-grown energy and to reduce our dependence on foreign oil.”

Proposed Lease Sale 249, scheduled to be livestreamed from New Orleans, will be the first offshore sale under the new Outer Continental Shelf Oil and Gas Leasing Program for 2017-2022 (Five Year Program). Under this new program, ten region-wide lease sales are scheduled for the Gulf, where the resource potential and industry interest are high, and oil and gas infrastructure is well established. Two Gulf lease sales will be held each year and include all available blocks in the combined Western, Central, and Eastern Gulf of Mexico Planning Areas.

**White House Energy Executive Orders** We received the proposed EO and are suggesting a few tweaks.  
**CRAs :** Passed the House

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# Conversation Contents

Interior Cabinet Affairs Report for 3/23/17

**Attachments:**

/2. Interior Cabinet Affairs Report for 3/23/17/1.1 DOI DAILY UPDATE FOR CABINET AFFAIRS 3-23-17.docx

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Thu Mar 23 2017 11:20:57 GMT-0600 (MDT)  
"Mashburn, John K. EOP/WHO"  
**To:** <(b) (6) gov>, "Flynn, Matthew"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Cabinet Affairs Report for 3/23/17  
**Attachments:** DOI DAILY UPDATE FOR CABINET AFFAIRS 3-23-17.docx

## DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/23/17

Doug Domenech, Senior Advisor

### Status of the Secretary

The Secretary will be in Washington this week.

The Secretary addressed the American Petroleum Institute's Board of Directors Meeting (DC)

### Media Announcements Today

No media expected today.

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### Executive Orders

EO on Energy is on Tuesday. (Of note, the Secretary is on travel Thursday and Friday next week.)

### Congressional Action Under the CRA

The BLM Planning 2.0 Rule CRA signing is Monday at the White House.

**CRA:** Passed the House and Senate.

- FWS H.J.Res.69 - "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska". Understand this is headed to the Senate floor perhaps as early as today.

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3/30-4/1: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate. The President is meeting

Waiting on Resolution of these items: (working with IGA)

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. Interior has provided a draft.

## **Speaking Invitations**

Accepted

3/28 Public Lands Council Legislative Conference Luncheon Keynote 12:00-1:00 Liaison Hotel in DC

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

4/3 North America's Building Trades Unions National Legislative Conference Remarks at the Washington Hilton & Towers Hotel, timing TBD.

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/27 NRA Leadership Forum, George World Congress Center in Atlanta, GA.

Regretted

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

4/3 Interstate Mining Compact Commission (Williamsburg, VA)

#### Outstanding Invitations in Process

4/4 The Memorial Foundation Martin Luther King Jr. Wreath Laying (DC, MLK Memorial)

4/5 National Alliance of Forest Owners Board of Directors (DC)

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)

4/5 National Parks Conservation Association Board of Trustees (DC)

4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

4/13-14 Arctic Encounter Symposium (Seattle, WA)

4/14 Montana State Meeting of the Society of American Foresters (Missoula, MT)

4/19 American Forest Resource Council 2017 Annual Meeting (Stevenson, WA)

4/24 National Mining Association Board of Directors Meeting (Naples, FL)

**Sportsmen's Event with VP/POTUS:** We are working on a possible announcement of \$1.1 billion in funding for hunting and fishing activities.

#### Emergency Management

In Florida, the Parliament Fire, which began March 18 on Big Cypress National Preserve in Florida (NPS), has burned 11,568 (+5,541) acres and is 20 (+20)-percent contained. The fire is managed by a Type-3 Incident Management Team (IMT) with 80 (+43) personnel assigned, including 5 (-2) DOI personnel. There are 10 (-4) residential structures threatened. In addition to residential structures, the fire continues to threaten endangered species habitat and other private holdings. The containment date for this fire remains March 26.

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In Oklahoma, the Chupco Fire (BIA) began on March 19 in Lamar, OK, has burned 2,405 acres, and is 40-percent contained. The fire is being managed by a Type-3 IMT with 26 personnel assigned, all of which are DOI personnel. There are 6 residential structures threatened. The fire is projected for containment on March 25.

Also, in Wetumka, Oklahoma, the Quassarte Fire (BIA), which began on March 16 and has burned 2,300 (no change) acres, is 90 (+15)-percent contained. The fire is being managed by a Type-3 IMT with 4 (-15) personnel assigned, all of which are DOI personnel. There are 22 residential structures threatened, and full containment is expected on March 25.

Extreme, critical, and elevated fire weather today, along with dry thunderstorms, could lead to increased fire behavior on the Chupco and Quassarte Fires, as conditions move east, while also lending to the onset of other fires along the Texas and Oklahoma panhandles, as well as in eastern New Mexico and western Texas.

## **Media of Interest**

### **Shell Places Highest Total Bid In Gulf Auction.**

Reuters (3/22, Munoz) reports Shell, Chevron and ExxonMobil signaled the oil industry's willingness to return to the deepwater Gulf of Mexico with high bids in the government's auction up 76 percent from a year ago. The auction of parcels received nearly \$275 million in high bids, up from \$156.4 million a year ago. Shell and Chevron each had 20 high bids, and Shell's \$55.8 million total was the largest among the 26 companies submitting bids. Shell also placed the highest bid on the single block at \$24 million. The company has cut its well costs by 50 percent and reduced logistics costs by three quarters, making deepwater projects affordable with crude prices below \$50 a barrel. Maritime Executive (3/22) reports Shell's bid for \$24 million was for a deepwater block in Atwater Valley.

### **Senate Democrats Slam White House Budget For Interior.**

Law360 (3/22, Sieniuc) reports that Senate Democrats on Tuesday "slammed" President Trump's "proposal to slash the Department of the Interior's budget by \$1.5 billion, saying planned cuts to programs that address climate change contradict the president's commitments to infrastructure spending made on the campaign trail." In a letter to the president led by ranking member of the Senate Energy and Natural Resources Committee Maria Cantwell. "the lawmakers called on Trump to work with Democrats on the DOI budget blueprint and reverse what they call indiscriminate cuts."

### **Battle Over National Monuments A Critical Issue Facing Secretary Zinke.**

The Washington Post (3/22, Fears) reports that Interior Secretary Ryan Zinke is facing pressure from both advocates and opponents of the new Bears Ears National Monument. According to the article, "management of Western land, with its teeming wildlife and vast mineral riches, will be Zinke's greatest challenge at Interior, and conflict over land is particularly acute in Utah." Zinke hasn't "commented publicly about Bears Ears, but a statement from Interior about his position on public lands echoed the concerns of Utah

Republican officials who complain that a massive amount of acreage was set aside for the monument without their consent.” Zinke supports “the creation of monuments when there is consent and input from local elected officials, the local community, and tribes prior to their designation,” Interior spokeswoman Heather Swift said in the statement. The secretary believes monuments are beneficial, but “careful consideration is required before designating significant acreage.” Meanwhile, “conservationists are worried not only about Bears Ears but also about the future of other monuments.”

### **Survey Finds More Minorities Going Outdoors To Camp.**

MarketWatch (3/22, Paul) reports, that camping is “increasingly becoming an attractive form of vacation” for minorities, “according to a new study from the large national private campground system Kampgrounds of America.” The survey “found nonwhite campers now comprise 26% of all campers more than double when it was first measured in 2012.” The article notes that “the forecast looks good for the next generation too: 99% of teenagers surveyed said they enjoy camping with family and friends and 90% say they plan to camp as an adult, the KOA survey found.”

### **Trump Administration Considering Changes To Five-Year Leasing Plan.**

E&E Daily (3/22) reports Richard Cardinale, acting assistant secretary for lands and minerals management in the Interior Department, told lawmakers yesterday that the Trump Administration is considering changes to the five year oil and gas leasing plan finalized under President Obama. Cardinale said, “At this point I don’t know the specifics, but I do know that the administration is in fact taking a look at the plan that was finalized at the end of the last administration.”

### **White House Communications Report** (sent to WH Comms yesterday, Tuesday.)

#### **Inquiries**

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- CNBC, Reuters – REQUEST – Comment on claims made by Senators Cardin and Luger that the U.S. is withdrawing from the international Extractive Industries Transparency Initiative (EITI). – RESPONSE - "The Department remains committed to the principles and goals of EITI including transparency and good governance of the extractive sectors and are institutionalizing and mainstreaming EITI goals into how the Department manages its revenues. No decision has been made on applying for validation under the EITI standard and the U.S. is not even scheduled to begin the validation process until April of 2018 (per the EITI International Board schedule published regularly). The United States has led the global initiative in providing revenue-related data and information from the extraction of oil, natural gas, coal and other minerals on federal land in an interactive, open-source data portal and regularly engaging with other implementing countries to share our best practices."

- EE News – REQUEST – Response to the letter Rep. Grijalva sent criticizing Zinke for not responding to his letters and demand that Zinke appear before the committee to testify on the budget. – RESPONSE – Didn't respond

### **Top Stories**

- **EE News:** [Interior Twitter shutdown after inaugural a mistake](#) [emails](#)

[EE News: Zinke should testify on Trump budget proposal soon](#) [Grijalva](#)

- [Washington Post: In a first for the government, dogs will be welcome at the Interior Department](#)

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### **Top Issues and Accomplishments**

- Tomorrow Zinke will deliver a speech to API
- Preparing to support Coal/Climate EOs
- FYIs – The Department will issue press releases this week on the following American Energy activity
  - March 20-23 - DOI will release a number of small coal lease sales in Utah, Ohio, ND.
  - Offshore oil/gas sale
  - Offshore wind energy
- Launching a “*Travels with Z*” blog on our website that is Secretary Zinke’s travel blog going to America’s public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)

### **Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Wednesday.

REG0006860 NPS National Register of Historic Places, February 25, 2017The National Park Service is soliciting comments on the significance of properties nominated before February 25, 2017 for listing or related actions in the National Register of Historic Places. Notice 03/22/2017

Doug Domenech  
Senior Advisor  
US Department of the Interior



## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/16/17**

Doug Domenech, Senior Advisor

### **Status of the Secretary**

The Secretary is on travel to Montana and Wyoming Thursday, Friday, and Saturday.

Thursday March 16: Travel to Bozeman, MT.

Friday March 17: Bozeman/Yellowstone. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area.

Sunday March 18: Fly to DC

**Of note:** Zinke and Perry had an informal meeting last night.

### **Media Announcements Today**

**President Trump Requests \$11.6 Billion for Interior Department's FY 2018 Budget:** Budget Blueprint Furthers the Administration's Strong Support for Responsible Energy Development on Federal Lands, Protects and Conserves America's Public Lands, and Fulfills DOI's Trust Responsibilities.

**(Later Today After we get the result) Interior Department Auctions Over 122,000 Acres Offshore Kitty Hawk, North Carolina for Wind Energy Development:** The Bureau of Ocean Energy Management (BOEM) Acting Director Walter Cruickshank today will announce the completion of the nation's seventh competitive lease sale for renewable wind energy in federal waters. A Wind Energy Area of 122,405 acres offshore Kitty Hawk, North Carolina received the high bid of \$9,066,650 from Avangrid Renewables, LLC.

### **Other Energy Actions**

The Bureau of Land Management held an Oil Lease Sale in Elko (NV). The sale generated \$131,245 during its quarterly oil and gas competitive online lease sale.

### **Executive Orders (No Change)**

The Department is awaiting EO on Energy (several) (understand looking like next week) and an EO on National Monuments.

### **Congressional Action Under the CRA (No change)**

**CRAs:** Pending WH Action.

- BLM Planning 2.0 Rule. When will the President sign?

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

### **Secretary Meetings and Schedule**

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

(No Change) ASSISTANCE NEEDED FROM CABINET AFFAIRS:

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. Interior has provided a draft.

### **Speaking Invitations**

Accepted

3/23 Address to the American Petroleum Institute's Board of Directors Meeting (DC, Trump Hotel)

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/27 NRA Leadership Forum, George World Congress Center in Atlanta, GA.

Regretted

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

Outstanding Invitations in Process

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

3/28 Address to the Public Lands Council Legislative Conference (DC)

4/3 North America's Building Trades Unions National Legislative Conference (DC, Washington Hilton)

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)

4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

### **Emergency Management**

Nothing significant to report.

### **Media of Interest**

#### **Interior's Budget Could Be Cut By 12 Percent.**

The Washington Post (3/16, Fears) reports that "the Interior Department's budget would be slashed by nearly \$2 billion compared with last year's budget, according to a proposed spending plan from the Trump White House." According to the article, "a proposed 12 percent decrease to \$11.6 billion would cause pain in the offices that purchase public lands." The article notes "that part of Interior would lose \$120 million in funding under the proposal."

#### **Signaling More Energy Deals, Secretary Zinke Approves Greens Hollow Coal Lease.**

The Deseret (UT) News (3/15, O'Donoghue) reports that Interior Secretary Ryan Zinke "approved a \$22 million coal lease for central Utah on Wednesday in his first official action impacting Utah's natural resources on federal lands and made it clear his agency is in the 'energy business.'" The Salt Lake (UT) Tribune (3/15, Maffly) reports that "the owner of the Sufco mine in Sanpete and Sevier counties delivered the winning bid of nearly \$23 million last January in a process billed as competitive even though no other bids were submitted on the 6,175-acre Greens Hollow tract under the Fishlake and Manti-La Sal national forests.

### **Secretary Zinke Rides Around DC With Park Police During Snowstorm.**

The Washington Times (3/15, Harper) reports that when a “freak snowstorm that descended on the nation’s capital in midweek,” Interior Secretary Ryan Zinke spent the day shoveling “snow off the steps of the Lincoln Memorial, attired in a forest-green U.S. Park Police flak jacket and sweater, utility pants and hiking shoes.” Zinke said, “I used to complain about the grass being too long when I pass by a park in D.C. Now that’s my park. If the trash can is full, it’s my fault. It changes your perspective.”

### **Secretary Zinke To Attend Centennial Ceremonies.**

The Virgin Islands Daily News (3/16, Austin) reports that the V.I. Transfer Centennial Commission announced Wednesday that Interior Secretary Ryan Zinke will “attend centennial commemorations along with senior staff from the department.” The committee also “decided that what was going to be a centennial gala ball at Marriott’s Frenchman’s Reef Beach Resort on April 1 will instead be a public reception featuring an appearance by Gov. Kenneth Mapp and Danish Prime Minister Lars Løkke Rasmussen.”

### **Republicans Blast Creation Of Marine Monument During Oversight Hearing.**

The AP (3/15) reports that members of subcommittee of the House Natural Resources Committee are “objecting to the way” the Obama Administration created “the Northeast Canyons and Seamounts Marine National Monument last year.” The subcommittee on water, power and oceans “held an oversight hearing on the creation and management of marine monuments on Wednesday.” Republican members say the creation of the Northeast Canyons and Seamounts Marine National Monument “lacked significant local input and scientific scrutiny.”

### **Republicans Must Disentangle Climate Funding To Cut It.**

Bloomberg Politics (3/15, Flavelle) reports that because former President Obama “sought to integrate climate programs into everything the federal government did,” climate programs will be difficult for the Trump administration to disentangle. The Congressional Research Service in 2013 estimated total federal spending on climate programs among 18 agencies cost \$77 billion from fiscal 2008 through 2013 alone. The Obama administration didn’t always include “climate” in program names and in some cases expanded existing programs to include climate change. Marc Morano, a former Republican staffer for the Senate Environment and Public Works Committee said, “In order to dismantle the climate establishment, agencies and programs throughout the federal government need to be targeted.”

### **Trump Administration Withdraws Defense Of Fracking Rule.**

The AP (3/15) reports the Trump Administration said in court papers on Wednesday that it is withdrawing from a lawsuit challenging an Obama-era rule requiring companies that drill for oil and natural gas on federal lands be forced to disclose chemicals used in hydraulic fracturing. The Administration will begin a new rule-making process later this year.

### **Inspector General Reports to be released tomorrow. (No press expected.)**

- Lack of adequate financial controls at NPS.
- Alleged Favoritism by an ONRR Supervisor.

### **White House Communications Report (sent to WH Comms yesterday, Wednesday)**

#### **Inquiries**

- Associated Press, Salt Lake Tribune, E&E News, Bloomberg REQUEST More details about the Greens Hollow coal sale

- The Hill (Tim Cama) REQUEST Asking for confirmation that DOI will rescind the Obama fracking rules on public and Tribal land. RESPONSE Confirmed, gave details of the order on background.

### **Top Stories**

- IJR: Yes, Secretary Ryan Zinke Actually Carries an 'ISIS Hunting License ...
- Salt Lake Tribune: Interior names energy and mineral chief new acting BLM director
- IJR: How Sec. Zinke Spent His Snow Day: Shoveling The Snow Off ...
- KPAX TV: Secretary Zinke marks 114 years of National Wildlife Refuge System

### **Top Issues and Accomplishments**

- Today Zinke announced a 55 million ton coal sale in Utah & named a new Acting Director of the BLM.
- Tomorrow, the Bureau of Ocean Energy Management will recommend approval of permits to conduct seismic studies on the potential of Atlantic Ocean energy resources.
- Launching a “Travels with Z” blog on our website that is Secretary Zinke’s travel blog going to America’s public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)
- On Friday, Zinke will meet with leadership and staff at Yellowstone National Park. No press planned.

### **Federal Register Notices Cleared for Publishing (None Significant)**

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**Label: "FOIA/OS-2017-00367"**

**Created by:douglas\_domenech@ios.doi.gov**

Total Messages in label:226 (113 conversations)

Created: 04-13-2017 at 08:30 AM

# Conversation Contents

Interior Report for 2/23/17

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

---

**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Thu Feb 23 2017 11:12:01 GMT-0700 (MST)  
"Mashburn, John K. EOP/WHO"  
**To:** <(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>, "Mashburn, Lori" <lori\_mashburn@ios.doi.gov>  
**Subject:** Interior Report for 2/23/17

Copied below and attached.

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Doug Domenech

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Area for leasing. The blocks stretch roughly from Kalgin Island in the north to Augustine Island in the south.

### **Upcoming Meeting**

NO CHANGE: On Friday, February 24, the annual meeting of the Intergovernmental Group on Insular Areas will occur at the Interior Department. The meeting is always scheduled to coincide with the NGA meeting. Three island Governor are scheduled to attend (USVI, Guam, and American Samoa).

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#### **Authorities Close Down Dakota Access Protest Camp.**

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#### **Lawsuit Pits Timber Companies Against Antiquities Act.**

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from timber production through the Antiquities Act.”

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**DC Park Police officer involved shooting early this morning.** Officer initiated a traffic stop, apparently approached vehicle at which time the driver rammed towards the officer striking him and the USPP

Cruiser. Officer fired into the vehicle which then departed the scene. Officer at the hospital, non life threatening injuries. Search is on for suspect.

### **White House Communications Report**

#### DAILY COMMUNICATIONS REPORT

#### **Inquiries**

POLITICO: Requested information from the Bureau of Indian Affairs, Bureau of Indian Education about how many teachers will be impacted by the hiring freeze Response the bureau public affairs officer gave them data about number of positions. DOI comms gave them a brief statement that the Department is in the process of securing authorizations for educators.

E&E (Brittany Patterson) Request - how it may approach the early closure of the Navajo Generating Station. On the one hand the Bureau of Reclamation has a 24.3 percent stake in NGS. On the other, the plant and mine that supplies the coal for the plant is on the Navajo reservation and the plant closure is expected to kill more than 800 Navajo jobs. Some experts I’ve spoken to have said Interior then has a federal Indian trust obligation to help the tribe, whether that be through creating a transition plan and/or with financial assistance. Response Collecting info, deadline Thursday by 4pm

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**"Uli, Gabriella M. EOP/WHO" <(b) (6) gov>**

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**From:** "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Sent:** Thu Feb 23 2017 15:01:12 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Subject:** RE: Interior Report for 2/23/17

Thanks-ive put into report!

**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Thursday, February 23, 2017 1:12 PM  
**To:** Mashburn, John K. EOP/WHO <(b) (6) gov>; Uli, Gabriella M. EOP/WHO <(b) (6) gov>; Mashburn, Lori <lori\_mashburn@ios.doi.gov>  
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Senior Advisor  
US Department of the Interior



# Conversation Contents

Interior Report 2/17/17

## "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Fri Feb 17 2017 11:49:54 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report 2/17/17

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US Department of the Interior

## "Mashburn, John K. EOP/WHO" <(b) (6) gov>

---

**From:** "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>  
**Sent:** Fri Feb 17 2017 12:59:35 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>, "Uli, Gabriella M. EOP/WHO"  
<(b) (6) gov>, "Flynn, Matthew" <(b) (6) gov>  
**Subject:** RE: Interior Report 2/17/17

Is there an attachment?

**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Friday, February 17, 2017 1:50 PM  
**To:** Mashburn, John K. EOP/WHO <(b) (6) gov>; Uli, Gabriella M. EOP/WHO <(b) (6) gov>  
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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Fri Feb 17 2017 13:25:34 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>  
**Subject:** Re: Interior Report 2/17/17

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Doug Domenech

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### **Zinke Schedule for first week.**

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- BLM Venting and Flaring Methane Rule (Passed the House)
- BLM Planning 2.0 Rule (Passed the House)
- House Republicans Move To Overturn Obama Limits on Alaska Hunting, Trapping. The Washington Post (2/16, Eilperin) reports that House Republicans on Thursday passed a bill that would nullify regulations affecting hunting activities on national wildlife refuges in Alaska. The AP (2/16) reports that the Fish and Wildlife Service "said last year the rule will help maintain sustainable populations of bears, wolves and coyotes on national wildlife refuges across Alaska." But Rep. Don Young "says the rule undermines Alaska's ability to manage fish and wildlife on refuge lands – one-fifth of its land mass." He says the rule "destroys a cooperative relationship between Alaska and the federal government."

### **Media**

#### **National Parks Offering Free Admission On Presidents' Day.**

The Washington Post (2/16, Taylor) reports that the National Park Service is offering Free Entrance Day to celebrate Presidents' Day.

#### **Dakota Access Stakeholders Debate At House Panel Hearing.**

E&E Daily (2/16, Bogardus) reports on "sharp exchanges" between Dakota Access pipeline developer Energy Transfer Partners and the Standing Rock Sioux Tribe during hearing of the House Energy and Commerce Subcommittee on Energy this week.

#### **Zinke Expected To Undertake "Major Reorganization" At Interior.**

Politico Morning Energy (2/16) reports that House Natural Resources Chairman Rob Bishop "told reporters Wednesday he won't roll out his legislative agenda until Trump's administration is in

place.” He said, “You need the entire cast in there. I’m not going to wait forever for the administration to get up and running before we start moving, but I want to give them a chance to be in place.” Bishop added that “he’d like to give Interior nominee Ryan Zinke time to complete some ‘major reorganization’ at the department that he said Zinke understands needs to happen.”

### **Zinke Not Participating In Recent House Votes.**

The Missoula (MT) Independent (2/16) reports that as Interior nominee Ryan Zinke awaits for his confirmation vote, “Montana’s sole voice in the House of Representatives appears to have gone AWOL.” The article notes that “according to congressional records, Zinke hasn’t cast a single vote since Jan. 5.” Moreover, “his private and official Twitter accounts have gone virtually dormant, though his Facebook page has been sporadically updated with links to news stories and a photo of his wife, Lola, at President Trump’s Jan. 20 inauguration.” The article also points out that the House has “been taking up issues of interest to Montanans.”

### **Heads Up in the News Upcoming**

- **Bureau of Ocean Energy Management Proposed Lease:** The Bureau of Ocean Energy Management (BOEM) today will announce it plans to offer approximately 1.09 million acres in Cook Inlet off Alaska’s southcentral coast in a proposed lease sale this year. Cook Inlet Oil & Gas Lease Sale 244, scheduled to take place in June 2017, would offer 224 blocks toward the northern part of the Cook Inlet Planning Area for leasing. The blocks stretch roughly from Kalgin Island in the north to Augustine Island in the south.

BOEM also sent the Proposed Notice of Sale to Alaska Governor Bill Walker for a 60-day review and comment period. This sale would be the final one in the Department of the Interior’s 2012-2017 OCS Oil & Gas Leasing Program, which proposes one lease sale (OCS Oil & Gas Lease Sale 244) in Cook Inlet in June 2017. Publication of this notice does not mean the final decision has been made to hold the lease sale.

- DOI has received multiple FOIAs (from media organizations) for all park service (and other Departmental) images taken on inauguration day (including crowd sizes). The law requires the FOIA office to post all inauguration photos publicly if multiple inquiries are received. The photos will be posted next week and DOI comms has alerted WH comms.
- DOI has received an inquiry from E+E News reporter Corbin Hiar for a copy of a Department of the Interior/Department of Homeland Security report (from March 2016) on border habitat and wildlife mitigation. It details conservation actions taken by DOI in the previous administration (costing nearly \$18 million) to buy habitat areas to move jaguars, antelope, sheep and other plant and animal species while construction and other work was done on the border.

### **White House Communications Report**

#### **DAILY COMMUNICATIONS REPORT**

#### **Inquiries**

VICE (Cheree Franco) sent questions to BIA regarding DOI law enforcement support at Standing Rock. Response - BIA shared the Standing Rock Sioux tribal resolution requesting BIA assistance on the reservation to clear the protest area to protect public health and safety.

WSJ (Amy Harder) is writing on the Navajo Generating Station. Response directed her to Bureau of Reclamation to highlight comments made at Monday’s meeting.



## Top Stories

- Infrastructure bill could tackle maintenance backlog
- Zinke confirmation moves to March, parties wait to pick replacement ...
- Did Ryan Zinke go AWOL?
- GAO finds rising risks for energy, environment programs

## Top Issues and Accomplishments

- DOI will post a blog tomorrow highlighting President Trump's signing of the House resolution on the Stream Buffer Rule.
- National Park Service bloggers and NPS former employee Facebook pages are denouncing NPS plans to provide law enforcement support to BIA and the Standing Rock Sioux Tribe in North Dakota.
- Working with our policy shop to establish secretary's early priorities and messaging
- Writing Day 1 content for various web platforms and finalizing Secretary's events
- Continuing to outline Days 1-100 and 1-year plan for Secretary

Doug Domenech  
Senior Advisor  
US Department of the Interior

On Fri, Feb 17, 2017 at 2:59 PM, Mashburn, John K. EOP/WHO

<(b) (6) gov> wrote:

Is there an attachment?

**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]

**Sent:** Friday, February 17, 2017 1:50 PM

**To:** Mashburn, John K. EOP/WHO <(b) (6) gov>; Uli, Gabriella M. EOP/WHO <(b) (6) gov>

**Subject:** Interior Report 2/17/17

Doug Domenech  
Senior Advisor  
US Department of the Interior

DOI UPDATE FOR CABINET AFFAIRS 2/28/17  
Doug Domenech

### **Status of the Nominee**

The Senate appears to be poised to vote to confirm Rep. Zinke today, late afternoon, or tomorrow. We are preparing Day One activities which could be Thursday or Friday.

### **Secretary's Schedule**

Wednesday 3/1 or Thursday 3/2.

As part of the Secretary's Day One activities he will:

- Greet employees.
- Attend an Ethics and Records Retention Briefings.
- Issue an email to all employees concerning high ethics.
- Meet with his Security Detail.
- Meeting with Sportsman/Hunting Groups, including the NRA.
- Sign Order overturning the prohibition on lead ammo on wildlife refuges.
- Sign Order on Conservation Stewardship (Hunting and Fishing).

Thursday 3/2: The Secretary has been asked to attend a meeting at the WH on Thursday on infrastructure. Scott Hommel DOI COS (Acting) will be the plus 1.

### **Energy/Interior Related Executive Orders**

White House Energy Executive Order We received the proposed EO and are suggesting a few tweaks.

CRA's NO CHANGE: Passed the House

- BLM Venting and Flaring Methane Rule
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- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

### **MEDIA**

#### **GAO: Repealing Interior Rules Would Leave Department Vulnerable.**

E&E Publishing (2/27) reports that if Congress successfully repeals a slate of energy-focused Department of Interior rules, the department could be at a high risk of fraud, waste and abuse, according to the GAO. At least four rules identified by the Congressional Western Caucus as priorities for repeal include provisions designed to address the Interior's performance on oil and gas oversight. Frank Rusco, director of natural resources and environment for the GAO, said that if there is no legislative intervention, getting rid of the BLM's methane and waste reduction rule and three onshore orders could leave the department vulnerable. He said, "If the rules are repealed, GAO's recommendations cannot be implemented, and the agency would not be able to implement similar rules under the Congressional Review Act. ... Most likely what will happen is Interior's high-risk status will stay the same."

#### **Interior Department IG Reports Law Enforcement Head's "Unprofessional Behavior."**

According to the AP (2/27, Daly), the Interior Department inspector general reported Monday that its director of law enforcement and security, Tim Lynn, "demonstrated a pattern of unprofessional

behavior” by touching and hugging at least six female employees and making flirtatious remarks. Lynn acknowledged the actions but insisted he had not intended to make the women uncomfortable, the IG report said. A spokesman said the department is evaluating the report and will take appropriate action, while the AP says it is “unclear whether any action has been taken.”

### **Study Says People Are The Leading Cause Of U.S. Wildfires.**

USA Today (2/27, Rice) reports that “a whopping 84% of all wildfires in the U.S. are started by people, says a new study.” According to the report, “the remaining 16% are started naturally, by lightning.” The study also found that “humans have added almost three months to the national fire season on average.” Study lead author Jennifer Balch of the University of Colorado said, “Thanks to people, the wildfire season is almost year-round.”

### **Infrastructure**

#### **BLM Approves Key Road To Spaceport America In New Mexico.**

The AP (2/27) reports that “federal authorities have given the green light on a key step to upgrade a southern New Mexico road to an aerospace economic hub.” The U.S. Bureau of Land Management “this month issued decisions on an environmental review of the proposed road improvements.” According to the article, “that would lead to a graveled or chip-sealed road being built from Interstate 25 to the remote spaceport in southeastern Sierra County.”

### **Upcoming Meetings**

Interior will be meeting with all the stakeholders involved in the Navajo Generating Station Wednesday.

### **Emergency Management**

The Department and the Interior Operations Center will achieve Continuity of Government Condition (COGCON) 3 and Operations Level III (Enhanced Operations), respectively, no later than 5:00 p.m. EST today in support of the President of the United States’ address to a Joint Session of Congress, designated a National Special Security Event. The President’s address is scheduled to begin at 9:00 p.m. EST. The COGCON condition and IOC Operations Level will return to Normal Operations when directed by the White House.

In North Dakota, trespass notices were provided to protesters of the Sacred Stone and Blackhoop camps associated with Dakota Access Pipeline protest activity. A majority of protesters are voluntarily dismantling and evacuating camp locations; however there is some evidence of new construction activity in the lower part of the Sacred Stone Camp. Cleanup activities continue on the former Rosebud Camp, and DOI/BIA law enforcement officers maintained security of the former Oceti Camp while clean-up activities continued in that location.

In California, Flood and Flash Flood Advisories have been issued for San Diego County, with a Winter Weather Advisory issued for high-elevation areas of Riverside County. Streamflow and river stages are high at numerous streamgages in San Diego County, including the San Diego River at Fashion Valley. Two USGS crews were deployed yesterday.

### **White House Communications Report**

#### **DAILY COMMUNICATIONS REPORT**

#### **Inquiries**

Budget (response off the record, nothing to add at this time)

Associated Press (Matt Daly)

1. Do you have any info on what DOI is recommending to cut or preserve in its budget proposal? Any specifics or details on where increases or decreases are likely is helpful for an overall story we are doing today.
2. Do you have comment on stay of coal royalty rule?
3. Timing of confirmation vote. We know cloture vote set tonight. Any update on final vote?

Politico (Esther Whieldon)

is the Interior releasing details about the noon WH briefing to the agency about the budget outline at noon or are you holding any press call on it? If so, please include me or send along the details.

Law360 (Adam Lidgett) Requesting comment on a story on Stand Up for California and three residents of Elk Grove, California asking a D.C. federal court on Friday to put a hold on its suit seeking to block the U.S. Department of the Interior from taking a parcel of land near Sacramento into trust for a tribal casino project while an administrative appeal with the Interior Board of Indian Appeals is being resolved.

Buzzfeed: Office of Inspector General report involving Tim Lynn that was published today. My questions are: What actions if any has the agency taken in response to the report? If no actions have been taken, are any actions planned? Does Tim Lynn currently still hold the position of OLES Director? Who is currently occupying the position of Acting Principal Deputy Assistant Secretary for Policy, Management and Budget? Response: "We are reviewing the matter outlined in the IG's report to determine appropriate further action. The Department takes allegations of inappropriate behavior and retaliation very seriously and is committed to fostering an inclusive workplace where every employee is treated with respect."

### **Top Stories**

Roll Call: Week Ahead Includes Trump Address, Cabinet Confirmations  
E&E: Can Trump keep this Ariz. coal plant open?

### **Top Issues and Accomplishments**

Drafting an op-ed for the Houston Chronicle (or Denver Post) to amplify POTUS speech  
Preparing for Zinke to arrive at DOI

The NY Times is in Whitefish, MT, (Zinke's hometown) interviewed a number of locals about Zinke. Profile about his conservation/public lands philosophy. Interviews were done with Zinke's best friend since kindergarten, his high school civics teacher, high school football coach, the ranger at Glacier National Park (who knows Zinke in a personal capacity for a number of years, their kids were on the wrestling team together) and a number of locals in town. Story preview expected online Monday or Tuesday with the full piece going live following his confirmation. Print version to follow digital. Expect a neutral to positive tone but it's the Times so....

Working with our policy shop to establish secretary's early priorities and messaging  
Writing Day 1 content for various web platforms and finalizing Secretary's events  
Continuing to outline Days 1-100 and 1-year plan for Secretary

### **Federal Register Notices Cleared for Publishing (None Significant)**

On Monday DOI cleared these items for publishing in the FR.

Date: 02/27/2017 Records: 10 DCN      Bureau Title      Synopsis      Type      Approved to go to FR

REG0006699 BLM Notice of Public Meeting, Twin Falls District Resource Advisory Council, Idaho. This Notice announces that the BLM Twin Falls District Resource Advisory Council (RAC) will meet on March 15, 2017, in Shoshone, Idaho. The meeting will be open to the public. Notice 02/27/2017

REG0006776 NPS Notice of Inventory Completion: Arkansas State Highway and Transportation Department, Little Rock, AR N2715 This notice is required by law to announce a decision made under the Native American Graves Protection and Repatriation Act (NAGPRA) for Native American human remains, funerary objects, and cultural objects.

Notice 02/27/2017 REG0006777 NPS Notice of Inventory Completion: St. Joseph Museums, Inc., St. Joseph, MO N2727 This notice is required by law to announce a decision made under the Native American Graves Protection and Repatriation Act (NAGPRA) for Native American human remains, funerary objects, and cultural objects. Notice 02/27/2017

REG0006779 NPS Notice of Intent to Repatriate Cultural Items - Denver Museum of Nature & Science, Denver, CO N2729 This notice is required by law to announce a decision made under the Native American Graves Protection and Repatriation Act (NAGPRA) for Native American human remains, funerary objects, and cultural objects. Notice 02/27/2017

REG0006780 NPS Notice of Intent to Repatriate Cultural Items: Denver Museum of Nature & Science, Denver, CO N2730 This notice is required by law to announce a decision made under the Native American Graves Protection and Repatriation Act (NAGPRA) for Native American human remains, funerary objects, and cultural objects. Notice 02/27/2017

REG0006781 NPS Notice of Intent to Repatriate Cultural Items- Denver Museum of Nature & Science, Denver, CO N2731 This notice is required by law to announce a decision made under the Native American Graves Protection and Repatriation Act (NAGPRA) for Native American human remains, funerary objects, and cultural objects. Notice 02/27/2017

REG0006782 NPS Notice of Inventory Completion: Murray State University Archaeology Laboratory, Murray, KY N2627 This notice is required by law to announce a decision made under the Native American Graves Protection and Repatriation Act (NAGPRA) for Native American human remains, funerary objects, and cultural objects. Notice 02/27/2017

REG0006783 NPS Notice of Inventory Completion: Fort Leonard Wood, Pulaski County, MO N2592 This notice is required by law to announce a decision made under the Native American Graves Protection and Repatriation Act (NAGPRA) for Native American human remains, funerary objects, and cultural objects. Notice 02/27/2017

REG0006784 NPS Notice of Inventory Completion: Fort Leonard Wood, Pulaski County, MO N2593 This notice is required by law to announce a decision made under the Native American Graves Protection and Repatriation Act (NAGPRA) for Native American human remains, funerary objects, and cultural objects. Notice 02/27/2017

REG0006785 NPS Notice of Inventory Completion: The Florida Department of State/Division of Historical Resources, Tallahassee, FL N2725 This notice is required by law to announce a decision made under the Native American Graves Protection and Repatriation Act (NAGPRA) for Native American human remains, funerary objects, and cultural objects. Notice 02/27/2017

# Conversation Contents

DOI Cabinet Affairs Report for 3/13/17

**Attachments:**

/28. DOI Cabinet Affairs Report for 3/13/17/1.1 DOI DAILY UPDATE FOR CABINET AFFAIRS 3-13-17.docx

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Mon Mar 13 2017 11:38:05 GMT-0600 (MDT)  
"Mashburn, John K. EOP/WHO"  
**To:** <(b) (6) gov>, "Flynn, Matthew"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** DOI Cabinet Affairs Report for 3/13/17  
**Attachments:** DOI DAILY UPDATE FOR CABINET AFFAIRS 3-13-17.docx

Attached and copied below.

## DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/13/17

Doug Domenech, Senior Advisor

### Status of the Nominee

The Secretary will be in the office Monday, Tuesday, and Wednesday of this week.

The Secretary will resume his travel in Montana and Wyoming Thursday, Friday, Saturday.

**HEADS UP: Major Sportsman Conservation Announcement POSSIBLE POTUS ANNOUCEMENT.** In mid-to-late March, the Department of the Interior will announce the distribution of \$1.1 billion in revenues generated by the Pittman-Robertson Wildlife Restoration and Dingell-Johnson Sport Fish Restoration acts to states, territories and District of Columbia. The funding, which supports critical state wildlife conservation and recreation projects throughout the nation, is generated by excise taxes on firearms, ammunition, fishing equipment and motorboat fuels paid by the hunting, shooting, boating and angling industries. The money goes to states. Interior is inquiring whether there is

interest in coordinating the announcement.

### **Executive Orders**

The Department is awaiting:

EO on Energy (several?)

EO on National Monuments

**Potential Announcement:** “Secretary Zinke Reverses Decision that Denied Atlantic Seismic G&G Permits -- New Directive Allows Consideration of Permit Applications to Continue.”

Will this conflict with any upcoming EO?

### **NO CHANGE: The Department is preparing plans to release these energy related Actions**

Secretarial Orders and Memoranda on:

- Secretarial Order: Revocation of the Federal Coal Moratorium
- Reopening National Petroleum Reserve – Alaska
- Reinitiating Quarterly Onshore Leasing Program
- Lifting Moratoriums on Offshore Energy
- Restarting a new Five Year OCS Plan
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- Well Control Rule Withdrawal
- Offshore Air Rule
- Atlantic Seismic Survey Activities
- Endangered Species Act Review and Reform
- Reverse Compensatory Mitigation
- National Monuments: Review

-

### **Congressional Action Under the CRA** (No change)

**CRAs:** Pending WH Action.

- BLM Planning 2.0 Rule. When will the President sign?

**CRAs:** Passed the House, Pending in the Senate.

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- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

## **Secretary Meetings and Schedule**

Monday March 13 to 15: The Secretary will be in DC.

Thursday March 16: Bozeman. Potential BUDGET media.

Friday: Bozeman/Yellowstone. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area.

Sunday: Fly to DC

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

### **ASSISTANCE NEEDED FROM CABINET AFFAIRS:**

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. The agency is drafting this.

## **Emergency Management**

In North Dakota, clean-up activity on the former Sacred Stone and Black Hoop campsites is nearing completion. All Non-BIA Federal law enforcement officers departed Standing Rock on March 10, while some BIA law enforcement officers will remain at Standing Rock through the end of the month or until the Office of Justice Services determines that there



is no longer need.

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## Media

**HEADS UP: Deepwater Horizon Oil Spill Settlement.** On April 4, 2017, per the terms of the 2016 Deepwater Horizon Consent Decree, BP is scheduled to make the first of 15 annual payments to the DOI Natural Resource Damage Assessment and Restoration (NRDAR) Fund. This \$489,655,172 payment will be allocated among seven sub-accounts - Open Ocean, Region-wide, and one for each affected State (AL, FL, LA, MS, and TX). These and all future settlement funds will be disbursed as directed by the co-trustees in accordance with publicly-reviewed restoration plans.

### **Visiting Glacier National Park, Secretary Zinke Vows To Reorganize Department For 21st Century.**

The Flathead (MT) Beacon (3/10, Franz) reports that Interior Secretary Ryan Zinke's first official trip from Washington D.C. was to Glacier National Park on March 10. Zinke met with National Park Service employees "to talk about his hopes and goals for the next four years." According to the article, "chief among those priorities is a '21st century reorganization' of the Department of Interior." He said, "We need to be bold and look at what the Department of Interior will be 100 years from now."

### **Bishop Concerned About Slow Pace Of Nomination Of Lower-Level Agency Officials.**

The "Morning Energy" blog of Politico (3/10, Adragna) reported House Natural Resources Chairman Rob Bishop is "among the lawmakers fed up with the Trump administration's failure to nominate more lower-level agency officials." Bishop told Politico, "I am frustrated at the pace of how this is moving. ... They need to get on with this so they can start dealing with policy issues." Sen. Lisa Murkowski "reiterated her own frustrations with the process at DOE and Interior one day after an Oval Office meeting with Trump." Of Interior Secretary Ryan Zinke, Murkowski said, "He's very anxious to get his folks up before the committee for confirmation. ... We've got a lot that we expect him to do, as we expect of [Energy] Secretary [Rick] Perry, but they need their people. It's slow. It's frustratingly slow."

**Federal Agencies Blasted For Twin Metals Decisions.** The Minneapolis Star Tribune (3/11, Loon, Melander), Doug Loon, president of the Minnesota Chamber of Commerce, Harry Melander, president of the Minnesota State Building and Construction Trades Council, write that the decisions by the U.S. Forest Service and Bureau of Land Management on a mine proposed by Twin Metals Minnesota "dealt two sharp blows to regional economic and job creation efforts supported by a broad coalition of labor, industry and community members." They call the moves an "arbitrary action" that "renders irrelevant the rigorous, longstanding public process in place to review environmental and

other effects of development proposals under the National Environmental Policy Act (NEPA) and equally tough state statutes.” They also note that “a new era of copper-nickel mining and other potential projects in the withdrawal area would bring thousands of high-paying, long-term mining jobs, as well as thousands of spinoff and construction jobs, according to estimates from the University of Minnesota-Duluth.”

### **Editorial: Secretary Zinke Deserves A Chance.**

The Seattle Times (3/12) editorializes that “unlike most” Trump Administration cabinet leaders, Interior Secretary Ryan Zinke “respects and appreciates the mission and values of the organization he now leads.” The paper expects that “there will be vehement disagreement with some of Zinke’s decisions, especially around resource extraction.” However, it asserts that Zinke “deserves a chance to prove that he’ll manage the agency fairly and follow through on his pledge to protect America’s priceless public assets now under his care.”

### **Four Convicted In Malheur Refuge Standoff Case.**

The Wall Street Journal (3/10, Randazzo) reports four men who participated in the armed takeover of an Oregon wildlife refuge were found guilty on Friday of some charges, but not all of them on the most serious charges of conspiracy to obstruct government workers. The Journal says that Jason Patrick and Darryl Thorn were found guilty of felony conspiracy and that Thorn was also found guilty of weapons possession in a federal facility. Jake Ryan and Duane Ehmer were found guilty of charge of depredation of government property.

## **White House Communications Report**

### **Inquiries**

- Local/regional coverage of Secretary Zinke’s trip to Montana. He got the following questions from local reporters in gaggle at Glacier National Park: (1) what do you see as future of federal law enforcement (standard answer plus DOI did a phenomenal job at SRST), (2) you’re open to climate change but greater admin is not. How do you reassure your employees? (I believe in sound science. we have best scientists in the world I look to them to create stronger models and make recommendations), and (3) explain reorganization (100 years out, creative use of technology, get young people in the parks).
- WSJ (Jim Carlton) – writing on efforts by Utah politicians to get President Trump to rescind or greatly reduce the new Bears Ears National Monument. I just spoke with Congressman Chaffetz and he said he has put that request in to the president personally, and has invited Secretary Zinke out to Utah to tour the land and meet. Can I get a comment on what Mr. Zinke thinks of this issue? Does he plan to visit Bears Ears and, if so, when? Response: will draft statement and circulate.
- Washington Times (Ben Wolfgang) - Are there any plans at Interior to revisit the

King Cove road issue? As far as I know, this whole thing has been dormant since former Secretary Jewell decided against the road in December 2013. Is the Secretary open to re-examining it? Why or why not?

## **Top Stories**

- Slate: Ryan Zinke is Having a Blast as Interior Secretary

## **Top Issues and Accomplishments**

- Updated Zinke travel advisory issued this afternoon. Secretary Zinke will no longer address the Montana legislature and travel to Denver, Colorado next week. He is returning to Washington due to schedule changes (for us only – for the Cabinet meeting, CRA signing and budget announcement).

- National Park Service will now next Friday release more than 300 pages of correspondence/emails regarding tweets/social media on Inauguration Day. Final remaining images under FOIA of inauguration photos (that were mistakenly not posted earlier this week) will also be posted.

- Two members of the Bundy family were convicted today of conspiracy regarding the occupation and standoff at the Department of the Interior Fish & Wildlife managed Malheur National Wildlife Refuge in Oregon in 2016.

- Next week, the Bureau of Ocean Energy Management will recommend approval of permits to conduct seismic studies on the potential of Atlantic Ocean energy resources.

-

## **Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Thursday.

REG0006836      FWS      Receipt of Application for Incidental Take Permit; Low Effect Habitat Conservation Plan for California Flats Solar Project Operations and Maintenance Activities, Monterey San Luis Obispo Counties, CA This notice is necessary to make our receipt of an application and Habitat Conservation Plan (HCP) available for public comment on the Service's proposed issuance of an Incidental Take Permit under the ESA for the 30-year operation and maintenance of the California Flats Solar Project. Notice

03/10/2017

REG0006826 NPS Notice of Open Meetings for the National Park Service Alaska Region Subsistence Resource Commission program NPS is giving notice that the Cape Krusenstern National Monument subsistence resource commission (SRC), Kobuk Valley National Park SRC, and Gates of the Arctic National Park SRC will hold public meetings to develop and continue work on NPS subsistence program recommendations, and other related regulatory proposals and resource management issues. Notice 03/10/2017

Doug Domenech  
Senior Advisor  
US Department of the Interior

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The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. The agency is drafting this.

### **Emergency Management**

In North Dakota, clean-up activity on the former Sacred Stone and Black Hoop campsites is nearing completion. All Non-BIA Federal law enforcement officers departed Standing Rock on March 10, while some BIA law enforcement officers will remain at Standing Rock through the end of the month or until the Office of Justice Services determines that there is no longer need.

### **Media**

**HEADS UP: Deepwater Horizon Oil Spill Settlement.** On April 4, 2017, per the terms of the 2016 Deepwater Horizon Consent Decree, BP is scheduled to make the first of 15 annual payments to the DOI Natural Resource Damage Assessment and Restoration (NRDAR) Fund. This \$489,655,172 payment will be allocated among seven sub-accounts - Open Ocean, Region-wide, and one for each affected State (AL, FL, LA, MS, and TX). These and all future settlement funds will be disbursed as directed by the co-trustees in accordance with publicly-reviewed restoration plans.

### **Visiting Glacier National Park, Secretary Zinke Vows To Reorganize Department For 21st Century.**

The Flathead (MT) Beacon (3/10, Franz) reports that Interior Secretary Ryan Zinke's first official trip from Washington D.C. was to Glacier National Park on March 10. Zinke met with National Park Service employees "to talk about his hopes and goals for the next four years." According to the article, "chief

among those priorities is a '21st century reorganization' of the Department of Interior." He said, "We need to be bold and look at what the Department of Interior will be 100 years from now."

#### **Bishop Concerned About Slow Pace Of Nomination Of Lower-Level Agency Officials.**

The "Morning Energy" blog of Politico (3/10, Adragna) reported House Natural Resources Chairman Rob Bishop is "among the lawmakers fed up with the Trump administration's failure to nominate more lower-level agency officials." Bishop told Politico, "I am frustrated at the pace of how this is moving. ... They need to get on with this so they can start dealing with policy issues." Sen. Lisa Murkowski "reiterated her own frustrations with the process at DOE and Interior one day after an Oval Office meeting with Trump." Of Interior Secretary Ryan Zinke, Murkowski said, "He's very anxious to get his folks up before the committee for confirmation. ... We've got a lot that we expect him to do, as we expect of [Energy] Secretary [Rick] Perry, but they need their people. It's slow. It's frustratingly slow."

**Federal Agencies Blasted For Twin Metals Decisions.** The Minneapolis Star Tribune (3/11, Loon, Melander), Doug Loon, president of the Minnesota Chamber of Commerce, Harry Melander, president of the Minnesota State Building and Construction Trades Council, write that the decisions by the U.S. Forest Service and Bureau of Land Management on a mine proposed by Twin Metals Minnesota "dealt two sharp blows to regional economic and job creation efforts supported by a broad coalition of labor, industry and community members." They call the moves an "arbitrary action" that "renders irrelevant the rigorous, longstanding public process in place to review environmental and other effects of development proposals under the National Environmental Policy Act (NEPA) and equally tough state statutes." They also note that "a new era of copper-nickel mining and other potential projects in the withdrawal area would bring thousands of high-paying, long-term mining jobs, as well as thousands of spinoff and construction jobs, according to estimates from the University of Minnesota-Duluth."

#### **Editorial: Secretary Zinke Deserves A Chance.**

The Seattle Times (3/12) editorializes that "unlike most" Trump Administration cabinet leaders, Interior Secretary Ryan Zinke "respects and appreciates the mission and values of the organization he now leads." The paper expects that "there will be vehement disagreement with some of Zinke's decisions, especially around resource extraction." However, it asserts that Zinke "deserves a chance to prove that he'll manage the agency fairly and follow through on his pledge to protect America's priceless public assets now under his care."

#### **Four Convicted In Malheur Refuge Standoff Case.**

The Wall Street Journal (3/10, Randazzo) reports four men who participated in the armed takeover of an Oregon wildlife refuge were found guilty on Friday of some charges, but not all of them on the most serious charges of conspiracy to obstruct government workers. The Journal says that Jason Patrick and Darryl Thorn were found guilty of felony conspiracy and that Thorn was also found guilty of weapons possession in a federal facility. Jake Ryan and Duane Ehmer were found guilty of charge of depredation of government property.

#### **White House Communications Report Inquiries**

- Local/regional coverage of Secretary Zinke's trip to Montana. He got the following questions from local reporters in gaggle at Glacier National Park: (1) what do you see as future of federal law enforcement (standard answer plus DOI did a phenomenal job at SRST), (2) you're open to climate change but greater admin is not. How do you reassure your employees? (I believe in sound science. we have best scientists in the world I look to them to create stronger models and make

recommendations), and (3) explain reorganization (100 years out, creative use of technology, get young people in the parks).

- WSJ (Jim Carlton) writing on efforts by Utah politicians to get President Trump to rescind or greatly reduce the new Bears Ears National Monument. I just spoke with Congressman Chaffetz and he said he has put that request in to the president personally, and has invited Secretary Zinke out to Utah to tour the land and meet. Can I get a comment on what Mr. Zinke thinks of this issue? Does he plan to visit Bears Ears and, if so, when? Response: will draft statement and circulate.
- Washington Times (Ben Wolfgang) - Are there any plans at Interior to revisit the King Cove road issue? As far as I know, this whole thing has been dormant since former Secretary Jewell decided against the road in December 2013. Is the Secretary open to re-examining it? Why or why not?

### **Top Stories**

- Slate: Ryan Zinke is Having a Blast as Interior Secretary

### **Top Issues and Accomplishments**

- Updated Zinke travel advisory issued this afternoon. Secretary Zinke will no longer address the Montana legislature and travel to Denver, Colorado next week. He is returning to Washington due to schedule changes (for us only for the Cabinet meeting, CRA signing and budget announcement).
- National Park Service will now next Friday release more than 300 pages of correspondence/emails regarding tweets/social media on Inauguration Day. Final remaining images under FOIA of inauguration photos (that were mistakenly not posted earlier this week) will also be posted.
- Two members of the Bundy family were convicted today of conspiracy regarding the occupation and standoff at the Department of the Interior Fish & Wildlife managed Malheur National Wildlife Refuge in Oregon in 2016.
- Next week, the Bureau of Ocean Energy Management will recommend approval of permits to conduct seismic studies on the potential of Atlantic Ocean energy resources.

### **Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Thursday.

REG0006836 FWS Receipt of Application for Incidental Take Permit; Low Effect Habitat Conservation Plan for California Flats Solar Project Operations and Maintenance Activities, Monterey San Luis Obispo Counties, CA This notice is necessary to make our receipt of an application and Habitat Conservation Plan (HCP) available for public comment on the Service's proposed issuance of an Incidental Take Permit under the ESA for the 30-year operation and maintenance of the California Flats Solar Project. Notice 03/10/2017

REG0006826 NPS Notice of Open Meetings for the National Park Service Alaska Region Subsistence Resource Commission program NPS is giving notice that the Cape Krusenstern National Monument subsistence resource commission (SRC), Kobuk Valley National Park SRC, and Gates of the Arctic National Park SRC will hold public meetings to develop and continue work on NPS subsistence



program recommendations, and other related regulatory proposals and resource management issues.  
Notice 03/10/2017

# Conversation Contents

Interior Report for 2/21/17

**Attachments:**

/65. Interior Report for 2/21/17/1.1 DOI UPDATE FOR CABINET AFFAIRS.docx

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Tue Feb 21 2017 11:24:31 GMT-0700 (MST)  
"Uli, Gabriella M. EOP/WHO"  
**To:** <(b) (6) gov>, "Mashburn, John K. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report for 2/21/17  
**Attachments:** DOI UPDATE FOR CABINET AFFAIRS.docx

Doug Domenech  
Senior Advisor  
US Department of the Interior

## DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/2/17

Doug Domenech

### Status of the Nominee

Secretary Ryan Zinke arrived at the Interior Department for the first time today. He addressed employees and arrived like any Montanan would, on horseback.



The National Park Service released this video welcoming the Secretary:

<https://youtu.be/KwRhuW3nmbM>

### Secretary's Schedule

Today the Secretary will:

- Greet employees.
- Issue an all employees greeting email.
- Issue an email to all employees concerning high ethics.
- Meet with his Security Detail.
- Meeting with Sportsman/Hunting Groups, including the NRA.
- Sign Order overturning the prohibition on lead ammo on wildlife refuges.
- Sign Order on Conservation Stewardship (Hunting and Fishing).

### Meeting with Sportsmens Groups

Participants: Jeff Crane (Congressional Sportsmen Foundation)

Chris Cox (National Rifle Association)

Larry Keane (National Sports Shooting Foundation)

Margaret Everson (Ducks Unlimited)

David Anderson (Boone & Crockett Club)

Mitch Butler (Mule Deer Foundation)

Greg Schildwachter (Wild Sheep Foundation)

Whit Fosberg (Theodore Roosevelt Conservation Partnership)

Mike Nussman (American Sportfishing Association)

Glenn Le Munyon (Dallas Safari Club)

Gary Taylor (National Wild Turkey Foundation)

Jay Mac Aninch (Archery Trade Association)

Ron Reagan (Association of Fish and Wildlife Agencies)

Collin O'Mara (National Wildlife Foundation)

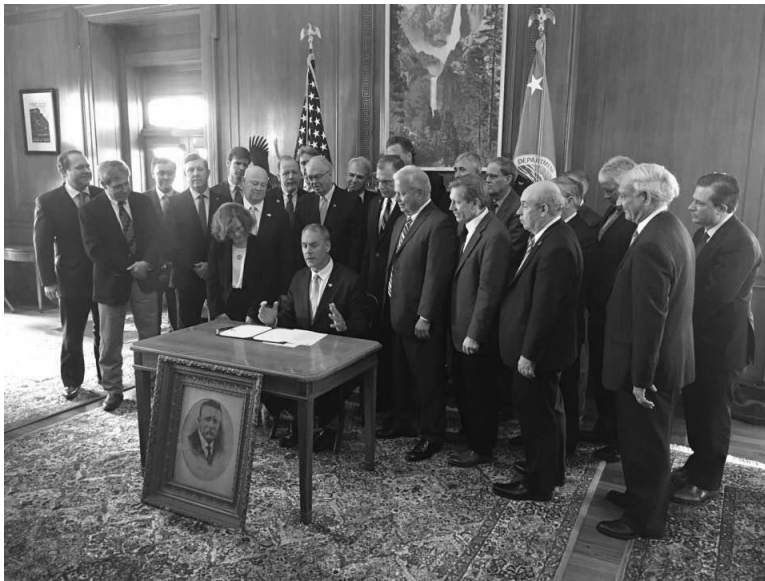
Anna Seidman (Safari Club International)

Steve Williams (Wildlife Management Institute)

Derrick Crandall (American Recreation Council)  
Miles Moretti (Mule Deer Foundation)  
Dave Nomsen (Pheasants Forever)  
Donald Peay (Sportsmen for Fish and Wildlife)  
Gentry Beach  
Jeff Trandahl (National Fish and Wildlife Foundation)

Thursday 3/2: The Secretary has been asked to attend a meeting at the WH on Thursday on infrastructure. Scott Hommel DOI COS (Acting) will be the plus 1. A number of other briefings are scheduled.

**Day One: Secretary Zinke Signs Orders to Expand Access to Public Lands and Revoke the Lead Ammo Ban on Refuges.**



Orders Strengthen America's Outdoor Heritage & Restore Opportunities for Sportsmen and Anglers Today, on his first day on duty, Department of the Interior Secretary Ryan Zinke (pronounced ZINK-ee) issued two secretarial orders which expand access to public lands and increase hunting, fishing, and recreation opportunities nationwide. These orders deliver on promises made by both President Donald J. Trump and Secretary Zinke to expand access to America's public lands. The action was hailed by representatives from sportsmen, conservation, and recreation organizations.

Outdoor recreation is about both our heritage and our economy. Between hunting, fishing, motorized recreation, camping and more, the industry generates thousands of jobs and billions of dollars in economic activity," said Zinke. "Over the past eight years however, hunting, and recreation enthusiasts have seen trails closed and dramatic decreases in access to public lands across the board. It worries me to think about hunting and fishing becoming activities for the land-owning elite. This package of secretarial orders will expand access for outdoor enthusiasts and also make sure the community's voice is heard."

The two secretarial orders include:

Secretarial Order 3346 advances conservation stewardship, improves game and habitat management, and increases outdoor recreation opportunities by directing bureaus and agencies to immediately identify areas where recreation and fishing can be expanded. The order also requests input from the Wildlife and Hunting Heritage Conservation Council and Sport Fishing and Boating Partnership Council to provide recommendations on enhancing and expanding access on public lands and improving habitat for fish and wildlife.

Secretarial Order 3347 overturns the recent ban lead ammunition and fish tackle used on Fish and Wildlife Service lands, waters, and facilities. The order highlights the need for additional review and consultation with local stakeholders.-

### **Energy/Interior Related Executive Orders**

White House Energy Executive Order We received the proposed EO and are suggesting a few tweaks.

CRA's NO CHANGE: Passed the House

- BLM Venting and Flaring Methane Rule  
OPED API: Senate Must Move To Repeal BLM Methane Rule.  
Erik Milito at the American Petroleum Institute writes for The Hill (2/28) in its "Congress Blog" that methane emissions associated with natural gas development have declined 18.6 percent since 1990 while natural gas production increased by over 45 percent. Industry and "effective state and federal regulations" make BLM's new Methane and Waste Prevention rule "redundant" and "counterproductive." BLM "lacks the statutory authority and expertise to regulate air quality," and the rule's compliance costs "could make as many as 40 percent of federal wells that flare uneconomical to produce." Milito urges the Senate to follow the House and repeal the rule under the Congressional Review Act.
- BLM Planning 2.0 Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

### **MEDIA**

#### **NYT: For Interior, Montanan With Deep Roots and Inconsistent Record**

[https://www.nytimes.com/2017/03/01/us/for-interior-montanan-with-deep-roots-and-inconsistent-record.html?\\_r=0](https://www.nytimes.com/2017/03/01/us/for-interior-montanan-with-deep-roots-and-inconsistent-record.html?_r=0)

#### **Coal Mining Begins Seeing Revival As Trump Gives Industry Hope.**

On its website, Fox News (3/1, Giles) highlighted recent production increases at a coal mining operation in Wise County, suggesting that a "long-awaited revival is under way" as President Trump works to fulfill his pledge to roll back energy industry regulations. A site supervisor who declined to provide his name said the facility is shipping one load per day for a power.

#### **National Parks Saw Record-Breaking 330 Million Visitors Last Year.**

The Los Angeles Times (3/1, Reynolds) reports that national parks broke visitation records in 2016, and the system as a whole recorded "more than 330 million visits during its centennial year." According to Jeffrey Olson, a National Park Service spokesman, "the Find Your Park marketing campaign, designed around the 100th anniversary of the NPS' creation, built on a five-year upswing in visitation nationwide." Also contributing to the visitation surge was the Every Kid in a Park campaign, "led by the White House,

which set a goal of getting every fourth-grader in the U.S. to visit at least one park between Sept. 1, 2016, and Aug. 31, 2017.” However, in many parks, “crowded trails, jammed parking lots and backed-up up traffic have been reported, especially in summer months.”

### **DC’s Cherry Blossoms Will Hit Peak Bloom March 14-17.**

The AP (3/1) reports that “officials say the peak bloom for Washington’s cherry blossoms could be just two weeks away.” National Mall and Memorial Parks Superintendent Gay Vietzke on Wednesday announced “that the peak bloom is expected between March 14 and March 17.”

### **Infrastructure**

#### **Meetings**

3/8 The Secretary will testify before the Senate Indian Affairs Committee.

#### **Emergency Management**

In North Dakota, the BIA reports that the Sacred Stone Camp has been cleared of protesters as of yesterday afternoon. Three arrests were made while clearing the camp. As protestors leave camp areas, they are not being allowed to re-enter.

In Ohio, USGS deployed 2 crews yesterday in response to a short duration heavy rainfall situation, where the Little Miami River Basin and Paint Creek River Basin were subject to substantial flooding.

In Hawaii, heavy rainfall over much of Kauai and Oahu has led to localized flash flooding and some prolonged flooding. Two USGS crews conducted discharge measurements and collected water quality samples on Tuesday. A gage on the Kamananui Stream, in northern Oahu, was damaged on Tuesday night when the stream rose more than 10 feet in 2 hours. This gage is currently offline, and crews will inspect the gage when it is safe to do so.

#### **Legal**

##### **Decision issued February 27, 2017 (cattle trespass in question occurred 2004-2011)**

Background: In 1978, E. Wayne Hage purchased the Pine Creek Ranch in Nye County and associated grazing permits with the BLM and US Forest Service. Following a series of disputes with BLM and USFS over his permits, Hage filed a takings claim before the U.S. Court of Federal Claims. His BLM grazing permit was revoked in 1997, but he continued grazing on public land. Hage established himself as a spokesman for private property rights among a small group of followers across the West. Hage and his wife, Helen Chenoweth-Hage, each died in 2006. Hage’s son, Wayne N. Hage, continued trespass grazing from 2004 to 2011.

In her decision issued Monday, February 27, 2017, U.S. District Judge Gloria M. Navarro ruled in the government’s favor in its case against both Wayne N. Hage individually and the estate of E. Wayne Hage to recover fees for willful and unauthorized grazing. She also vacated a previous judgment from 2013 that had found in favor of the Hages. In addition to requiring the Hages to pay over \$555,000 to the BLM and \$11,000 to the USFS, Navarro’s February 27 decision also required the removal within 30 days of all Hage livestock from federal land and “forever enjoined and restrained” the Hages from grazing livestock on federal land in the future.

Judge Navarro is also the judge for the ongoing trial in Las Vegas over the 2014 cattle gather incident in Southern Nevada. Due to the timing this trial and the 2016 occupation of the Malheur Wildlife Refuge in Oregon, the decision has the potential to inflame anti-government and anti-BLM activists.

### **White House Communications Report**

#### **DAILY COMMUNICATIONS REPORT**

There was no White House Communications Report yesterday.

### **Federal Register Notices Cleared for Publishing (None Significant)**

On Wednesday DOI cleared these items for publishing in the FR.

REG0006706 FWS Hoopeston Wind Farm Draft Habitat Conservation Plan; Draft Environmental Assessment Pursuant to the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA), the U.S. Fish and Wildlife Service is announcing the availability of an application from Hoopeston Wind Farm LLC (Applicant) for a permit to incidentally take federally endangered Indiana bats and federally threatened northern long-eared bats. The take could result from operation and decommissioning activities at the Applicant's facility in Vermilion County, Illinois. Included with the application is a draft habitat conservation plan (HCP). Also available for review is our draft environmental assessment (EA) that was prepared in response to the application. We are seeking public comments on the permit application, draft HCP, and draft EA. Notice 03/01/2017

REG0006787 BOEM Proposed Notice of Sale for Gulf of Mexico Lease Sale 249 Pursuant to the Outer Continental Shelf Lands Act, BOEM announces the availability of the Proposed Notice of Sale (PNOS) for the proposed Gulf of Mexico Outer Continental Shelf (OCS) Oil and Gas Lease Sale 249. Bid opening for the sale is currently scheduled for Aug. 16, 2017. Notice 03/01/2017

REG0006790 OSM Notice of Proposed Information Collection; Request for Comments for 1029-0114 To comply with the Paperwork Reduction Act of 1995, OSMRE announces its intent to request that the Office of Management and Budget (OMB) renew OSMRE's authority to collect information for customer surveys to evaluate its performance in meeting the performance goals outlined in annual plans developed under the Government Performance and Results Act (GPRA). OMB previously approved this collection under OMB Control Number 1029-0114. OSMRE is requesting public comments on the renewal for 60 days. Notice 03/01/2017

REG0006791 OSM Notice of Proposed Information Collection; Request for Comments for 1029-0055 To comply with the Paperwork Reduction Act of 1995, OSMRE announces its intent to request that the Office of Management and Budget (OMB) renew an existing approval for the collection of information under OSMRE's Rights of Entry rules. OMB previously approved the collection under OMB Control Number 1029-0055. OSMRE is requesting public comments on the renewal for 60 days. Notice 03/01/2017

REG0006792 OSM Notice of Proposed Information Collection; Request for Comments for 1029-0067 To comply with the Paperwork Reduction Act of 1995, OSMRE announces its intent to request that the Office of Management and Budget (OMB) renew OSMRE's authority to collect information under its rules regarding restrictions on financial interests of State employees and Form OSMRE-23. OMB previously approved this collection under OMB Control Number 1029-0067. OSMRE is requesting public comments on the renewal for 60 days. Notice 03/01/2017

**Label: "FOIA/OS-2017-00367"**

**Created by:douglas\_domenech@ios.doi.gov**

Total Messages in label:226 (113 conversations)

Created: 04-13-2017 at 08:41 AM



# Conversation Contents

Interior Report for 2/16/17

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Thu Feb 16 2017 11:44:17 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report for 2/16/17

DOI UPDATE FOR CABINET AFFAIRS 2/16/17  
Doug Domenech

## **Status of the Nominee**

Rep. Zinke waiting Senate floor vote. It is increasingly likely that his confirmation will not occur until after the recess.

## **Zinke Schedule for first week.**

The travel plans submitted yesterday are being paused unless a miracle happens and he is confirmed.

## **Energy/Interior Related Executive Orders**

- Stream Protection Rule (At the White House)
- BLM Venting and Flaring Methane Rule (Passed the House)
- BLM Planning 2.0 Rule (Passed the House)

## **Heads Up in the News**

- **Utah Gov. Herbert Looking To Discuss Bears Ears National Monument During DC Trip.**

The AP (2/15, Price) reports that Utah Gov. Gary Herbert "hopes to use his trip to Washington next week to discuss states' authority and the new Bears Ears National Monument with President Donald Trump's administration." Herbert said Wednesday "that he doesn't know what kind of opportunity he will have to speak with U.S. officials about the Bears Ears National Monument, but it may come up while he's in Washington for National Governors Association meetings." He is also "set to discuss the issue Thursday with outdoor recreation officials upset about Utah's stance, but the governor said he's unsure to what extent he will raise it in the nation's capital next week."

- **Environmental Group Sues Over Delay Of Bumblebee's Endangered Listing.**

Additional coverage that an environmental group has sued the Trump Administration “for delaying the listing of the rusty patched bumblebee as an endangered species”. The Rule was paused for review under the White House COS’s memo.

## **Dakota Access Pipeline**

- Yesterday, the *Governor of North Dakota signed an emergency evacuation* order out of concern for the safety of the people who are residing on U.S. Army Corps of Engineers (USACE) lands in southern Morton County and to avoid an ecological disaster to the Missouri River. Warm temperatures have accelerated snowmelt in the area of the Oceti Sakowin protest camp, and the National Weather Service reports that the Cannonball River could experience rising water levels and an increased risk of ice jams later this week. Due to these conditions, the Governor’s emergency order addresses safety concerns to human life, as anyone in the floodplain is at risk for possible injury or death. According to the Governor’s press release, the Oceti Sakowin camp needs to be evacuated no later than February 22.

- **Federal Judge Rejects Landowner Challenge To Dakota Access Pipeline.**

The AP (2/15) reports from Des Moines, IA that US District Judge Jeffrey Farrell “has ruled against 14 Iowa landowners who sued to block the Dakota Access pipeline from crossing their property, concluding that the Iowa Utilities Board properly approved a permit for its construction.”

## **White House Communications Report**

### DAILY COMMUNICATIONS REPORT

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- AP Boston (Philip Marcelo) Requesting statement about POTUS position on Tribal relations and priorities and statement responding to a letter send by a Massachusetts tribe. Response: Coordinating with WH. Deadline Thursday at noon.

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- Washington Post: Congress’s latest target for reversal: An Obama attempt to modernize how we manage public lands

- E&E News: GAO finds rising risks for energy, environment programs

- Washington Post: The Endangered Species Act may be heading for the threatened list. This hearing confirmed it.

- The Intercept: Text Describing Federal Fracking Rule Disappears From Interior ...

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BIA is unable to fulfill the full request for support so NPS and the BLM are detailing officers.

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Doug Domenech  
Senior Advisor  
US Department of the Interior

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**"Uli, Gabriella M. EOP/WHO" <(b) (6) gov>**

**From:** "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Sent:** Thu Feb 16 2017 12:35:32 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Subject:** RE: Interior Report for 2/16/17

Received, thanks!

**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Thursday, February 16, 2017 1:44 PM  
**To:** Mashburn, John K. EOP/WHO <(b) (6) gov>; Uli, Gabriella M. EOP/WHO <(b) (6) gov>  
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Doug Domenech  
 Senior Advisor  
 US Department of the Interior

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VERSION 2 of the Interior Report adding info requested

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**Subject:** VERSION 2 of the Interior Report adding info requested

DOI UPDATE FOR CABINET AFFAIRS 2/14/17  
Doug Domenech

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Key Announcements/Secretarial Orders:

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- Renew charter for Wildlife Hunting Heritage Conservation Council
- Expand opportunities for outdoor recreation on public lands
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Agree to Work with Navajo Nation to Keep Plant Running through 2019 Rather than close the plant later this year, the utility owners of Navajo Generating Station (NGS) voted today to extend operations of the facility near Page, Ariz., to the December 2019 end of its lease if an agreement can be reached with the Navajo Nation.

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## **White House Communications Report**

### Inquiries

-  
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-  
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Doug Domenech

Senior Advisor

US Department of the Interior

**"Uli, Gabriella M. EOP/WHO" <(b) (6) gov>**

---

**From:** "Uli, Gabriella M. EOP/WHO"  
<(b) (6) gov>  
**Sent:** Tue Feb 14 2017 12:18:32 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Subject:** RE: VERSION 2 of the Interior Report adding info requested

Received. Thanks!

**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Tuesday, February 14, 2017 1:56 PM  
**To:** Mashburn, John K. EOP/WHO <(b) (6) gov>; Uli, Gabriella M. EOP/WHO <(b) (6) gov>  
**Subject:** VERSION 2 of the Interior Report adding info requested

DOI UPDATE FOR CABINET AFFAIRS 2/14/17  
Doug Domenech

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# Conversation Contents

CRA passed the Senate. It is in your lap now.

**Douglas Domenech <douglas\_domenech@ios.doi.gov>**

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**From:** Douglas Domenech <douglas\_domenech@ios.doi.gov>  
**Sent:** Thu Feb 02 2017 14:59:39 GMT-0700 (MST)  
**To:** "Mashburn John K. EOP/WHO"  
<(b) (6) gov>  
**Subject:** CRA passed the Senate. It is in your lap now.

Sent from my iPhone

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## Interior Cabinet Affairs Report for 3/16/17

### Attachments:

/20. Interior Cabinet Affairs Report for 3/16/17/1.1 DOI DAILY UPDATE FOR CABINET AFFAIRS 3-16-17.docx

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Thu Mar 16 2017 15:28:38 GMT-0600 (MDT)  
"Mashburn, John K. EOP/WHO"  
**To:** <(b) (6) gov>, "Flynn, Matthew"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Cabinet Affairs Report for 3/16/17  
**Attachments:** DOI DAILY UPDATE FOR CABINET AFFAIRS 3-16-17.docx

## DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/16/17

Doug Domenech, Senior Advisor

### Status of the Secretary

The Secretary is on travel to Montana and Wyoming Thursday, Friday, and Saturday.

Thursday March 16: Travel to Bozeman, MT.

Friday March 17: Bozeman/Yellowstone. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area.

Sunday March 18: Fly to DC

**Of note:** Zinke and Perry had an informal meeting last night.

### Media Announcements Today

**President Trump Requests \$11.6 Billion for Interior Department's FY 2018 Budget: Budget Blueprint Furthers the Administration's Strong Support for Responsible Energy Development on Federal Lands, Protects and Conserves America's Public Lands, and**



Fulfills DOI's Trust Responsibilities.

**(Later Today After we get the result) Interior Department Auctions Over 122,000 Acres Offshore Kitty Hawk, North Carolina for Wind Energy Development:**

The Bureau of Ocean Energy Management (BOEM) Acting Director Walter Cruickshank today will announce the completion of the nation's seventh competitive lease sale for renewable wind energy in federal waters. A Wind Energy Area of 122,405 acres offshore Kitty Hawk, North Carolina received the high bid of \$9,066,650 from Avangrid Renewables, LLC.

**Other Energy Actions**

The Bureau of Land Management held an Oil Lease Sale in Elko (NV). The sale generated \$131,245 during its quarterly oil and gas competitive online lease sale.

**Executive Orders (No Change)**

The Department is awaiting EO on Energy (several) (understand looking like next week) and an EO on National Monuments.

**Congressional Action Under the CRA (No change)**

**CRAs:** Pending WH Action.

- BLM Planning 2.0 Rule. When will the President sign?

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

**Secretary Meetings and Schedule**

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

(No Change) ASSISTANCE NEEDED FROM CABINET AFFAIRS:

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. Interior has provided a draft.

## **Speaking Invitations**

Accepted

3/23 Address to the American Petroleum Institute's Board of Directors Meeting (DC, Trump Hotel)

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/27 NRA Leadership Forum, George World Congress Center in Atlanta, GA.

Regretted

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

Outstanding Invitations in Process

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

3/28 Address to the Public Lands Council Legislative Conference (DC)

4/3 North America's Building Trades Unions National Legislative Conference (DC, Washington Hilton)

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)

4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

## **Emergency Management**

Nothing significant to report.

## **Media of Interest**

### **Interior's Budget Could Be Cut By 12 Percent.**

The Washington Post (3/16, Fears) reports that "the Interior Department's budget would be slashed by nearly \$2 billion compared with last year's budget, according to a proposed spending plan from the Trump White House." According to the article, "a proposed 12 percent decrease to \$11.6 billion would cause pain in the offices that purchase public lands." The article notes "that part of Interior would lose \$120 million in funding under the proposal."

### **Signaling More Energy Deals, Secretary Zinke Approves Greens Hollow Coal Lease.**

The Deseret (UT) News (3/15, O'Donoghue) reports that Interior Secretary Ryan Zinke "approved a \$22 million coal lease for central Utah on Wednesday in his first official action impacting Utah's natural resources on federal lands and made it clear his agency is in the 'energy business.'" The Salt Lake (UT) Tribune (3/15, Maffly) reports that "the owner of the Sufco mine in Sanpete and Sevier counties delivered the winning bid of nearly \$23 million last January in a process billed as competitive even though no other bids were submitted on the 6,175-acre Greens Hollow tract under the Fishlake and Manti-La Sal national forests."

### **Secretary Zinke Rides Around DC With Park Police During Snowstorm.**

The Washington Times (3/15, Harper) reports that when a "freak snowstorm that descended on the nation's capital in midweek," Interior Secretary Ryan Zinke spent the day shoveling "snow off the steps of the Lincoln Memorial, attired in a forest-green U.S. Park Police flak jacket and sweater, utility pants and hiking shoes." Zinke said, "I used to complain about the grass being too long when I pass by a park in D.C. Now that's my park. If the trash can is full, it's my fault. It changes your perspective."

### **Secretary Zinke To Attend Centennial Ceremonies.**

The Virgin Islands Daily News (3/16, Austin) reports that the V.I. Transfer Centennial Commission announced Wednesday that Interior Secretary Ryan Zinke will "attend centennial commemorations along with senior staff from the department." The committee also "decided that what was going to be a centennial gala ball at Marriott's Frenchman's Reef Beach Resort on April 1 will instead be a public reception featuring an appearance by Gov. Kenneth Mapp and Danish Prime Minister Lars Løkke Rasmussen."

## **Republicans Blast Creation Of Marine Monument During Oversight Hearing.**

The AP (3/15) reports that members of subcommittee of the House Natural Resources Committee are “objecting to the way” the Obama Administration created “the Northeast Canyons and Seamounts Marine National Monument last year.” The subcommittee on water, power and oceans “held an oversight hearing on the creation and management of marine monuments on Wednesday.” Republican members say the creation of the Northeast Canyons and Seamounts Marine National Monument “lacked significant local input and scientific scrutiny.”

## **Republicans Must Disentangle Climate Funding To Cut It.**

Bloomberg Politics (3/15, Flavelle) reports that because former President Obama “sought to integrate climate programs into everything the federal government did,” climate programs will be difficult for the Trump administration to disentangle. The Congressional Research Service in 2013 estimated total federal spending on climate programs among 18 agencies cost \$77 billion from fiscal 2008 through 2013 alone. The Obama administration didn’t always include “climate” in program names and in some cases expanded existing programs to include climate change. Marc Morano, a former Republican staffer for the Senate Environment and Public Works Committee said, “In order to dismantle the climate establishment, agencies and programs throughout the federal government need to be targeted.”

## **Trump Administration Withdraws Defense Of Fracking Rule.**

The AP (3/15) reports the Trump Administration said in court papers on Wednesday that it is withdrawing from a lawsuit challenging an Obama-era rule requiring companies that drill for oil and natural gas on federal lands be forced to disclose chemicals used in hydraulic fracturing. The Administration will begin a new rule-making process later this year.

## **Inspector General Reports to be released tomorrow. (No press expected.)**

- Lack of adequate financial controls at NPS.
- Alleged Favoritism by an ONRR Supervisor.

## **White House Communications Report** (sent to WH Comms yesterday, Wednesday)

### **Inquiries**

- Associated Press, Salt Lake Tribune, E&E News, Bloomberg – REQUEST – More details about the Greens Hollow coal sale
- The Hill (Tim Cama) – REQUEST – Asking for confirmation that DOI will rescind

the Obama fracking rules on public and Tribal land. – RESPONSE – Confirmed, gave details of the order on background.

### **Top Stories**

- IJR: Yes, Secretary Ryan Zinke Actually Carries an 'ISIS Hunting License ...
- Salt Lake Tribune: Interior names energy and mineral chief new acting BLM director
- IJR: How Sec. Zinke Spent His Snow Day: Shoveling The Snow Off ...
- KPAX TV: Secretary Zinke marks 114 years of National Wildlife Refuge System

### **Top Issues and Accomplishments**

- Today Zinke announced a 55 million ton coal sale in Utah & named a new Acting Director of the BLM.
- Tomorrow, the Bureau of Ocean Energy Management will recommend approval of permits to conduct seismic studies on the potential of Atlantic Ocean energy resources.
- Launching a “Travels with Z” blog on our website that is Secretary Zinke’s travel blog going to America’s public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)
- On Friday, Zinke will meet with leadership and staff at Yellowstone National Park. No press planned.

### **Federal Register Notices Cleared for Publishing (None Significant)**

No Items were cleared for the Federal Register on Wednesday.

Doug Domenech  
Senior Advisor  
US Department of the Interior

# Conversation Contents

Interior Report for 2/28/17

**Attachments:**

/58. Interior Report for 2/28/17/1.1 DOI Weekly Report to the Secretary 2-28-17.docx

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Tue Feb 28 2017 10:49:45 GMT-0700 (MST)  
**To:** "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>, "Mashburn, John K. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report for 2/28/17  
**Attachments:** DOI Weekly Report to the Secretary 2-28-17.docx

Attached and copies below.

DOI UPDATE FOR CABINET AFFAIRS 2/28/17  
Doug Domenech

**Status of the Nominee**

The Senate appears to be poised to vote to confirm Rep. Zinke today, late afternoon, or tomorrow. We are preparing Day One activities which could be Thursday or Friday.

**Secretary's Schedule**

Wednesday 3/1 or Thursday 3/2.

As part of the Secretary's Day One activities he will:

- Greet employees.
- Attend an Ethics and Records Retention Briefings.
- Issue an email to all employees concerning high ethics.
- Meet with his Security Detail.
- Meeting with Sportsman/Hunting Groups, including the NRA.
- Sign Order overturning the prohibition on lead ammo on wildlife refuges.
- Sign Order on Conservation Stewardship (Hunting and Fishing).

Thursday 3/2: The Secretary has been asked to attend a meeting at the WH on Thursday on infrastructure. Scott Hommel DOI COS (Acting) will be the plus 1.

**Energy/Interior Related Executive Orders**

White House Energy Executive Order We received the proposed EO and are suggesting a few tweaks.

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## **MEDIA**

### **GAO: Repealing Interior Rules Would Leave Department Vulnerable.**

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Roll Call: Week Ahead Includes Trump Address, Cabinet Confirmations

E&E: Can Trump keep this Ariz. coal plant open?

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Preparing for Zinke to arrive at DOI



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Doug Domenech  
Senior Advisor  
US Department of the Interior

**"Uli, Gabriella M. EOP/WHO" <(b) (6) gov>**

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**From:** "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Sent:** Tue Feb 28 2017 12:26:11 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Subject:** RE: Interior Report for 2/28/17

Thanks!

**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Tuesday, February 28, 2017 12:50 PM  
**To:** Uli, Gabriella M. EOP/WHO <(b) (6) gov>; Mashburn, John K. EOP/WHO <(b) (6) gov>  
**Subject:** Interior Report for 2/28/17

Attached and copies below.

DOI UPDATE FOR CABINET AFFAIRS 2/28/17  
Doug Domenech

**Status of the Nominee**

The Senate appears to be poised to vote to confirm Rep. Zinke today, late afternoon, or tomorrow. We are preparing Day One activities which could be Thursday or Friday.

**Secretary's Schedule**

Wednesday 3/1 or Thursday 3/2.

As part of the Secretary's Day One activities he will:

- Greet employees.
- Attend an Ethics and Records Retention Briefings.
- Issue an email to all employees concerning high ethics.
- Meet with his Security Detail.
- Meeting with Sportsman/Hunting Groups, including the NRA.
- Sign Order overturning the prohibition on lead ammo on wildlife refuges.
- Sign Order on Conservation Stewardship (Hunting and Fishing).

Thursday 3/2: The Secretary has been asked to attend a meeting at the WH on Thursday on infrastructure. Scott Hommel DOI COS (Acting) will be the plus 1.

### **Energy/Interior Related Executive Orders**

White House Energy Executive Order We received the proposed EO and are suggesting a few tweaks.

CRA's NO CHANGE: Passed the House

- BLM Venting and Flaring Methane Rule
- BLM Planning 2.0 Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

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# Conversation Contents

Interior Report 2/15/17

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**Sent:** Wed Feb 15 2017 11:23:35 GMT-0700 (MST)  
**To:** "Uli, Gabriella M. EOP/WHO"  
<(b) (6) gov>, "Mashburn, John K. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report 2/15/17

DOI UPDATE FOR CABINET AFFAIRS 2/15/17  
Doug Domenech

## **Status of the Nominee**

Rep. Zinke waiting Senate floor vote. We anticipate (hopeful) he may be confirmed Thursday or Friday.

## **Zinke Schedule for first week.**

Friday, 2/17 Day One in the building. Various employee meetings, Ethics Briefing, Travel Briefing. Meeting with Sportsmans Groups listed below (invited):

Jeff Crane (Congressional Sportsmen's Foundation)  
Chris Cox (National Rifle Association)  
Larry Keane (National Sports Shooting Foundation)  
Margaret Everson (Ducks Unlimited)  
David Anderson (Boone &Crockett Club)  
Mitch Butler (Mule Deer Foundation)  
Greg Schildwachter (Wild Sheep Foundation)  
Whit Fosberg (Theodore Roosevelt Conservation Partnership)  
Mike Nussman (American Sportfishing Association)  
Glenn Le Munyon (Dallas Safari Club)  
Gary Taylor (National Wild Turkey Foundation)  
Jay Mac Aninch (Archery Trade Association)  
Ron Reagan (Association of Fish and Wildlife Agencies)  
Collin O'Mara (National Wildlife Foundation)  
Anna Seidman (Safari Club International)  
Steve Williams (Wildlife Management Institute)

## **Key Announcements/Secretarial Orders:**

- Overturning the FWS Director's decision to ban lead ammo
- Renew charter for Wildlife Hunting Heritage Conservation Council
- Expand opportunities for outdoor recreation on public lands

- Issue Employee Letter on Ethical Standards

Saturday, 2/18 Day Two in the building.

- Briefing on budget
- Briefing on law enforcement and emergency management.
- Briefing on the status of hiring/appointments.

### **Secretarial Travel**

Subject to change, Secretary Zinke will travel as follows:

Interior Secretary designee Ryan Zinke proposes travel to Utah, Alaska and California during the first ten days at the U.S. Department of the Interior.

During the 2016 campaign, then-candidate Donald J. Trump put a new focus on states and local communities. His message to return power to the people and "drain the swamp" resonated with millions of Americans in the Heartland and across the country, who felt as though Washington had left them behind. In an effort to capitalize on that wave of support, honor commitments made in his Senate confirmation hearing and fulfill the President's campaign commitments, Secretary designee Zinke proposes travel to Utah, Alaska, and California where he will participate in round-table meetings, listening sessions, site tours, and deliver remarks about America First policies and ideology. The trip will provide the Trump Administration the ability to drive a positive message of prioritizing issues important to Western states.

The goals of the trip include:

- Fulfill commitments made during the Senate confirmation hearing (and in individual Senate meetings) to travel to key states and address priority issues
- Initiate action on policies that align with President Trump's America First priorities (energy development, state input on monument designations, keeping public lands public)
- Establish strong working relationships with local, state, Tribal and Congressional members, who will be key in helping ensure the success of the Administration
- Garner positive regional media about the Trump Administration's actions

Below is a summary of the schedule with news-making items highlighted.

### **SUMMARY OF TRAVEL SCHEDULE (NOTE CABINET AFFAIRS HAS ASKED US TO PAUSE PLANNING FOR THE TRIP)**

February 20-21: Utah with the Congressional delegation and governor. Zinke will visit Bears Ears national monument and hold a meeting with Navajo, Governor and Congressional delegation regarding the controversial monument designation at the visitor center in southeast Utah. In Salt Lake City, he will attend a reception with the Governor and state legislators. The goal of this visit is to listen to local officials and provide input to POTUS on what measures should be taken regarding the monument. Zinke noted in his confirmation hearing that Utah would be his first trip. Press will be invited to Bears Ears to get B-roll and statement after the meeting however the meeting will be closed to press. Fly to Alaska.

February 21-24: Travel to Juneau, Alaska w/ Senator Murkowski. Zinke proposes to accept an invitation from Sen. Murkowski to meet with the Legislature in Juneau. Zinke will also meet with Governor Walker, Tribal representatives at Alaska Native Corporations, Senator Sullivan, and business leaders. Zinke will also go to a DOI facility where he will meet with about 200 DOI employees in Anchorage. Local press will be done with the Governor and the Senators.

Planned Secretarial Actions:



- Zinke will sign an order reestablishing the Office of the Senior Advisor for Alaskan Affairs.
- Memo directing FWS to review issues related to building a road to serve the people of King Cove.
- Possible action on National Petroleum Reserve Alaska to overturn the last administration's decision to remove 11,000 acres from the NPRA. (BIG NEWS)

February 24-26: Fly to California on Friday. On Saturday, Secretary Zinke will go on a morning run with Park Police located in San Francisco, then meet with them to talk about their mission, challenges, and opportunities. Zinke will also meet with Golden Gate National Recreation Area director and tour the Presidio National Park which until 1994 was a U.S. Army post.

That evening, Secretary Zinke will deliver dinner keynote remarks at the Steamboat Institute's summit in Aptos, California. He will speak broadly about unleashing American First Energy and economic opportunities without breaking new policy. Focus on restoring trust and integrity to the federal government. The event is open to credentialed media. Will receive a list of reporters ahead of time. No interviews granted. Fly back to DC.

## **Energy Executive Orders**

### **Stream Protection Rule (At the White House)**

Let us know if you want anyone from the Department to attend.

### **BLM Venting and Flaring Methane Rule (Passed the House)**

### **BLM Planning 2.0 Rule (Passed the House)**

## **News**

### **White House Communications Report**

#### **DAILY COMMUNICATIONS REPORT**

##### **Inquiries**

- **Washington Post** (Darryl Fears) & **WSJ** (Kris Maher): Requesting a statement on the Natural Resources Defense Council lawsuit against the Trump administration for delaying the listing of the rusty patch bumblebee. Response: "The Department is working to review this regulation as expeditiously as possible and expects to issue further guidance on the effective date of the listing shortly." Heather Swift, Interior spokesman.

"FWS today published in the Federal Register a notice of delay in the effective date of the final listing determination for the rusty patched bumble bee as an endangered species under the Endangered Species Act. The change in the effective date from February 10 to March 21, 2017, is not expected to have an impact on the conservation of the species. FWS is developing a recovery plan to guide efforts to bring this species back to a healthy and secure condition." Gary Frazer, Assistant Director -- Ecological Services, U.S. Fish and Wildlife Service.

- **Outside Magazine**: Requesting information about the hiring freeze and seasonal firefighters. Response: Directed them to the 1/31 OMB memo clarifying exemptions for seasonal firefighters and noting DOI requested the waivers last week.

- **Arizona Republic** (Brenna Goth) Requesting information on whether DOI was still considering keeping a community garden on a piece of land it is set to acquire due to a litigation matter in Phoenix.

- **Bloomberg** (Jennifer A. Dlouhy) Request: "President Trump signed into law a CRA resolution of disapproval repealing the SEC rule governing foreign payment disclosure for resource extraction. Because of the DOI's involvement in the EITI, can you weigh in on how this might change the approach to the transparency initiative? And, can I get a copy of the DOI letter supporting the resolution of disapproval?"

#### Top Stories

- Roll Call: NRA Urges Zinke Confirmation
- Outdoor Recreation Groups support Zinke Confirmation
- Zinke confirmation likely not until March
- Group sues feds for delaying bumblebee's endangered listing
- Wyden presses Interior Department over firefighting hiring concerns

#### Top Issues and Accomplishments

- FYI This week, the National Parks Service is sending 22 law enforcement officers to fulfill the Standing Rock Sioux Tribe's January request for BIA law enforcement assistance. BIA is unable to fulfill the full request for support so NPS and the BLM are detailing officers.
- Tomorrow, Rep. Zinke will be featured in part 2 of a History Channel documentary about the U.S. Navy SEAL teams
- Working with our policy shop to establish secretary's early priorities and messaging
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Friday, 2/17 Day One in the building. Various employee meetings, Ethics Briefing, Travel Briefing. Meeting with Sportsmans Groups listed below (invited):

Jeff Crane (Congressional Sportsmen's Foundation)  
Chris Cox (National Rifle Association)  
Larry Keane (National Sports Shooting Foundation)  
Margaret Everson (Ducks Unlimited)  
David Anderson (Boone &Crockett Club)  
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Ron Reagan (Association of Fish and Wildlife Agencies)  
Collin O'Mara (National Wildlife Foundation)  
Anna Seidman (Safari Club International)  
Steve Williams (Wildlife Management Institute)

Key Announcements/Secretarial Orders:

- Overturning the FWS Director's decision to ban lead ammo
- Renew charter for Wildlife Hunting Heritage Conservation Council
- Expand opportunities for outdoor recreation on public lands
- Issue Employee Letter on Ethical Standards

Saturday, 2/18 Day Two in the building.

- Briefing on budget
- Briefing on law enforcement and emergency management.
- Briefing on the status of hiring/appointments.

### **Secretarial Travel**

Subject to change, Secretary Zinke will travel as follows:

Interior Secretary designee Ryan Zinke proposes travel to Utah, Alaska and California during the first ten days at the U.S. Department of the Interior.

During the 2016 campaign, then-candidate Donald J. Trump put a new focus on states and local communities. His message to return power to the people and "drain the swamp" resonated with millions of Americans in the Heartland and across the country, who felt as though Washington had left them behind. In an effort to capitalize on that wave of support, honor commitments made in his Senate confirmation hearing and fulfill the President's campaign commitments, Secretary designee

Zinke proposes travel to Utah, Alaska, and California where he will participate in round-table meetings, listening sessions, site tours, and deliver remarks about America First policies and ideology. The trip will provide the Trump Administration the ability to drive a positive message of prioritizing issues important to Western states.

The goals of the trip include:

- Fulfill commitments made during the Senate confirmation hearing (and in individual Senate meetings) to travel to key states and address priority issues
- Initiate action on policies that align with President Trump's America First priorities (energy development, state input on monument designations, keeping public lands public)
- Establish strong working relationships with local, state, Tribal and Congressional members, who will be key in helping ensure the success of the Administration
- Garner positive regional media about the Trump Administration's actions

Below is a summary of the schedule with news-making items highlighted.

### **SUMMARY OF TRAVEL SCHEDULE (NOTE CABINET AFFAIRS HAS ASKED US TO PAUSE PLANNING FOR THE TRIP)**

February 20-21: Utah with the Congressional delegation and governor. Zinke will visit Bears Ears national monument and hold a meeting with Navajo, Governor and Congressional delegation regarding the controversial monument designation at the visitor center in southeast Utah. In Salt Lake City, he will attend a reception with the Governor and state legislators. The goal of this visit is to listen to local officials and provide input to POTUS on what measures should be taken regarding the monument. Zinke noted in his confirmation hearing that Utah would be his first trip. Press will be invited to Bears Ears to get B-roll and statement after the meeting however the meeting will be closed to press. Fly to Alaska.

February 21-24: Travel to Juneau, Alaska w/ Senator Murkowski. Zinke proposes to accept an invitation from Sen. Murkowski to meet with the Legislature in Juneau. Zinke will also meet with Governor Walker, Tribal representatives at Alaska Native Corporations, Senator Sullivan, and business leaders. Zinke will also go to a DOI facility where he will meet with about 200 DOI employees in Anchorage. Local press will be done with the Governor and the Senators.

Planned Secretarial Actions:

- Zinke will sign an order reestablishing the Office of the Senior Advisor for Alaskan Affairs.
- Memo directing FWS to review issues related to building a road to serve the people of King Cove.
- Possible action on National Petroleum Reserve Alaska to overturn the last administration's decision to remove 11,000 acres from the NPRA. (BIG NEWS)

February 24-26: Fly to California on Friday. On Saturday, Secretary Zinke will go on a morning run with Park Police located in San Francisco, then meet with them to talk about their mission, challenges, and opportunities. Zinke will also meet with Golden Gate National Recreation Area director and tour the Presidio National Park which until 1994 was a U.S. Army post.

That evening, Secretary Zinke will deliver dinner keynote remarks at the Steamboat Institute's summit in Aptos, California. He will speak broadly about unleashing American First Energy and economic opportunities without breaking new policy. Focus on restoring trust and integrity to the

federal government. The event is open to credentialed media. Will receive a list of reporters ahead of time. No interviews granted. Fly back to DC.

## **Energy Executive Orders**

### **Stream Protection Rule (At the White House)**

Let us know if you want anyone from the Department to attend.

### **BLM Venting and Flaring Methane Rule (Passed the House)**

### **BLM Planning 2.0 Rule (Passed the House)**

## **News**

### **White House Communications Report**

#### **DAILY COMMUNICATIONS REPORT**

##### **Inquiries**

- **Washington Post** (Darryl Fears) & **WSJ** (Kris Maher): Requesting a statement on the Natural Resources Defense Council lawsuit against the Trump administration for delaying the listing of the rusty patch bumblebee. Response: "The Department is working to review this regulation as expeditiously as possible and expects to issue further guidance on the effective date of the listing shortly." Heather Swift, Interior spokesman.  
"FWS today published in the Federal Register a notice of delay in the effective date of the final listing determination for the rusty patched bumble bee as an endangered species under the Endangered Species Act. The change in the effective date from February 10 to March 21, 2017, is not expected to have an impact on the conservation of the species. FWS is developing a recovery plan to guide efforts to bring this species back to a healthy and secure condition." Gary Frazer, Assistant Director -- Ecological Services, U.S. Fish and Wildlife Service.
- **Outside Magazine**: Requesting information about the hiring freeze and seasonal firefighters. Response: Directed them to the 1/31 OMB memo clarifying exemptions for seasonal firefighters and noting DOI requested the waivers last week.
- **Arizona Republic** (Brenna Goth) Requesting information on whether DOI was still considering keeping a community garden on a piece of land it is set to acquire due to a litigation matter in Phoenix.
- **Bloomberg** (Jennifer A. Dlouhy) Request: "President Trump signed into law a CRA resolution of disapproval repealing the SEC rule governing foreign payment disclosure for resource extraction. Because of the DOI's involvement in the EITI, can you weigh in on how this might change the approach to the transparency initiative? And, can I get a copy of the DOI letter supporting the resolution of disapproval?"

## **Top Stories**

- Roll Call: NRA Urges Zinke Confirmation
- Outdoor Recreation Groups support Zinke Confirmation
- Zinke confirmation likely not until March
- Group sues feds for delaying bumblebee's endangered listing
- Wyden presses Interior Department over firefighting hiring concerns

## **Top Issues and Accomplishments**

- FYI This week, the National Parks Service is sending 22 law enforcement officers to fulfill the Standing Rock Sioux Tribe's January request for BIA law enforcement assistance. BIA is unable to fulfill the full request for support so NPS and the BLM are detailing officers.
- Tomorrow, Rep. Zinke will be featured in part 2 of a History Channel documentary about the U.S. Navy SEAL teams
- Working with our policy shop to establish secretary's early priorities and messaging
- Writing Day 1 content for various web platforms and finalizing Secretary's events
- Continuing to outline Days 1-100 and 1-year plan for Secretary

Doug Domenech  
Senior Advisor  
US Department of the Interior

# Conversation Contents

## Interior Cabinet Affairs Daily Report for 3/2/17

### Attachments:

/54. Interior Cabinet Affairs Daily Report for 3/2/17/1.1 DOI Daily Report to the Secretary 3-2-17.docx

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**Sent:** Thu Mar 02 2017 11:25:38 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO" <(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Cabinet Affairs Daily Report for 3/2/17  
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Orders Strengthen America's Outdoor Heritage & Restore Opportunities for Sportsmen and Anglers

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Outdoor recreation is about both our heritage and our economy. Between hunting, fishing, motorized recreation, camping and more, the industry generates thousands of jobs and billions of dollars in economic activity," said Zinke. "Over the past eight years however, hunting, and recreation enthusiasts have seen trails closed and dramatic decreases in access to public lands across the board. It worries me to think about hunting and fishing becoming activities for the land-owning elite. This package of secretarial orders will expand access for outdoor enthusiasts and also make sure the community's voice is heard."

The two secretarial orders include:

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<https://www.nytimes.com/2017/03/01/us/for-interior-montanan-with-deep-roots-and-inconsistent-record.html? r=0>

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Judge Navarro is also the judge for the ongoing trial in Las Vegas over the 2014 cattle gather incident in Southern Nevada. Due to the timing this trial and the 2016 occupation of the Malheur Wildlife Refuge in Oregon, the decision has the potential to inflame anti-government and anti-BLM activists.

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### **Federal Register Notices Cleared for Publishing (None Significant)**

On Wednesday DOI cleared these items for publishing in the FR.

REG0006706      FWS      Hoopeston Wind Farm Draft Habitat Conservation Plan; Draft Environmental Assessment      Pursuant to the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA), the U.S. Fish and Wildlife Service is announcing the availability of an application from Hoopeston Wind Farm LLC (Applicant) for a permit to incidentally take federally endangered Indiana bats and federally threatened northern long-eared bats. The take could result from operation and decommissioning activities at the Applicant's

facility in Vermilion County, Illinois. Included with the application is a draft habitat conservation plan (HCP). Also available for review is our draft environmental assessment (EA) that was prepared in response to the application. We are seeking public comments on the permit application, draft HCP, and draft EA. Notice 03/01/2017

REG0006787 BOEM Proposed Notice of Sale for Gulf of Mexico Lease Sale 249 Pursuant to the Outer Continental Shelf Lands Act, BOEM announces the availability of the Proposed Notice of Sale (PNOS) for the proposed Gulf of Mexico Outer Continental Shelf (OCS) Oil and Gas Lease Sale 249. Bid opening for the sale is currently scheduled for Aug. 16, 2017. Notice 03/01/2017

REG0006790 OSM Notice of Proposed Information Collection; Request for Comments for 1029-0114 To comply with the Paperwork Reduction Act of 1995, OSMRE announces its intent to request that the Office of Management and Budget (OMB) renew OSMRE's authority to collect information for customer surveys to evaluate its performance in meeting the performance goals outlined in annual plans developed under the Government Performance and Results Act (GPRA). OMB previously approved this collection under OMB Control Number 1029-0114. OSMRE is requesting public comments on the renewal for 60 days. Notice 03/01/2017

REG0006791 OSM Notice of Proposed Information Collection; Request for Comments for 1029-0055 To comply with the Paperwork Reduction Act of 1995, OSMRE announces its intent to request that the Office of Management and Budget (OMB) renew an existing approval for the collection of information under OSMRE's Rights of Entry rules. OMB previously approved the collection under OMB Control Number 1029-0055. OSMRE is requesting public comments on the renewal for 60 days. Notice 03/01/2017

REG0006792 OSM Notice of Proposed Information Collection; Request for Comments for 1029-0067 To comply with the Paperwork Reduction Act of 1995, OSMRE announces its intent to request that the Office of Management and Budget (OMB) renew OSMRE's authority to collect information under its rules regarding restrictions on financial interests of State employees and Form OSMRE-23. OMB previously approved this collection under OMB Control Number 1029-0067. OSMRE is requesting public comments on the renewal for 60 days. Notice 03/01/2017

Doug Domenech  
Senior Advisor  
US Department of the Interior

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**From:** "Uli, Gabriella M. EOP/WHO" <(b) (6)> gov>  
**Sent:** Thu Mar 02 2017 12:53:20 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Subject:** RE: Interior Cabinet Affairs Daily Report for 3/2/17

Awesome, thank you! Congrats on the Secretary's first official day!

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**Sent:** Thursday, March 2, 2017 1:26 PM

**To:** Mashburn, John K. EOP/WHO <(b) (6) gov>; Uli, Gabriella M. EOP/WHO <(b) (6) gov>

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## **Federal Register Notices Cleared for Publishing (None Significant)**

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REG0006706 FWS Hoopeston Wind Farm Draft Habitat Conservation Plan; Draft Environmental Assessment Pursuant to the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA), the U.S. Fish and Wildlife Service is announcing the availability of an application from Hoopeston Wind Farm LLC (Applicant) for a permit to incidentally take federally endangered Indiana bats and federally threatened northern long-eared bats. The take could result from operation and decommissioning activities at the Applicant's facility in Vermilion County, Illinois. Included with the application is a draft habitat conservation plan (HCP). Also available for review is our draft environmental assessment (EA) that was prepared in response to the application. We are seeking public comments on the permit application, draft HCP, and draft EA. Notice 03/01/2017

REG0006787 BOEM Proposed Notice of Sale for Gulf of Mexico Lease Sale 249 Pursuant to the Outer Continental Shelf Lands Act, BOEM announces the availability of the Proposed Notice of Sale (PNOS) for the proposed Gulf of Mexico Outer Continental Shelf (OCS) Oil and Gas Lease Sale 249. Bid opening for the sale is currently scheduled for Aug. 16, 2017.

Notice 03/01/2017

REG0006790 OSM Notice of Proposed Information Collection; Request for Comments for 1029-0114 To comply with the Paperwork Reduction Act of 1995, OSMRE announces its intent to request that the Office of Management and Budget (OMB) renew OSMRE's authority to collect information for customer surveys to evaluate its performance in meeting the performance goals outlined in annual plans developed under the Government Performance and Results Act (GPRA). OMB previously approved this collection under OMB Control Number 1029-0114. OSMRE is requesting public comments on the renewal for 60 days. Notice 03/01/2017

REG0006791 OSM Notice of Proposed Information Collection; Request for Comments for 1029-0055 To comply with the Paperwork Reduction Act of 1995, OSMRE announces its intent to request that the Office of Management and Budget (OMB) renew an existing approval for the collection of information under OSMRE's Rights of Entry rules. OMB previously approved the collection under OMB Control Number 1029-0055. OSMRE is requesting public comments on the renewal for 60 days. Notice 03/01/2017

REG0006792 OSM Notice of Proposed Information Collection; Request for Comments for 1029-0067 To comply with the Paperwork Reduction Act of 1995, OSMRE announces its intent to request that the Office of Management and Budget (OMB) renew OSMRE's authority to collect information under its rules regarding restrictions on financial interests of State employees and Form OSMRE-23. OMB previously approved this collection under OMB Control Number 1029-0067. OSMRE is requesting public comments on the renewal for 60 days. Notice 03/01/2017

Doug Domenech  
Senior Advisor  
US Department of the Interior



**Label: "FOIA/OS-2017-00367"**

**Created by:douglas\_domenech@ios.doi.gov**

Total Messages in label:226 (113 conversations)

Created: 04-13-2017 at 08:37 AM

# Conversation Contents

Interior Cabinet Affairs Daily Report for 3/1/17

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Wed Mar 01 2017 10:49:18 GMT-0700 (MST)  
"Uli, Gabriella M. EOP/WHO"  
**To:** <(b) (6) gov>, "Mashburn, John K. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Cabinet Affairs Daily Report for 3/1/17

Attached and copied below.

## DOI UPDATE FOR CABINET AFFAIRS – 3/1/17

Doug Domenech

### Status of the Nominee

The Senate confirmed Rep. Zinke today as Secretary of the Interior. The vote was 68-31 . Zinke has resigned his seat in Congress and will be sworn-into office by the VP in a 6 pm event at the WH.

### Secretary's Schedule

Day one in the office is Thursday 3/2.

As part of the Secretary's Day One activities he will:

- Greet employees.
- Attend an Ethics and Records Retention Briefings.
- Issue an email to all employees concerning high ethics.
- Meet with his Security Detail.
- Meeting with Sportsman/Hunting Groups, including the NRA.
- Sign Order overturning the prohibition on lead ammo on wildlife refuges.
- Sign Order on Conservation Stewardship (Hunting and Fishing).

Meeting with Sportsmens Groups

Participants: Jeff Crane (Congressional Sportsmen's Foundation)

Chris Cox (National Rifle Association)

Larry Keane (National Sports Shooting Foundation)

Margaret Everson (Ducks Unlimited)

David Anderson (Boone & Crockett Club)

Mitch Butler (Mule Deer Foundation)

Greg Schildwachter (Wild Sheep Foundation)

Whit Fosberg (Theodore Roosevelt Conservation Partnership)

Mike Nussman (American Sportfishing Association)

Glenn Le Munyon (Dallas Safari Club)

Gary Taylor (National Wild Turkey Foundation)

Jay Mac Aninch (Archery Trade Association)

Ron Reagan (Association of Fish and Wildlife Agencies)

Collin O'Mara (National Wildlife Foundation)

Anna Seidman (Safari Club International)

Steve Williams (Wildlife Management Institute)

Derrick Crandall (American Recreation Council)

Miles Moretti (Mule Deer Foundation)

Dave Nomsen (Pheasants Forever)

Donald Peay (Sportsmen for Fish and Wildlife)

Jeff Trandahl (National Fish and Wildlife Foundation)

Thursday 3/2: The Secretary has been asked to attend a meeting at the WH on Thursday on infrastructure. Scott Hommel DOI COS (Acting) will be the plus 1. A number of other briefings are scheduled.

### **Energy/Interior Related Executive Orders**

White House Energy Executive Order – We received the proposed EO and are suggesting a few tweaks.

CRA NO CHANGE: Passed the House

- BLM Venting and Flaring Methane Rule

OPED API: Senate Must Move To Repeal BLM Methane Rule.

Erik Milito at the American Petroleum Institute writes for The Hill (2/28) in its “Congress Blog” that methane emissions associated with natural gas development have declined 18.6 percent since 1990 while natural gas production increased by over 45 percent. Industry and “effective state and federal regulations” make BLM’s new Methane and Waste Prevention rule “redundant” and “counterproductive.” BLM “lacks the statutory authority and expertise to regulate air quality,” and the rule’s compliance costs “could make as many as 40 percent of federal wells that flare uneconomical to produce.” Milito urges the Senate to follow the House and repeal the rule under the Congressional Review Act.

- BLM Planning 2.0 Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

## **MEDIA**

**NYT: For Interior, Montanan With Deep Roots and Inconsistent Record**

<https://www.nytimes.com/2017/03/01/us/for-interior-montanan-with-deep-roots-and-inconsistent-record.html? r=0>

**New Group Forms To Support Katahdin Woods And Waters National Monument.**

The AP (2/28) reports that a nonprofit group has been created “to preserve and protect” the Katahdin Woods and Waters National Monument. The private group, called Friends of Katahdin Woods and Waters, plans to work together with the National Park Service. The group’s president, Lucas St. Clair, “says its initial focus will be on organizing volunteer opportunities, developing education programs and advocating for the monument.”

**Flake Reintroduces Bill To Revise Mexican Gray Wolf Recovery Plan.**

Grand Canyon (AZ) News (2/28) reports that Sen. Jeff Flake has reintroduced the Mexican Gray Wolf Recovery Plan Act. The legislation would require the U.S. Fish and Wildlife Service “to collaborate with states, county governments, and local stakeholders to sustain viable wild wolf populations without adversely impacting livestock, wild game or recreation.” The bill would require the FWS “to draft an updated recovery plan for the Mexican gray wolf in Arizona and New Mexico,” and “if the agency’s director does not comply with this new recovery plan, state wildlife authorities would be empowered to supplement or assume management of the Mexican gray wolf in accordance with the Endangered Species Act.”

**Montana Lawmakers Clear Grizzly Resolution Urging Removal Of Protections.**

The Bozeman (MT) Daily Chronicle (2/28, Wright) reports that “Montana lawmakers gave the initial OK to a resolution urging the wholesale removal of Endangered Species Act protections from all Montana grizzly bears, including those in areas where the federal government has not recommended delisting.” House Joint Resolution 15, sponsored by Rep. Steve Gunderson, “cleared its first vote of the full House 63-37 on Tuesday.” The resolution, “which amounts to a policy letter and not a change in law, asks Congress to lift protections for bears in the state and return management to the state wildlife agency, a move that could eventually lead to the hunting of grizzlies.”

## **Infrastructure**

### **TransCanada Suspends \$15B Challenge Against US.**

The Hill (2/28, Cama) reports Keystone XL pipeline developer, TransCanada Corp., “has suspended an international arbitration challenge that sought \$15 billion from the United States government for blocking the project.” On Monday, the company “filed a notice of the suspension” with “the World Bank’s International Centre for Settlement of Investment Disputes, just over a month after President Trump wrote a memo to restart the federal consideration of the project, a decision that could make the arbitration moot.” On Tuesday, “TransCanada spokesman Terry Cunha confirmed the filing” but didn’t “offer any additional comments.”

### **BLM Considering Drilling Near Zion National Park.**

KTVX-TV Salt Lake City (2/28, Higgins) reports that “more than 40,000 people emailed the Bureau of Land Management as the agency considers leasing land for oil drilling near Zion National Park.” BLM St. George Field Manager Brian Tritle said, “It isn’t a done deal. We are definitely open to public comment. But where there is oil, it’s not a surprise that someone would be interested in it. We just have to figure out if it makes sense.” The comment period closes March 9.

## **Meetings**

Interior is meeting today with all the stakeholders involved in the Navajo Generating Station Wednesday.

### **RELATED: Texas Public Policy Foundation VP Says Arizona Coal Plant, Mine Must Be Kept Open.**

Writing an op-ed for the Daily Caller (2/28, Devore), Texas Public Policy Foundation Vice President Chuck DeVore defends Arizona’s coal-fired Navajo Generating Station and the coal mine that supplies it against “a federal report” that “now threatens” the jobs associated with the plant, “755 good-paying jobs, about 90 percent of which are [filled by] Native Americans.” DeVore expresses hope that President Trump will help keep NGS open, given his campaign promises related to the coal industry, although “unnamed Trump administration officials at the Department of the Interior urged otherwise.” DeVore also notes criticism of the Bureau of Reclamation for its assessment of Arizona’s

projected power needs and capacity and the support NGS has from both of Arizona's senators.

## **Emergency Management**

In North Dakota, the BIA maintained an active presence in the Sacred Stone Camp, where an estimated 30 protesters remain. There has been no active resistance to law enforcement, and most protesters are attempting to comply with eviction orders.

In central Arizona, many streamgages have exceeded flood stage in response to recent heavy rain. The USGS Arizona Water Science Center deployed 8 crews in response to this event on Monday, with planned deployments throughout the duration of the flood event.

Significant river flooding is likely along the Wapsipinicon and Mississippi Rivers in portions of northwestern Illinois and eastern Iowa.

## **White House Communications Report**

### DAILY COMMUNICATIONS REPORT

#### **Inquiries**

Bloomberg asked about the Budget (response off the record, nothing to add at this time)

Roll Call (Toth) Can the agency comment on the ONRR's decision to delay the royalty valuation rulemaking? Has the agency received Rep. Raul Grijalva's letter detailing concerns over the legality of the agency's action? RESPONSE – "DOI extended the effective date of the Office of Natural Resource Revenue rule to allow the administration time to conduct a detailed review of the rule and the compliance burden it puts on job creators. The Department will make a definitive decision in the future." (also from Associated Press)

#### **Top Stories**

E&E: Senate to push Zinke vote to tomorrow

Helena IR: Interior nominee Zinke clears Senate hurdle on way to confirmation

The Hill (oped): National Wildlife Federation and Colorado Wildlife Federation: Zinke ...

## **Top Issues and Accomplishments**

Zinke confirmation vote scheduled for 10:30 AM EST Wednesday

Zinke swearing in Wednesday at 6:00 PM EST

Drafting an op-ed for the Houston Chronicle (or Denver Post) to amplify POTUS speech

Preparing for Zinke to arrive at DOI

The NY Times is in Whitefish, MT, (Zinke's hometown) interviewed a number of locals about Zinke. Profile about his conservation/public lands philosophy. Interviews were done with Zinke's best friend since kindergarten, his high school civics teacher, high school football coach, the ranger at Glacier National Park (who knows Zinke in a personal capacity for a number of years, their kids were on the wrestling team together) and a number of locals in town. Story preview expected online Monday or Tuesday with the full piece going live following his confirmation. Print version to follow digital. Expect a neutral to positive tone but it's the Times so....

Working with our policy shop to establish secretary's early priorities and messaging

Writing Day 1 content for various web platforms and finalizing Secretary's events

Continuing to outline Days 1-100 and 1-year plan for Secretary

## **Federal Register Notices Cleared for Publishing (None Significant)**

On Tuesday DOI cleared these items for publishing in the FR.

REG0006713 FWS Incidental Take Permit Application and Environmental Assessment for Commercial Mixed-Use Development; Miami-Dade County, Florida (Coral Reef Commons). The proposed Habitat Conservation Plan and Incidental Take Permit would authorize incidental take of the covered species for a 30-year term on a 138-acre tract. In addition to on-site conservation of 51 acres, there would be a 50-acre off-site conservation area. Notice 02/28/2017

REG0006734 FWS Notice of Availability: Technical/Agency Draft Recovery Plan for the Yellowcheek Darter. The draft recovery plan includes specific recovery objectives and criteria that must be met in order for FWS to reclassify this species to threatened status and ultimately to delist. Notice 02/28/2017

REG0006771 FWS Endangered Species Recovery Permit Applications (for the Louisville zoo and others). This is a batched notice of the receipt of recovery permit

applications under the Endangered Species Act. All permit requests are time-sensitive with the majority of projects ensuing mid-March 2017. Notice 02/28/2017

REG0006772 BLM Notice of Public Meeting, North Slope Science Initiative - Science Technical Advisory Panel, Alaska The BLM announces a meeting of the North Slope Science Initiative - Science Technical Advisory Panel to be held in Fairbanks, Alaska, on March 20 and 21, 2017. Notice 02/28/2017

REG0006775 BLM Notice of Public Meeting, Southwest Resource Advisory Council, Colorado. Pursuant to the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the BLM announces a Mar. 31, 2017, meeting of the Southwest Resource Advisory Council (RAC) in Montrose, Colorado. The meeting will be open to the public. Notice 02/28/2017

REG0006778 USGS National Geospatial Advisory Committee Meeting Notice. Pursuant to the Federal Advisory Committee Act (FACA), this Notice announces a meeting of the National Geospatial Advisory Committee (NGAC) on March 21 and 22, 2017, at the Main Interior Building in Washington, DC. The meeting is open to the public. Notice 02/28/2017

REG0006789 BIA Indian Child Welfare Act; Designated Tribal Agents for Service of Notice. The regulations implementing the Indian Child Welfare Act (ICWA or Act) provide that Indian Tribes may designate an agent other than the Tribal chairman for service of notice of proceedings under the Act. This Notice provides the updated, current list of designated Tribal agents for service of notice. Notice 02/28/2017

Doug Domenech  
Senior Advisor  
US Department of the Interior



# Conversation Contents

Interior Report 2/8/17

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Wed Feb 08 2017 11:35:21 GMT-0700 (MST)  
**To:** "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>, "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Report 2/8/17

DOI UPDATE FOR CABINET AFFAIRS 2/8/17  
Doug Domenech

## **Status of the Nominee**

Rep. Zinke waiting Senate floor vote. Latest is late next week. We are planning his first 10 days. (Let me know if you need detail on the plan.)

REPEAT: Zinke will be featured in a History Channel special about Navy SEAL Teams tonight at 8PM. It's a 2-hour special but we are told Zinke will be featured a few times throughout.

## **IMPORTANT - Invitation to Speak**

The Congressional Western Caucus has requested that someone from Interior speak briefly at their meeting on Friday. The event is closed to the media. I have been asked to do this. I am seeking guidance if I should accept.

## **Congressional Review Act – POTUS ACTION**

- REPEAT: The Stream Protection Act CRA has passed both the House and Senate and is awaiting the President's signature. We are prepared to assist in providing miners for a signing ceremony. If Mr. Zinke is confirmed next week, he obviously should participate.
- BLM Methane Rule: We are awaiting Senate action on the Bureau of Land Management's methane venting and flaring rule CRA.
- BLM 2.0 Rule: The House passed H.J. Res. 44 which would nullify the final rule relating to the BLM Resource Management Planning, 81 Fed. Reg. 89580 (Dec. 12, 2016), promulgated by the Department of the Interior, Bureau of Land Management (BLM). The White House blog stated that, "This rule, also known as the BLM Planning Rule 2.0, would prioritize regional and national considerations over state and local interests in land use planning for activities on public lands. The BLM manages over 245 million acres of Federal lands, located mostly in the western States, for multiple uses, including grazing, timber, recreation, and energy and mineral development. Given its regional approach to planning, the Administration believes the rule does not adequately serve the State and local communities' interests and could potentially dilute their input in planning decisions."

## Dakota Pipeline Action

DOI and DOD (ACOE) are coordinating a response to the impact on anticipated flooding on the significant trash left by protestors. Here is a link to environmental action groups:

<http://sacredstonecamp.org/blog/2017/2/7/breaking-army-corps-to-grant-dakota-access-easement>

## Energy Executive Orders

Interior is anxious to have a sense when, and if, the President will issue Executive Orders related to facilitating energy development. Or, whether we can have permission to proceed on our own.

Doug Domenech  
Senior Advisor  
US Department of the Interior

---

**"Uli, Gabriella M. EOP/WHO" <(b) (6) gov>**

**From:** "Uli, Gabriella M. EOP/WHO" <(b) (6) gov>  
**Sent:** Wed Feb 08 2017 11:42:14 GMT-0700 (MST)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>, "Mashburn, John K. EOP/WHO" <(b) (6) gov>  
**Subject:** RE: Interior Report 2/8/17

Received. Thanks, Doug

**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Wednesday, February 8, 2017 1:35 PM  
**To:** Mashburn, John K. EOP/WHO <(b) (6) gov>; Uli, Gabriella M. EOP/WHO <(b) (6) gov>  
**Subject:** Interior Report 2/8/17

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Doug Domenech

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Doug Domenech  
Senior Advisor  
US Department of the Interior

# Conversation Contents

DOI Cabinet Affairs Report for 3/9/17

**Attachments:**

/37. DOI Cabinet Affairs Report for 3/9/17/1.1 DOI Daily Report to the Secretary 3-9-17.docx

**"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

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**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Thu Mar 09 2017 11:19:12 GMT-0700 (MST)  
"Mashburn, John K. EOP/WHO"  
**To:** <(b) (6) gov>, "Flynn, Matthew"  
<(b) (6) gov>, "Uli, Gabriella M.  
EOP/WHO" <(b) (6) gov>  
**Subject:** DOI Cabinet Affairs Report for 3/9/17  
**Attachments:** DOI Daily Report to the Secretary 3-9-17.docx

Copied below and attached.

## DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/9/17

Doug Domenech, Senior Advisor

### Status of the Nominee

Last night, after returning from the Oval, the Secretary met with Rick Dearborn, Justin Clark, and Billy Kirkland to discuss various matters.

Today Secretary Zinke held meetings, briefings, and interviews in the office. Calls are scheduled with Senators Portman, Flake, and Collins to ask support for the CRA on Venting and Flaring. He departed for travel.

**HEADS UP:** DOI will clear a FOIA related to activity on 1/20 and 1/21 related to the shutdown of the National Park Service Twitter account. The FOIA involves official email related to direction to suspend the account until we know what was happening.

## **EO on Energy/Interior Related**

The Media is reporting that the EO on energy is now delayed to next week or the week after.

### **Trump Order On Clean Power Plan, Coal Leasing “Unlikely” This Week.**

The Hill (3/8, Cama) reports that President Trump’s executive order to instruct EPA Administrator Scott Pruitt to start the process of repealing the Clean Power Plan is “unlikely” to be signed this week, according to a White House official. The official told Greenwire that the order “may be pushed to next week.” Trump’s order “is also expected to instruct Interior Secretary Ryan Zinke to undo the Obama administration’s moratorium on new coal mining leases on federal land,” The Hill reports.

### **List of Interior Planned Energy related Actions**

- Secretarial Orders and Memoranda on:
- Secretarial Order: Revocation of the Federal Coal Moratorium
- Reopening National Petroleum Reserve – Alaska
- Reinitiating Quarterly Onshore Leasing Program
- Lifting Moratoriums on Offshore Energy
- Restarting a new Five Year OCS Plan
- Financial Assurance Notice to Leasees (NTL) Policy Review
- Well Control Rule Withdrawal
- Offshore Air Rule
- Atlantic Seismic Survey Activities
- Endangered Species Act Review and Reform
- Reverse Compensatory Mitigation
- National Monuments: Review

-

## **EO on National Monuments**

An EO related to National Monuments Review appears to be eminent.

## **Congressional Action Under the CRA.**

**CRAs** : Pending WH Action.

- BLM Planning 2.0 Rule. The Secretary would like to participate in any signing ceremony.

**CRAs**: Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures,

on National Wildlife Refuges in Alaska".

## **Secretary Meetings and Schedule**

On Friday, March 10, 2017, U.S. Department of the Interior Secretary Ryan Zinke will travel to Montana to tour regional and local offices and facilities within the Department. Secretary Zinke will meet with leadership from the National Park Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and other agencies, as well as local and Tribal governments and stakeholders. More stops may be announced.

Friday, March 10: Tribal Blessing by the Blackfeet Nation at Glacier National Park, Meeting with Glacier National Park leadership and staff.

Saturday March 11: Meeting on Bison Management in Missoula, MT

Monday, March 13: Speake at a Special Joint Session of the Montana State Legislature, State Capitol in Helena, MT. Meeting with the Governor. Approved political event with candidate for Congress.

Tuesday, March 14: Site visit to the BLM Lewistown Field Office, Lewistown, MT, Secretary Zinke will meet with employees at the BLM's Field Office. Also Site visit to the BLM Regional HQ for Montana and the Dakotas, Billings, MT.

-

Wednesday, March 15: Secretary Zinke will travel to Colorado to visit employees with the Denver Service Center. Further details pending

Thursday, March 16: Visit to Rocky Mountain National Park. Potential BUDGET media.

Friday, March 17: Fly to Bozeman. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area.

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

#### ASSISTANCE NEEDED FROM CABINET AFFAIRS:

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration.

### **Emergency Management**

In North Dakota, a bomb threat was received at the Standing Rock Middle School yesterday afternoon after all students and staff had already vacated the premises. BIA, NPS, and USPP personnel responded, and K-9s were used in the search of the building with negative results. As demobilization continues, the Incident Command Post will relocate to the Fort Yates BIA Police Department.

Many protesters are traveling to newly-established anti-pipeline camps throughout the country, with a stop in Washington, DC for a scheduled 4-day protest march. In conjunction with the protest in Washington, DC, there is a scheduled protest at the North Dakota State Capitol on March 10, where a forecast of snow and 12-degree temperatures may impact turnout.

In Oklahoma, the Irate Fire, located northeast of Lamar, OK, began on March 6 and has burned 2,000 acres. The fire is 40-percent contained and managed by a Type-4 Incident Management Team (IMT) with 8 DOI personnel assigned. There are 15 residential and 30 commercial structures threatened. The containment date has been set for March 11.

Also in Oklahoma, the Spocogee Fire, located south of Mannford, OK and in the vicinity of the Osage Reservation, began on March 1 and has burned 6,478 acres. The fire is 50-percent contained and managed by a Type-4 IMT with 8 personnel assigned, including 5 DOI personnel. The containment date for this fire has been set for March 15.

### **Media**

**Trump Meets With Secretary Zinke, Alaska Senators.**

E&E Daily (3/8) reports on President Trump's planned meeting with Interior Secretary Ryan Zinke and Alaska Sens. Lisa Murkowski and Dan Sullivan. A spokeswoman for Murkowski "plans to discuss the wide array of federal regulations and restrictions ... that are harming Alaska's economy by preventing the state from responsibly accessing its lands and resources." Sullivan's spokesman said the senator plans to talk about growing Alaska's economy by cutting regulations and reforming federal permitting. The meeting comes as "Trump is reportedly preparing to sign an executive order lifting the Obama administration's moratorium on coal leasing on federal lands." The AP (3/8) reports that in a joint statement, Murkowski and Sullivan said "they discussed everything from responsible resource development to national security."

### **Archaeology Groups Ask Secretary Zinke To Protect Bears Ears.**

The Fronteras (3/8, Morales) reports that "seven archaeology groups in the southwest have asked the new Interior secretary to support the Bears Ears national monument designation." Carrie Heinonen, director of the Museum of Northern Arizona, "said the Obama administration extensively vetted this site." Heinonen said, "The risk to future understanding of cultures that came before us is significant in this particular national monument due to the extraordinarily rich nature of the number of objects housed there."

### **Cantwell Asks Secretary Zinke To Lift Suspension Of Valuation Rule.**

The Seattle Times (3/8, Bernton) reports that Sen. Maria Cantwell, in a letter sent Tuesday to Interior Department Secretary Ryan Zinke, "accused the Trump administration of unlawfully putting on hold an Obama-era rule regulating oil, gas and coal valuations on federal lands." Cantwell claimed that the Interior Department "lacked the authority for the Feb. 22 suspension of the rule." She requested that Zinke "lift the stay on the rule."

### **Ivanka Trump's Landlord Involved In Dispute With US Government Over Proposed Mine.**

The Wall Street Journal (3/8, Maremont, Grimaldi) reports that Ivanka Trump and Jared Kushner are renting their DC home from Chilean billionaire Andrónico Luksic, who bought the home following the November election and whose company is involved in a dispute with the US government over its plan build a copper-and-nickel mine next to a Minnesota wilderness area. The Obama Administration blocked the plan in its final days and the company is now urging the Trump Administration to reverse the decision.

### **White House Communications Report**

DAILY COMMUNICATIONS REPORT (From Wednesday evening 6:15 pm)

#### **Inquiries**

- Axios (Jonathan Swan) REQUEST: As part of that story I will be reporting on an interaction between Sec Zinke and the President. The way it's been described to me by a senior administration source: "Zinke on his first day went right to the President



and tried blowing him up saying I need my people in here right now. And the President said, 'look we'll get your people in so long as they're our people.'" RESPONSE: "The only thing Ryan Zinke has ever blown up was on the SEAL Teams. He is however working hand in hand with the president on top Interior priorities."

- E&E News (Brittany Patterson) REQUEST: BIA and other Interior agencies have in recent years doled out a lot of grant money and staff support to tribes to craft climate change mitigation plans. What is the new Secretary's position on helping tribal nations plan for the impacts of climate change? Is the Secretary of the Interior's Tribal Climate Resilience Program expected to continue on? RESPONSE: "the Secretary addressed the questions that were asked by the Senators. Concerning any other projects at BIA the Secretary is just a week into the job and still learning from the agencies all the different programs they have."

- POLITICO, E&E, Bloomberg, AP and Others REQUEST: readout from POTUS/DOI/Alaska meeting. RESPONSE: TBD

- CNN (Gregory Wallace) REQUEST: "Do you have any information you can provide on the status of the Twin Metals Minnesota mining lawsuit and matter? This question is in regards to a Wall Street Journal report today: <https://www.wsj.com/articles/ivanka-trumps-landlord-is-a-chilean-billionaire-suing-the-u-s-government-1489000307>" RESPONSE: Referred the reporter to DOJ

## **Top Stories**

Not a lot of news today from DOI. Expecting articles on the Secretary's testimony at Indian Affairs this evening and tomorrow morning.

## **Top Issues and Accomplishments**

Zinke testified before the Senate Indian Affairs Committee at 2:30PM

Planning: Zinke's trip to Glacier National Park, Yellowstone National Park, address to MT State Legislature, Denver DOI Service Center

## **Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Wednesday.

REG0006805 FWS Notice of Availability: Applications for American Burying-Beetle Amended Industry Conservation Plan Participation Under the Endangered Species Act, FWS invites the public to comment on an incidental take permit application for the federally listed American burying beetle in Oklahoma. Notice  
03/07/2017

REG0006807 NPS Notice of Inventory Completion - Department of Anthropology, The University of Tulsa, Tulsa, OK N2723 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains under the control of the Department of Anthropology, The University of Tulsa, in Tulsa, Oklahoma. Notice 03/07/2017

REG0006811 FWS Massasoit National Wildlife Refuge, Plymouth, MA; Draft Comprehensive Conservation Plan and Environmental Assessment The National Wildlife Refuge System Improvement Act of 1997 requires us to develop a CCP for each NWR. CCPs provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the Refuge System mission, consistent with sound principles of fish and wildlife conservation, legal mandates, and FWS policies. Notice 03/07/2017

REG0006812 NPS Notice of Inventory Completion - U.S. Fish and Wildlife Service, Southeast Region, Hardeeville, SC N2732 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this is a notice of completion of an inventory of human remains and associated funerary objects removed from Limestone and Morgan Counties, Alabama, and Decatur County, Tennessee, between 1953 and 1997. The U.S. Fish and Wildlife Service, Southeast Region (USFWS-SER) has control of the remains and objects. Notice 03/07/2017

REG0006813 NPS Notice of Inventory Completion - Human Remains Repository, Department of Anthropology, University of Wyoming, Laramie, WY N2741 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains under the control of the Department of Anthropology, University of Wyoming, in Laramie, Wyoming. The remains were removed from Kodiak Island, Alaska, prior to 1991. Notice 03/07/2017

REG0006814 NPS Notice of Inventory Completion - Human Remains Repository, Department of Anthropology, University of Wyoming, Laramie, WY N2746 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains and associated funerary objects under the control of the Department of Anthropology, University of Wyoming, in Laramie, Wyoming. The remains were removed from an unknown location near Julesburg, Sedgwick County, Colorado, prior to 1995. Notice 03/07/2017

REG0006821 NPS Notice of Inventory Completion - Nebraska State Historical Society, Lincoln, NE N2748 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this is a Notice that the Nebraska State Historical Society (NSHS) has completed an inventory of human remains and determined that there is a cultural affiliation between the remains and a present-day Indian tribe. The remains were removed from the Linwood site in Butler County, Nebraska, at some time before 1973. Notice 03/07/2017

REG0006823 NPS Notice of Inventory Completion - Nebraska State Historical Society, Lincoln, NE N2747 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces that the Nebraska State Historical Society (NSHS) has completed an inventory of human remains and associated funerary objects removed from the Woodcliff site in Saunders County, Nebraska, in the 1960s and in 2002. The site is a Native American village and cemetery complex that was occupied around 1700-1800. Notice 03/07/2017

REG0006815 NPS Notice of Inventory Completion - U.S. Department of Agriculture, Forest Service, Ouachita National Forest, Hot Springs, AR N2688 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains and associated funerary objects under the control of the U.S. Department of Agriculture, Forest Service, Ouachita National Forest in Hot Springs, Arkansas. The remains and objects were removed from McCurtain County, Oklahoma, between 1997 and 2005. Notice 03/07/2017

REG0006816 FWS Draft environmental assessment; Export Program for Certain Native Species under the Convention on International Trade in Endangered Species of Wild Fauna and Flora FWS is announcing the availability of a draft environmental assessment under the National Environmental Policy Act for the CITES Export Program (CEP) for certain native furbearer species. Some native furbearers are listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), including bobcat, river otter, Canada lynx, gray wolf, and brown bear. Notice 03/07/2017

REG0006817 NPS Notice of Inventory Completion - Museum of Northern Arizona, Flagstaff, AZ N2736 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the completion of an inventory of human remains under the control of the Museum of Northern Arizona in Flagstaff, Arizona. The remains were removed from the Van Liere Site, a Hohokam settlement in Maricopa County, Arizona, in 1978. Notice 03/07/2017

REG0006818 NPS Notice of Inventory Completion - San Diego Museum of Man, San Diego, CA; Correction N2721 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this Notice announces the correction of an inventory of human remains and associated funerary objects under the control of the San Diego Museum of Man in San Diego, California. The remains and objects were removed in the La Jolla area of San Diego, and the inventory was announced in a Notice published on Jan. 27, 2016. Notice 03/07/2017

REG0006819 NPS Notice of Inventory Completion - Museum of Northern Arizona, Flagstaff, AZ; Correction N2735 This Notice corrects an inventory of human

remains and associated funerary objects completed by the Museum of Northern Arizona in Flagstaff, Arizona, and published on Sept. 11, 2006 (71 FR 53469). The remains and objects were removed from the Cashion site in Maricopa County, Arizona. Notice 03/07/2017

REG0006820 NPS Notice of Intent to Repatriate Cultural Items - Denver Museum of Nature & Science, Denver, CO N2745 Pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), this is a Notice of Intent to Repatriate Cultural Items under the control of the Denver Museum of Nature & Science in Denver, Colorado. The six cultural items, masks from the Onondaga Reservation in New York, meet the definition of sacred objects. Notice 03/07/2017

Doug Domenech  
Senior Advisor  
US Department of the Interior

## DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/15/17

Doug Domenech, Senior Advisor

### **Status of the Secretary**

The Secretary will be in Washington, DC on the Wednesday. He spoke to the Awaken America Conference.

The Secretary will resume his travel in Montana and Wyoming Thursday, Friday, and Saturday.

Thursday March 16: Travel to Bozeman, MT. Potential BUDGET media.

Friday March 17: Bozeman/Yellowstone. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area.

Sunday March 18: Fly to DC

### **Announcements**

**Press Announcement Yesterday: Secretary Zinke Celebrates 114 Years of National Wildlife Refuge System:** Yesterday the Secretary recognized the 114<sup>th</sup> anniversary of the National Wildlife Refuge System. Hunting, fishing, and other outdoor activities contributed more than \$144.7 billion in economic activity across the United States, according to the FWS's most recent [National Survey of Fishing, Hunting, and Wildlife-Associated Recreation](#), published every five years. More than 90 million Americans, or 41 percent of the United States population age 16 and older, pursue wildlife-related recreation. The report [Banking on Nature](#) shows that refuges pump \$2.4 billion into the economy and support more than 35,000 jobs.

**Press Announcement Today: Zinke Announces Major Lease on Federal Lands:** BLM Issues Lease for 6,175.39 acres holding 55.7 million tons of recoverable coal. Canyon Fuel submitted the winning bid of \$22,850,000 in Central Utah.

**Press Announcement Today:** Interior will auction wind development rights to 122,400 acres of the Atlantic Ocean near North Carolina's Outer Banks. The Kitty Hawk Wind Energy Area, covering 191 square miles of outer continental shelf roughly 24 miles from the beaches where the Wright brothers achieved first powered flight in 1903, has an opening bid price of \$244,810, or \$2 per acre.

**Press Announcement:** On Friday, DOI Announces \$3.74 Million for Species Recovery in 12 States.

### **Executive Orders**

The Department is awaiting EO on Energy (several) (understand looking like next week) and an EO on National Monuments.

### **Congressional Action Under the CRA** (No change)

**CRAs:** Pending WH Action.

- BLM Planning 2.0 Rule. When will the President sign?

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule

- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

## **Secretary Meetings and Schedule**

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

### **ASSISTANCE NEEDED FROM CABINET AFFAIRS:**

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. Interior has provided a draft.

### **Speaking Invitations** (No change from yesterday.)

#### Outstanding Invitations in Process

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

3/23 Address to the American Petroleum Institute's Board of Directors Meeting (DC, Trump Hotel)

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

3/28 Address to the Public Lands Council Legislative Conference (DC)

4/3 North America's Building Trades Unions National Legislative Conference (DC, Washington Hilton)

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

Accepted

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

### **Emergency Management**

The Mississippi Band of Choctaw Indians' Community Lake, in the Tucker Community, was inspected on Tuesday morning due to the deterioration of its dam, where an area of concern was noted along the lake's dam. An inspection yesterday suggests that dam failure is imminent. The Tucker Community Lake is considered a low hazard dam, meaning that loss of life is not likely and that arterial traffic routes would be minimally impacted, should the dam fail. Vehicular traffic across the dam appears to have been the leading contributor to the current situation, and all traffic crossing has been blocked at this time.

In Oklahoma, the Howell Fire began on March 10 in Osage County (BIA) and has burned 1,900 (no change) acres. The fire is 50 (+10)-percent contained and being managed by a Type-4 Incident Management Team (IMT) with 8 (no change) personnel assigned, all of which are DOI personnel. There are 10 (no change) residential structures threatened, and the containment date has been set for March 25. Additional perimeter growth is not expected.

The Milsap Fire, which began on March 2 in Osage County (BIA), remains at 9,636 (no change) acres burned. The fire is 75 (+5)-percent contained and managed by a Type-4 IMT with 6 (no change) personnel assigned, all of which are DOI personnel. There are no structures threatened, and the containment date remains March 25. Additional perimeter growth is not expected.

The Tucker Fire began on March 3 in Seminole County, OK (BIA) and has burned 1,030 (no change) acres to date. The fire is 80 (+5)-percent contained and managed by a Type-4 IMT with 20 (no change) DOI personnel assigned. Full containment is expected today.

## **Media of Interest**

### **National Wildlife Refuge System Celebrates 114 Years.**

KPVI-TV Idaho Falls, ID (3/14) reports that on Tuesday, the National Wildlife Refuge System celebrated its 114th anniversary. Interior Secretary Ryan Zinke said, "This past Saturday, I visited the National Bison Range in Moiese, Montana, to speak with refuge managers and get a better understanding of both the habitat and the management of the range. In addition to the range, the Refuge System has millions of acres of public lands and waters that provide quality hunting and fishing in addition to other recreation activities." He added, "Our wildlife refuges are an incredible asset to the national economy, bringing tourism and recreation jobs as well as revenue from spending in local communities. At the same time, refuges offer a place where families can carry on cherished outdoor traditions while making the important connection between people and nature. It worries me to think about hunting and fishing becoming activities for the land-owning elite. Refuges are an important part of making sure that doesn't happen."

### **Analysis: Secretary Zinke Faces Looming Controversial Issues.**

The High Country (CO) News (3/15, Wiles) reports that so far, Interior Secretary Ryan Zinke's "stated priorities for Interior have been vague but unsurprising: rebuilding trust between the public and the department, increasing public lands access for sportsmen, and improving outdated infrastructure at national parks." However, "considering the controversial issues embedded in those priorities he'll soon have to wrangle, the ride won't stay smooth for long." According to the article, "perhaps the biggest questions around Zinke's Interior are how he will balance a mining and drilling-friendly agenda with habitat conservation and access to public lands, as well as how he will achieve his priorities if President Donald Trump follows through with major budget cuts."

### **Timber Group Files Suit Against Cascade-Siskiyou Monument Expansion.**

The Medford (OR) Mail Tribune (3/14, Freeman) reports that "a timber-industry group has joined the growing list of entities asking the federal courts to invalidate" last year's expansion of the Cascade-Siskiyou National Monument. The American Forest Resource Council "filed suit Friday in federal court claiming President Barack Obama illegally used the Antiquities Act to add thousands of acres of O&C Act lands in the monument expansion, contradicting a 1940 Department of the Interior legal opinion stating O&C lands can't be pulled from production." The article notes that "it is the third federal suit filed since Feb. 3 seeking to nullify the expansion of the monument east of Ashland by 47,624 acres." According to the article, "nearly identical lawsuits were filed Feb. 13 by the Oregon Association of O&C Counties and Feb. 17 by the Murphy Co., which owns about 2,000 acres within the monument footprint."

### **Congressional Hearing To Hear About Marine Monument Concerns.**

The AP (3/14) reports that New Bedford Mayor Jon Mitchell is "traveling to Washington, D.C. to express concerns of port communities about the federal government's approach to marine monument

designations.” Mitchell will testify at a hearing of the U.S. House of Representatives Subcommittee on Water, Poser and Oceans on Wednesday. The article notes that “a coalition of commercial fishing groups this month filed a lawsuit challenging former President Barack Obama’s decision to create a national monument off the coast of New England, using his executive authority under the Antiquities Act.”

### **Coal Country Sees Small Mining-related Job Growth.**

The Washington Post (3/14, Bump) reports that February job gains announced last week showed little gains specifically for coal mining, a Trump campaign pledge. Coal mining makes up only a small part of the mining sector broadly and job gains were mostly in “support activities for mining,” which the BLS defines as “support services, on a contract or fee basis, required for the mining and quarrying of minerals and for the extraction of oil and gas.”

### **Inspector General Reports to be released tomorrow. (No press expected.)**

- Lack of adequate financial controls at NPS.
- Alleged Favoritism by an ONRR Supervisor.

### **White House Communications Report (sent to WH Comms yesterday)**

#### **Inquiries**

- Fusion (Renee Lewis) REQUEST Status of California Condor reintroduction and Zinke’s commitment to “gut protections” of species. RESONSE Refused to accept the premise of the question. Corrected the reporter on multiple “sources” used. Got them to a place where they admitted their shoddy research and gave them a quote that Zinke is meeting with bureau and agency heads to get a deep understanding of the projects they have in progress and looks forward to working with stakeholders on a variety of projects under Interior’s jurisdiction.
- POLITICO (Esther Wielden) REQUEST Asked if there are plans to roll out the budget via a press call or presentation. RESPONSE TBD

#### **Top Stories**

EE News: BLM blocked from starting ATV trails in Bears Ears

Bloomberg: Trump to Drop Climate Change From Environmental Reviews ...

SF Examiner: Bay Area national parks receive record number of visitors in 2016

#### **Top Issues and Accomplishments**

Today @SecretaryZinke reached 10,000 organic Twitter followers

- Today Secretary Zinke did a ride along with U.S. Park Police. The USPP patrol much of Washington, D.C., including the GW Parkway, Memorial Bridge, Rock Creek Parkway and i395. They also have jurisdiction over much of D.C. because of proximity to various National Parks sites. Benny Johnson at IJR covered. Multiple stories expected ranging from support for federal law enforcement, seeing problems of bureaucracy affecting the front lines (in this case the disrepair of national parks sites), Zinke’s patriotism and passion for fallen warriors.
- Today Secretary Zinke announced the 114th anniversary of the National Wildlife Refuge System.
- Later this week, the Bureau of Ocean Energy Management will recommend approval of permits to conduct seismic studies on the potential of Atlantic Ocean energy resources.
- Launching a “Travels with Z” blog on our website that is Secretary Zinke’s travel blog going to America’s public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)



· On Friday, Zinke will meet with leadership and staff at Yellowstone National Park. No press planned.

**Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Tuesday.

REG0006835 OS Federal Register Notice of the Invasive Species Advisory Committee Meeting via Teleconference Federal Register Notice of the Invasive Species Advisory Committee (ISAC) via teleconference call. The sole purpose of the call scheduled for March 29, 2017 is to discuss and consider white papers generated by the ISAC task teams on Fed/State and Fed/Tribal Coordination. Notice 03/14/2017

# Conversation Contents

Re: Interior Report 2/15/17 ERROR

**Douglas Domenech <douglas\_domenech@ios.doi.gov>**

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**From:** Douglas Domenech <douglas\_domenech@ios.doi.gov>  
**Sent:** Wed Feb 15 2017 12:46:39 GMT-0700 (MST)  
"Uli, Gabriella M. EOP/WHO"  
**To:** <(b) (6) gov>, "Mashburn, John K. EOP/WHO" <(b) (6) gov>  
**Subject:** Re: Interior Report 2/15/17 ERROR

Sorry. In my report I said "11,000 acres NPRA". It is actually 11 million acres. Ugh.

Sent from my iPhone

On Feb 15, 2017, at 1:23 PM, Domenech, Douglas <douglas\_domenech@ios.doi.gov> wrote:

DOI UPDATE FOR CABINET AFFAIRS 2/15/17  
Doug Domenech

## **Status of the Nominee**

Rep. Zinke waiting Senate floor vote. We anticipate (hopeful) he may be confirmed Thursday or Friday.

## **Zinke Schedule for first week.**

Friday, 2/17 Day One in the building. Various employee meetings, Ethics Briefing, Travel Briefing. Meeting with Sportsmans Groups listed below (invited):

Jeff Crane (Congressional Sportsmen's Foundation)  
Chris Cox (National Rifle Association)  
Larry Keane (National Sports Shooting Foundation)  
Margaret Everson (Ducks Unlimited)  
David Anderson (Boone &Crockett Club)  
Mitch Butler (Mule Deer Foundation)  
Greg Schildwachter (Wild Sheep Foundation)  
Whit Fosberg (Theodore Roosevelt Conservation Partnership)  
Mike Nussman (American Sportfishing Association)  
Glenn Le Munyon (Dallas Safari Club)  
Gary Taylor (National Wild Turkey Foundation)  
Jay Mac Aninch (Archery Trade Association)  
Ron Reagan (Association of Fish and Wildlife Agencies)  
Collin O'Mara (National Wildlife Foundation)

Anna Seidman (Safari Club International)  
Steve Williams (Wildlife Management Institute)

Key Announcements/Secretarial Orders:

- Overturning the FWS Director's decision to ban lead ammo
- Renew charter for Wildlife Hunting Heritage Conservation Council
- Expand opportunities for outdoor recreation on public lands
- Issue Employee Letter on Ethical Standards

Saturday, 2/18 Day Two in the building.

- Briefing on budget
- Briefing on law enforcement and emergency management.
- Briefing on the status of hiring/appointments.

### **Secretarial Travel**

Subject to change, Secretary Zinke will travel as follows:

Interior Secretary designee Ryan Zinke proposes travel to Utah, Alaska and California during the first ten days at the U.S. Department of the Interior.

During the 2016 campaign, then-candidate Donald J. Trump put a new focus on states and local communities. His message to return power to the people and "drain the swamp" resonated with millions of Americans in the Heartland and across the country, who felt as though Washington had left them behind. In an effort to capitalize on that wave of support, honor commitments made in his Senate confirmation hearing and fulfill the President's campaign commitments, Secretary designee Zinke proposes travel to Utah, Alaska, and California where he will participate in round-table meetings, listening sessions, site tours, and deliver remarks about America First policies and ideology. The trip will provide the Trump Administration the ability to drive a positive message of prioritizing issues important to Western states.

The goals of the trip include:

- Fulfill commitments made during the Senate confirmation hearing (and in individual Senate meetings) to travel to key states and address priority issues
- Initiate action on policies that align with President Trump's America First priorities (energy development, state input on monument designations, keeping public lands public)
- Establish strong working relationships with local, state, Tribal and Congressional members, who will be key in helping ensure the success of the Administration
- Garner positive regional media about the Trump Administration's actions

Below is a summary of the schedule with news-making items highlighted.

### **SUMMARY OF TRAVEL SCHEDULE (NOTE CABINET AFFAIRS HAS ASKED US TO PAUSE PLANNING FOR THE TRIP)**

February 20-21: Utah with the Congressional delegation and governor. Zinke will visit Bears Ears national monument and hold a meeting with Navajo, Governor and Congressional delegation regarding the controversial monument designation at the visitor center in southeast Utah. In Salt Lake City, he will attend a reception with the Governor and state legislators. The goal of this visit is to listen to local officials and provide input to POTUS on what measures should be taken regarding the monument.

Zinke noted in his confirmation hearing that Utah would be his first trip. Press will be invited to Bears Ears to get B-roll and statement after the meeting however the meeting will be closed to press. Fly to Alaska.

February 21-24: Travel to Juneau, Alaska w/ Senator Murkowski. Zinke proposes to accept an invitation from Sen. Murkowski to meet with the Legislature in Juneau. Zinke will also meet with Governor Walker, Tribal representatives at Alaska Native Corporations, Senator Sullivan, and business leaders. Zinke will also go to a DOI facility where he will meet with about 200 DOI employees in Anchorage. Local press will be done with the Governor and the Senators.

Planned Secretarial Actions:

- Zinke will sign an order reestablishing the Office of the Senior Advisor for Alaskan Affairs.
- Memo directing FWS to review issues related to building a road to serve the people of King Cove.
- Possible action on National Petroleum Reserve Alaska to overturn the last administration's decision to remove 11,000 acres from the NPRA. (BIG NEWS)

February 24-26: Fly to California on Friday. On Saturday, Secretary Zinke will go on a morning run with Park Police located in San Francisco, then meet with them to talk about their mission, challenges, and opportunities. Zinke will also meet with Golden Gate National Recreation Area director and tour the Presidio National Park which until 1994 was a U.S. Army post.

That evening, Secretary Zinke will deliver dinner keynote remarks at the Steamboat Institute's summit in Aptos, California. He will speak broadly about unleashing American First Energy and economic opportunities without breaking new policy. Focus on restoring trust and integrity to the federal government. The event is open to credentialed media. Will receive a list of reporters ahead of time. No interviews granted. Fly back to DC.

## **Energy Executive Orders**

### **Stream Protection Rule (At the White House)**

Let us know if you want anyone from the Department to attend.

### **BLM Venting and Flaring Methane Rule (Passed the House)**

### **BLM Planning 2.0 Rule (Passed the House)**

## **News**

### **White House Communications Report**

#### **DAILY COMMUNICATIONS REPORT**

##### **Inquiries**

- **Washington Post** (Darryl Fears) & **WSJ** (Kris Maher): Requesting a statement on the Natural Resources Defense Council lawsuit against the Trump administration for delaying the listing of the rusty patch bumblebee. Response: "The Department is working to review this regulation as expeditiously as possible and expects to issue further guidance on the effective date of the listing shortly." Heather Swift, Interior

spokesman.

"FWS today published in the Federal Register a notice of delay in the effective date of the final listing determination for the rusty patched bumble bee as an endangered species under the Endangered Species Act. The change in the effective date from February 10 to March 21, 2017, is not expected to have an impact on the conservation of the species. FWS is developing a recovery plan to guide efforts to bring this species back to a healthy and secure condition." Gary Frazer, Assistant Director -- Ecological Services, U.S. Fish and Wildlife Service.

- **Outside Magazine:** Requesting information about the hiring freeze and seasonal firefighters. Response: Directed them to the 1/31 OMB memo clarifying exemptions for seasonal firefighters and noting DOI requested the waivers last week.
- **Arizona Republic** (Brenna Goth) Requesting information on whether DOI was still considering keeping a community garden on a piece of land it is set to acquire due to a litigation matter in Phoenix.
- **Bloomberg** (Jennifer A. Dlouhy) Request: "President Trump signed into law a CRA resolution of disapproval repealing the SEC rule governing foreign payment disclosure for resource extraction. Because of the DOI's involvement in the EITI, can you weigh in on how this might change the approach to the transparency initiative? And, can I get a copy of the DOI letter supporting the resolution of disapproval?"

#### Top Stories

- Roll Call: NRA Urges Zinke Confirmation
- Outdoor Recreation Groups support Zinke Confirmation
- Zinke confirmation likely not until March
- Group sues feds for delaying bumblebee's endangered listing
- Wyden presses Interior Department over firefighting hiring concerns

#### Top Issues and Accomplishments

- FYI This week, the National Parks Service is sending 22 law enforcement officers to fulfill the Standing Rock Sioux Tribe's January request for BIA law enforcement assistance. BIA is unable to fulfill the full request for support so NPS and the BLM are detailing officers.
- Tomorrow, Rep. Zinke will be featured in part 2 of a History Channel documentary about the U.S. Navy SEAL teams
- Working with our policy shop to establish secretary's early priorities and messaging
- Writing Day 1 content for various web platforms and finalizing Secretary's events
- Continuing to outline Days 1-100 and 1-year plan for Secretary

Doug Domenech  
Senior Advisor  
US Department of the Interior

**"Uli, Gabriella M. EOP/WHO" <(b) (6) gov>**

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<(b) (6) gov>  
**Sent:** Wed Feb 15 2017 12:55:10 GMT-0700 (MST)  
**To:** Douglas Domenech <douglas\_domenech@ios.doi.gov>, "Mashburn, John K. EOP/WHO"  
<(b) (6) gov>  
**Subject:** RE: Interior Report 2/15/17 ERROR

I've updated the report. Thanks for catching!

---

**From:** Douglas Domenech [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Wednesday, February 15, 2017 2:47 PM  
**To:** Uli, Gabriella M. EOP/WHO <(b) (6) gov>; Mashburn, John K. EOP/WHO <(b) (6) gov>  
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Interior Secretary designee Ryan Zinke proposes travel to Utah, Alaska and California during the first ten days at the U.S. Department of the Interior.

During the 2016 campaign, then-candidate Donald J. Trump put a new focus on states and local communities. His message to return power to the people and "drain the swamp" resonated with millions of Americans in the Heartland and across the country, who felt as though Washington had left them behind. In an effort to capitalize on that wave of support, honor commitments made in his Senate confirmation hearing and fulfill the President's campaign commitments, Secretary designee Zinke proposes travel to Utah, Alaska, and California where he will participate in round-table meetings, listening sessions, site tours, and deliver remarks about America First policies and ideology. The trip will provide the Trump Administration the ability to drive a positive message of prioritizing issues important to Western states.

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- Garner positive regional media about the Trump Administration's actions

Below is a summary of the schedule with news-making items highlighted.

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February 20-21: Utah with the Congressional delegation and governor. Zinke will visit Bears Ears national monument and hold a meeting with Navajo, Governor and

Congressional delegation regarding the controversial monument designation at the visitor center in southeast Utah. In Salt Lake City, he will attend a reception with the Governor and state legislators. The goal of this visit is to listen to local officials and provide input to POTUS on what measures should be taken regarding the monument. Zinke noted in his confirmation hearing that Utah would be his first trip. Press will be invited to Bears Ears to get B-roll and statement after the meeting however the meeting will be closed to press. Fly to Alaska.

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##### **Stream Protection Rule (At the White House)**

Let us know if you want anyone from the Department to attend.

##### **BLM Venting and Flaring Methane Rule (Passed the House)**

##### **BLM Planning 2.0 Rule (Passed the House)**

-  
News

#### **White House Communications Report**



## DAILY COMMUNICATIONS REPORT

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"FWS today published in the Federal Register a notice of delay in the effective date of the final listing determination for the rusty patched bumble bee as an endangered species under the Endangered Species Act. The change in the effective date from February 10 to March 21, 2017, is not expected to have an impact on the conservation of the species. FWS is developing a recovery plan to guide efforts to bring this species back to a healthy and secure condition." Gary Frazer, Assistant Director -- Ecological Services, U.S. Fish and Wildlife Service.

- **Outside Magazine:** Requesting information about the hiring freeze and seasonal firefighters. Response: Directed them to the 1/31 OMB memo clarifying exemptions for seasonal firefighters and noting DOI requested the waivers last week.

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Doug Domenech  
Senior Advisor  
US Department of the Interior

**Douglas Domenech <douglas\_domenech@ios.doi.gov>**

---

**From:** Douglas Domenech <douglas\_domenech@ios.doi.gov>  
**Sent:** Wed Feb 15 2017 14:18:05 GMT-0700 (MST)  
**To:** "Uli, Gabriella M. EOP/WHO"  
<(b) (6) gov>  
**Subject:** Re: Interior Report 2/15/17 ERROR

Thanks.

Sent from my iPhone

On Feb 15, 2017, at 3:41 PM, Uli, Gabriella M. EOP/WHO  
<(b) (6) gov> wrote:

I've updated the report. Thanks for catching!

---

**From:** Douglas Domenech [[mailto:douglas\\_domenech@ios.doi.gov](mailto:douglas_domenech@ios.doi.gov)]  
**Sent:** Wednesday, February 15, 2017 2:47 PM  
**To:** Uli, Gabriella M. EOP/WHO <(b) (6) gov>; Mashburn, John K.  
EOP/WHO <(b) (6) gov>  
**Subject:** Re: Interior Report 2/15/17 ERROR

Sorry. In my report I said "11,000 acres NPRA". It is actually 11 million acres.  
Ugh.

Sent from my iPhone

On Feb 15, 2017, at 1:23 PM, Domenech, Douglas  
<douglas\_domenech@ios.doi.gov> wrote:

DOI UPDATE FOR CABINET AFFAIRS 2/15/17  
Doug Domenech

**Status of the Nominee**

Rep. Zinke waiting Senate floor vote. We anticipate (hopeful) he may be confirmed Thursday or Friday.

**Zinke Schedule for first week.**

Friday, 2/17 Day One in the building. Various employee meetings, Ethics Briefing, Travel Briefing. Meeting with Sportsmans Groups listed below (invited):

Jeff Crane (Congressional Sportsmen's Foundation)  
Chris Cox (National Rifle Association)

Larry Keane (National Sports Shooting Foundation)  
Margaret Everson (Ducks Unlimited)  
David Anderson (Boone & Crockett Club)  
Mitch Butler (Mule Deer Foundation)  
Greg Schildwachter (Wild Sheep Foundation)  
Whit Fosberg (Theodore Roosevelt Conservation Partnership)  
Mike Nussman (American Sportfishing Association)  
Glenn Le Munyon (Dallas Safari Club)  
Gary Taylor (National Wild Turkey Foundation)  
Jay Mac Aninch (Archery Trade Association)  
Ron Reagan (Association of Fish and Wildlife Agencies)  
Collin O'Mara (National Wildlife Foundation)  
Anna Seidman (Safari Club International)  
Steve Williams (Wildlife Management Institute)

Key Announcements/Secretarial Orders:

- Overturning the FWS Director's decision to ban lead ammo
- Renew charter for Wildlife Hunting Heritage Conservation Council
- Expand opportunities for outdoor recreation on public lands
- Issue Employee Letter on Ethical Standards

Saturday, 2/18 Day Two in the building.

- Briefing on budget
- Briefing on law enforcement and emergency management.
- Briefing on the status of hiring/appointments.

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Doug Domenech  
Senior Advisor  
US Department of the Interior

# Conversation Contents

BLM Planning 2.0

## "Hoelscher, Douglas L. EOP/WHO"

<(b) (6) gov>

---

**From:** "Hoelscher, Douglas L. EOP/WHO"  
<(b) (6) gov>  
**Sent:** Sun Mar 19 2017 18:29:01 GMT-0600 (MDT)  
**To:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>,  
"Scott Hommel@ios.doi.gov"  
<Scott\_Hommel@ios.doi.gov>  
**Subject:** BLM Planning 2.0

Hi Team DOI -- saw below nugget from you all in Cab. Affairs report -- if you all could keep Bill, Justin, and me in the loop as this moves forward, would be good to work with you all to coordinate on the state and local front. Thanks, Doug 🌐 Sec. Zinke Wants a Public Event with POTUS When POTUS signs the CRA on BLM Planning 2.0. – this Obama reg centralized control in the fed govt to prescribe and implement resource management plans to almost exclusively dictate how almost all federally owned lands can be used -- to the exclusion of almost all state, local, or county input regarding such uses, and thus restricting drilling, mining, logging and even recreational uses of federal lands no matter the impact on the local citizenry.

## Scott Hommel <scott\_hommel@ios.doi.gov>

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**From:** Scott Hommel <scott\_hommel@ios.doi.gov>  
**Sent:** Sun Mar 19 2017 20:42:04 GMT-0600 (MDT)  
**To:** "Hoelscher, Douglas L. EOP/WHO"  
<(b) (6) gov>  
"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>,  
"Mashburn, John K. EOP/WHO"  
<(b) (6) gov>, "Flynn, Matthew J.  
**CC:** EOP/WHO" <(b) (6) gov>, "Gunn,  
Ashley L. EOP/WHO" <(b) (6) gov>,  
"Clark, Justin R. EOP/WHO"  
<(b) (6) gov>, "Kirkland, William H.  
EOP/WHO" <(b) (6) gov>  
**Subject:** Re: BLM Planning 2.0

Will do. Thanks. Scott C. Hommel Chief of Staff (acting) Department of the Interior > On Mar 19, 2017, at 8:31 PM, Hoelscher, Douglas L. EOP/WHO

<(b) (6) gov> wrote: > > Hi Team DOI -- saw below nugget from you all in Cab. Affairs report -- if you all could keep Bill, Justin, and me in the loop as this moves forward, would be good to work with you all to coordinate on the state and local front. > > Thanks, > Doug > > > 🌐 Sec. Zinke Wants a Public Event with POTUS When POTUS signs the CRA on BLM Planning 2.0. – this Obama reg centralized control in the fed govt to prescribe and implement resource management plans to almost exclusively dictate how almost all federally owned lands can be used -- to the exclusion of almost all state, local, or county input regarding such uses, and thus restricting drilling, mining, logging and even recreational uses of federal lands no matter the impact on the local citizenry.

## **"Domenech, Douglas" <douglas\_domenech@ios.doi.gov>**

---

**From:** "Domenech, Douglas" <douglas\_domenech@ios.doi.gov>  
**Sent:** Mon Mar 20 2017 09:53:55 GMT-0600 (MDT)  
**To:** Scott Hommel <scott\_hommel@ios.doi.gov>  
"Hoelscher, Douglas L. EOP/WHO"  
<(b) (6) gov>, "Mashburn, John K. EOP/WHO" <(b) (6) gov>, "Flynn, Matthew J. EOP/WHO" <(b) (6) gov>, "Gunn, Ashley L. EOP/WHO" <(b) (6) gov>, "Clark, Justin R. EOP/WHO" <(b) (6) gov>, "Kirkland, William H. EOP/WHO" <(b) (6) gov>  
**CC:**  
**Subject:** Re: BLM Planning 2.0

Sorry I do not recall that specific language. My request was the the Secretary be able to attend the signing ceremony but we are happy to work on anything you want.

Doug Domenech  
Senior Advisor  
US Department of the Interior

On Sun, Mar 19, 2017 at 10:42 PM, Scott Hommel <scott\_hommel@ios.doi.gov> wrote:  
Will do. Thanks.

Scott C. Hommel  
Chief of Staff (acting)  
Department of the Interior

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RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN McCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
JOHN HOEVEN, NORTH DAKOTA  
STEVE DAINES, MONTANA

CLAIRE McCASKILL, MISSOURI  
THOMAS R. CARPER, DELAWARE  
JON TESTER, MONTANA  
HEIDI HEITKAMP, NORTH DAKOTA  
GARY C. PETERS, MICHIGAN  
MARGARET WOOD HASSAN, NEW HAMPSHIRE  
KAMALA D. HARRIS, CALIFORNIA

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

January 30, 2017

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

K. Jack Haugrud  
Acting Secretary  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

Dear Mr. Acting Secretary:

I am writing to request information regarding leadership positions and other critical staffing at the U.S. Department of the Interior during this period of Presidential transition. As the Senate considers President Trump's nominees for cabinet posts, we must also ensure that the federal government remains open and provides necessary services to the American people. In order to meet these oversight obligations, the United States Congress, the IG community and the public must first know who is leading decision-making and operations at federal agencies.

While the confirmation process remains ongoing, it is unclear when Senate leadership will schedule floor votes to confirm several of President Trump's cabinet nominees or who is directing critical decisions at our federal agencies in their absence. Despite this uncertainty, the Trump administration has already deployed hundreds of political appointees to federal agencies to begin work. A spokesperson for the Trump administration reported that: "We have approximately 520 individuals on the beachhead teams and they have worked with the agencies to go in any time after 12:01 [p.m.] on Friday — each team has worked out their own timing."<sup>1</sup> Media reports also indicate that the White House has hired senior aides within federal agencies to monitor the administration's Cabinet secretaries once confirmed.<sup>2</sup> According to a report by *Politico*, these aides "have already been responsible for hiring at some departments and crafting the blueprint of Trump policy before the Cabinet members win Senate confirmation to take office."<sup>3</sup> After this spate of hiring, critical details remain unclear to the American public

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<sup>1</sup> *Trump's 'Beachhead' Teams Primed to Grab Agencies' Reins at Noon Friday*, Politico (Jan. 18, 2017) ([www.politico.com/blogs/donald-trump-administration/2017/01/beachhead-teams-agenda-inauguration-day-233774](http://www.politico.com/blogs/donald-trump-administration/2017/01/beachhead-teams-agenda-inauguration-day-233774)).

<sup>2</sup> *See e.g., Trump Assembles a Shadow Cabinet*, Politico (Jan. 24, 2017) ([www.politico.com/story/2017/01/trumps-shadow-cabinet-234088](http://www.politico.com/story/2017/01/trumps-shadow-cabinet-234088)); *see also Trump Reportedly Installing 'Shadow Cabinet' in Federal Agencies*, AOL News (Jan. 24, 2017) ([www.aol.com/article/news/2017/01/24/trump-reportedly-installing-shadow-cabinet-in-federal-agencies/21661843/](http://www.aol.com/article/news/2017/01/24/trump-reportedly-installing-shadow-cabinet-in-federal-agencies/21661843/)).

<sup>3</sup> *Trump Assembles a Shadow Cabinet*, Politico (Jan. 24, 2017) (<http://www.politico.com/story/2017/01/trumps-shadow-cabinet-234088>).

including who comprises the agency “beachhead teams” and other political appointments and what function these appointees serve relative to the individuals currently in acting positions at federal agencies, pending confirmation of the President’s nominees for cabinet positions.

Already, without Senate-confirmed secretaries, federal agencies in the Trump Administration are making decisions that could adversely impact significant numbers of Americans. For example, on January 20, 2017, the Department of Housing and Urban Development reversed a decision to help expand access to affordable housing to thousands of American families by announcing that it had “suspended indefinitely” a reduction of Mortgage Insurance Premiums for Federal Housing Administration insured loans.<sup>4</sup> That same day, the Department of Justice stated that it would request a delay in a federal case examining the constitutionality of a Texas voter identification law.<sup>5</sup> On January 21, 2017, the Department of Interior suspended its official Twitter account after the Department tweeted images depicting the National Mall during the inauguration of President Donald Trump and President Barack Obama.<sup>6</sup> The Environmental Protection Agency and the Department of Agriculture also put in place formal policies restricting certain communications with the American public.<sup>7</sup> Media reports were unclear regarding which agency officials were involved in directing any of these decisions.

Although with any Presidential transition federal agencies maintain continuity of leadership with acting agency and program heads, as of this writing, some agencies, such as the Department of Agriculture, have not updated their leadership webpages to reflect current agency leadership appointed in an acting capacity. It is critically important that Congress and the Inspector General are aware of, and able to communicate with all Departmental leadership, even in these early days of the new administration. More importantly, the American people need to know who is accountable for the decisions made by federal agencies, especially in the absence of Senate-confirmed leadership. In order to better understand the Department’s current leadership structure please provide the following information to my office not later than close of business on February 6, 2017:

1. A list of and contact information (phone and email address) for the Department’s senior leadership team including, but not limited to: (a) officials appointed in an acting capacity

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<sup>4</sup> Federal Housing Administration, Mortgage Letter 2017-07 (Jan. 20, 2017).

<sup>5</sup> *Trump DOJ Asks for Delay in Texas Voter ID Case Due to ‘Change in Administration’*, CNN (website) (Jan. 20, 2017) (<http://www.cnn.com/2017/01/20/politics/trump-doj-voter-id-delay/index.html>).

<sup>6</sup> *The Interior Department Was Ordered to Suspend Twitter Accounts After Trump Inauguration Tweets*, Fortune (website) (Jan. 21, 2017) ([fortune.com/2017/01/21/interior-department-twitter-donald-trump-inauguration/](http://fortune.com/2017/01/21/interior-department-twitter-donald-trump-inauguration/)).

<sup>7</sup> *Federal Agencies Ordered to Restrict their Communications*, Washington Post (Jan. 24, 2017) ([www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63\\_story.html?utm\\_term=.0e56356fa6e0&wpisrc=nl\\_draw&wpm=1](http://www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.0e56356fa6e0&wpisrc=nl_draw&wpm=1)).

- pending confirmation of a presidentially appointed, Senate confirmed (PAS) official; (b) officials appointed as members of the Trump Administration's "beachhead" team; and (c) any political appointees hired as senior advisors within the Office of the Secretary;
2. List when the members of the Department's "beachhead" team and senior advisors began working at the Department, and explain whether any or all members of the Department's "beachhead team" or senior advisors within the Office of the Secretary have received required ethics training and submitted applicable ethics disclosures;
  3. Provide all documents referring or relating to the roles and responsibilities of each member of the Department's senior leadership team including, but not limited to: (a) officials appointed in an acting capacity pending confirmation of a PAS official; (b) officials appointed as members of the Trump Administration's "beachhead" team; and (c) any political appointees hired as senior advisors within the Office of the Secretary; and
  4. Explain whether the Department has in place appropriate Delegation of Authority documents or any other documents outlining authorities for acting officials, members of the "beachhead" team, and senior advisors within the Office of the Secretary.

Please confirm that you have also provided the above requested information to the Department's Office of Inspector General not later than close of business on February 6, 2017.

Should you have any questions regarding this inquiry, please contact Donald Sherman on my staff at [Donald\\_Sherman@hsgac.senate.gov](mailto:Donald_Sherman@hsgac.senate.gov) or by phone at (202) 224-2627. Thank you in advance for your prompt attention to this request. I look forward to your response.

Sincerely,



Claire McCaskill  
Ranking Member  
Senate Homeland Security and  
Governmental Affairs Committee

cc: The Honorable Ron Johnson  
Chairman  
Senate Homeland Security and  
Governmental Affairs Committee

Ms. Mary L. Kendall  
Deputy Inspector General  
U.S. Department of the Interior

# Conversation Contents

## Interior Cabinet Affairs Report for 3/14/17

### Attachments:

/25. Interior Cabinet Affairs Report for 3/14/17/1.1 DOI DAILY UPDATE FOR CABINET AFFAIRS 3-14-17.docx

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**To:** <(b) (6) gov>, "Flynn, Matthew"  
<(b) (6) gov>, "Uli, Gabriella M.  
EOP/WHO" <(b) (6) gov>  
**Subject:** Interior Cabinet Affairs Report for 3/14/17  
**Attachments:** DOI DAILY UPDATE FOR CABINET AFFAIRS 3-14-17.docx

Attached and copied below.

## DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/14/17

Doug Domenech, Senior Advisor

### Status of the Nominee

The Secretary will be in the office Tuesday and Wednesday.

The Secretary will resume his travel in Montana and Wyoming Thursday, Friday, and Saturday.

### Executive Orders

The Department is awaiting:

EO on Energy (several): Understand looking like next week.

EO on National Monuments

**Potential Announcement:** “Secretary Zinke Reverses Decision that Denied Atlantic Seismic G&G Permits -- New Directive Allows Consideration of Permit Applications to Continue.”

Will this conflict with any upcoming EO?

**Congressional Action Under the CRA** (No change)

**CRAs:** Pending WH Action.

- BLM Planning 2.0 Rule. When will the President sign?

**CRAs:** Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".

**Secretary Meetings and Schedule**

Tuesday March 14: DC

Wednesday 15: DC.

Thursday March 16: Travel to Bozeman, MT. Potential BUDGET media.

Friday: Bozeman/Yellowstone. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area.

Sunday: Fly to DC

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

ASSISTANCE NEEDED FROM CABINET AFFAIRS:

Status?

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. The agency is drafting this.

## **Speaking Invitations**

Regretted.

3/14 National Conference of State Historic Preservation Officers (DC, Liaison Hotel)

3/15 Canadian Minister of Environment and Climate Change, Catherine McKenna (DC)

3/16 National Park Foundation Board Meeting (DC, Hay-Adams Hotel).

Outstanding in Process

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

3/23 Address to the American Petroleum Institute's Board of Directors Meeting (DC, Trump Hotel)

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

4/3 North America's Building Trades Unions National Legislative Conference (DC, Washington Hilton)

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

Accepted

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

## **Emergency Management**

Nothing significant to report.

-

## **Media of Interest**

### **Army Corps Completes \$1.1 Million Dakota Access Protest Camp Cleanup.**

According to the Washington Times (3/13, Richardson), the US Army Corps of Engineers declared its \$1.1 million cleanup of the Dakota Access pipeline protest camps finished Thursday. Corps Capt. Ryan Highnight said in an email that the Florida sanitation company which cleaned the area removed 835 dumpsters of trash, a total of 8,170 cubic yards of debris, from the three camps. Furry Friends Rockin' Rescue of Bismarck-Mandan said in an online post that it has rescued 12 dogs since the protesters evacuated.

### **Senate Urged To Repeal BLM Methane Rule.**

Javier Palomarez, president and CEO of the United State Hispanic Chamber of Commerce, writes in the Pundits Blog for The Hill (3/13, Palomarez) that the energy sector, which helps small businesses expand and hire more workers through cheaper gasoline and utility prices, is threatened by the BLM methane rule. Palomarez says the rule "is unnecessary and adds yet another layer of bureaucratic scrutiny." He argues that the rule will "stifle growth" and jeopardize the 9.8 million jobs supported by the oil and gas industry. The rule is a reach of BLM's jurisdiction because the Clean Air Act gives the authority to regulate clean air to the EPA and individual states. Palomarez ends the piece by urging the Senate to repeal the regulation.

### **Garfield County Votes In Favor Of Downsizing Grand Staircase-Escalante National Monument.**

The Salt Lake (UT) Tribune (3/13, Maffly) reports that advocates and opponents of the Grand Staircase-Escalante National Monument "faced off Monday inside and outside the Garfield County Courthouse, where county commissioners fielded public comments then passed a controversial resolution calling for downsizing the 1.9 million-acre monument." The commission received "comments of up to two minutes from 12 speakers on each side before unanimously voting to approve the resolution, based nearly verbatim on a successful resolution before the Utah Legislature, sponsored by Rep. Mike Noel." The proceedings "highlighted a growing disconnect between entrepreneurs who have moved to Garfield County and elected leaders who claim the monument has undermined the county's customs and heritage, based largely on ranching and natural resource extraction."

### **Interior Director Displayed A "Pattern Of Unprofessional Behavior".**



Additional coverage of the Interior Department inspector general's report that found that "a director at the Department of Interior is alleged to have 'behaved inappropriately' toward six of his female employees" was provided by the Federal Soup (3/13) and Federal News Radio (DC) (3/13, Thornton).

## **White House Communications Report** (sent to WH Comms yesterday)

### **Inquiries**

- WSJ (Jim Carlton) – REQUEST – writing on efforts by Utah politicians to get President Trump to rescind or greatly reduce the new Bears Ears National Monument. I just spoke with Congressman Chaffetz and he said he has put that request in to the president personally, and has invited Secretary Zinke out to Utah to tour the land and meet. Can I get a comment on what Mr. Zinke thinks of this issue? Does he plan to visit Bears Ears and, if so, when? Response: will draft statement and circulate. RESPONSE – TBD

- Washington Times (Ben Wolfgang) REQUEST - Are there any plans at Interior to revisit the King Cove road issue? As far as I know, this whole thing has been dormant since former Secretary Jewell decided against the road in December 2013. Is the Secretary open to re-examining it? Why or why not? RESPONSE – TBD

- Reuters (Dena Aubin) REQUEST – I am writing a story for Westlaw today about a lawsuit filed Friday against the Interior Department seeking to block designation of the Rogue River as a wild and scenic river. Do you have a comment on the lawsuit? RESPONSE – Still coordinating to get an answer.

- EE News (Daniel Cusick) REQUEST – working on a story about this week's scheduled offshore lease sale in North Carolina (March 16). I have communicated with the Bureau of Ocean Energy Management and know that the sale is proceeding as scheduled. I am reaching out to see if I can get comment from Interior HQ about the role that offshore wind power is expected to have in the department's energy leasing program under the Trump administration. RESPONSE – Crafted w/ Kelly Love: "Secretary Zinke and President Trump are committed to creating public lands jobs that provide affordable and reliable energy for America. The administration supports a comprehensive energy solution and renewable energy will play a role so long as that energy is affordable and reliable."

- POLITICO (Darren Samuelson) to National Parks Service REQUEST – asking if NPS will use salt to treat the streets we are responsible for managing. An article in the Boston Globe indicated that President Trump does not like the use of salt to treat roads

because it is corrosive. RESPONSE – NPS Public affairs specialist, “The parks in the region have pre-treated all of our managed roadways in anticipation of the storm. Salt is one of several types of materials we use to treat the roads, but that depends on the condition of each road.”

## **Top Stories**

- Seattle Times (Editorial) Give Interior secretary with a Western perspective a chance
- Flathead Beacon (MT) On First Trip as Interior Secretary, Zinke Vows to Reorganize ...
- Ravalli Republic (MT) Zinke pledges big changes at Department of the Interior
- EE News Zinke hails 3rd straight year of record-breaking visits
- EE News Zinke cancels Mont. visits for Cabinet meeting (Discusses reorganization)
- National Review: Trump’s Skeletal Crew

## **Top Issue and Accomplishments**

- Tomorrow Secretary Zinke will do a ride along with U.S. Park Police as they respond to winter weather emergencies. The USPP patrol much of Washington, D.C., including the GW Parkway, Memorial Bridge, Roosevelt Bridge and I-395. They also have jurisdiction over much of D.C. because of proximity to various National Parks sites. Benny Johnson at IJR is covering. Zinke is focused on the front lines and empowering the law enforcement officers on the ground.
- On Friday, Zinke and the National Park Service announced record visitation at National Parks Service locations in 2016. In an interview at Glacier National Park, Zinke touted the numbers, their economic impact, and the future of the NPS.
- Later this week, the Bureau of Ocean Energy Management will recommend approval of permits to conduct seismic studies on the potential of Atlantic Ocean energy resources.
- Launching a “Travels with Z” blog on our website that is Secretary Zinke’s travel blog going to America’s public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)

-

## **Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Monday.

REG0006837 BLM Notice of Public Meeting; Central Montana Resource Advisory

Council. The meeting is scheduled for March 29, 2017 in Glasgow, Montana.  
Notice 03/13/2017

Doug Domenech  
Senior Advisor  
US Department of the Interior

## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/23/17**

Doug Domenech, Senior Advisor

### **Status of the Secretary**

The Secretary will be in Washington this week.

The Secretary addressed the American Petroleum Institute's Board of Directors Meeting (DC)

### **Media Announcements Today**

No media expected today.

### **Executive Orders**

EO on Energy is on Tuesday. (Of note, the Secretary is on travel Thursday and Friday next week.)

### **Congressional Action Under the CRA**

The BLM Planning 2.0 Rule CRA signing is Monday at the White House.

**CRA:** Passed the House and Senate.

- FWS H.J.Res.69 - "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska". Understand this is headed to the Senate floor perhaps as early as today.

**CRA** pending in the Senate:

- BLM Venting and Flaring Methane Rule

### **Secretary Meetings and Schedule**

3/30-4/1: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate. The President is meeting

Waiting on Resolution of these items: (working with IGA)

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. Interior has provided a draft.

### **Speaking Invitations**

Accepted

3/28 Public Lands Council Legislative Conference Luncheon Keynote 12:00-1:00 Liaison Hotel in DC

3/30-31 U.S. Virgin Islands Transfer Centennial Commission (St. Croix, St. Thomas)

4/3 North America's Building Trades Unions National Legislative Conference Remarks at the Washington Hilton & Towers Hotel, timing TBD.

4/5-7 National Ocean Industries Assoc (NOIA) 2017 Annual Meeting (DC, Ritz Carlton)

4/27 NRA Leadership Forum, George World Congress Center in Atlanta, GA.

Regretted

3/20 Address to the National Water Resources Association's Federal Water Issues Conference

3/23 Address the Student Conservation Association's 60th Anniversary Commemoration (DC)

4/3 Interstate Mining Compact Commission (Williamsburg, VA)

#### Outstanding Invitations in Process

4/4 The Memorial Foundation Martin Luther King Jr. Wreath Laying (DC, MLK Memorial)

4/5 National Alliance of Forest Owners Board of Directors (DC)

4/5 Association of Equipment Distributors & Equipment Dealers Association (DC, Liaison Hotel)

4/5 National Parks Conservation Association Board of Trustees (DC)

4/13 Columbia University's Center on Global Energy Policy's Global Energy Summit (NYC)

4/13-14 Arctic Encounter Symposium (Seattle, WA)

4/14 Montana State Meeting of the Society of American Foresters (Missoula, MT)

4/19 American Forest Resource Council 2017 Annual Meeting (Stevenson, WA)

4/24 National Mining Association Board of Directors Meeting (Naples, FL)

**Sportsmen's Event with VP/POTUS:** We are working on a possible announcement of \$1.1 billion in funding for hunting and fishing activities.

#### Emergency Management

In Florida, the Parliament Fire, which began March 18 on Big Cypress National Preserve in Florida (NPS), has burned 11,568 (+5,541) acres and is 20 (+20)-percent contained. The fire is managed by a Type-3 Incident Management Team (IMT) with 80 (+43) personnel assigned, including 5 (-2) DOI personnel. There are 10 (-4) residential structures threatened. In addition to residential structures, the fire continues to threaten endangered species habitat and other private holdings. The containment date for this fire remains March 26.

In Oklahoma, the Chupco Fire (BIA) began on March 19 in Lamar, OK, has burned 2,405 acres, and is 40-percent contained. The fire is being managed by a Type-3 IMT with 26 personnel assigned, all of which are DOI personnel. There are 6 residential structures threatened. The fire is projected for containment on March 25.

Also, in Wetumka, Oklahoma, the Quassarte Fire (BIA), which began on March 16 and has burned 2,300 (no change) acres, is 90 (+15)-percent contained. The fire is being managed by a Type-3 IMT with 4 (-15) personnel assigned, all of which are DOI personnel. There are 22 residential structures threatened, and full containment is expected on March 25.

Extreme, critical, and elevated fire weather today, along with dry thunderstorms, could lead to increased fire behavior on the Chupco and Quassarte Fires, as conditions move east, while also lending to the onset of other fires along the Texas and Oklahoma panhandles, as well as in eastern New Mexico and western Texas.

#### Media of Interest

##### **Shell Places Highest Total Bid In Gulf Auction.**

Reuters (3/22, Munoz) reports Shell, Chevron and ExxonMobil signaled the oil industry's willingness to return to the deepwater Gulf of Mexico with high bids in the government's auction up 76 percent from a year ago. The auction of parcels received nearly \$275 million in high bids, up from \$156.4 million a year ago. Shell and Chevron each had 20 high bids, and Shell's \$55.8 million total was the largest among the 26 companies submitting bids. Shell also placed the highest bid on the single block at \$24 million. The company has cut its well costs by 50 percent and reduced logistics costs by three quarters, making

deepwater projects affordable with crude prices below \$50 a barrel. Maritime Executive (3/22) reports Shell's bid for \$24 million was for a deepwater block in Atwater Valley.

### **Senate Democrats Slam White House Budget For Interior.**

Law360 (3/22, Sieniuc) reports that Senate Democrats on Tuesday "slammed" President Trump's "proposal to slash the Department of the Interior's budget by \$1.5 billion, saying planned cuts to programs that address climate change contradict the president's commitments to infrastructure spending made on the campaign trail." In a letter to the president led by ranking member of the Senate Energy and Natural Resources Committee Maria Cantwell. "the lawmakers called on Trump to work with Democrats on the DOI budget blueprint and reverse what they call indiscriminate cuts."

### **Battle Over National Monuments A Critical Issue Facing Secretary Zinke.**

The Washington Post (3/22, Fears) reports that Interior Secretary Ryan Zinke is facing pressure from both advocates and opponents of the new Bears Ears National Monument. According to the article, "management of Western land, with its teeming wildlife and vast mineral riches, will be Zinke's greatest challenge at Interior, and conflict over land is particularly acute in Utah." Zinke hasn't "commented publicly about Bears Ears, but a statement from Interior about his position on public lands echoed the concerns of Utah Republican officials who complain that a massive amount of acreage was set aside for the monument without their consent." Zinke supports "the creation of monuments when there is consent and input from local elected officials, the local community, and tribes prior to their designation," Interior spokeswoman Heather Swift said in the statement. The secretary believes monuments are beneficial, but "careful consideration is required before designating significant acreage." Meanwhile, "conservationists are worried not only about Bears Ears but also about the future of other monuments."

### **Survey Finds More Minorities Going Outdoors To Camp.**

MarketWatch (3/22, Paul) reports, that camping is "increasingly becoming an attractive form of vacation" for minorities, "according to a new study from the large national private campground system Kampgrounds of America." The survey "found nonwhite campers now comprise 26% of all campers more than double when it was first measured in 2012." The article notes that "the forecast looks good for the next generation too: 99% of teenagers surveyed said they enjoy camping with family and friends and 90% say they plan to camp as an adult, the KOA survey found."

### **Trump Administration Considering Changes To Five-Year Leasing Plan.**

E&E Daily (3/22) reports Richard Cardinale, acting assistant secretary for lands and minerals management in the Interior Department, told lawmakers yesterday that the Trump Administration is considering changes to the five year oil and gas leasing plan finalized under President Obama. Cardinale said, "At this point I don't know the specifics, but I do know that the administration is in fact taking a look at the plan that was finalized at the end of the last administration."

### **White House Communications Report** (sent to WH Comms yesterday, Tuesday.)

#### **Inquiries**

- CNBC, Reuters REQUEST Comment on claims made by Senators Cardin and Luger that the U.S. is withdrawing from the international Extractive Industries Transparency Initiative (EITI). RESPONSE - "The Department remains committed to the principles and goals of EITI including transparency and good governance of the extractive sectors and are institutionalizing and mainstreaming EITI goals

into how the Department manages its revenues. No decision has been made on applying for validation under the EITI standard and the U.S. is not even scheduled to begin the validation process until April of 2018 (per the EITI International Board schedule published regularly). The United States has led the global initiative in providing revenue-related data and information from the extraction of oil, natural gas, coal and other minerals on federal land in an interactive, open-source data portal and regularly engaging with other implementing countries to share our best practices."

- **EE News** REQUEST Response to the letter Rep. Grijalva sent criticizing Zinke for not responding to his letters and demand that Zinke appear before the committee to testify on the budget.  
RESPONSE Didn't respond

### **Top Stories**

- **EE News:** [Interior Twitter shutdown after inaugural a mistake](#) [emails](#)  
**EE News:** [Zinke should testify on Trump budget proposal soon](#) [Grijalva](#)
- **Washington Post:** [In a first for the government, dogs will be welcome at the Interior Department](#)

### **Top Issues and Accomplishments**

- Tomorrow Zinke will deliver a speech to API
- Preparing to support Coal/Climate EOs
- FYIs The Department will issue press releases this week on the following American Energy activity
  - March 20-23 - DOI will release a number of small coal lease sales in Utah, Ohio, ND.
  - Offshore oil/gas sale
  - Offshore wind energy
- Launching a "*Travels with Z*" blog on our website that is Secretary Zinke's travel blog going to America's public lands and his work on the front lines improving land management for multiple use (energy, recreation, conservation, economy)

### **Federal Register Notices Cleared for Publishing (None Significant)**

Items cleared for the Federal Register on Wednesday.

REG0006860 NPS National Register of Historic Places, February 25, 2017  
The National Park Service is soliciting comments on the significance of properties nominated before February 25, 2017 for listing or related actions in the National Register of Historic Places. Notice 03/22/2017

## **DOI DAILY UPDATE FOR CABINET AFFAIRS – 3/10/17**

Doug Domenech, Senior Advisor

### **Status of the Nominee**

Friday, March 10: The Secretary will participate in a Tribal Blessing by the Blackfeet Nation at Glacier National Park in Montana and will meet with Glacier National Park leadership and staff.

NOTE: The Secretary changed his travel plans and will attend the Cabinet Meeting.

### **Major Energy Announcement**

Denver-based Armstrong Oil and Gas and Spanish-based partner Repsol just announced the largest onshore find on the North Slope in 30 years: 1.2 billion barrels. This is huge for Alaska and TAPS. It's on state lands, the minerals are state and some Alaska natives, but will need permitting from FWS and the Army Corps. This is also a sign of potential for federal lands nearby.

<https://www.usnews.com/news/business/articles/2017-03-09/companies-claim-largest-us-onshore-oil-discovery-in-30-years>

### **Executive Orders**

The Department is awaiting:

EO on Energy (several)

EO on National Monuments

### **The Department is preparing plans to release these energy related Actions**

- Secretarial Orders and Memoranda on:
- Secretarial Order: Revocation of the Federal Coal Moratorium
- Reopening National Petroleum Reserve Alaska
- Reinitiating Quarterly Onshore Leasing Program
- Lifting Moratoriums on Offshore Energy
- Restarting a new Five Year OCS Plan
- Financial Assurance Notice to Lessees (NTL) Policy Review
- Well Control Rule Withdrawal
- Offshore Air Rule
- Atlantic Seismic Survey Activities
- Endangered Species Act Review and Reform
- Reverse Compensatory Mitigation
- National Monuments: Review

### **Congressional Action Under the CRA ( No change)**

**CRAs** : Pending WH Action.

- BLM Planning 2.0 Rule. The Secretary would like to participate in any signing ceremony.

**CRAs**: Passed the House, Pending in the Senate.

- BLM Venting and Flaring Methane Rule
- FWS H.J.Res.69 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Department of the Interior relating to "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska".



### **Secretary Meetings and Schedule**

Friday, March 10: Tribal Blessing by the Blackfeet Nation at Glacier National Park, Meeting with Glacier National Park leadership and staff.

Saturday March 11: Meeting on Bison Management in Missoula, MT

Saturday March 12: Sunday: Fly from Missoula to DC

Monday March 13 to 15: DC

Thursday March 16: Helena. Speak at a Special Joint Session of the Montana State Legislature, State Capitol in Helena, MT. Meeting with the Governor. Approved political event with candidate for Congress. Potential BUDGET media.

Friday: Bozeman/Yellowstone. Press conference in front of arch announcing historic park visitation. Meeting with Yellowstone National Park about maintenance backlog and bison management issues.

Saturday March 18: Meeting with Sen. Murkowski in Bozeman area.

Sunday: Fly to DC

Further out.

3/31: Participate in the 100<sup>th</sup> Commemoration of the purchase of the Virgin Islands from Denmark. The Danish Prime Minister will participate.

#### **ASSISTANCE NEEDED FROM CABINET AFFAIRS:**

The Secretary is requesting that he attend this important event at the request of the President.

The Secretary is requesting military aircraft assistance with this trip.

The Secretary is requesting the White House provide a Proclamation and/or letter he can read from the President acknowledging the commemoration. The agency is drafting this.

### **Emergency Management**

In North Dakota, completion of camp clean-up efforts by the U.S. Army Corps of Engineers contractor is scheduled for March 11. A total of 40 BIA law enforcement officers will remain on the Standing Rock Sioux Reservation. There have been 98 arrests since February 24.

In Oklahoma, the Irate Fire, located northeast of Lamar, OK (BIA), began on March 6 and has burned 2,350 (+350) acres. The fire is 45 (+5)-percent contained and managed by a Type-4 Incident Management Team (IMT) with 34 (+26) personnel assigned, which includes 30 (+22) DOI personnel. There are 6 (-9) residential and 50 (+20) commercial structures threatened. The containment date has been adjusted to March 16.

The Milsap Fire, located on the Osage Reservation in Oklahoma, began on March 7 and has burned 9,636 (no change) acres. The fire is 55 (+35)-percent contained and managed by a Type-4 IMT with 4 (-55) personnel assigned, all of which are DOI personnel. No additional perimeter growth is expected. The containment date for this fire is March 25.

The Lost Creek Fire in Okfuskee County, Oklahoma (BIA) began on March 2 and has burned 2,135 (+135) acres. The fire is 99 (+34)-percent contained and managed by a Type-4 IMT with 3 (-23) personnel assigned, all of which are DOI personnel. Full containment is expected today.

## **Media**

### **Secretary Zinke To Visit Montana.**

The AP (3/9) reports that Interior Secretary Ryan Zinke on Friday will visit Glacier National Park “to talk about the park system’s multi-billion-dollar maintenance backlog.” During his visit to Glacier, Zinke “also will receive a traditional tribal blessing by members of the Blackfoot Nation.” On Monday, he will “address a joint session of the Montana Legislature.” Then, on Tuesday, Zinke will “visit Bureau of Land Management field offices in Lewistown and Billings for closed meetings with agency personnel.”

### **Secretary Zinke Pledges Support For Tribal Energy, Infrastructure Development, Quiet On Climate Change.**

E&E Daily (3/9) reports that Interior Secretary Ryan Zinke pledged to support tribal energy development, telling the Senate Indian Affairs Committee that the Interior Department “has not always stood shoulder to shoulder with many of the tribal communities for which it is tasked to fight.” Zinke sees an opportunity to foster economic productivity through “improved infrastructure and expanded access to an all-of-the-above energy development approach.” Zinke pledged to support Sen. Al Franken’s efforts to find money for the tribal energy loan guarantee program and improve consultation with tribes around energy development. Zinke promised Sen. Steve Daines that he would urge the Army Corps of Engineers to quickly permit coal export terminals supported by some tribes, but E&E reports that Zinke’s commitment “glossed divisions among tribes over coal export terminals.”

ClimateWire (3/9) reports that Zinke did not remark on climate change during the hearing. Julie Maldonado, director of research for the Livelihoods and Knowledge Exchange Network and a lead author of the 2014 National Climate Assessment chapter on indigenous peoples, said, “Zinke brought up the need to pay specific attention to sovereignty and self-determination,” adding that tribes are “on the front lines of climate change and experience unique climate-related challenges.” In one example, tribes, confined to reservation land, cannot follow elk if climate change shifts migration patterns.

### **Texas Land Commissioner Wants Protections For Endangered Warbler Removed.**

The Austin (TX) American Statesman (3/9, Price) reports that Texas Land Commissioner George P. Bush, “determined to remove special habitat protections for” the golden-cheeked warbler, “said Thursday that he is preparing to sue the federal government on the matter.” However, “birders and the U.S. Fish and Wildlife Service disagree with Bush’s premise that the warbler has fully recovered from the circumstances that landed the bird on the endangered species in the first place.” The dispute “promises to be a test case for the Trump administration’s approach to endangered species protections.”

### **Inspector General Report**

Released today. In April 2016, we opened this investigation into potential mismanagement of U.S. Fish and Wildlife Service (FWS) employees by Hannibal Bolton, Senior Advisor for Diversity and Workforce Inclusion, FWS, while in his former position as assistant director for the FWS Wildlife and Sport Fish Restoration (WSFR) program. An earlier investigation had revealed that over the course of several years, Bolton’s former employee, Stephen M. Barton, failed to report that he received income from a prohibited source and that he violated the U.S. Department of the Interior’s (DOI) telework rules and took personal trips at Government expense.

**To:** Magallanes, Downey[downey\_magallanes@ios.doi.gov]  
**From:** Bolen, Brittany (RPC)  
**Sent:** 2017-02-15T13:26:58-05:00  
**Importance:** Normal  
**Subject:** FW: H.J. Res. 36, Resolution of disapproval regarding BLM's methane rule  
**Received:** 2017-02-15T13:27:07-05:00

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**From:** Bolen, Brittany (RPC)  
**Sent:** Monday, February 13, 2017 9:34 AM  
**Subject:** H.J. Res. 36, Resolution of disapproval regarding BLM's methane rule

The Senate is expected to consider H.J. Res. 36, a resolution of disapproval under the Congressional Review Act regarding the Bureau of Land Management's final "Waste Prevention, Production Subject to Royalties, and Resource Conservation" rule.

## **H.J. Res. 36, Resolution of disapproval regarding BLM's methane rule**

### **Summary**

The resolution provides for congressional disapproval under the CRA of the BLM's final "Waste Prevention, Production Subject to Royalties, and Resource Conservation" rule.

On February 3, the House passed H.J. Res. 36 by a bipartisan vote of 221 to 191. Senate consideration is expected to follow.

### **Background**

On November 18, 2016, the BLM rule was published in the Federal Register, and it went into effect on January 17. BLM is an office in the Department of the Interior. The rule regulates methane emissions from and establishes new royalty rates for oil and natural gas production on federal and Indian lands. BLM estimated the rule would cost up to \$279 million each year over a 10-year period (2017-2026) and impose an annual burden of 82,170 paperwork hours.

On January 30, Sen. John Barrasso, introduced S.J. Res. 11, and Rep. Rob Bishop introduced H.J. Res. 36, which provide for congressional disapproval of the rule under the Congressional Review Act. Currently, S.J. Res. 11 has 14 co-sponsors.

Congress and the new administration can repeal midnight rules finalized after June 13, 2016, through a resolution of disapproval under the 1996 Congressional Review Act. H. J. Res. 36 deems that BLM's final rule shall have no force or effect and prohibits the agency from issuing any future rule that is "substantially the same" form.

On February 1, the Trump administration issued a Statement of Administration Policy that "strongly supports" H.J. Res. 36 and indicated the president would sign it into law.

## Considerations

Methane is the primary component of natural gas. During the course of oil and natural gas production, methane may be emitted. Because it is a valuable commodity, oil and natural gas producers have an incentive to capture and process methane to provide energy to American consumers. In its proposed rule, BLM itself acknowledged that “operators do not want to waste gas.” However, in the interest of worker safety, producers and operators will at times find it necessary to let methane escape (i.e. vent) or combust it (i.e. flare). Flaring also occurs in areas that lack gas-gathering infrastructure, which consists of small pipelines that ship natural gas from oil and gas wells to processing plants. BLM’s proposed rule admitted that flaring takes place in areas: (1) “where capture and processing infrastructure has not yet been built out”; and (2) “with existing capture infrastructure, but where the rate of new-well construction is outpacing the infrastructure capacity.”

Last year, BLM issued a proposed methane rule, which was published in the Federal Register on February 8, 2016. Days after the election, on November 15, 2016, BLM released a 337-page prepublication version of the final rule, which unusually specified an effective date of January 17, 2017. The final rule has already been affecting oil and natural gas operations. Since January 17, the venting prohibition and new royalty rates have been in effect, and operators have been required to submit a plan to comply with BLM’s waste-prevention controls with any new application for a permit to develop a well.

### Exceeds BLM’s authority

BLM promulgated the rule under Mineral Leasing Act of 1920, which provides BLM authority to address undue waste on federal and Indian lands. Rather than abide by this authority, BLM designed the rule to address air quality by imposing specific requirements to curb methane emissions. Under the Clean Air Act, Congress vested the authority to regulate air quality with the Environmental Protection Agency in partnership with the states. Concerns over BLM’s lack of authority have been expressed by several state and tribal officials, including:

- New Mexico’s Energy, Minerals, and Natural Resources Department commented: “It appears as though BLM is attempting to promulgate Clean Air Act rules under the guide of a waste rule. Certainly, [the EPA] and its state counterpart, the Environment Department, have the statutory authority to regulate air quality matters.”
- The Wyoming Department of Environmental Quality, Air Quality Division, commented: “Congress knew that the complicated nature of air emissions would be best understood and managed by the states and the ... EPA, not the BLM.”

- The Attorney General of the state of Montana, stated: “the Rule, as written, impermissibly intrudes upon the sovereign authority of state oil and gas conservation commissions to define and control oil and gas waste, and it unnecessarily creates jurisdictional confusion over the specific regulatory standards that Operators of wells must meet.”
- The chairman of the Southern Ute Indian tribe, located in southwest Colorado, stated: “the BLM lacks legal authority under the Clean Air Act to impose air quality control aspects of the rule and, even if it had authority, the rule creates a regulatory conflict between the BLM and the U.S. EPA.”

A federal district court judge also expressed significant concerns with the rule’s overlap with EPA and state regulation. In a January 16 order, Judge Scott Skavdahl wrote: “It appears the asserted cost benefits of the Rule are predominantly based upon emission reductions, which is outside of BLM’s expertise, and not attributed to the purported waste prevention purpose of the Rule.”

#### Duplicative of state and EPA regulation

The rule is duplicative of existing state and EPA regulation of oil and natural gas facilities. The BLM’s rule is based on Wyoming and Colorado regulations. Nearly all energy-producing states have issued similar emission control requirements. BLM’s fact sheet on the final rule even stated, “[s]everal states, including North Dakota, Colorado, Wyoming, Utah and most recently Pennsylvania, as well as the U.S. Environmental Protection Agency (EPA), have also taken steps to limit venting, flaring and/or leaks.” Since 2012, EPA has issued two regulations addressing emissions from oil and gas facilities nationwide, including one last May that specifically targets methane from new and modified existing oil and natural gas facilities. Many sources of methane emissions within oil and natural gas facilities are covered by both BLM and EPA’s rules. Moreover, days after the election and before BLM issued its final rule, the EPA submitted an immense information collection request to the oil and natural gas industry in order to develop a rule to regulate unmodified existing oil and gas sources.

While BLM’s final rule said it “seeks to minimize regulatory overlap,” the rule creates greater confusion for and burden on producers as well as state and federal regulators. For instance, the North Dakota Industrial Commission, which includes the governor, attorney general, and agriculture commissioner of the state, commented: “The highly detailed leak detection and repair requirements in the [BLM’s] proposed rule may be consistent with EPA [regulation] initially, but will likely result in conflicting requirements when either agency makes changes or issues guidance.”

#### Ignores commonsense solutions

BLM claims the rule is necessary to capture more methane in order to garner increased royalty revenue; yet the rule may actually decrease production and royalties. The rule’s costly and burdensome requirements could result in the shut-in of a number of

producing wells on federal and Indian lands. This would not only reduce the royalty revenue assumed in the rule but would reduce American consumers' access to affordable energy. While BLM estimates the rule would provide \$23 million more in annual royalties, additional [economic analyses](#) have reported that based on current market prices of natural gas the rule would create no more than \$3.68 million in additional royalties and would reduce federal and state tax revenue by an annual \$114 million.

The oil and gas industry has already taken voluntary steps to capture methane that has generated revenue for the U.S. Treasury absent federal regulation. In 2012 alone, voluntary measures to reduce methane emission by the oil and gas industry generated \$264 million in revenue. In a state such as [Wyoming](#), which already regulates methane emissions, Gov. Matt Mead reported last year that only 0.26 percent of produced gas is flared. In June 2016, the U.S. Energy Information Administration [reported](#) that flaring in North Dakota declined more than 20 percent in the two years following state regulation of methane emissions.

Nationwide, as natural gas production rose 47 percent from 1990 to 2014, EPA's greenhouse gas [inventory reported](#) natural gas systems have reduced methane emissions by roughly 15 percent during the same period of time. This figure almost certainly underestimates the reduction, as EPA dramatically altered its methodology for estimating methane emissions from oil and gas production last year. The agency started applying emission levels from larger facilities to small facilities that are not included in EPA's greenhouse gas reporting program.

Rather than impede this progress, BLM should embrace a common-sense solution to capture more methane and increase production royalties on federal lands by providing increased access to pipelines and gathering lines to process and transport methane to market. By fixing permitting and pipeline delays, natural gas can reach consumers more quickly. In a [letter](#) to House Speaker Paul Ryan supporting congressional repeal of BLM's rule, New Mexico Gov. Susana Martinez further explained: "Insufficient pipeline capacity and gas processing capacity make it difficult for producers to capture and sell as much of their product as possible. The Department of Interior can correct the root causes of venting and flaring events by approving pipeline right-of-ways more efficiently, which will increase pipeline capacity."

Even BLM has admitted that unnecessary venting and flaring takes place in areas with a lack of pipelines or pipeline capacity. A bipartisan majority of senators voted last year in favor of expediting permitting process for natural gas gathering lines on federal and Indian lands. At his nomination hearing to be secretary of the interior, Rep. Ryan Zinke also [expressed](#) support for repealing BLM's rule and agreed that a better network of pipelines and gathering lines would provide greater capture and transport of natural gas for sale.

#### Provides no meaningful environmental benefits

BLM also asserts the rule is needed to fulfill President Obama's climate action plan and

strategy to reduce methane. However, BLM's rule produces no meaningful climate benefits. As a practical matter, by causing producers to shut-in wells, BLM's rule could have the effect of increasing energy production in other countries with weaker environmental standards and greater global methane emissions.

Moreover, absent the flawed royalty assumptions, BLM's only other asserted monetized benefits of the rule are attributed to the novel, so-called social cost of methane metric. This metric has nothing to do with BLM's authority to capture undue waste and has been widely challenged for failing to follow information quality and peer review guidelines. Had BLM conducted a proper cost-benefit analysis, the costs of the rule would overwhelmingly exceed the benefits.

Methane emissions addressed by BLM's rule also pose no significant contribution to global climate change. EPA reported the most recent estimates of global methane emissions at 8,375 million metric tons of carbon dioxide equivalents per year. EPA's 2016 GHG Inventory reported that U.S. methane emissions are estimated at 730.8 million metric tons of CO2 equivalents per year. BLM estimates its final rule would reduce roughly 4.4-4.5 million metric tons of CO2 equivalents per year. In other words, BLM's rule would address 0.61 percent of domestic methane emissions and 0.053 percent of global methane emissions.

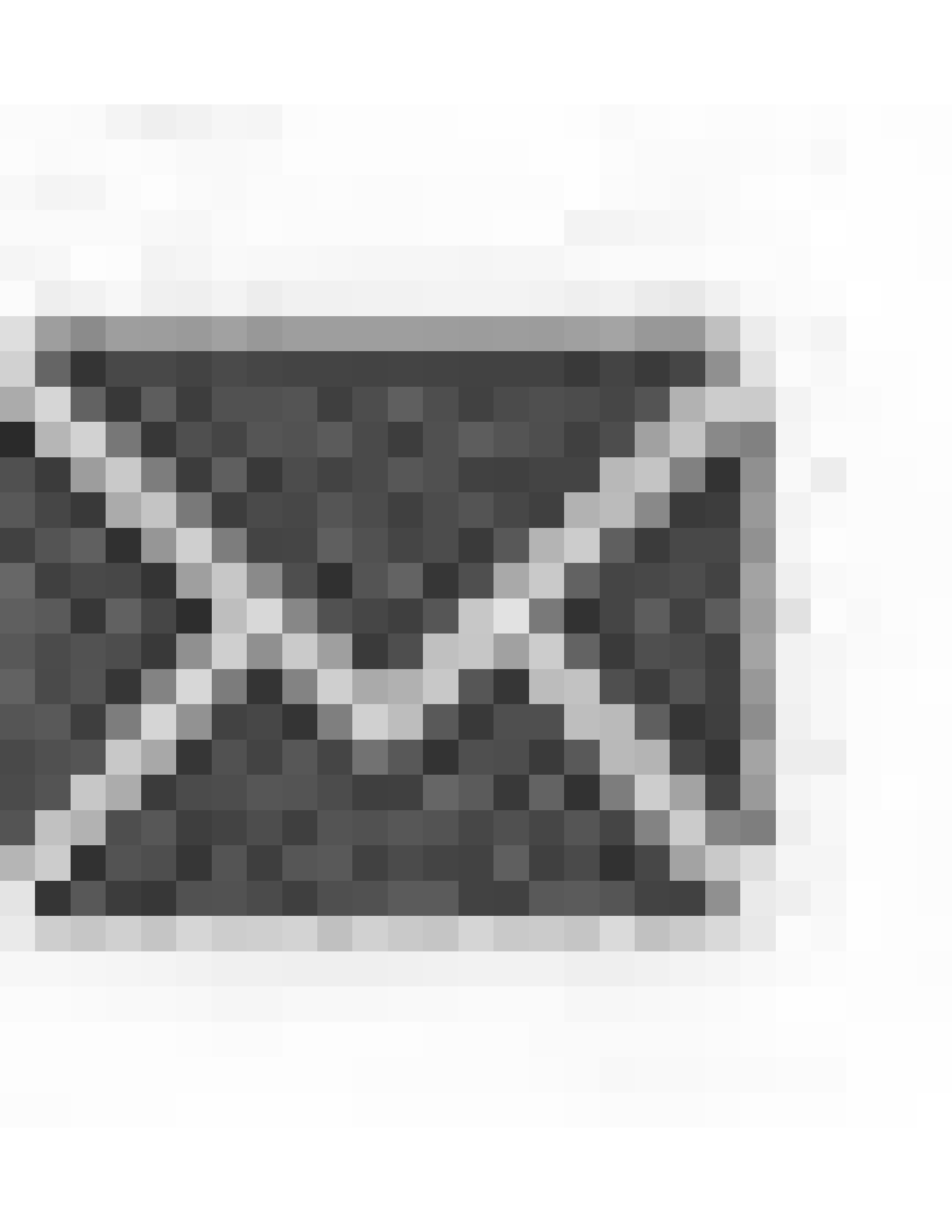
Brittany Bolen  
Policy Counsel  
Energy, Environment, and Agriculture

(b) (5)

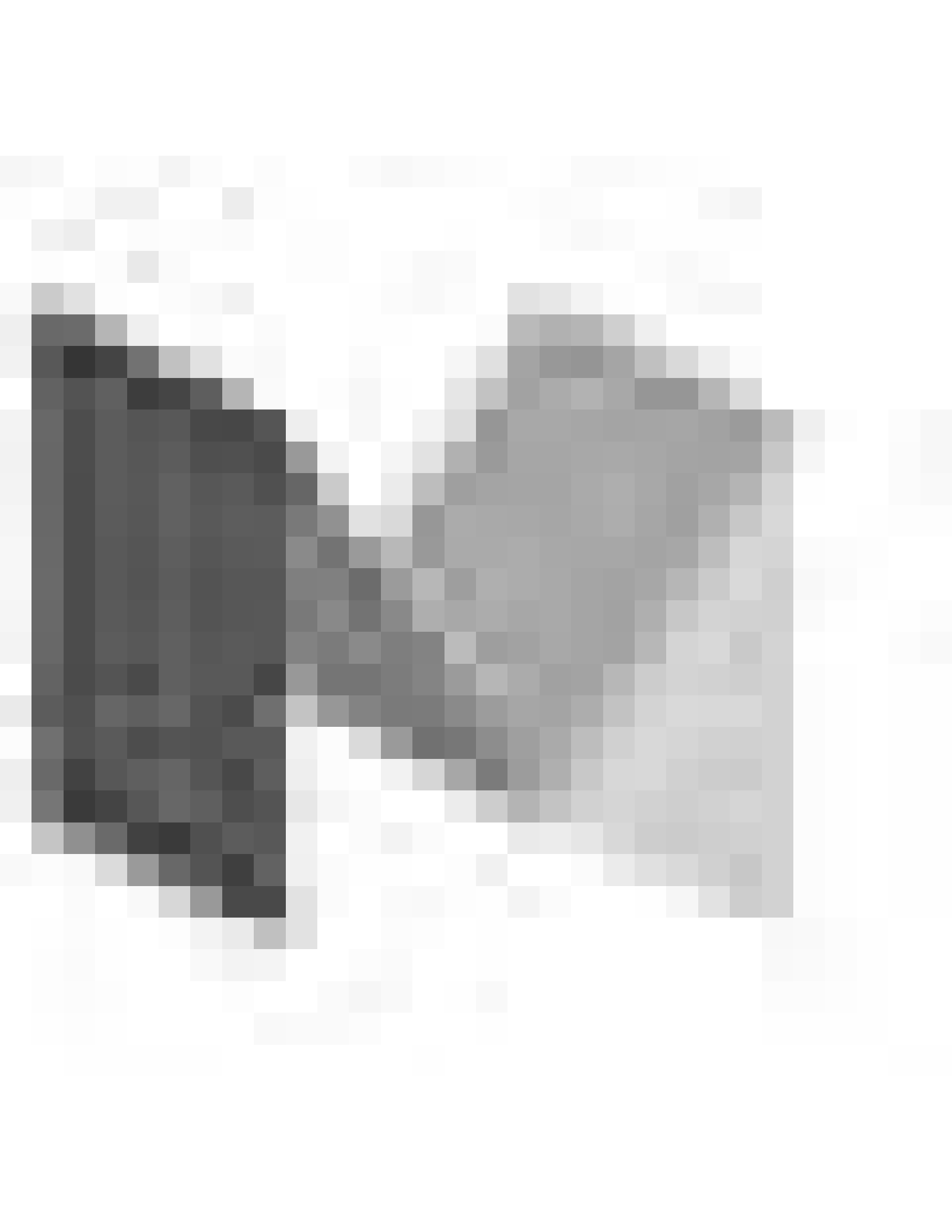
--

U.S. Senate Republican Policy Committee  
Chairman John Barrasso















**To:** Bolen, Brittany (RPC)[Brittany\_Bolen@rpc.senate.gov]  
**From:** Magallanes, Downey  
**Sent:** 2017-02-15T13:54:18-05:00  
**Importance:** Normal  
**Subject:** Re: FW: H.J. Res. 36, Resolution of disapproval regarding BLM's methane rule  
**Received:** 2017-02-15T13:54:27-05:00

THANK YOU

On Wed, Feb 15, 2017 at 1:26 PM, Bolen, Brittany (RPC) <[Brittany\\_Bolen@rpc.senate.gov](mailto:Brittany_Bolen@rpc.senate.gov)> wrote:

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**From:** Bolen, Brittany (RPC)  
**Sent:** Monday, February 13, 2017 9:34 AM  
**Subject:** H.J. Res. 36, Resolution of disapproval regarding BLM's methane rule

The Senate is expected to consider H.J. Res. 36, a resolution of disapproval under the Congressional Review Act regarding the Bureau of Land Management's final "Waste Prevention, Production Subject to Royalties, and Resource Conservation" rule.

## **H.J. Res. 36, Resolution of disapproval regarding BLM's methane rule**

### **Summary**

The [resolution](#) provides for congressional disapproval under the CRA of the BLM's final "Waste Prevention, Production Subject to Royalties, and Resource Conservation" rule.

On February 3, the House [passed](#) H.J. Res. 36 by a bipartisan vote of 221 to 191. Senate consideration is expected to follow.

### **Background**

On November 18, 2016, the BLM rule was published in the Federal Register, and it went into effect on January 17. BLM is an office in the Department of the Interior. The rule regulates methane emissions from and establishes new royalty rates for oil and natural gas production on federal and Indian lands. BLM estimated the rule would cost up to \$279 million each year over a 10-year period (2017-2026) and impose an annual burden of 82,170 paperwork hours.

On January 30, Sen. John Barrasso, introduced S.J. Res. 11, and Rep. Rob Bishop introduced H.J. Res. 36, which provide for congressional disapproval of the rule under the Congressional Review Act. Currently, S.J. Res. 11 has 14 co-sponsors.

Congress and the new administration can repeal midnight rules finalized after June 13, 2016, through a resolution of disapproval under the 1996 Congressional Review Act. H. J. Res. 36 deems that BLM's final rule shall have no force or effect and prohibits the agency from issuing any future rule that is "substantially the same" form.

On February 1, the Trump administration issued a Statement of Administration Policy that "strongly supports" H.J. Res. 36 and indicated the president would sign it into law.

## **Considerations**

Methane is the primary component of natural gas. During the course of oil and natural gas production, methane may be emitted. Because it is a valuable commodity, oil and natural gas producers have an incentive to capture and process methane to provide energy to American consumers. In its proposed rule, BLM itself acknowledged that "operators do not want to waste gas." However, in the interest of worker safety, producers and operators will at times find it necessary to let methane escape (i.e. vent) or combust it (i.e. flare). Flaring also occurs in areas that lack gas-gathering infrastructure, which consists of small pipelines that ship natural gas from oil and gas wells to processing plants. BLM's proposed rule admitted that flaring takes place in areas: (1) "where capture and processing infrastructure has not yet been built out"; and (2) "with existing capture infrastructure, but where the rate of new-well construction is outpacing the infrastructure capacity."

Last year, BLM issued a proposed methane rule, which was published in the Federal

Register on February 8, 2016. Days after the election, on November 15, 2016, BLM released a 337-page prepublication version of the final rule, which unusually specified an effective date of January 17, 2017. The final rule has already been affecting oil and natural gas operations. Since January 17, the venting prohibition and new royalty rates have been in effect, and operators have been required to submit a plan to comply with BLM's waste-prevention controls with any new application for a permit to develop a well.

### Exceeds BLM's authority

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- New Mexico's Energy, Minerals, and Natural Resources Department commented: "It appears as though BLM is attempting to promulgate Clean Air Act rules under the guise of a waste rule. Certainly, [the EPA] and its state counterpart, the Environment Department, have the statutory authority to regulate air quality matters."
  
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Policy Counsel

Energy, Environment, and Agriculture

(b) (5)

U.S. Senate Republican Policy Committee

Chairman John Barrasso



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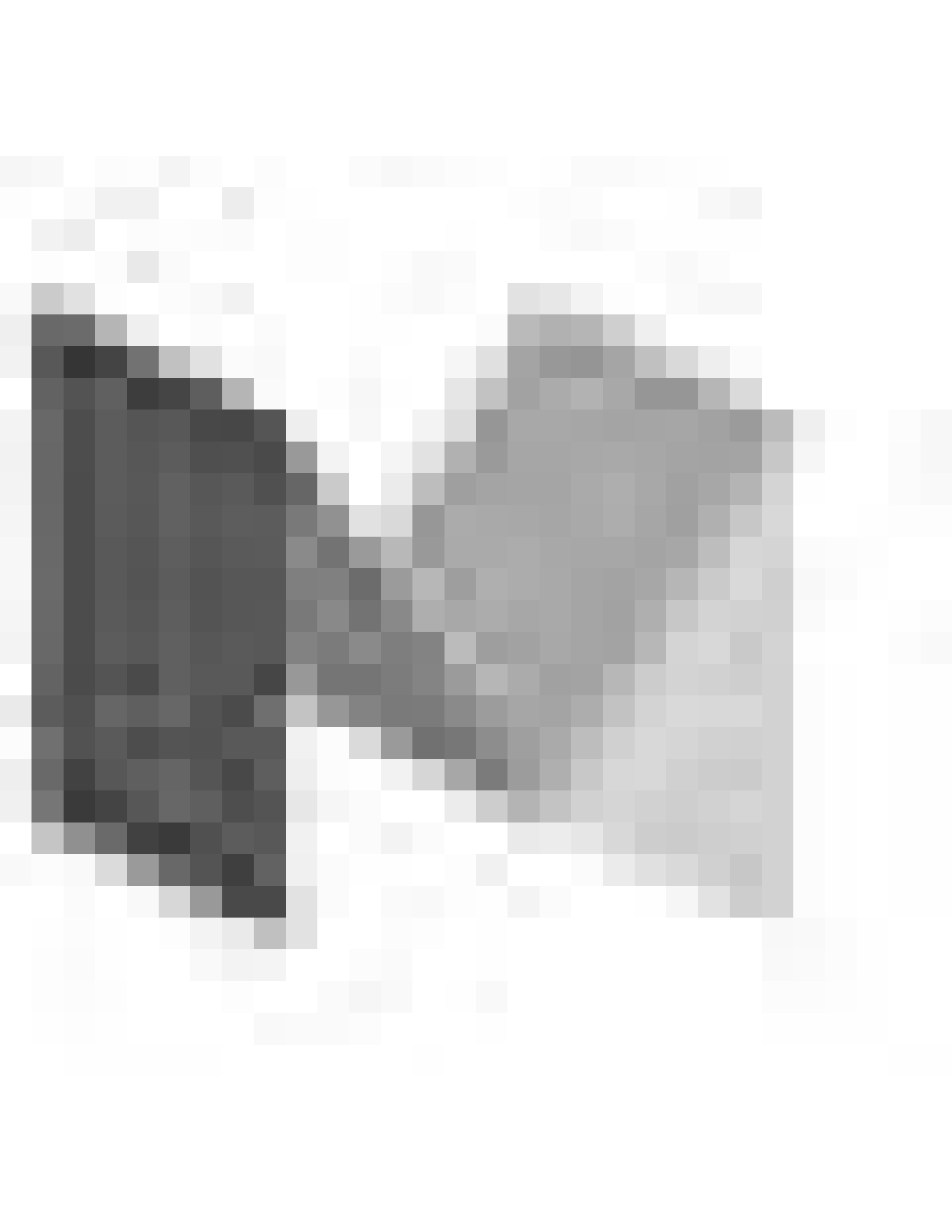
Downey Magallanes

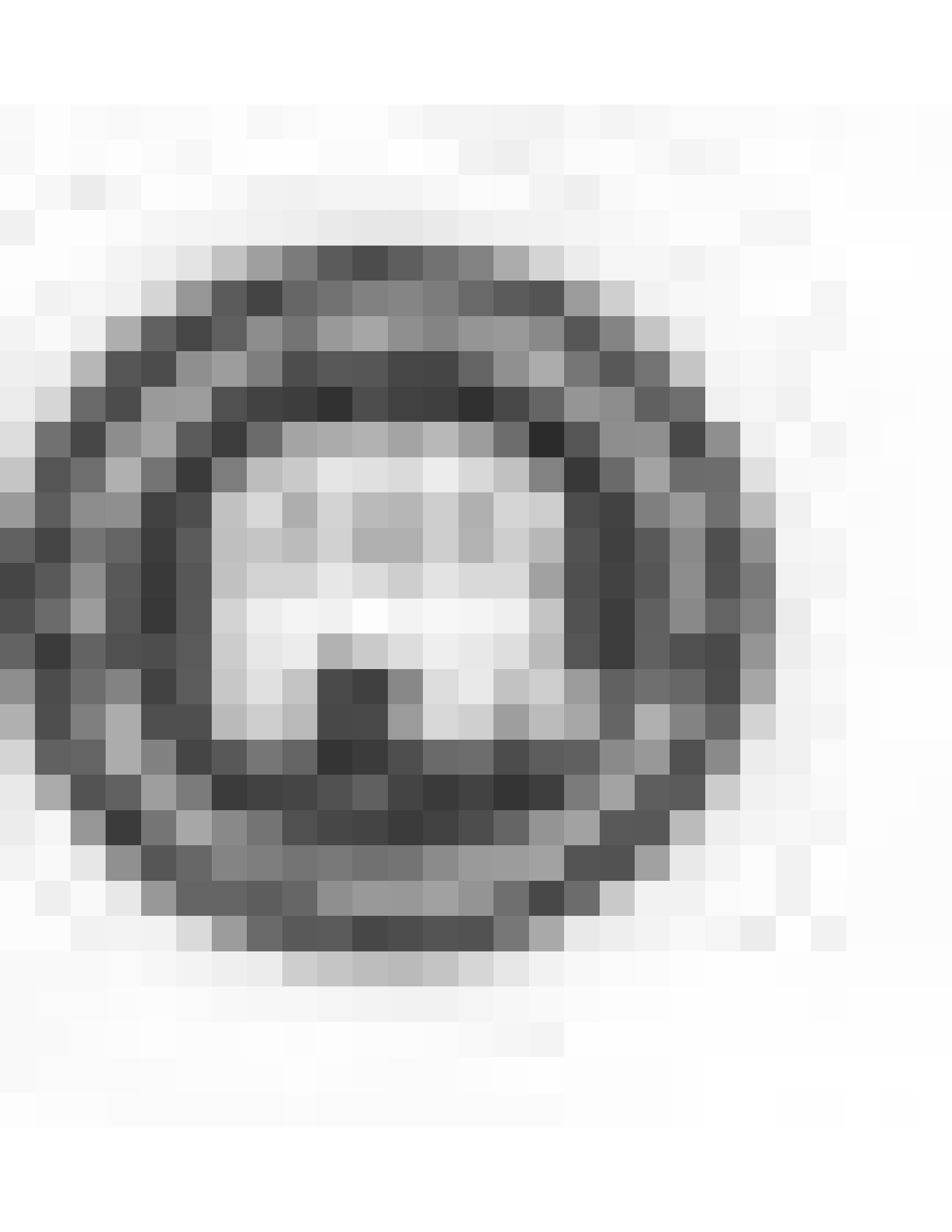
Office of the Secretary

[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)

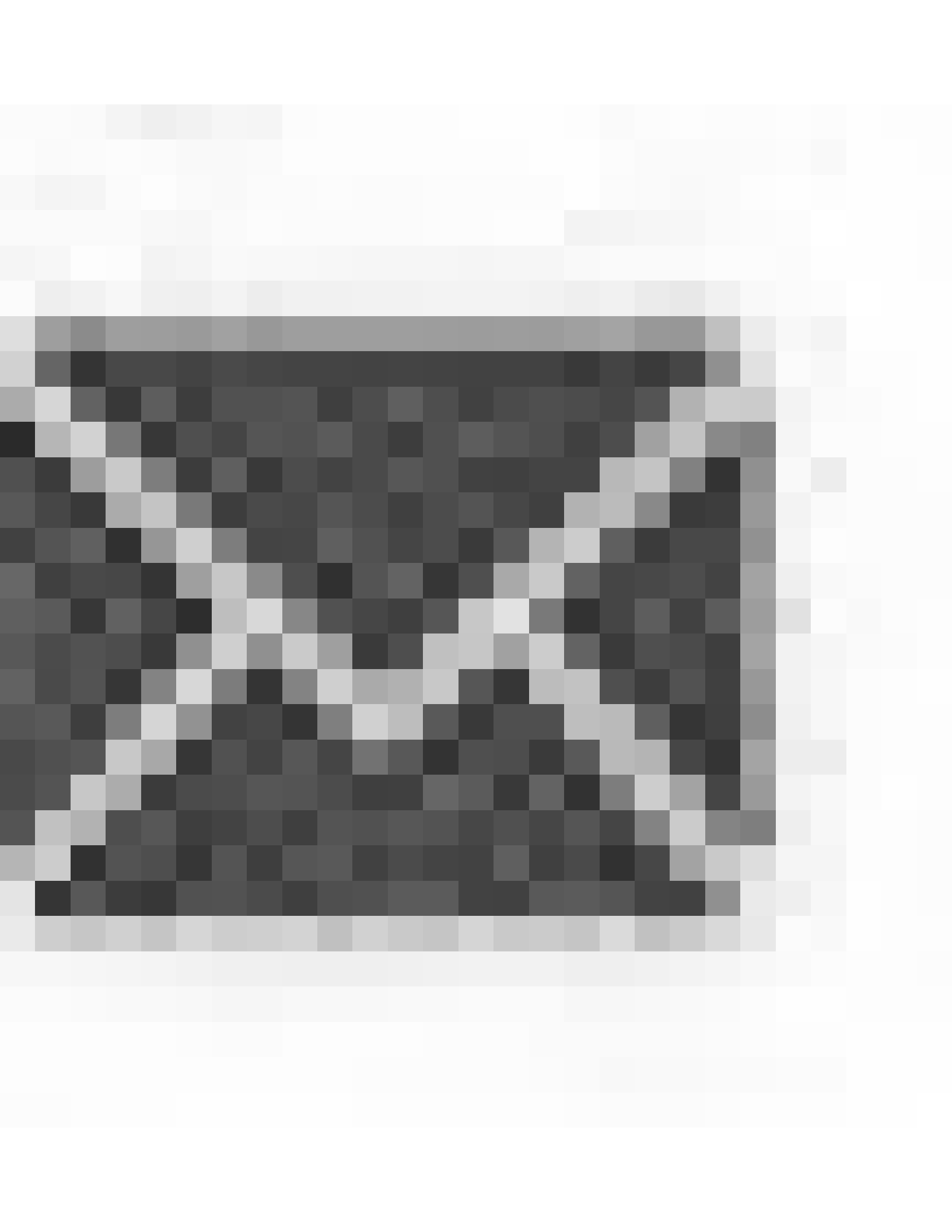
202-501-0654 (desk)

202-706-9199 (cell)













**To:** Neely, Amanda (HSGAC)[Amanda\_Neely@hsgac.senate.gov]  
**Cc:** Micah Chambers[micah\_chambers@ios.doi.gov]; Pearce, Sarah (Portman)[Sarah\_Pearce@portman.senate.gov]; Owen, Matt (HSGAC)[Matt\_Owen@hsgac.senate.gov]  
**From:** Kaster, Amanda  
**Sent:** 2017-03-17T11:00:16-04:00  
**Importance:** Normal  
**Subject:** Re: Follow up from the call  
**Received:** 2017-03-17T11:00:48-04:00  
[ARTICLE A COST-BENEFIT INTERPRETATION OF THE SUBSTANTI \(2\).pdf](#)  
[Con Rec E571 Hyde Remarks 4-19-96.pdf](#)  
[Con Rec S3683 Nickles Remarks 4-18-96.pdf](#)  
[Judicial Citations CRA 3-15-17.docx](#)

Amanda: please see attached.

- The joint statements read into the record in 1996 in lieu of legislative history for the Congressional Review Act.
- A list of the judicial opinions referenced Wednesday.
- The 2011 law review article we referenced yesterday, entitled "A Cost Benefit Interpretation of the 'Substantially Similar' Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E Word (Ergonomics) Again?"
  - Note: these commentators cite the joint statement and conclude that "[a]lthough the text of the CRA significantly limits judicial review of a congressional veto (or failure to veto), the statute does *not* prohibit judicial review for noncompliance with the substantial similarity clause of a rule promulgated after a congressional veto." (P. 732). Note also that the authors' interpretation of the joint statement does not necessarily comport with judicial interpretation of the judicial limitation provision as they suggest that the limitation applies only to congressional action under the CRA.

On Fri, Mar 17, 2017 at 10:56 AM, Neely, Amanda (HSGAC)  
<[Amanda\\_Neely@hsgac.senate.gov](mailto:Amanda_Neely@hsgac.senate.gov)> wrote:

Micah and Amanda,

Per our discussion on Wednesday, would you please send me the cases regarding the CRA's judicial review clause and the law review article that argues that a "substantially the same as" analysis should be based on economic impact? I've found the joint statement, so no need to send that. Given the timeliness of this issue, it would be great if you would send those on today.

Thanks,

Amanda

Amanda H. Neely

Deputy Chief Counsel

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS (PSI)

U.S. SENATE

(b) (5)

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**From:** Micah Chambers [mailto:[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]  
**Sent:** Tuesday, March 14, 2017 7:07 PM  
**To:** Pearce, Sarah (Portman)  
**Cc:** Amanda Kaster; Owen, Matt (HSGAC); Neely, Amanda (HSGAC)

**Subject:** Re: Follow up from the call

We will be there. I just got confirmation from Sen. Collins staff Mary Grace and I believe one SENR staffer will be attending as well. Thanks again for taking the time.

Micah

Sent from my iPhone

On Mar 14, 2017, at 6:56 PM, Pearce, Sarah (Portman) <[Sarah\\_Pearce@portman.senate.gov](mailto:Sarah_Pearce@portman.senate.gov)> wrote:

Hi All,

I'm writing to confirm our meeting tomorrow, Wednesday March 15<sup>th</sup> at 12:30 in Russell 199.

Looking forward to seeing everyone then.

Thanks,

Sarah

**From:** Chambers, Micah [mailto:[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]  
**Sent:** Monday, March 13, 2017 6:52 PM

**To:** Pearce, Sarah (Portman) <[Sarah\\_Pearce@portman.senate.gov](mailto:Sarah_Pearce@portman.senate.gov)>  
**Cc:** Amanda Kaster <[amanda\\_kaster@ios.doi.gov](mailto:amanda_kaster@ios.doi.gov)>; Owen, Matt (HSGAC) <[Matt\\_Owen@hsgac.senate.gov](mailto:Matt_Owen@hsgac.senate.gov)>; Neely, Amanda (HSGAC) <[Amanda\\_Neely@hsgac.senate.gov](mailto:Amanda_Neely@hsgac.senate.gov)>  
**Subject:** Re: Follow up from the call

We will plan on 1230 Wednesday. Just give the location and we'll plan on seeing you there. Thank you

Micah

On Mon, Mar 13, 2017 at 5:17 PM, Pearce, Sarah (Portman) <[Sarah\\_Pearce@portman.senate.gov](mailto:Sarah_Pearce@portman.senate.gov)> wrote:

Hi Micah,

12:30PM on Wednesday works for Matt, Amanda, and me. Would this work on your end?

Thanks,

Sarah

**From:** Chambers, Micah [[mailto:micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]  
**Sent:** Friday, March 10, 2017 5:16 PM  
**To:** Amanda Kaster <[amanda\\_kaster@ios.doi.gov](mailto:amanda_kaster@ios.doi.gov)>  
**Cc:** Pearce, Sarah (Portman) <[Sarah\\_Pearce@portman.senate.gov](mailto:Sarah_Pearce@portman.senate.gov)>; Owen, Matt (HSGAC) <[Matt\\_Owen@hsgac.senate.gov](mailto:Matt_Owen@hsgac.senate.gov)>; Neely, Amanda (HSGAC) <[Amanda\\_Neely@hsgac.senate.gov](mailto:Amanda_Neely@hsgac.senate.gov)>  
**Subject:** Re: Follow up from the call

Sarah. Can we coordinate a time to sit down next Wednesday?

Micah

On Fri, Mar 10, 2017 at 12:53 PM, Micah Chambers <[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)> wrote:

Sarah. If you're free, give me a call 202.706.9093

Sent from my iPhone

On Mar 10, 2017, at 12:32 PM, Amanda Kaster <[amanda\\_kaster@ios.doi.gov](mailto:amanda_kaster@ios.doi.gov)> wrote:

Thanks, Sarah. I'll be in touch ASAP with more information about availability.

Sent from my iPhone

On Mar 10, 2017, at 12:24 PM, Pearce, Sarah (Portman) <[Sarah\\_Pearce@portman.senate.gov](mailto:Sarah_Pearce@portman.senate.gov)> wrote:

Hi Micah and Amanda,

Happy Friday! I am following up on Senator Portman's call with Secretary Zinke yesterday on the BLM methane rule. I understand that our bosses discussed Secretary Zinke's ability to address methane venting and flaring.

At Senator Portman's request, I'd like to connect the Senator's staff on the HSGAC committee - Matt Owen and Amanda Neely with DOI's Solicitor Office. If possible, could a call be arranged between them as soon as this afternoon, or at your earliest convenience?

Thanks for your help. Please let me know if you have any questions. My direct line is (b) (5)

Best,

Sarah

Sarah Pearce

Office of Senator Rob Portman

(b) (5)

448 Russell Senate Office Building

Washington, DC 20510

[Sarah\\_Pearce@portman.senate.gov](mailto:Sarah_Pearce@portman.senate.gov)

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Micah Chambers

Special Assistant / Acting Director

Office of Congressional & Legislative Affairs

Office of the Secretary of the Interior

--

Micah Chambers

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--

Amanda Kaster Averill  
Special Assistant  
Office of Congressional and Legislative Affairs  
U.S. Department of the Interior  
(202) 208 3337  
[amanda\\_kaster@ios.doi.gov](mailto:amanda_kaster@ios.doi.gov)

**User Name:** Robert Johnston

**Date and Time:** Thursday, February 09, 2017 1:51:00 PM EST

**Job Number:** 43192602

## Document (1)

1. ARTICLE:A COST-BENEFIT INTERPRETATION OF THE "SUBSTANTIALLY SIMILAR" HURDLE IN THE CONGRESSIONAL REVIEW ACT: CAN OSHA EVER UTTER THE E-WORD (ERGONOMICS) AGAIN?, 63 ADMIN. L. REV. 707

**Client/Matter:** -None-

**Search Terms:** "cost-benefit interpretation of the substantially similar hurdle"

**Search Type:** Natural Language

**Narrowed by:**

**Content Type**  
Secondary Materials

**Narrowed by**  
-None-

# ARTICLE: A COST-BENEFIT INTERPRETATION OF THE "SUBSTANTIALLY SIMILAR" HURDLE IN THE CONGRESSIONAL REVIEW ACT: CAN OSHA EVER UTTER THE E-WORD (ERGONOMICS) AGAIN?

Fall 2011

## Reporter

63 ADMIN. L. REV. 707 \*

**Length:** 42998 words

**Author:** ADAM M. FINKEL\* & JASON W. SULLIVAN\*\*

\* Senior Fellow and Executive Director, Penn Program on Regulation, University of Pennsylvania Law School. Sc.D., Harvard School of Public Health. 1987; A.B., Harvard College, 1979. Professor Finkel gratefully acknowledges the support for his Occupational Safety and Health Administration reform work provided by the Public Welfare Foundation.

\*\* Associate, Irell & Manella LLP, Los Angeles, California. J.D., University of Pennsylvania Law School, 2009; B.A., Rutgers College, 2005.

We are grateful to Valerie Baron, James O'Reilly, and Stuart Shapiro for their comments and suggestions.

## Text

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### [\*708] INTRODUCTION

Congress has always had the power to overturn a specific regulation promulgated by an executive branch agency and, as the author of the underlying statutes under which the agencies regulate, has also always been able to amend those statutes so as to thwart entire lines of regulatory activity before they begin. But in 1996, Congress carved out for itself a shortcut path to regulatory oversight with the passage of the Congressional Review Act (CRA),<sup>1</sup> and can now veto a regulation by passing a joint resolution rather than by passing a law.<sup>2</sup> There is no question that Congress can now kill a regulation with relative ease, although it has only exercised that ability once in the fifteen years since the passage of the [\*709] CRA.<sup>3</sup> It remains ambiguous, however, whether Congress can use this new mechanism to, in effect, due to a regulation what the Russian nobles reputedly did to Rasputin--poison it, shoot it, stab it, and throw its weighted body into a river--that is, to veto not only the instant rule it objects to, but forever bar an agency from regulating in that area. From the point of view of the agency, the question is, "What kind of phoenix, if any, is allowed to rise from the ashes of a dead regulation?" This subject has, in our view, been surrounded by mystery and misinterpretations, and is the area we hope to clarify via this Article.

A coherent and correct interpretation of the key clause in the CRA, which bars an agency from issuing a new rule that is "substantially the same" as one vetoed under the CRA,<sup>4</sup> matters most generally as a verdict on the precise

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<sup>1</sup> Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868-74 (codified as amended at 5 U.S.C. §§ 801-808 (2006)).

<sup>2</sup> See 5 U.S.C. §§ 801-802 (2006).

<sup>3</sup> See *infra* Parts II.A and IV.A.4 (discussing the Occupational Safety and Health Administration (OSHA) ergonomics rule and the congressional veto thereof in 2001).

<sup>4</sup> 5 U.S.C. § 801(b)(2).



demarcation of the relative power of Congress and the Executive. It matters broadly for the administrative state, as all agencies puzzle out what danger they court by issuing a rule that Congress might veto (can they and their affected constituents be worse off for having awakened the sleeping giant than had they issued no rule at all?). And it matters most specifically for the U.S. Occupational Safety and Health Administration (OSHA), whose new Assistant Secretary<sup>5</sup> is almost certainly concerned whether any attempt by the agency to regulate musculoskeletal disorders ("ergonomic" hazards) in any fashion would run afoul of the "substantially the same" prohibition in the CRA.

The prohibition is a crucial component of the CRA, as without it the CRA is merely a reassertion of authority Congress always had, albeit with a streamlined process. But whereas prior to the CRA Congress would have had to pass a law invalidating a rule *and* specifically state exactly what the agency could not do to reissue it, Congress can now kill certain future rules semiautomatically and perhaps render them unenforceable in court. This judicial component is vital to an understanding of the "substantially the same" prohibition as a legal question, in addition to a political one: whereas Congress can choose whether to void a subsequent rule that is substantially similar to an earlier vetoed rule (either for violation of the "substantially the same" prohibition or on a new substantive basis), if a court rules that a reissued rule is in fact "substantially the same" it would be obligated to treat the new rule as void *ab initio* even if Congress had failed to enact a new veto.<sup>6</sup>

[\*710] In this Article, we offer the most reasonable interpretation of the three murky words "substantially the same" in the CRA. Because neither Congress nor any reviewing court has yet been faced with the need to consider a reissued regulation for substantial similarity to a vetoed one, this is "uncharted legal territory."<sup>7</sup> The range of plausible interpretations runs the gamut from the least daunting to the most ominous (from the perspective of the agencies), as we will describe in detail in Part III.A. To foreshadow the extreme cases briefly, it is conceivable that even a verbatim identical rule might not be "substantially similar" if scientific understanding of the hazard or the technology to control it had changed radically over time. At the other extreme, it is also conceivable that any subsequent attempt to regulate in any way whatsoever in the same broad topical area would be barred.<sup>8</sup> We will show, however, that considering the legislative history of the CRA, the subsequent expressions of congressional intent issued during the one legislative veto of an agency rule to date, and the bedrock principles of good government in the administrative state, an interpretation of "substantially similar" much closer to the former than the latter end of this spectrum is most reasonable and correct. *We conclude that the CRA permits an agency to reissue a rule that is very similar in content to a vetoed rule, so long as it produces a rule with a significantly more favorable balance of costs and benefits than the vetoed rule.*<sup>9</sup>

We will assert that our interpretation of "substantially similar" is not only legally appropriate, but arises naturally when one grounds the interpretation in the broader context that motivated the passage of the CRA and that has come to dominate both legislative and executive branch oversight of the regulatory agencies: the insistence that regulations should generate benefits in excess of their costs. We assert that even if the hazards addressed match exactly those covered in the vetoed rule, if a reissued rule has a substantially different cost-benefit equation than

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<sup>5</sup> David Michaels was confirmed December 3, 2009. See 155 CONG. REC. S12,351 (daily ed. Dec. 3, 2009).

<sup>6</sup> See *infra* notes 122-125 and accompanying text.

<sup>7</sup> Kristina Sherry, 'Substantially the Same' Restriction Poses Legal Question Mark for Ergonomics, INSIDE OSHA, Nov. 9, 2009, at 1, 1, 8.

<sup>8</sup> See *infra* Part III.A.

<sup>9</sup> For a thorough defense of cost-benefit (CBA) analysis as a valuable tool in saving lives, rather than an antiregulatory sword, see generally John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008). But cf. James K. Hammitt, *Saving Lives: Benefit-Cost Analysis and Distribution*, 157 U. PA. L. REV. PENNUMBRA 189 (2009), <http://www.pennumbra.com/responses/03-2009/Hammitt.pdf> (noting the difficulties in accounting for equitable distribution of benefits and harms among subpopulations when using cost-benefit analysis).

the vetoed rule, then it cannot be regarded as "substantially similar" in the sense in which those words were (and also should have been) intended.

The remainder of this Article will consist of seven Parts. In Part I, we [\*711] will lay out the political background of the 104th Congress, and then explain both the substance and the legislative history of the Congressional Review Act. In Part II, we discuss the one instance in which the fast-track congressional veto procedure has been successfully used, and mention other contexts in which Congress has considered using it to repeal regulations. In this Part, we also discuss the further "uncharted legal territory" of how the courts might handle a claim that a reissued rule was "substantially similar." In Part III, we present a detailed hierarchy of possible interpretations of "substantially similar," and in Part IV, we explain why the substantial similarity provision should be interpreted in among the least ominous ways available. In Part V, we summarize the foregoing arguments and give a brief verdict on exactly where, in the seven-level hierarchy we developed, we think the interpretation of "substantially similar" must fall. In Part VI, we discuss some of the practical implications of our interpretation for OSHA as it considers its latitude to propose another ergonomics rule. Finally, in Part VII, we recommend some changes in the system to help achieve Congress's original aspirations with less inefficiency and ambiguity.

## I. REGULATORY REFORM AND THE CONGRESSIONAL REVIEW ACT

The Republican Party's electoral victory in the 1994 midterm elections brought with it the prospect of sweeping regulatory reform. As the Republicans took office in the 104th Congress, they credited their victory to public antigovernment sentiment, especially among the small business community. Regulatory reform was central to the House Republicans' ten-plank Contract with America proposal, which included provisions for congressional review of pending agency regulations and an opportunity for both houses of Congress and the President to veto a pending regulation via an expedited process.<sup>10</sup> This Part discusses the Contract with America and the political climate in which it was enacted.

### A. *The 1994 Midterm Elections and Antiregulatory Sentiment*

An understanding of Congress's goal for regulatory reform requires some brief familiarity with the shift in political power that occurred prior to the enactment of the Contract with America. In the 1994 elections, the Republican Party attained a majority in both houses of Congress. In the House of Representatives, Republicans gained a twenty-six-seat advantage over the House Democrats.<sup>11</sup> Similarly, in the Senate, Republicans turned [\*712] their minority into a four-seat advantage.<sup>12</sup>

The 1994 election included a large increase in participation among the business community. In fact, a significant majority of the incoming Republican legislators were members of that community.<sup>13</sup> Small business issues--and in particular the regulatory burden upon them--were central in the midterm election, and many credited the Republican Party's electoral victory to its antiregulatory position.<sup>14</sup> Of course, it was not only business owners who

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<sup>10</sup> Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, **110 Stat. 868-74** (codified as amended at **5 U.S.C. §§ 801-808** (2006)).

<sup>11</sup> See ROBIN H. CARLE, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 8, 1994, at 50 (1995), [http://clerk.house.gov/member\\_info/electionInfo/1994election.pdf](http://clerk.house.gov/member_info/electionInfo/1994election.pdf) (reporting the results of the 1994 U.S. House elections, in which the Republicans won a majority of 230-204).

<sup>12</sup> See *id.* (reporting the results of the 1994 U.S. Senate elections, after which the Republicans held a majority of 52-48).

<sup>13</sup> Newt Gingrich, *Foreword* to RICHARD LESHER, MELTDOWN ON MAIN STREET: WHY SMALL BUSINESS IS LEADING THE REVOLUTION AGAINST BIG GOVERNMENT, at xi, xiv (1996) ("Of the 73 freshman Republicans elected to the House in 1994, 60 were small businesspeople . . .").

<sup>14</sup> See, e.g., Linda Grant, *Shutting Down the Regulatory Machine*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 70, 70 ("Resentment against excessive government regulation helped deliver election victory to Republicans . . .").

campaigned to decrease the volume of federal regulation--seeking more autonomy and fewer compliance costs, farmers and local governments also aimed to decrease the size of the federal government.<sup>15</sup>

One catalyst for the wave of antigovernment sentiment and the Republicans' related electoral victory was the increasing regulatory burden. By some estimates, the annual costs of federal regulation had increased to more than \$ 600 billion by 1995.<sup>16</sup>

Regulatory reform was not merely an idle campaign promise. Republicans had spent a great deal of effort in prior years to push for fewer regulations, to little avail. When the 104th Congress was sworn in, changes to the regulatory process ranked highly on the Republican Party's agenda.<sup>17</sup> The party leaders were aggressive in their support of regulatory reform. Senator Don Nickles of Oklahoma declared, "We're going to get regulatory reform . . . . We can do it with a rifle or we can do it with a shotgun, but we're going to do it."<sup>18</sup>

[\*713] The case that the federal government had been hurtling toward a coercive "nanny state," and the need to deregulate (or at least to slam on the brakes) in response, was bolstered in the early 1990s by a confluence of new ideas, new institutions, and new advocates.<sup>19</sup> The rise of quantitative risk assessment (QRA), and the rapid increase in the capability of analytical chemistry to detect lower and lower amounts of contaminants in all environmental media and human tissues, made possible an ongoing stream of revelations about the apparent failure to provide an ample margin of safety below safe levels of substances capable of causing chronic disease and ecological damage. But at the same time, the successes of the 1970s and 1980s at picking the low-hanging fruit of the most visible manifestations of environmental pollution (for example, flaming rivers or plumes of soot rising from major point sources) made possible a compelling counterargument: that unlike the first generation of efficient remedies for intolerable problems, the mopping up of the purportedly last small increments of pollution threatened to cost far more than the (dubious) benefits achieved. This view was supported by the passage of time and the apparent lack of severe long-term consequences from some of the environmental health crises of the early 1980s (for example, Love Canal, New York and Times Beach, Missouri).<sup>20</sup> In the early 1990s, several influential books advanced the thesis that regulation was imposing (or was poised to impose) severe harm for little or nonexistent benefit. Among the most notable of these were *The Death of Common Sense: How Law Is Suffocating America*,<sup>21</sup> which decried the purported insistence on inflexible and draconian strictures on business, and *Breaking the Vicious Circle*.<sup>22</sup> In this latter book, then-Judge Stephen Breyer posited a cycle of mutual amplification between a public eager to insist on zero risk and a cadre of [\*714] risk assessors and bureaucrats happy to invoke

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<sup>15</sup> See *id.* at 72 ("Business has gained a number of allies in its quest to rein in regulation. State and local governments, ranchers and farmers, for example, also want to limit Washington's role in their everyday dealings.").

<sup>16</sup> *Id.* at 70 (reporting the annual costs of federal regulation in 1991 dollars).

<sup>17</sup> See, e.g., Bob Tutt, *Election '94: State; Hutchinson Pledges to Help Change Things*, HOUS. CHRON., NOV. 9, 1994, at A35 (reporting that Senator Kay Bailey Hutchinson of Texas named "reduction of regulations that stifle small business" as one of the items that "had her highest priority").

<sup>18</sup> Stan Crock et al., *A GOP Jihad Against Red Tape*, Bus. WK., NOV. 28, 1994, at 48 (quoting Senator Nickles).

<sup>19</sup> This section, and the subsequent section on the regulatory reform legislation of the mid-1990s, is informed by one of our (Adam Finkel's) experiences as an expert in methods of quantitative risk assessment, and (when he was Director of Health Standards at OSHA from 1995-2000) one of the scientists in the executive agencies providing expertise in risk assessment and cost-benefit analysis during the series of discussions between the Clinton Administration and congressional staff and members.

<sup>20</sup> See generally *Around the Nation: Times Beach, Mo., Board Moves to Seal Off Town*, N.Y. TIMES, Apr. 27, 1983, at A18 (reporting attempts by officials to blockade a St. Louis suburb that had been contaminated by dioxin); Eckardt C. Beck, *The Love Canal Tragedy*, EPA J., Jan. 1979, at 16, available at <http://www.epa.gov/aboutepa/history/topics/lovecanal/01.html> (describing the events following the discovery of toxic waste buried beneath the neighborhood of Love Canal in Niagara Falls, New York).

<sup>21</sup> PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: How LAW IS SUFFOCATING AMERICA* (1995).

<sup>22</sup> STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1994).

conservative interpretations of science to exaggerate the risks that remained uncontrolled.<sup>23</sup> Although the factual basis for the claim that risk assessment is too "conservative" (or even that it does not routinely *underestimate* risk) was and remains controversial,<sup>24</sup> enough of the individual common assumptions used in risk assessment were so clearly "conservative" (for example, the use of the upper confidence limit when fitting a dose-response function to cancer bioassay data) that this claim had considerable intuitive appeal. Around the same time, influential think tanks and trade associations (for example, the Cato Institute and the American Council on Science and Health) echoed the indictment against overregulation, and various media figures (notably John Stossel) advanced the view that the U.S. public was not just desirous of a safer world than common sense would dictate, but had scared itself into irrationality about how dangerous the status quo really was.<sup>25</sup>

The scholars and advocates who made the most headway with Congress in the period leading up to the passage of the CRA made three related, compelling, and in our opinion very politically astute arguments that still influence the landscape of regulation fifteen years later. First, they embraced risk assessment--thereby proffering a "sound science" alternative to the disdain for risk assessment that most mainstream and grassroots environmental groups have historically expressed<sup>26</sup>--although they insisted that each allegedly conservative assumption should be ratcheted back. Second, they advocated for the routine quantitative comparison of benefits (risks reduced) to the cost of regulation, thereby throwing cold water even on large risks if it could be shown that once monetized, the good done by controlling them was outweighed by the economic costs of that control. And perhaps most significantly, they emphasized--particularly in the writings and testimony of John Graham, who went on to lead the White House's Office of Information and Regulatory Affairs (OIRA) in the George W. Bush Administration--that regulatory overkill was tragic not just because it was economically expensive, but because it could ill serve the very goal of maximizing human longevity and quality of life. Some regulations, Graham and others emphasized,<sup>27</sup> could create or exacerbate [\*715] similar or disparate risks and do more harm to health and the environment than inaction would. Many other stringent regulations could produce non-negative net benefits, but far less benefit than smarter regulation could produce. Graham famously wrote and testified that going after trace amounts of environmental pollution, while failing to regulate risky consumer products (for example, bicycle helmet requirements) or to support highly cost-effective medical interventions, amounted to the "statistical murder" of approximately 60,000 Americans annually whose lives could have been saved with *different* regulation, as opposed to deregulation per se.<sup>28</sup>

The stage was thus set for congressional intervention to rationalize (or, perhaps, to undermine) the federal regulatory system.

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<sup>23</sup> See *id.* at 9-13.

<sup>24</sup> See Adam M. Finkel, *Is Risk Assessment Really Too Conservative?: Revising the Revisionists*, 14 COLUM. J. ENVTL. L. 427 (1989) (discussing numerous flaws in the assertion that risk assessment methods systematically exaggerate risk, citing aspects of the methods that work in the opposite direction and citing empirical evidence contrary to the assertion).

<sup>25</sup> *Special Report: Are We Scaring Ourselves to Death? The People Respond* (ABC television broadcast Apr. 21, 1994).

<sup>26</sup> See Alon Tal, *A Failure to Engage*, 14 ENVTL. F., Jan.-Feb. 1997, at 13.

<sup>27</sup> See John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1, 1-5 John D. Graham & Jonathan Baert Wiener eds., 1995); see also Cass R. Sunstein, *Health-Health Tradeoffs* (Chi. Working Papers on Law & Econ., Working Paper No. 42, 1996), available at [http://www.law.uchicago.edu/files/files/42.CRS\\_Health.pdf](http://www.law.uchicago.edu/files/files/42.CRS_Health.pdf).

<sup>28</sup> n28 Republican Representative John Mica stated:

Let me quote John Graham, a Harvard professor, who said, "Sound science means saving the most lives and achieving the most ecological protection with our scarce budgets. Without sound science, we are engaging in a form of 'statistical murder,' where we squander our resources on phantom risks when our families continue to be endangered by real risks.

141 CONG. REC. 6101 (1995) (statement of Rep. Mica).

## B. *The Contract with America and the CRA*

When the Republicans in the 104th Congress first began drafting the Contract with America, they intended to stop the regulatory process in its tracks by imposing a moratorium on the issuance of any new regulations. After the Clinton Administration resisted calls for a moratorium, Congress compromised by instead suggesting an amendment to the Administrative Procedure Act (APA) that allowed Congress and the President to veto pending regulations via an expedited process. This compromise led to a subtitle in the Contract with America now known as the Congressional Review Act of 1996. This Part describes the history of the CRA and its substance as enacted.

### 1. *From Moratorium to Congressional Review*

Even before being sworn in, Republican leaders had their sights set on imposing a moratorium on the issuance of all new federal regulation and urged President Clinton to implement a moratorium himself.<sup>29</sup> When he [\*716] declined to do so,<sup>30</sup> House Republicans called for a legislative solution--they intended to enact a statute that would put a moratorium on new regulations<sup>31</sup> so that Congress could implement regulatory reform without the distraction of having the federal bureaucracy continue to operate. A moratorium would also allow any new procedural or substantive requirements to be applied to all pending regulations without creating a "moral hazard"--agencies rushing to get more rules out (especially more unpalatable ones) in advance of a new set of strictures.<sup>32</sup> Members of Congress put particular emphasis on the importance of cost-benefit analysis (CBA) and risk assessment, noting that the moratorium might be lifted early if stricter CBA guidelines were implemented.<sup>33</sup> These ideas formed the basis of House Bill 450, the proposed Regulatory Transition Act of 1995, which would have imposed a retroactive moratorium period starting November 20, 1994, and lasting until either December 31, 1995, or the date that CBA or risk assessment requirements were imposed, whichever came earlier.<sup>34</sup>

The proposed moratorium, despite passing in the House,<sup>35</sup> met strong opposition in the Senate. Although Senate committees recommended enactment of the moratorium for largely the same reasons as the House leadership,<sup>36</sup> a

<sup>29</sup> See Melissa Healy, *GOP Seeks Moratorium on New Federal Regulations*, L.A. TIMES, Dec. 13, 1994, at A32 (reporting that House Speaker Newt Gingrich of Georgia and Senate Majority Leader Bob Dole of Kansas sent a letter to the White House urging President Clinton to issue an executive order imposing a moratorium on new federal rules).

<sup>30</sup> See Letter from Sally Katzen, Exec. Office of the President, Office of Mgmt. & Budget, to Tom DeLay, U.S. House of Representatives (Dec. 14, 1994), *reprinted in* H.R. REP. NO. 104-39, pt. 1, at 38-39 (1995) (expressing, on behalf of President Clinton, concern about the efficiency of federal regulation but declining to issue an executive order imposing a moratorium on federal regulation).

<sup>31</sup> See Grant, *supra* note 14, at 70 ("To halt the rampant rule making, Rep. David McIntosh . . . co-sponsored a bill with House Republican Whip Tom DeLay that calls for a moratorium on all new federal regulation . . .").

<sup>32</sup> See H.R. REP. NO. 104-39, pt. 1, at 9-10 (1995) ("[A] moratorium will provide both the executive and the legislative branches . . . with more time to focus on ways to fix current regulations and the regulatory system. Everyone involved in the regulatory process will be largely freed from the daily burden of having to review, consider and correct newly promulgated regulations . . . ."); S. REP. No. 104-15, at 5 (1995) (same).

<sup>33</sup> See H.R. REP. NO. 104-39, pt. 1, at 4 ("The moratorium can be lifted earlier, but only if substantive regulatory reforms (cost/benefit analysis and risk assessment) are enacted."); *see also id.* (noting that agencies would not be barred from conducting CBA during the moratorium).

<sup>34</sup> H.R. 450, 104th Cong. §§ 3(a), 6(2) (1995) (as passed by House of Representatives, Feb. 24, 1995).

<sup>35</sup> 141 CONG. REC. 5880 (1995) (recording the House roll call vote of 276-146, **with** 13 Representatives not voting).

<sup>36</sup> See S. 219, 104th Cong. §§ 3(a), 6(2) (1995) (as reported by S. Comm. on Governmental Affairs, Mar. 16, 1995) (proposing a moratorium similar to that considered in the House, but with a retroactivity clause that reached even further back); *see also* S. REP. No. 104-15, at 1 ("The Committee on Governmental Affairs . . . reports favorably [on S. 219] . . . and recommends that the bill . . . pass.").

strong minority joined the Clinton Administration in [\*717] opposition to the bill.<sup>37</sup> Six of the fourteen members of the Senate Committee on Governmental Affairs argued that a moratorium was overbroad and wasteful, and "does not distinguish between good and bad regulations."<sup>38</sup> In their view, a moratorium would hurt more than it would help, since it would "create delays in good regulations, waste money, and create great uncertainty for citizens, businesses, and others."<sup>39</sup> The Republicans, with only a slim majority in the Senate,<sup>40</sup> would face difficulty enacting a moratorium.

While House Bill 450 worked its way through the House, Senate Republicans drafted a more moderate (and, from the Senate's perspective, more realistic) proposal for regulatory reform through congressional oversight. Senate Bill 348 would have set up an expedited congressional review process for all new federal regulations and allowed for their invalidation by enactment of a joint resolution.<sup>41</sup> Faced with a Senate that was closely split over the moratorium bill, Senators Don Nickles of Oklahoma and Harry Reid of Nevada reached a compromise: they introduced the text of Senate Bill 348 as a substitute for the moratorium proposal, which became known as the Nickles-Reid Amendment.<sup>42</sup> Senate Democrats saw the more nuanced review process as a significant improvement over the moratorium's prophylactic approach,<sup>43</sup> and the Nickles-Reid Amendment (Senate Bill 219) passed the chamber by a roll call vote of 100-0.<sup>44</sup>

Disappointed in the defeat of their moratorium proposal, House leaders did not agree to a conference to reconcile House Bill 450 with Senate Bill [\*718] 219.<sup>45</sup> Pro-environment House Republicans eventually convinced House leaders that their antiregulatory plans were too far-reaching,<sup>46</sup> and over the following year, members of Congress attempted to include the review provision in several bills.<sup>47</sup> The provision was finally successfully included in the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), a part of the larger Contract with America

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<sup>37</sup> See S. REP. NO. 104-15, at 25-32 (calling the moratorium "dangerous" and "unnecessary"); see also Letter from Sally Katzen to Tom DeLay, *supra* note 30 (calling the moratorium a "blunderbuss" and noting that it was so overbroad that it would impede regulations addressing tainted meat in the food supply and assisting the diagnosis of illnesses that veterans may have suffered while serving in the Persian Gulf War).

<sup>38</sup> S. REP. No. 104-15, at 25.

<sup>39</sup> *Id.* at 26.

<sup>40</sup> See *supra* note 12 and accompanying text.

<sup>41</sup> S. 348, 104th Cong. (as introduced in Senate, Feb. 2, 1995).

<sup>42</sup> See 141 CONG. REC. 9426-27 (1995) (statement of Sen. Baucus) (noting withdrawal of the moratorium in favor of a fast-track process for congressional review).

<sup>43</sup> See *id.* ("To my mind, this amendment is much closer to the mark . . . Congress can distinguish good rules from bad. . . . [I]f an agency is doing a good job, the rule will go into effect, and public health will not be jeopardized.").

<sup>44</sup> *Id.* at 9580 (recording the roll call vote); see S. 219, 104th Cong. § 103 (as passed by Senate, Mar. 29, 1995) (including the congressional review procedure in lieu of the moratorium proposal).

<sup>45</sup> See 142 CONG. REC. 6926-27 (1996) (statement of Rep. Hyde) (summarizing the procedural history of the Congressional Review Act (CRA)).

<sup>46</sup> See John H. Cushman Jr., *House G. O.P. Chiefs Back Off on Stiff Antiregulatory Plan*, N.Y. TIMES, Mar. 6, 1996, at A19 ("Representative Sherwood Boehlert, a Republican from upstate New York who has emerged as the leader of a block of pro-environment House members, persuaded Speaker Newt Gingrich at a meeting today that this legislation went too far.").

<sup>47</sup> However, each bill eventually failed for reasons unrelated to the congressional review provision. See 142 CONG. REC. 6926-27 (statement of Rep. Hyde) (discussing the procedural history of the CRA).

Advancement Act (CWAA), as Subtitle E.<sup>48</sup> The congressional review provision was ultimately enacted without debate, as more controversial parts of the Contract with America occupied Congress's attention.<sup>49</sup> On March 28, 1996, the CWAA passed both houses of Congress.<sup>50</sup> In a signing statement, President Clinton stated that he had "long supported" the idea of increasing agency accountability via a review procedure, but he also noted his reservations about some of the provision's specific terms, which he said "will unduly complicate and extend" the process.<sup>51</sup>

## 2. Regulatory "Reform"

At the same time as they considered the idea of a regulatory moratorium, both houses of Congress considered far more detailed and sweeping changes to the way federal agencies could regulate. As promised by Speaker Newt Gingrich, within 100 days of the installation of 104th Congress, House Bill 9, the Job Creation and Wage Enhancement Act was [\*719] introduced and voted on.<sup>52</sup> This bill would have required most regulations to be justified by a judicially reviewable QRA, performed under a set of very specific requirements regarding the appropriate models to select and the statistical procedures to use.<sup>53</sup> It also would have required agencies to certify that each rule produced benefits to human health or the environment that justified the costs incurred.<sup>54</sup> Although the House passed this bill by a vote of 277-141, the Republican Senate majority made no public pledge to reform regulation as had their House counterparts,<sup>55</sup> and the analogous Senate Bill 343 (the Comprehensive Regulatory Reform Act, sponsored primarily by Republican Robert Dole of Kansas and Democrat J. Bennett Johnston of Louisiana), occupied that body for months of debate.<sup>56</sup> The Senate took three separate cloture votes during the summer of 1995, the final one falling only two votes shy of the sixty needed to end debate.<sup>57</sup>

Professors Landy and Dell attribute the failure of Senate Bill 343 largely to presidential politics: Senator Dole (who won the Republican nomination that year) may have been unwilling to tone down the judicial review provisions (under which agencies would face remand for deficiencies in their risk assessments or disputes over their cost-benefit pronouncements) because he was looking to his base, while President Clinton threatened a veto as an

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<sup>48</sup> See Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, **110 Stat. 868-74** (codified as amended at **5 U.S.C. §§ 801-808** (2006)).

<sup>49</sup> See 142 CONG. REC. 6922-30 (statement of Rep. Hyde) (inserting documents into the legislative history of the Contract with America Advancement Act (CWAA) several weeks after its enactment, and noting that "no formal legislative history document was prepared to explain the [CRA] or the reasons for changes in the final language negotiated between the House and Senate"); see *also id.* at 8196-8201 (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>50</sup> See *id.* at 6940 (recording the House roll call vote of 328-91 with 12 nonvoting Representatives, including several liberals voting for the bill and several conservatives voting against it); see *also id.* at 6808 (reporting the Senate unanimous consent agreement).

<sup>51</sup> Presidential Statement on Signing the Contract with America Advancement Act of 1996, 32 WEEKLY COMP. PRES. DOC. 593 (Apr. 29, 1996).

<sup>52</sup> See H.R. 9, 104th Cong. §§ 411-24 (1995) (as passed by House, Mar. 3, 1995).

<sup>53</sup> See, e.g., *id.* § 414(b)(2) (setting forth specific requirements for the conduct of risk assessments).

<sup>54</sup> *Id.* § 422(a)(2).

<sup>55</sup> See Marc Landy & Kyle D. Dell, *The Failure of Risk Reform Legislation in the 104th Congress*, 9 DUKE ENVTL. L. & POL'Y F. 113, 115-16 (1998).

<sup>56</sup> S. 343, 104th Cong. (1995) (as introduced in Senate, Feb. 2, 1995).

<sup>57</sup> 141 CONG. REC. 19,661 (1995) (recording the roll call vote of 58-40).

attempt to "tap into the public's longstanding support for environmental regulation."<sup>58</sup> However, serious substantive issues existed as well. Public interest groups actively opposed the bill; with each untoward event in the news as the debate continued (notably a cluster of deaths and illnesses caused by fast-food hamburgers contaminated with *E. coli*<sup>59</sup>), the [\*720] bill's "green eyeshade" tone (dissect all costs and benefits, giving inaction the seeming benefit of the doubt) became a flashpoint for concern. For its part, the White House aggressively charted its own course of reform, strengthening the executive order giving OIRA broad authority over regulatory agencies and making regulatory transparency and plain language cornerstones of Vice President Gore's broader Reinventing Government initiative.<sup>60</sup> As Professor John Graham concluded, "The Democratic leadership made a calculation that it was more profitable to accuse Republicans of rolling back protections (in the guise of reform) than it was to work collaboratively toward passage of a bipartisan regulatory reform measure."<sup>61</sup>

Nevertheless, the majority of both houses of Congress believed that each federal regulation should be able to pass a formal benefit-cost test, and perhaps that agencies should be required to certify this in each case. Although no law enshrined this requirement or the blueprint for how to quantify benefits and costs, the CRA's passage less than a year after the failure of the Dole-Johnston bill can most parsimoniously be interpreted as Congress asserting that if the agencies remained free to promulgate rules with an unfavorable cost-benefit balance, Congress could veto at the finish line what a regulatory reform law would have instead nipped in the bud.

The CRA can also be interpreted as one of four contemporaneous attempts to salvage as much as possible of the cost-benefit agenda embodied in the failed omnibus regulatory reform legislation.<sup>62</sup> During 1995 and 1996, Congress also enacted the Unfunded Mandates Reform Act (which requires agencies to quantify regulatory costs to state and local governments, and to respond in writing to suggestions from these stakeholders for alternative regulatory provisions that could be more cost-effective),<sup>63</sup> the Regulatory Compliance Simplification Act (which requires [\*721] agencies to prepare compliance guides directed specifically at small businesses),<sup>64</sup> and a series of

<sup>58</sup> See Landy & Dell, *supra* note 55, at 125.

<sup>59</sup> n59 In a hearing on Senate Bill 343, Senator Paul Simon read from a February 22 letter in the *Washington Post*:

"Eighteen months ago, my only child, Alex, died after eating hamburger meat contaminated with *E. coli* 0157H7 bacteria. Every organ, except for Alex's liver, was destroyed . . . My son's death did not have to happen and would not have happened if we had a meat and poultry inspection system that actually protected our children."

*Regulatory Reform: Hearing on S. 343 Before the S. Comm. on the Judiciary*, 104th Cong. 19 (1995) (statement of Sen. Simon). Simon urged caution in burdening the agencies with new-requirements, saying, "The food we have is safer than for any other people on the face of the earth. I don't think the American people want to move away from that." *Id.*; see also James S. Kunen, *Rats: What's for Dinner? Don't Ask*, *NEW YORKER*, Mar. 6, 1995, at 7 (discussing the continuing importance of Upton Sinclair's *The Jungle* as it relates to regulation of food contaminants).

<sup>60</sup> See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended* in **5 U.S.C. § 601** app. at 745 (2006); AL GORE, *CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW* (1993).

<sup>61</sup> John D. Graham, *Legislative Approaches to Achieving More Protection Against Risk at Less Cost*, *1997 U. CHI. LEGAL F.* 13, 57 (1997). However, as a participant in numerous executive-branch and congressional discussions at the time, one of us (Adam Finkel) hastens to add that many in the executive agencies believed that the specific provisions in the Dole-Johnston bill were in fact punitive, and were indeed offered merely "in the guise of reform."

<sup>62</sup> James T. O'Reilly, *EPA Rulemaking After the 104th Congress: Death from Four Near-Fatal Wounds?*, *3 ENVTL. LAW.* 1, 1 (1996).

<sup>63</sup> Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, **109 Stat. 48** (codified in amended at scattered sections of 2 U.S.C.).

<sup>64</sup> Contract with America Advancement Act of 1996, Pub. L. No. 104-121, tit. II, subtit. A, **110 Stat. 858-59** (codified as amended in scattered sections of 2, 5, 15, and 42 U.S.C.).



amendments to the Regulatory Flexibility Act (which makes judicially reviewable the agency's required analysis of why it should not adopt less costly regulatory alternatives favoring small businesses).<sup>65</sup> Against this backdrop, the CRA is more clearly seen as serving the primary purpose of giving special scrutiny--before aggrieved parties would have to plead their case in court--to rules that arguably conflict with other strong signals from Congress about the desired flexibility and cost-effectiveness of agency regulatory proposals.

### 3. The CRA

The CRA established a procedure by which Congress can oversee and, with the assent of the President, veto rules promulgated by federal agencies. Before any rule can take effect, the promulgating agency must submit to the Senate, House of Representatives, and the Comptroller General of the Government Accountability Office (GAO) a report containing, among other things, the rule and its complete CBA (if one is required).<sup>66</sup> The report is then submitted for review to the chairman and ranking member of each relevant committee in each chamber.<sup>67</sup> Some rules--for example, rules pertaining to internal agency functioning, or any rule promulgated by the Federal Reserve System--are exempted from this procedure.<sup>68</sup>

During this review process, the effective date of any major rule is postponed.<sup>69</sup> However, the President has discretion to allow a major rule [\*722] that would otherwise be suspended to go into effect for a limited number of purposes, such as national security.<sup>70</sup> The Act also exempts from suspension any rule for which the agency finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>71</sup>

If Congress chooses to repeal any rule through the CRA, it may pass a joint resolution of disapproval via an expedited process. The procedure is expedited "to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule."<sup>72</sup> From the date that the agency submits its report of the rule, Congress has sixty days in session to pass a joint

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<sup>65</sup> *Id.* subtit. D, **110 Stat. 864-68** (codified as amended at **5 U.S.C. §§ 601-605, 609, 611** (2006)).

<sup>66</sup> **5 U.S.C. § 801(a)(1)(A)-(B)** (2006). Senator Pete Domenici of New Mexico inserted the provision requiring submission of the report to the Comptroller General because the Government Accountability Office (GAO) would be able to effectively review the CBA and ensure that the regulation complies with legal requirements, such as unfunded mandates legislation. See 141 CONG. REC. 9428-29 (1995) (statement of Sen. Domenici).

<sup>67</sup> **5 U.S.C. § 801(a)(1)(C)**.

<sup>68</sup> *Id.* § 804(3) (defining *rule* for the purposes of the CRA so as to exclude certain categories); *id.* § 807 (exempting all regulations promulgated by the Federal Reserve and Federal Open Market Committee from CRA requirements).

<sup>69</sup> *Id.* § 801(a)(3). A "major rule" under the CRA is any rule that: (1) has an annual effect on the economy of \$ 100 million or more; (2) results in a "major increase in costs or prices" for various groups, such as consumers and industries; or (3) is likely to result in "significant adverse effects on competition, employment, investment," or other types of enterprise abilities. *Id.* § 804(2). Any rule promulgated under the Telecommunications Act of 1996 is not a major rule for purposes of the CRA. *Id.*

<sup>70</sup> *Id.* § 801(c).

<sup>71</sup> *Id.* § 808. The good cause exception is intended to be limited to only those rules that are exempt from notice and comment by statute. See 142 CONG. REC. 6928 (1996) (statement of Rep. Hyde).

<sup>72</sup> 142 CONG. REC. 8198 (joint statement of Sens. Nickles, Reid, and Stevens); see also 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) (noting that "scarce agency resources are also a concern" that justifies a stay on the enforcement of major rules).

resolution.<sup>73</sup> The procedure is further expedited in the Senate, where debate over a joint resolution of disapproval is limited to a maximum of ten hours, effectively preventing any possibility of a filibuster.<sup>74</sup> The House does not have a similar expedited procedure.<sup>75</sup> When a disapproval resolution passes both houses of Congress, it is presented to the President for signing.<sup>76</sup> The CRA drafters developed this structure to meet the bicameralism and presentment requirements of the Constitution, which had thwarted an earlier congressional attempt to retain veto power over certain agency actions.<sup>77</sup>

[\*723] Upon the enactment of a joint resolution against a federal agency rule, the rule will not take effect.<sup>78</sup> If the rule has already taken effect by the time a joint resolution is enacted—for example, if the rule is not a major rule, or if the President has exercised the authority to override suspension of the rule's effective date<sup>79</sup>—then it cannot continue in force.<sup>80</sup> The effect of a joint resolution of disapproval is also retroactive: any regulation overridden by the CRA process is "treated as though [it] had never taken effect."<sup>81</sup>

The CRA places a further limitation on agency action following a successful veto, which is the focus of this Article. Not only does the regulation not take effect as submitted to Congress, but the agency may not be free to reissue another rule to replace the one vetoed. Specifically, the CRA provides that:

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<sup>73</sup> **5 U.S.C. § 802(a)**. The sixty-day window excludes "days either House of Congress is adjourned for more than 3 days during a session of Congress." *Id.* If an agency submits a report with fewer than sixty days remaining in the session of Congress, the sixty-day window is reset, beginning on the fifteenth day of the succeeding session of Congress. See *id.* § 801(d)(1), (2)(A).

<sup>74</sup> *Id.* § 802(d)(2); cf. STANDING RULES OF THE SENATE R. XXII § 2 (2007) (requiring the affirmative vote of three-fifths of Senators to close debate on most legislative actions).

<sup>75</sup> See Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1063 (1999) (criticizing the CRA for its lack of an expedited House procedure because, "As a practical matter, no expedited procedure will mean engaging the House leadership each time a rule is deemed important enough by a committee or group of members to seek speedy access to the floor").

<sup>76</sup> **5 U.S.C. § 801(a)(3)(B)**. If the President vetoes a resolution disapproving of a major rule, the suspension of the effective date is extended, at a minimum, until the earlier of thirty session days or the date that Congress votes and fails to override the President's veto. *Id.*

<sup>77</sup> U.S. CONST. art. I, § 7, cls. 2-3 (requiring, for a bill to become law, passage by both houses of Congress and either signing by the President or a presidential veto followed by a two-thirds congressional override in each house of Congress). Under these principles, the Supreme Court struck down § 224(c)(2) of the Immigration and Nationality Act, which allowed a single house of Congress to override the Attorney General's determination that deportation of an alien should be suspended. See *INS v. Chadha*, 462 U.S. 919, 959 (1983), invalidating 8 U.S.C. § 1254(c)(2) (1982). Curiously, while the CRA was intended to give respect to the Constitution's bicameralism and presentment requirements, 142 CONG. REC. 6926 (statement of Rep. Hyde) (noting that, after *Chadha*, "the one-house or two-house legislative veto . . . was thus voided," and as a consequence the authors of the CRA developed a procedure that would require passage by both houses and presentment to the President); 142 CONG. REC. 8197 (joint statement of Sens. Nickles, Reid, and Stevens) (same), the 104th Congress enacted the unconstitutional line item veto in violation of those very principles less than two weeks after it had enacted the CRA. See Line Item Veto Act, Pub. L. No. 104-130, **110 Stat. 1200 (1996)** (codified as amended at 2 U.S.C. §§ 691-692 (Supp. II 1997)), *invalidated by Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>78</sup> **5 U.S.C. § 801(b)(1)**.

<sup>79</sup> See *supra* notes 69-70 and accompanying text.

<sup>80</sup> **5 U.S.C. § 801(b)(1)**.

<sup>81</sup> *Id.* § 801(f). For a summary of the disapproval procedure created by the CRA, with emphasis on its possible use as a tool to check midnight regulation, see Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 189-90 (2009).

A rule that does not take effect (or does not continue) under [a joint resolution of disapproval] may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.<sup>82</sup>

An agency's ability to promulgate certain rules after a veto thus turns on the CRA's meaning of "substantially the same form." We will discuss the range of scholarly and editorial interpretations of how ominously executive agencies should regard the prohibition against reissuance of "substantially similar" rules in Part III.B. But to foreshadow the main argument, we [\*724] believe that most commentators have offered an unduly pessimistic reading of this provision. One of the most respected experts in administrative law, Professor Peter Strauss, testified before Congress a year after the enactment of the CRA that the substantial similarity provision has a "doomsday effect."<sup>83</sup> Because, Strauss opined, the provision precludes the affected agency from ever attempting to regulate in the same topical area, Congress may well have tied its own hands and as a result will refrain from vetoing rules altogether.<sup>84</sup> Although we agree wholeheartedly with Strauss's recommendation that Congress should amend the CRA to require a statement of the reasons for the initial veto, we simply observe here that events subsequent to his 1997 testimony demonstrate that Congress did *not* in fact blanch from invoking a veto even when it was not primarily concerned about an agency exceeding its statutory authority: Congress overturned the OSHA ergonomics rule in 2001 ostensibly because of concern about excessive compliance costs and illusory risk-reduction benefits.<sup>85</sup> Therefore, § 801 (b)(2) of the CRA represents a very influential consequence of a veto power that Congress is clearly willing to use, and its correct interpretation is therefore of great importance to administrative law and process.

With very little evidence in the CRA's legislative history discussing this provision,<sup>86</sup> and only one instance in which the congressional veto has actually been carried out,<sup>87</sup> neither Congress nor the Judiciary has clearly established the meaning of this crucial clause. In the next several Parts, we will attempt to give the CRA's substantial similarity provision a coherent and correct meaning by interpreting it in the context of its legislative history, the political climate in which it was enacted and has been applied, and the broader administrative state.

## II. EXERCISE OF THE CONGRESSIONAL VETO

The CRA procedure for congressional override of a federal regulation [\*725] has only been used once.<sup>88</sup> In 2001, when the Bush Administration came into office, Republicans in Congress led an attempt to use the measure to

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<sup>82</sup> **5 U.S.C. § 801(b)(2)**.

<sup>83</sup> *Congressional Review Act: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 89 (1997) [hereinafter *Hearing on the CRA*] (statement of Peter L. Strauss, Betts Professor of Law, Columbia University), available at [http://commdocs.house.gov/committees/judiciary/hju40524.000/hju40524\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju40524.000/hju40524_of.htm).

<sup>84</sup> *Id.*

<sup>85</sup> See *infra* Part VI and VII.

<sup>86</sup> See 142 CONG. REC. 6926 (1996) (statement of Rep. Hyde) (noting that, although the measure had already been enacted into law, "no formal legislative history document was prepared to explain the [CRA]"); *id.* at 8197 (joint statement of Sens. Nickles, Reid, and Stevens) (same).

<sup>87</sup> See *infra* Part II.A (discussing Congress's use of the veto in 2001 to disapprove of OSHA's ergonomics rule).

<sup>88</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, CONGRESSIONAL REVIEW ACT (CRA) FAQs, [http://www.gao.gov/legal/congressact/cra\\_faq.html#9](http://www.gao.gov/legal/congressact/cra_faq.html#9) (last visited Nov. 3, 2011) (explaining that the Department of Labor's ergonomics rule is the only rule that Congress has disapproved under the CRA).

strike down a workplace ergonomics regulation promulgated by OSHA.<sup>89</sup> The joint resolution generated much debate, in Washington and nationwide, over whether Congress should use the CRA procedure.<sup>90</sup> This Part discusses the joint resolution disapproving OSHA's ergonomics rule and briefly notes some other instances in which Congress has brought up but has not successfully executed the CRA. It then explores potential means by which the substantial similarity provision might be enforced.

#### A. *The OSHA Ergonomics Rule*

In 1990, Secretary of Labor Elizabeth Dole stated that ergonomic injuries were one "of the nation's most debilitating across-the-board worker safety and health illnesses," and announced that the Labor Department, under President George H.W. Bush, was "committed to taking the most effective steps necessary to address the problem of ergonomic hazards."<sup>91</sup> As we will discuss briefly in Part VI, in 1995 OSHA circulated a complete regulatory text of an ergonomics rule, but it met with such opposition that it was quickly scuttled. Five years after abandoning the first ergonomics proposal, OSHA proposed a new section to Title 20 of the *Code of Federal Regulations* "to reduce the number and severity of musculoskeletal disorders (MSDs) caused by exposure to risk factors in the workplace."<sup>92</sup> The regulation would, among other things, have required employers to provide employees with certain information about ergonomic injuries and MSDs and implement "feasible" controls to reduce MSD hazards if certain [\*726] triggers were met.<sup>93</sup> OSHA published the final rule in the *Federal Register* during the lame-duck period of the Clinton Administration, and it met strong opposition from Republicans and pro-business interest groups.

After the 107th Congress was sworn in, Senate Republicans led the charge against the ergonomics rule and proposed a joint resolution to disapprove of the regulation pursuant to the CRA.<sup>94</sup> Opponents of the OSHA regulation argued that it was the product of a flawed, last-minute rulemaking process in the outgoing Clinton Administration.<sup>95</sup> Although the Department of Labor had been attempting to develop an ergonomics program for at least the previous ten years,<sup>96</sup> the opponents called this particular rule "a regulation crammed through in the last couple of days of the Clinton administration" as a "major gift to organized labor."<sup>97</sup> Senator Mike Enzi of Wyoming argued that the proposed regulation was not published in the *Federal Register* until "a mere 358 days before

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<sup>89</sup> See Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001), *invalidating Ergonomics Program*, 65 Fed. Reg. 68,262 (Nov. 14, 2000).

<sup>90</sup> Compare Robert A. Jordan, *Heavy Lifting Not W's Thing*, BOS. SUNDAY GLOBE, Mar. 11, 2001, at E4 (arguing that President Bush's support of the joint resolution to overturn OSHA's ergonomics rule sends the message, "I do not share--or care about--your pain"), with Editorial, *Roll Back the OSHA Work Rules*, CHI. TRIB., Mar. 6, 2001, at N14 (calling the ergonomics rule "bad rule-making" and arguing that Congress should "undo it"). See generally 147 CONG. REC. 3055-80 (2001) (chronicling the floor debates in the House); *id.* at 2815-74 (chronicling the floor debates in the Senate).

<sup>91</sup> Press Release, Elizabeth H. Dole, Sec'y, Dep't of Labor, Secretary Dole Announces Ergonomics Guidelines to Protect Workers from Repetitive Motion Illnesses/Carpal Tunnel Syndrome (Aug. 30, 1990), *reprinted in* 145 CONG. REC. 24,467-68 (1999).

<sup>92</sup> Ergonomics Program, 65 Fed. Reg. at 68,846; see also Ergonomics Program, 64 Fed. Reg. 65,768-66,078 (proposed Nov. 23, 1999).

<sup>93</sup> Ergonomics Program, 65 Fed. Reg. at 68,847, 68,850-51.

<sup>94</sup> See S.J. Res. 6, 107th Cong. (2001) (enacted).

<sup>95</sup> See, e.g., 147 CONG. REC. 2815-16 (statement of Sen. Jeffords) ("[T]he ergonomics rule certainly qualifies as a 'midnight' regulation . . .").

<sup>96</sup> See Ergonomics Program, 65 Fed. Reg. at 68,264 (presenting an OSHA Ergonomics Chronology); see also *supra* note 91 and accompanying text (noting the Department of Labor's commitment in 1990 to address ergonomic injuries).

<sup>97</sup> 147 CONG. REC. 2817-18 (statement of Sen. Nickles).

[OSHA] made it the law of the land, one-quarter of the time they typically take." <sup>98</sup> He further suggested that OSHA ignored criticisms received during the notice-and-comment period, and instead relied on "hired guns" to provide information and tear apart witness testimony against the rule. <sup>99</sup>

This allegedly flawed and rushed procedure, OSHA's opponents argued, coupled with an overly aggressive posture toward the regulated industries, <sup>100</sup> led to an inefficient and unduly burdensome rule. Congressional Republicans and other critics seemed unconvinced by the agency's estimate of the costs and benefits. OSHA estimated that the regulation would cost \$ 4.5 billion annually, while others projected that it could cost up to \$100 billion--Senator Don Nickles of Oklahoma noted this wide range of estimates and said, "There is no way to know how much this would cost." <sup>101</sup> Democrats, however, argued that the rule was not [\*727] wasteful. Senator Edward Kennedy of Massachusetts said, in contrast, that the ergonomics rule was "flexible and cost-effective for businesses, and . . . overwhelmingly based upon scientific evidence." <sup>102</sup> The rule's proponents also emphasized its benefits, arguing that the rule's true cost of \$ 4.5 billion would be more than offset by a savings of "\$ 9.1 billion annually . . . recouped from the lost productivity, lost tax payments, administrative costs, and workers comp." <sup>103</sup> Critics argued that these benefits were overstated as businesses were naturally becoming more ergonomically friendly on their own. <sup>104</sup> Democrats also noted scientific evidence favoring the rule, including two reports by the National Academy of Sciences (NAS) and the Institute of Medicine reporting the enormous costs of work-related ergonomic injuries. <sup>105</sup> But critics cited reports in their favor, <sup>106</sup> and responded that the NAS report did not endorse the rule and could not possibly have shaped it, as the report was not released until after OSHA went forward with the regulation. <sup>107</sup>

Following expedited debate in Congress during which the legislators argued about the costs and benefits of the OSHA rule, both houses passed the joint resolution in March 2001. <sup>108</sup> When President Bush signed the joint

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<sup>98</sup> *Id.* at 2823 (statement of Sen. Enzi).

<sup>99</sup> *Id.* (estimating that "close to 2 million pages" of materials were submitted to OSHA during the public comment period, yet "there were only 94 days between the end of the public comment period and the date of the OSHA-published [rule]").

<sup>100</sup> See, e.g., Lisa Junker, *Marthe Kent: A Second Life in the Public Eye*, SYNERGIST, May 2000, at 28, 30 (quoting former OSHA Director of Safety Standards as saying: "I was born to regulate.," and "I don't know why, but that's very true. So as long as I'm regulating, I'm happy. . . . I think that's really where the thrill comes from. And it is a thrill; it's a high").

<sup>101</sup> 147 CONG. REC. 2818 (statement of Sen. Nickles); see also Editorial, *supra* note 90, at N14 ("Although [OSHA] puts the price tag on its rules at \$ 4.5 billion, the Economic Policy Foundation gauges the cost to business at a staggering \$ 125.6 billion.").

<sup>102</sup> 147 CONG. REC. 2818 (statement of Sen. Kennedy).

<sup>103</sup> *Id.* at 2827 (statement of Sen. Wellstone).

<sup>104</sup> *Id.* at 2815-16 (statement of Sen. Jeffords). Of course, if a market-driven move toward ergonomically friendly business meant that the future benefits of OSHA's rule were overstated, then its future costs must have been simultaneously overstated as well.

<sup>105</sup> See *id.* at 2830 (statement of Sen. Dodd) (citing a report finding that "nearly 1 million people took time from work to treat or recover from work-related ergonomic injuries" and that the cost was "about \$ 50 billion annually").

<sup>106</sup> See *id.* at 2833-34 (statement of Sen. Hutchinson) (citing a report that "shows that the cost-to-benefit ratio of this rule may be as much as 10 times higher for small businesses than for large businesses").

<sup>107</sup> See *id.* at 3056 (statement of Rep. Boehner) ("OSHA completed its ergonomics regulation without the benefit of the National Academy study.").

<sup>108</sup> See Ergonomics Rule Disapproval, Pub. L. No. 107-5, **115 Stat. 7 (2001)**, *invalidating* Ergonomics Program, **65 Fed. Reg. 68,262** (Nov. 14, 2000); 147 CONG. REC. 3079 (recording the House roll call vote of 223-206, with 4 Representatives not voting); *id.* at 2873 (recording the Senate roll call vote of 56-44).

resolution into law, he emphasized the need for "an understanding of the costs and benefits" and his Administration's intent to continue to "pursue a comprehensive approach to ergonomics."<sup>109</sup>

However, OSHA has never since made any attempt to regulate in this area, although it has issued four sets of voluntary ergonomics guidelines-- [\*728] for nursing homes, retail grocery stores, poultry processing, and the shipbuilding industry. Even without a specific standard, OSHA could use its general duty authority<sup>110</sup> to issue citations for ergonomic hazards that it can show are likely to cause serious physical harm, are recognized as such by a reasonable employer, and can be feasibly abated. However, in the more than ten years after the congressional veto of the ergonomics rule, OSHA issued fewer than one hundred such citations nationwide.<sup>111</sup> For purposes of comparison, in an average year, federal and state OSHA plans collectively issue more than 210,000 violations of all kinds nationwide.<sup>112</sup>

### *B. Midnight Regulations and Other Threats to Use the CRA*

The repeal of the OSHA ergonomics regulation has so far been the only instance in which Congress has successfully used the CRA to veto a federal regulation. However, the option of congressional repeal of rules promulgated by federal agencies has been considered in several other arenas, and in some instances threats by legislators to call for a CRA veto have led to a type of "soft veto" in which the agency responds to the threat by changing its proposed regulation. This has surfaced often, though not always, in the context of possibly repealing so-called midnight regulations.<sup>113</sup>

Some Republican lawmakers argued that the OSHA ergonomics standard circumvented congressional oversight because it was finalized in the closing weeks of the Clinton Administration.<sup>114</sup> Years later, these same arguments were echoed by the Obama Administration and some [\*729] Democrats in the 111th Congress with respect to other rules. As the Bush Administration left office in January 2009, it left behind several last-minute regulations, including rules that would decrease protection of endangered species, allow development of oil shale on some federal lands, and open up oil drilling in the Utah wilderness.<sup>115</sup> The Bush Administration also left behind a conscientious objector regulation that would allow certain healthcare providers to refuse to administer abortions or

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<sup>109</sup> Presidential Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 37 WEEKLY COMP. PRES. DOC. 477 (Mar. 20, 2001).

<sup>110</sup> See Occupational Safety and Health (OSH) Act of 1970 § 5(a)(1), 29 U.S.C. § 654 (2006).

<sup>111</sup> The OSHA website permits users to word-search the text of all general duty violations. See OCCUPATIONAL SAFETY & HEALTH ADMIN., DEPT OF LABOR, GENERAL DUTY STANDARD SEARCH, <http://www.osha.gov/pls/imis/generalsearch.html> (last visited Nov. 3, 2011). A search for all instances of the word *ergonomic* between March 7, 2001, (the day after the congressional veto) and August 18, 2011, (the day we ran this search) yielded sixty violations. The busiest year was 2003 (fifteen violations), and there were eight violations in 2010. An additional search for the term *MSD* yielded thirteen violations during this ten-year span, although some of these were duplicative of the first group of sixty.

<sup>112</sup> See SAFETY & HEALTH DEP'T, AFL-CIO, DEATH TOLL ON THE JOB: THE TOLL OF NEGLECT 61 (19th ed. 2010), [http://www.aflcio.org/issues/safety/memorial/upload/dotj\\_2010.pdf](http://www.aflcio.org/issues/safety/memorial/upload/dotj_2010.pdf).

<sup>113</sup> See Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352, 352 n.1 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/9/LRColl2009n9Beermann.pdf> ("Midnight regulation" is loosely defined as late-term action by an outgoing administration."). Colloquially, the term is usually reserved for situations in which the White House changes parties.

<sup>114</sup> See *supra* notes 95-99 and accompanying text.

<sup>115</sup> See, e.g., Stephen Power, *U.S. Watch: Obama Shelves Rule Easing Environmental Reviews*, WALL ST. J., Mar. 4, 2009, at A4 (noting executive and administrative decisions to "shelve" a Bush Administration rule allowing federal agencies to "bypass" consultation on whether new projects could harm endangered wildlife).

dispense contraception.<sup>116</sup> Congressional Democrats brought up the CRA as an option for repealing the Bush Administration's midnight regulations, while the Obama Administration searched for an executive strategy to scuttle them.<sup>117</sup> Although the CRA may be at its most useful when there is a significant realignment in party control over the Legislative and Executive Branches (as occurred in 2001 and 2009),<sup>118</sup> the Democrats of the **111th** Congress did not use the CRA to achieve their goal of overturning the Bush Administration's regulations--in the end, the Obama Administration used executive procedures.<sup>119</sup>

However, not all threats to use the CRA have occurred immediately [\*730] following a party change. In early 2010, one year after President Obama's inauguration, Senator Lisa Murkowski of Alaska considered proposing a resolution to disapprove of the Environmental Protection Agency's (EPA's) "endangerment finding" that greenhouse gases threaten the environment and human health.<sup>120</sup> Senator Murkowski's idea never came to fruition.

### C. Enforcement of the Substantial Similarity Provision

Since there has never yet been an attempt by an agency to reissue a rule following a CRA veto, there remains ambiguity not only over what kinds of rules are barred, but how any such restrictions would be enforced. In this Part, we briefly discuss three possible ways the substantial similarity provision may affect agency action: one administrative response, one legislative, and one judicial.

One possible means of application of the substantial similarity provision begins in the Executive Branch, most likely within the administrative department whose regulation has been vetoed. With the threat of invalidation hanging overhead, an agency may be deterred from promulgating regulations within a certain area for fear of having its work nullified--or worse, of having ruined for posterity the ability to regulate in a given area (if it interprets the CRA

<sup>116</sup> See Jennifer Lubell, *Conscientious Objectors: Obama Plan to Rescind Rule Draws Catholic Criticism*, MOD. HEALTHCARE, Mar. 23, 2009, at 33 (discussing the Obama Administration's plans to prevent the Bush Administration's conscientious objector rule from going into effect); Charlie Savage, *Democrats Look for Ways to Undo Late Bush Administration Rules*, N.Y. TIMES, Jan. 12, 2009, at A10 ("Democrats are hoping to roll back a series of regulations issued late in the Bush administration that weaken environmental protections and other restrictions.").

<sup>117</sup> See Peter Nicholas & Christi Parsons, *Obama Plans a Swift Start*, L.A. TIMES, Jan. 20, 2009, at A1 (reporting that "Obama aides have been reviewing the so-called midnight regulations" and noting that "Obama can change some Bush policies through executive fiat"); Savage, *supra* note 116 (reporting that "Democrats . . . are also considering using the Congressional Review Act of 1996" to overturn some Bush Administration regulations).

<sup>118</sup> See Brito & de Rugy, *supra* note 81, at 190 ("[T]he CRA will only be an effective check on midnight regulations if the incoming president and the Congress are of the same party. If not, there is little reason to expect that the Congress will use its authority under the CRA to repeal midnight regulations. Conversely, if the president is of the same party as his predecessor and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn his predecessor's last-minute rules." (footnote omitted)). *But see* Rosenberg, *supra* note 75 (pointing out flaws in the CRA and proposing a new scheme of congressional review of federal regulation).

<sup>119</sup> See, e.g., Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," *74 Fed. Reg. 10,207, 10,209-10* (proposed Mar. 10, 2009) (rescinding the Bush Administration's "conscientious objector" rule).

<sup>120</sup> See Editorial, *Ms. Murkowski's Mischief*, NY. TIMES, Jan. 19, 2010, at A30. Note, however, that it is unclear that an agency "finding" is sufficiently final agency action for a CRA veto. *But cf. infra* note 268 (noting attempts to bring a broader range of agency actions under congressional review, including the recently introduced Closing Regulatory Loopholes Act of 2011). Nor is it clear that a joint resolution of disapproval may be inserted as part of a large bill, as Senator Murkowski considered. *Cf. 5 U.S.C. § 802(a)* (2006) (setting forth the exact text to be used in a joint resolution of disapproval). Murkowski intended to insert the resolution into the bill raising the debt ceiling. See Editorial, *supra*. Doing so would not only have run afoul of the provision setting the joint resolution text, but would impermissively have either expanded debate on the resolution, see *5 U.S.C. § 802(d)(2)* (limiting debate in the Senate to ten hours), or limited debate on the debt ceiling bill, which is not subject to the CRA's procedural restrictions.

ominously). In other words, agencies might engage in a sort of self-censorship that itself enforces the CRA. Indeed, the continuous absence of ergonomics from the regulatory agenda for an entire decade following the veto of OSHA's rule--and well into the Obama Administration--arguably provides evidence of such self-censorship. In prepared testimony before a Senate subcommittee of the Committee on Appropriations, Secretary of Labor Elaine Chao testified that, due to the exercise of the veto, the Department of Labor would need to work with Congress to determine what principles to apply to any future regulation in the ergonomics field. She did not want to "expend valuable--and limited--resources on a new effort" if another regulation would be [\*731] invalidated as substantially similar.<sup>121</sup>

In addition to agency self-censorship, there is, of course, a potential Legislative application of the substantial similarity provision. If an agency were to reissue a vetoed rule "in substantially the same form," then Congress could use the substantial similarity provision as a compelling justification for enacting another joint resolution, perhaps voicing its objection to the substance of the new rule, but using "similarity" to bypass a discussion of the merits. For example, if OSHA reissued an ergonomics rule that members of Congress thought was substantially similar to the Clinton Administration rule, then they might be motivated to repeal the rule simply because they would see the new rule as outside the law, and a disrespect to their prior action under the CRA. Of course, as with the original ergonomics rule, the notion that an agency is acting outside its authority may be considered as merely one factor among others--procedural, cost-benefit related, and even political--in determining whether to strike down an agency rule. But a congressional belief that an agency is reissuing a rule in violation of the CRA may cut in favor of enacting a second joint resolution of disapproval, even if certain members of Congress would not be inclined to veto the rule on more substantive grounds. Indeed, this could even turn Congress's gaze away from the rule's substance entirely--a sort of "us against them" drama might be played out in which opponents could use the alleged circumvention as a means to stir [\*732] up opposition to a rule that the majority might find perfectly acceptable if seeing it de novo.

The Judiciary might also weigh in on the issue. If an agency were to reissue a rule that is substantially similar to a vetoed rule, and Congress chose not to exercise its power of veto under the CRA, then a regulated party might convince the courts to strike down the rule as outside of the agency's statutory authority. Although the text of the CRA significantly limits judicial review of a congressional veto (or failure to veto), the statute does *not* prohibit judicial review for noncompliance with the substantial similarity clause of a rule promulgated after a congressional veto.<sup>122</sup> In other words, while Congress may have successfully insulated its own pronouncements from judicial

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<sup>121</sup> *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations for Fiscal Year 2002: Hearing on H.R. 3061/S. 1536 Before a Subcomm. of the S. Comm. on Appropriations*, 107th Cong. 72 (2001) [hereinafter *Hearing on H.R. 3061/S. 1536*] (statement of Elaine L. Chao, Secretary, U.S. Department of Labor). However, Secretary Chao had promised immediately before the veto that she would do exactly the opposite and treat a CRA action as an impetus to reissue an improved rule. See Letter from Elaine L. Chao, Sec'y, U.S. Dep't of Labor, to Arlen Specter, Chairman, Subcomm. on Labor, Health & Human Servs., Educ, S. Comm. on Appropriations, U.S. Senate (Mar. 6, 2001) (promising to take future action to address ergonomics), *reprinted in* 147 CONG. REC. 2844 (2001) (statement of Sen. Specter). More recently, OSHA Assistant Secretary David Michaels, appointed by President Obama, has repeatedly indicated that OSHA has no plans to propose a new ergonomics regulation. For example, in February 2010, he addressed the ORG Worldwide Occupational Safety and Health Group (an audience of corporate health directors for large U.S. companies) and explained his proposal to restore a separate column for musculoskeletal disorder (MSD) cases in the required establishment-specific log of occupational injuries with this caveat: "It appears from press reports that our announcement of this effort may have confused some observers. So, let me be clear: This is *nota* prelude to a broader ergonomics standard." David Michaels, Assistant Sec'y of Labor for Occupational Safety & Health Administration, Remarks at the Quarterly Meeting of the ORC Worldwide Occupational Safety & Health Group & Corp. Health Dirs. Network (Feb. 3, 2010), [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=SPEECHES&p\\_id=2134](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=2134). For a discussion of similar about-faces in statements by members of Congress immediately before and after the veto, see *infra* Part III.B.

<sup>122</sup> See 5 U.S.C. § 805 (2006) ("No determination, finding, action, or omission under this chapter shall be subject to judicial review."). The legislative record makes clear that "a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule." 142 CONG. REC. 8199 (1996) (statement of Sen. Nickles). Indeed, the CRA prohibits a court only



review, that does not stop a plaintiff from asking a court to rule--without considering Congress's silence or statements--whether a rule that was allowed through should have been struck down as substantially similar.

There appear to be two primary ways in which judicial review would arise. First, a party might raise invalidity as a defense if an agency were to try enforcing a rule it arguably did not have authority to promulgate under the CRA. The defendant in the administrative proceedings could appeal agency enforcement of the rule to the federal courts under Chapter 7 of the APA, and a court might then strike down the regulation as a violation of [\*733] the substantial similarity provision.<sup>123</sup> But a regulated party need not wait until an agency attempts to enforce the rule in order to raise a challenge; as a second option, one may go on the offensive and bring suit for declaratory judgment or injunctive relief to prevent the agency from ever enforcing the rule in the first place.<sup>124</sup> In either of these situations, assuming a justiciable case or controversy under Article III,<sup>125</sup> a federal court would need to interpret the CRA to determine whether the reissued rule was substantially similar to a vetoed rule and thus invalid.

Since such a lawsuit has not yet been brought to the federal courts, there is no authoritative interpretation of the CRA to guide agency rulemaking following a congressional veto.<sup>126</sup> Where an agency does not wish to risk invalidation of a rule that merely *may* skirt the outer margins of substantial similarity (whatever those might be), the effect of the CRA may be to overdeter agency action via "self-censorship" even where its regulation may be legally valid. Until the federal courts provide an authoritative interpretation of the CRA, those outer margins of substantial similarity are quite large.<sup>127</sup> For this reason, it is important to provide a workable and realistic interpretation of the CRA to guide agency action and avoid overdeterrence. It is also important to set boundaries with an eye toward the problem of agency *inaction*--agencies should not hide behind the CRA as an excuse not to do anything in an area where the public expects some action and where Congress did not intend to block all rulemaking.

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from inferring the intent of Congress in *refusing* to enact a joint resolution of disapproval, implying that courts should (1) consider congressional intent in considering enacted resolutions, and (2) not infer substantial dissimilarity from Congress's failure to veto a second rule. See 5 U.S.C. § 801(g) ("If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval."); see also 142 CONG. REC. 8199 (statement of Sen. Nickles) (referring to § 801(g) and noting that the "limitation on judicial review in no way prohibits a court from determining whether a rule is in effect"). While some may call into question the constitutionality of such strong limits on judicial review, the CRA drafters' constitutional argument defending the provisions suggests that the limits are meant to address procedure. See *id.* ("This . . . limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to 'determine the Rules of its Proceedings' which includes being the final arbiter of compliance with such Rules." (citing U.S. CONST. art. I, § 5, cl. 2)). Thus, since a court may rule upon whether a rule is in effect, yet lacks the power to weigh Congress's omission of a veto *against* a finding of substantial similarity, a court could conduct its own analysis to determine whether a non-vetoed second rule is substantially similar and hence invalid.

<sup>123</sup> See 5 U.S.C. § 702 (conferring a right of judicial review to persons "suffering legal wrong because of agency action"); *id.* § 706(2)(C) (granting courts the authority to strike down agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); see also *id.* § 704 (requiring that an aggrieved party exhaust its administrative remedies before challenging a final agency action in federal court).

<sup>124</sup> See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (entertaining a declaratory relief action brought by parties challenging a regulation promulgated by the Department of Interior under the Endangered Species Act).

<sup>125</sup> U.S. CONST. art. III, § 2 (granting the federal courts jurisdiction only over cases and controversies); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (explaining the requirement of plaintiff standing); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (requiring that the plaintiffs case be ripe for adjudication).

<sup>126</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>127</sup> See *infra* Part III (providing a spectrum of possible interpretations, and noting the vastly different interpretations of the substantial similarity provision during the debates over the ergonomics rule).

In the next two Parts we will attempt to reconcile the vast spectrum of possible "substantial similarity" interpretations with the political and legislative history of the CRA, with the joint resolution overturning the OSHA ergonomics rule, and with the background principles of CBA and administrative law.

### [\*734] III. THE SPECTRUM OF INTERPRETATIONS OF "SUBSTANTIALLY SIMILAR"

In this Part, we develop seven possible interpretations of the key term "substantially similar," argue that interpretations offered by partisans during the ergonomics debate should be uniformly ignored as posturing, and suggest that interpretations offered after the ergonomics veto are too pessimistic.

#### *A. Hierarchy of Possible Interpretations*

Rather than constructing a definition of "substantially the same" from first principles, we will ground this discussion with reference to the spectrum of plausible interpretations of that key phrase, arrayed in ascending order from the least troublesome to the issuing agency to the most daunting. We use this device not to suggest that the center of gravity in the struggle of competing ideologies in Congress at the time the CRA was enacted should point the way toward a particular region of this spectrum, but rather to erect some markers that can be rejected as implausible interpretations of "substantially the same" and thereby help narrow this range. Although we will support our interpretation with reference to specific items in the legislative history of the CRA, starting out with this hierarchy also allows us to focus on what Congress could have made less frustratingly vague in its attempt to prevent agencies from reissuing rules that would force duplicative congressional debate.

We can imagine at least seven different levels of stringency that Congress could plausibly have chosen when it wrote the CRA and established the "substantially the same" test to govern the reissuance of related rules:

**Interpretation 1: An identical rule can be reissued if the agency asserts that external conditions have changed.** A reissued rule only becomes "substantially the same," in any sense that matters, if Congress votes to veto it again on these grounds. Therefore, an agency could simply wait until the makeup of Congress changes, or the same members indicate a change of heart about the rule at hand or about regulatory politics more generally, and reissue a wholly identical rule. The agency could then simply claim that although the regulation was certainly in "substantially the same form," the effect of the rule is now substantially different from what it would have been the first time around.

**Interpretation 2: An identical rule can be reissued if external conditions truly *have* changed.** We will discuss this possibility in detail in Part V. This interpretation of "substantially the same" recognizes that the effects of regulation--or the estimates of those effects--can change over time even if the rule itself does not change. Our understanding of the [\*735] science or economics behind a rule can change our understanding of its benefits or costs, or those benefits and costs themselves can change as technologies improve or new hazards emerge. For example, a hypothetical Federal Aviation Administration (FAA) rule banning smoking on airliners might have seemed draconian if proposed in 1960, given the understanding of the risks of second-hand smoking at the time, but it was clearly received much differently when actually issued thirty years later.<sup>128</sup> Safety technologies such as antilock brake systems that would have been viewed as experimental and prohibitively expensive when first developed came to be viewed as extremely cost-effective when their costs decreased with time. In either type of situation, an identical rule might become "substantially different" not because the vote count had changed, but because the same regulatory language had evolved a new meaning, and then Congress might welcome another opportunity to evaluate the costs and benefits.

**Interpretation 3: The reissued rule must be altered so as to have significantly greater benefits and/or significantly lower costs than the original rule.** Under this interpretation, the notion of "similar form" would not be judged via a word-by-word comparison of the two versions, but by a common-sense comparison of the stringency and impact of the rule. We will discuss in Part IV a variety of reasons why we believe Congress intended that the

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<sup>128</sup> Prohibition Against Smoking, *55 Fed. Reg. 8364* (Mar. 7, 1990) (codified at 14 C.F.R. pts. 121, 129, 135) (2006).

currency for judging similarity should be costs and benefits rather than the extent of narrative revision to the regulatory text per se or the extent to which a reissued rule contains wholly different provisions or takes a different approach. At this point, it should suffice to point out that as a practical matter, two versions of a regulation that have vastly different impacts on society might contain 99.99% or more of their individual words in common, and thus be almost identical in "form" if that word was used in its most plebian sense. An OSHA rule requiring controls on a toxic substance in the workplace, for example, might contain thousands of words mandating engineering controls, exposure monitoring, recordkeeping, training, issuance of personal protective equipment, and other elements, all triggered when the concentration of the contaminant exceeded some numerical limit. If OSHA reissued a vetoed toxic substance rule *with one single word changed* (the number setting the limit), the costs and burdens could drop precipitously. We suggest it would be bizarre to constrain the agency from attempting to satisfy congressional concerns by fundamentally changing the substance and import of a vetoed rule merely because doing so might affect only a [\*736] small fraction of the individual words in the regulatory text.<sup>129</sup>

**Interpretation 4: In addition to changing the overall costs and benefits of the rule, the agency must fix all of the specific problems Congress identified when it vetoed the rule.** This interpretation would recognize that despite the paramount importance of costs, benefits, and stringency, Congress may have reacted primarily to specific aspects of the regulation. Perhaps it makes little sense for an agency to attempt to reissue a rule that is substantially different in broad terms, but that pushes the same buttons with respect to the way it imposes costs, or treats the favored sectors or constituents that it chooses not to exempt. However, as we will discuss in Part IV.B, the fact that Congress chose not to accompany statements of disapproval with any language explaining the consensus of what the objections were may make it inadvisable to require the agency to fix problems that were never formally defined and that may not even have been seen as problems by more than a few vocal representatives.

**Interpretation 5: In addition to changing the costs and benefits and fixing specific problems, the agency must do more to show it has "learned its lesson."** This interpretation would construe "substantially the same form" in an expansive way befitting the colloquial use of the word *form* as more than, or even perpendicular to, substance. In other words, the original rule deserved a veto because of how it was issued, not just because of what was issued, and the agency needs to change its attitude, not just its output. This interpretation comports with Senator Enzi's view of why the CRA was written, as he expressed during the ergonomics floor debate: "I assume that some agency jerked the Congress around, and Congress believed it was time to jerk them back to reality. Not one of you voted against the CRA."<sup>130</sup> If the CRA was created as a mechanism to assert the reality of congressional power, then merely fixing the regulatory text may not be sufficient to avoid repeating the same purported mistakes that doomed the rule upon its first issuance.

**Interpretation 6: In addition to the above, the agency must devise a wholly different regulatory approach if it wishes to regulate in an area Congress has cautioned it about.** This would interpret the word *form* in the way that scholars of regulation use to distinguish fundamentally different kinds of regulatory instruments--if the [\*737] vetoed rule was, for example, a specification standard, the agency would have to reissue it as a performance standard in order to devise something that was not in "substantially the same form." An even more restrictive reading would divide *form* into the overarching dichotomy between command-and-control and voluntary (or market-based) designs: if Congress nixed a "you must" standard, the agency would have to devise a "you may" alternative to avoid triggering a "substantially similar" determination.

**Interpretation 7: An agency simply cannot attempt to regulate (in any way) in an area where Congress has disapproved of a specific regulation.** This most daunting interpretation would take its cue from a particular reading of the clause that follows the "same form" prohibition: "unless the reissued or new rule is specifically

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<sup>129</sup> It is even conceivable that a wholly identical regulatory text could have very different stringency if the accompanying preamble made clear that it would be enforced in a different way than the agency had intended when it first issued the rule (or that Congress had misinterpreted it when it vetoed the rule).

<sup>130</sup> 147 CONG. REC. 2821 (2001) (statement of Sen. Enzi).

authorized by a law enacted after the date of the joint resolution disapproving the original rule." <sup>131</sup> Such a reading could have been motivating the dire pronouncements of congressional Democrats who argued, as did Senator Russ Feingold of Wisconsin, that a "vote for this resolution is a vote to block any Federal ergonomics standard for the foreseeable future." <sup>132</sup> However, we will argue below that it is clear that Congress meant this interpretation only to apply in the rare cases where the organic statute only allowed the exact rule that the agency brought forward, and thus the veto created a paradox because the agency was never authorized to promulgate a different regulation.

#### *B. How Others Have Interpreted "Substantially the Same"*

By far the majority of all the statements ever made interpreting the meaning of "substantially the same" were uttered by members of Congress during the floor debate over the OSHA ergonomics standard. None of these statements occupied the wide middle ground within the spectrum of possible interpretations presented above. Rather, at one extreme were many statements trivializing the effect of the veto, such as, "the CRA will not act as an impediment to OSHA should the agency decide to engage in ergonomics rulemaking." The members who disagreed with this sanguine assessment did so in stark, almost apocalyptic terms, as in, "make no mistake about the resolution of disapproval that is before us. It is an atom bomb for the ergonomics rule . . . . Until Congress gives it permission, OSHA will be powerless to adopt an ergonomics rule

Surely the Democrats in Congress generally prefer an interpretation of legislative control over the regulatory system that defers maximally to the [\*738] executive agencies, allowing them to regulate with relatively few constraints or delays, while Republicans generally favor an interpretation that gives Congress the power to kill whole swaths of regulatory activity "with extreme prejudice." But in both cases, what they want the CRA to mean in general is the opposite of what they wanted their colleagues to think it meant in the run-up to a vote on a specific resolution of disapproval. Hence the fact that the first quote above, and dozens like it, came not from the left wing but from Republican James Jeffords of Vermont; <sup>133</sup> whereas the "atom bomb" and similarly bleak interpretations of the CRA came from Democrats such as Edward Kennedy of Massachusetts. <sup>134</sup> Clearly, both the trivialization of a possible veto by those hoping to convince swing voters that their disapproval was a glancing blow, as well as the statements cowering before the power of the CRA by those hoping to dissuade swing voters from "dropping the bomb," should not be taken at face value, and should instead be dismissed as posturing to serve an expedient purpose. Indeed, when the smoke cleared after the ergonomics veto, the partisans went back to their usual stances. <sup>135</sup>

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<sup>131</sup> **5 U.S.C. § 801(b)(2)** (2006).

<sup>132</sup> 147 CONG. REC. 2860 (statement of Sen. Feingold).

<sup>133</sup> *Id.* at 2816 (statement of Sen. Jeffords).

<sup>134</sup> *Id.* at 2820 (statement of Sen. Kennedy). This particular pattern was also clearly evident in the House floor debate on ergonomics. Consider, for example, this sanguine assessment from a strident opponent of the OSHA rule, Republican Representative Roy Blunt: "When we look at the legislative history of the Congressional Review Act, it is clear that this issue can be addressed again . . . . [T]he same regulation cannot be sent back essentially with one or two words changed . . . . [But] this set of regulations can be brought back in a much different and better way." *Id.* at 3057 (statement of Rep. Blunt). At the opposite end of the spectrum were proponents of ergonomics regulation such as Democratic Representative Rob Andrews: "Do not be fooled by those who say they want a better ergonomics rule, because if this resolution passes . . . [t]his sends ergonomics to the death penalty . . . ." *Id.* at 3059 (statement of Rep. Andrews).

<sup>135</sup> For example, in June 2001, Republican Senator Judd Gregg strongly criticized the Breaux Bill for encouraging OSHA to promulgate what he called a regulation "like the old Clinton ergonomics rule, super-sized." See James Nash, *Senate Committee Approves Bill Requiring Ergonomics Rule*, EHS TODAY (June 20, 2002, 12:00 AM), [http://ehstoday.com/news/ehs\\_imp\\_35576/](http://ehstoday.com/news/ehs_imp_35576/); see also *infra* Part IV.A.5 (describing the Breaux Bill). But at roughly the same time, Democratic Senator Edward Kennedy was encouraging OSHA to reissue a rule, with no mention of any possible impediment posed by the CRA: "It has been a year now that America's workers have been waiting for the Department of Labor to adopt a new ergonomics standard. We must act boldly to protect immigrant workers from the nation's leading cause of workplace injury." *Workplace Safety and Health for Immigrants*

The set of less opportunistic interpretations of "substantially the same," on the other hand, has a well-defined center of gravity. Indeed, most legal and political science scholars, as well as experts in OSHA rulemaking, seem to agree that a veto under the CRA is at least a harsh punishment, and [\*739] perhaps a death sentence. For example, Charles Tiefer described the substantial similarity provision as a "disabling of the agency from promulgating another rule on the same subject."<sup>136</sup> Morton Rosenberg, the resident expert on the CRA at the Congressional Research Service, wrote after the ergonomics veto that "substantially the same" is ambiguous, but he only reached a sanguine conclusion about one narrow aspect of it: an agency does not need express permission from Congress to reissue a "substantially different" rule when it is compelled to act by a statutory or judicial deadline.<sup>137</sup> He concluded, most generally, that whatever the correct legal interpretation, "[T]he practical effect . . . may be to dissuade an agency from taking any action until Congress provides clear authorization."<sup>138</sup> Similarly, Julie Parks criticized § 801(b)(2) as "unnecessarily vague," but concluded that it at least "potentially withdraws substantive authority from OSHA to issue *any* regulation concerning ergonomics."<sup>139</sup>

Advocates for strong OSHA regulation, who presumably would have no interest in demonizing the CRA after the ergonomics veto had already passed, nevertheless also take a generally somber view. Vernon Mogensen interprets "substantially the same" such that "the agency that issued the regulation is prohibited from promulgating it again without congressional authorization."<sup>140</sup> A.B. (Butch) de Castro—who helped write the ergonomics standard while an OSHA staff member—similarly opined in 2006 that "OSHA is barred from pursuing development of another ergonomics standard unless ordered so by Congress."<sup>141</sup> In 2002, Parks interviewed Charles Jeffress, who was the OSHA Assistant Secretary who "bet the farm" on the ergonomics rule, and he reportedly believed (presumably with chagrin) that "OSHA does not have the authority to issue [\*740] another ergonomics rule, because the substantially similar language is vague and ambiguous."<sup>142</sup>

As we will argue in detail below, we believe that all of these pronouncements ascribe to Congress more power to preemptively bar reissued regulations than the authors of the CRA intended, and certainly more anticipatory power than Congress should be permitted to wield.

#### IV. WHY "SUBSTANTIALLY THE SAME" SHOULD NOT BE INTERPRETED OMINOUSLY

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*and Low Wage Workers: Hearing Before the Subcomm. on Emp't, Safety & Training of the S. Comm. on Health, Educ., Labor & Pensions*, 107th Cong. 3 (2002) (statement of Sen. Kennedy).

<sup>136</sup> Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About lawmaking in 2001*, *17 J.L.&POL.* 409, 476 (2001).

<sup>137</sup> MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT AFTER NULLIFICATION OF OSHA'S ERGONOMICS STANDARD 23 (2003).

<sup>138</sup> *Id.*

<sup>139</sup> Julie A. Parks, Comment, *Lessons in Politics: Initial Use of the Congressional Review Act*, *55 ADMIN. L. REV.* 187, 200 (2003) (emphasis added); see also Stuart Shapiro, *The Role of Procedural Controls in OSHA's Ergonomics Rulemaking*, 67 PUB. ADMIN. REV. 688, 696 (2007) (concluding that "[a]ttempts to create an ergonomics regulation effectively ended" with the 2001 veto because of the language of § 801(b)(2)).

<sup>140</sup> Vernon Mogensen, *The Slow Rise and Sudden Fall of OSHA's Ergonomics Standard*, WORKINGUSA, Fall 2003, at 54, 72.

<sup>141</sup> A.B. de Castro, *Handle with Care: The American Nurses Association's Campaign to Address Work-Related Musculoskeletal Disorders*, 4 CLINICAL REVS. BONE & MIN. METABOLISM 45, 50 (2006).

<sup>142</sup> Parks, *supra* note 139, at 200 n.69. Note that Jeffress' statement that the language is "vague and ambiguous" expresses uncertainty and risk aversion from within the agency, rather than a confident stance that issuance of another ergonomics standard would actually be illegal. See also *supra* Part II.C (noting agency self-censorship as one means of enforcing the CRA's substantial similarity provision).

In this Part, we argue that so long as the rule as reissued makes enough changes to alter the cost-benefit ratio in a significant and favorable way (and, we recommend, as long as the issuing agency also corrects any procedural flaws that Congress deplored as essentially arbitrary and capricious), the purposes of the CRA will be served, and the new rule should not be barred as "substantially the same" (although it would not be immunized against a second veto on new substantive grounds). We find four sets of reasons for this interpretation of the substantial similarity provision. First, the legislative history--both in the mid-1990s when the Republicans took control of Congress and enacted the CRA, and when Congress struck down the OSHA ergonomics rule in 2001--indicates that CBA and risk assessment were the intended emphases.<sup>143</sup> Congress wanted more efficient regulations, and requiring an agency to go back and rewrite rules that failed a cost-benefit test served Congress's needs.<sup>144</sup> Along with the legislative history, the signing statement interpreting the Act and Senate Bill 2184 introduced in the wake of the ergonomics veto also provide some strong clues as to the intended definition of "substantially the same." Secondly, the constraint that the text of any joint resolution of disapproval must be all-or-nothing--all nonoffending portions of the vetoed rule must fall along with the offending ones--argues for a limited interpretation, as a far-reaching interpretation of "substantially the same" would limit an agency's authority in ways Congress did not intend in exercising the veto. Third, in a system in which courts generally defer to an agency's own interpretation of its authority under an organic statute, agency action [\*741] following a joint resolution of disapproval should also be given deference. Finally, since a joint resolution of disapproval, read along with too broad an interpretation of "substantially the same," could significantly alter the scope of an agency's authority under its organic statute, one should avoid such a broad interpretation, since it seems implausible (or at least unwise) that Congress would intend to significantly alter an agency's delegated authority via the speedy and less-than-deliberative process it created to effect the CRA.

#### A. Congressional Intent and Language

Whether the plain language of the CRA is viewed on its own or in the context of the events leading up to the passage of the statute and the events surrounding the first and only congressional disapproval action in 2001, it is clear that Congress intended the new streamlined regulatory veto process to serve two purposes: one pragmatic and one symbolic. Congress needed to create a chokepoint whereby it could focus its ire on the worst of the worst--those specific regulations that did the greatest offense to the general concept of "do more good than harm" or the ones that gored the oxen of specific interest groups with strong allies in Congress. Congress also felt it needed, as the floor debate on the ergonomics standard made plain, to move the fulcrum on the scales governing the separation of powers so as to assert greater congressional control over the regulatory agencies whose budgets--but not always whose behavior--it authorizes. Neither of these purposes requires Congress to repudiate whole categories of agency activity when it rejects a single rule, as we will discuss in detail below. To use a mundane behavioral analogy, a parent who wants her teenager to bring home the right kind of date will clearly achieve that goal more efficiently, and with less backlash, by rejecting a specific suitor (perhaps with specific detail about how to avoid a repeat embarrassment) than by grounding her or forbidding her from ever dating again. Even if Congress had wanted to be nefarious, with the only goal that of tying the offending agency in knots, it would actually better achieve that goal by vetoing a series of attempts to regulate, one after the other, then by barring the instant rule and all future rules in that area in one fell swoop.

The plain language of the statute also shows that the regulatory veto was intended to preclude repetitious actions, *not to preclude related actions informed by the lessons imparted through the first veto*. Simply put, Congress put so much detail in the CRA about when and how an agency could try to reissue a vetoed rule that it seems bizarre for analysts to interpret "substantially the same" as a blanket prohibition against regulating in an area. We will explain how congressional intent sheds light on the precise meaning of [\*742] "substantially the same" by examining five facets of the legislative arena: (1) the events leading up to the passage of the CRA; (2) the plain text of the statute; (3) the explanatory statement issued a few weeks after the CRA's passage by the three major leaders of the

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<sup>143</sup> See *infra* Parts IV.A. 1, IV.A.4.

<sup>144</sup> *But see* Parks, *supra* note 139, at 199-205 (arguing that in practice the CRA has been used not to increase accountability, but to appease special interest groups, leaving no clear statutory guidance for agencies).

legislation in the Senate (and contemporaneously issued verbatim in the House); (4) the substantive (as opposed to the polemical) aspects of the ergonomics floor debate; and (5) the provisions of Senate Bill 2184 subsequently proposed to restart the ergonomics regulatory process.

### 1. Events Leading up to Passage

One cannot interpret the CRA without looking at the political history behind it--both electoral and legislative. The political climate of the mid-1990s reveals that congressional Republicans sought to reform the administrative process in order to screen for rules whose benefits did not outweigh their costs.<sup>145</sup> A Senate report on the moratorium proposal stated, "As taxpayers, the American people have a right to ask whether they are getting their money's worth. Currently, too few regulations are subjected to stringent cost-benefit analysis or risk assessment based on sound science. Without such protections, regulations can have unintended results."<sup>146</sup> This led to the inclusion in the CRA, for example, of a requirement that agencies submit the report of their rule not only to Congress, but also to GAO so that it can evaluate the CBA.<sup>147</sup> Although there were some complaints about the number or volume of regulations as opposed to merely their efficiency<sup>148</sup> --possibly suggesting that some members of Congress would not support even regulations whose benefits strongly outweighed their costs--the overall political history of the CRA in the period from 1994 to 1996 sends a clear sign that CBA and risk assessment were key. A statute enacted to improve regulation should not be interpreted so as to foreclose regulation.

### 2. Statutory Text

The plain language of the CRA provides at least three hints to the intended meaning and import of the "substantially the same" provision. [\*743] First, we note that in the second sentence of the statute, the first obligation of the agency issuing a rule (other than to submit a copy of the rule itself to the House and Senate) is to submit "a complete copy of the cost-benefit analysis of the rule, if any" to the Comptroller General and each house of Congress.<sup>149</sup> Clearly, as we have discussed above, the CRA is a mechanism for Congress to scrutinize the costs and benefits of individual regulations for possible veto of rules that appear to have costs in excess of benefits (a verdict that Congress either infers in the absence of an agency statement on costs and benefits, makes using evidence contained in the agency CBA, or makes by rejecting conclusions to the contrary in the CBA).<sup>150</sup> Moreover, the CRA's application only to major rules--a phrase defined in terms of the rule's economic impact<sup>151</sup> -- suggests that Congress was primarily concerned with the overall financial cost of regulations. As we discuss in detail below, we believe the first place Congress therefore should and will look to see if the reissued rule is "in substantially the same form" as a vetoed rule is the CBA; a similar-looking rule that has a wholly different (and more favorable) balance between costs and benefit is simply not the same. Such a rule will be different along precisely the key dimension over which Congress expressed paramount concern.

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<sup>145</sup> See *supra* Parts I.A-B; see also *infra* Part IV.D (arguing that allowing an agency to reissue a rule with a significantly better cost-benefit balance is a victory for congressional oversight).

<sup>146</sup> S. REP. NO. 104-15, at 5 (1995).

<sup>147</sup> See 5 U.S.C. § 801(a)(1)(B) (2006); 141 CONG. REC. 9428-29 (1995) (statement of Sen. Domenici).

<sup>148</sup> See, e.g., S. REP. NO. 104-15, at 5 ("Without significant new controls, the volume of regulations will only grow larger.").

<sup>149</sup> 5 U.S.C. § 801(a)(1)(B).

<sup>150</sup> Though not the subject of this Article, it is worth noting that CBA's quantitative nature still leaves plenty of room for argument, particularly in regards to valuation of the benefits being measured. See Graham, *supra* note 9, at 483-516 (defending the use of cost-benefit analysis despite its "technical challenges" as applied to lifesaving regulations).

<sup>151</sup> 5 U.S.C. § 804(2).

In addition, in the very sentence that bars an agency from reissuing a "substantially similar" rule, the Act provides for Congress to specifically authorize it to do just that via a new law enacted after the veto resolution passes.<sup>152</sup> We will discuss below, in the context of the April 1996 signing statement, how Congress in part intended this provision to apply in the special case in which Congress had previously instructed the agency to issue almost precisely the rule it did issue, thereby leaving the agency caught between an affirmative requirement and a prohibition. So, other than needing such a mechanism to cover the rare cases where the agency is obligated to reissue a similar rule, why would Congress have specifically reserved the right to authorize a very similar rule to one it had recently taken the trouble to veto? We assert that there are only two logical explanations for this: (1) Congress might use the new specific authorization to clarify exactly what minor changes that might *appear* to leave the rule [\*744] "substantially the same" would instead be sufficient to reverse all concerns that prompted the original veto; or (2) Congress might come to realize that new information about the harm(s) addressed by the rules or about the costs of remedying them made the original rule desirable (albeit in hindsight). Because the passage of time can make the original veto look unwise (see *supra* interpretations 1 and 2 in the hierarchy in Part III.A), Congress needed a way to allow something "substantially similar" to pass muster despite the prohibition in the first part of § 801(b)(2). Whatever the precise circumstances of such a clarifying or about-face authorization, the very fact that Congress also anticipated occasional instances where similar or even identical rules could be reissued means, logically, that it clearly expected different rules to be reissued, making the interpretation of "substantially the same" as barring all further activity in a given problem area quite far-fetched.

Finally, § 803 of the CRA establishes a special rule for a regulation originally promulgated pursuant to a deadline set by Congress, the courts, or by another regulation. This section gives the agency whose rule is vetoed a one-year period to fulfill the original obligation to regulate. Such deadlines always specify at least the problem area the agency is obligated to address,<sup>153</sup> so there is little or no question that Congress intended to allow agencies to reissue rules covering the same hazard(s) as a vetoed rule, when needed to fulfill an obligation, so long as the revised rule approaches the problem(s) in ways not "substantially the same." Further support for this common-sense interpretation of "substantially the same" is found in the one-year time period established by § 803: one year to repropose and finalize a new rule is a breakneck pace in light of the three or more years it not uncommonly takes agencies to regulate from start to finish.<sup>154</sup> Thus, in § 803, Congress chose a time frame compatible only with a very circumscribed set of "fixes" to respond to the original resolution of disapproval. If "not substantially the same" meant "unrecognizably different from," one year would generally be quite insufficient to re-promulgate under these circumstances. Admittedly, Congress could have [\*745] intended a different meaning for "substantially the same" in cases where no judicial, statutory, or regulatory deadline existed, but then one might well have expected § 803 to cross-reference § 802(b)(2) and make clear that a more liberal interpretation of "substantially the same" only applies to compliance with preexisting deadlines.

### 3. The Signing Statement

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<sup>152</sup> See *id.* § 801(b)(2) ("[A] new rule that is substantially the same as [a vetoed] rule may not be issued, *unless* the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving of the original rule." (emphasis added)).

<sup>153</sup> See, e.g., Needlestick Safety and Prevention Act, Pub. L. No. 106-430, § 5, **114 Stat. 1901, 1903-04 (2000)** (establishing the procedure and deadline by which OSHA was required to promulgate amendments to its rule to decrease worker exposure to bloodborne pathogens). In this case, Congress went further and actually wrote the exact language it required OSHA to insert in amending the existing rule.

<sup>154</sup> See Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, *23 J.L. & POL.* 393, 416 (2007) (showing that, on average, it takes almost three years for a regulation to move from first publication in the *Unified Agenda* of rules in development to final promulgation, with outliers in both the Clinton and Bush (43) Administrations exceeding ten years in duration).



In the absence of a formal legislative history, the explanatory statement written by the prime sponsors of the CRA<sup>155</sup> serves its intended purpose as "guidance to the agencies, the courts, and other interested parties when interpreting the act's terms."<sup>156</sup> This document contains various elaborations that shed light on congressional expectations regarding agency latitude to reissue rules after disapproval.

The background section clarifies that Congress sought not to "become a super regulatory agency" speaking directly to the regulated community, but needed the CRA to tip the "delicate balance" between congressional enactment and executive branch implementation of laws toward slightly more policymaking authority for Congress.<sup>157</sup> Notably, the sponsors repeatedly referred to "a rule" in the singular noun form, rather than to whole regulatory programs, whenever they discussed the need for review (for example, "Congress may find *a rule* to be too burdensome, excessive, inappropriate or duplicative"<sup>158</sup>). In other words, agencies may take specific actions that usurp policymaking activity from Congress, so the remedy is for Congress to send them back to try again (to regulate consistent with their delegated authority), not to shut down the regulatory apparatus in an area. A CRA that had a "one strike and you're out" mechanism would, we believe, not redress the "delicate balance," but rewrite it entirely.

As discussed above,<sup>159</sup> the passage of time or the advance of knowledge [\*746] can ruin a well-intentioned rule and demand congressional intervention--Nickles, Reid, and Stevens explain how "during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change."<sup>160</sup> The principle that costs and benefits can be a moving target must, we believe, also inform the meaning of "substantially the same." If the "proper solution" Congress envisioned to an environmental or other problem has changed such that an agency regulation no longer comports with congressional expectations, then it must also be possible for circumstances to change *again* such that a vetoed rule could turn out to effect "the proper solution." The signing statement sets up a predicate for intervention when the regulatory solution and the proper solution diverge--which in turn implies that an agency certainly cannot reissue "the same rule in the same fact situation," but in rare cases it should be permitted to argue that what once was improper has now become proper.<sup>161</sup> Whether in the ten years since the ergonomics veto the 2000 rule may still look "improper" does not change the logic that costs and benefits can change by agency action or by exogenous factors, and that the purpose of the CRA is to block rules that fail a cost-benefit test.

The signing statement also offers up the "opportunity to act . . . before regulated parties must invest the significant resources necessary to comply with a major rule"<sup>162</sup> as the sole reason for a law that delays the effectiveness of rules while Congress considers whether to veto them. Again, this perspective is consistent with the purpose of the CRA as a filter against agencies requiring costs in excess of their accompanying benefits, not as a means for Congress to reject all solutions to a particular problem by disapproving one particular way to solve it.

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<sup>155</sup> 142 CONG. REC. 8196-8201 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>156</sup> *Id.* at 8197.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (emphasis added). In one instance only, the authors of this statement refer to "regulatory schemes" as perhaps being "at odds with Congressional expectations," possibly in contrast to individual rules that conflict with those expectations. *Id.* However, four sentences later in the same paragraph, they say that "[i]f these concerns are sufficiently serious, Congress can stop *the rule*," *id.* (emphasis added), suggesting that "schemes" does not connote an entire regulatory program or refer to all conceivable attempts to regulate to control a particular problem area, but simply refers to a single offending rule that constitutes a "scheme."

<sup>159</sup> *See supra* Part III.A.

<sup>160</sup> 142 CONG. REC. 8197 (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>161</sup> *See infra* Part V.

<sup>162</sup> 142 CONG. REC. 8198 (joint statement of Sens. Nickles, Reid, and Stevens).

The (brief) direct explanation of the "substantially the same" paragraph provides additional general impressions of likely congressional intent, as well as some specific elaboration of the remainder of § 801(b)(2). The only mention given to the purpose of the "substantially the same" prohibition is as follows: "Subsection 801 (b)(2) is necessary to prevent circumvention of a resolution [of] disapproval."<sup>163</sup> The use of the pejorative word *circumvention* seems clearly to signal congressional concern that an agency could fight and win a war of attrition simply by continuing to promulgate near-identical variants of a vetoed rule until it finally caught Congress asleep at the switch or wary of having said "no" too many times. This rationale for invoking the substantial similarity prohibition was echoed many times in the [\*747] ergonomics floor debate, notably in this statement by Senator James Jeffords of Vermont: "an agency should not be able to reissue a disapproved rule merely by making minor changes, thereby claiming that the reissued regulation was a different entity."<sup>164</sup> Viewed in this light, "substantially the same" means something akin to "different enough that it is clear the agency is not acting in bad faith."

The remainder of the paragraph explaining § 801 (b)(2) sheds more light on the process whereby Congress can even specifically authorize an agency to reissue a rule that is *not* "substantially different." Here the sponsors made clear that if the underlying statute under which the agency issued the vetoed rule does not constrain the substance of such a rule, "the agency may exercise its broad discretion to issue a substantially different rule."<sup>165</sup> *Notice that the sponsors make no mention of the agency needing any permission from Congress to do so.* However, in some cases Congress has obliged an agency to issue a rule *and* has imposed specific requirements governing what such a rule should and should not contain.<sup>166</sup> When Congress disapproves of this sort of rule, "the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of *any* rule."<sup>167</sup> In these unusual cases, the sponsors clarify, the "debate on any resolution of disapproval . . . [should] make the congressional intent clear regarding the agency's options or lack thereof."<sup>168</sup> If an agency is allowed by the original statute to issue a substantially different rule, Congress has no obligation to speak further, but if the veto and the statute collide, then Congress must explain the seeming paradox. Such a case has never occurred, of course (the Occupational Safety and Health (OSH) Act does not require OSHA to issue any kind of ergonomics rule), but we can offer informed speculation about the likely contours of such an event. Suppose that in 2015, Congress was to pass a law requiring the Department of Transportation (DOT) to issue a regulation by January 1, 2018, prohibiting drivers from writing text messages while driving. But by 2018, suppose the makeup of Congress had changed, as had the party in control of the White House, and the new Congress was not pleased that DOT had followed the old Congress's instructions to the letter. It could veto the rule and make clear that DOT had no options left--perhaps Congress could save face in light of this flip-flop by claiming that new technology had made it possible to text safely, and it could simply assert that the original order to regulate was now moot. [\*748] Or, Congress could observe (or claim) that DOT had followed the original instructions in a particularly clumsy way: perhaps it had brushed aside pleas from certain constituency groups (physicians, perhaps) who asserted that more harm to public safety would ensue if they were not exempted from the regulations. Congress could resolve this paradox by instructing DOT to reissue the rule with one additional sentence carving out such an exemption. That new document would probably be "substantially the same" as the vetoed rule and might have costs and benefits virtually unchanged from those of the previous rule, but it would be permissible because Congress had in effect amended its original instructions from 2015 to express its will more clearly.

Because Congress specifically provided the agency with an escape valve (a written authorization on how to proceed) in the event of a head-on conflict between a statutory obligation and a congressional veto, it is clear that

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<sup>163</sup> See *id.* at 8199.

<sup>164</sup> 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords).

<sup>165</sup> 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>166</sup> See, e.g., *supra* note 153.

<sup>167</sup> 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

<sup>168</sup> *Id.*

no such authorization is needed if the agency can craft on its own a "substantially different" rule that still comports with the original statute. Although Democratic Senators did introduce a bill in the several years after the ergonomics veto that (had it passed) would have required OSHA to promulgate a new ergonomics rule,<sup>169</sup> we believe it is clear that a new law requiring an agency to act (especially when an agency appears more than content with the prior veto) is not necessary to allow that agency to act, as long as it could produce a revision sufficiently different from the original so as not to circumvent the veto. The special process designed to avoid situations when the veto might preclude all regulation in a particular area simply suggests that Congress intended that none of its vetoes should ever have such broad repercussions.

#### 4. *Ergonomics Floor Debate--Substantive Clues*

Although we argued above that many of the general statements about the CRA itself during the ergonomics debate should be dismissed as political posturing, during that debate there were also statements for or against the specific resolution of disapproval that provide clues to the intended meaning of "substantially similar." Statements about the actual rule being debated, rather than the hypothetical future effect of striking it down, can presumably be interpreted at face value--in particular, opponents of the rule would have a disincentive to play down their substantive concerns, lest swing voters decide that the rule was not so bad after all. And yet, while several of the key opponents emphasized very specific concerns with the rule at hand, and stated their objections in heated [\*749] terms, they yet clearly left open the door for OSHA to take specific steps to improve the rule. For example, Republican Representative John Sweeney of New York made plain: "My vote of no confidence on the ergonomics regulations does not mean I oppose an ergonomics standard; I just oppose this one"--primarily in his view because it did not specify impermissible levels of repetitive stress along the key dimensions of workplace ergonomics (force, weight, posture, vibration, etc.) that would give employers confidence they knew what constituted compliance with the regulation.<sup>170</sup> Similarly, Republican Representative Charles Norwood of Georgia emphasized that the vagueness of the OSHA rule "will hurt the workers," and said that "when we have [a rule] that is bad and wrong . . . then we should do away with it and begin again."<sup>171</sup>

Interpretations of "substantially similar" that assume the agency is barred from re-regulating in the same subject area therefore seem to ignore how focused the ergonomics debate was on the consternation of the majority in Congress with the specific provisions of the OSHA final rule. Although opponents might have felt wary of stating emphatically that they opposed any attempt to control ergonomic hazards, it nevertheless was the case that even the staunchest opponents focused on the "wrong ways to solve the ergonomics problem" rather than on the inappropriateness of any rule in this area.

#### 5. *Subsequent Activity*

Legislative activity following the veto of the ergonomics rule might seem to suggest that at least some in Congress thought that OSHA might have required a specific authorization to propose a new ergonomics rule. In particular, in 2002 Senator John Breaux of Louisiana introduced Senate Bill 2184, which included a specific authorization pursuant to the CRA for OSHA to issue a new ergonomics rule.<sup>172</sup> The presence of a specific authorization in Senate Bill 2184 may imply that the bill's sponsors believed that such an authorization was necessary in order for OSHA to promulgate a new ergonomics regulation.

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<sup>169</sup> See *infra* Part IV.A.5.

<sup>170</sup> 147 CONG. REC. 3074-75 (2001) (statement of Rep. Sweeney); see also *infra* Part VLB.

<sup>171</sup> *Id.* at 3056 (statement of Rep. Norwood)

<sup>172</sup> See S. 2184, 107th Cong. § 1(b)(4) (as introduced in the Senate, Apr. 17, 2002) ("Paragraph (1) [which requires OSHA to issue a new ergonomics rule] shall be considered a specific authorization by Congress in accordance with section 801(b)(2) of title 5, United States Code . . ."). Senate Bill 2184 never became law.

Other circumstances, however, suggest more strongly that the inclusion of this specific authorization may have been merely a safeguard rather than [\*750] the purpose of the bill. The bill's mandate that OSHA issue a new rule within two years of the enactment of Senate Bill 2184<sup>173</sup> clearly indicates that the sponsors intended to spur a recalcitrant agency to take some action under the Republican administration. The bill's findings do not state that OSHA had been otherwise prohibited from issuing a new ergonomics rule--indeed, the findings do not mention Congress's 2001 veto at all.<sup>174</sup> Thus, the congressional authorization may have instead served to preempt a Bush Administration belief (or pretext) that Congress's earlier veto prohibited OSHA from further regulating workplace ergonomics.<sup>175</sup>

### B. All or Nothing

Another tool for interpreting the substantial similarity provision lies in the CRA's choice to provide only a "nuclear option" to deal with a troublesome rule. The CRA provides a nonamendable template for any joint resolution of disapproval, which allows only for repealing an entire rule, not just specific provisions.<sup>176</sup> Furthermore, there is "no language anywhere [in the CRA that] expressly refers in any manner to a part of any rule under review."<sup>177</sup> An inability to sever certain provisions while upholding others is consistent with the CRA contemplating a "speedy, definitive and limited process" because "piecemeal consideration would delay and perhaps obstruct legislative resolution."<sup>178</sup>

Because an offending portion of the rule is not severable, Congress has decided to weigh only whether, on balance, the bad aspects of the rule outweigh the good. For example, even when they argued against certain provisions of the OSHA ergonomics regulation, congressional Republicans still noted that they supported some type of ergonomics rule.<sup>179</sup> Since the CRA strikes down an entire rule even though Congress may support certain portions of that rule, it only makes sense to read the substantial [\*751] similarity provision as allowing the nonoffending provisions to be incorporated into a future rule. If an agency were not allowed to even reissue the parts of a rule that Congress does support, that would lead to what some have called "a draconian result"<sup>180</sup>--and what we would be tempted to call a nonsensical result. To the extent that interpreting the CRA prevents agencies from issuing congressionally approved portions of a rule, such an interpretation should be avoided.

### C. Deference to Agency Expertise

Because courts are generally deferential to an agency's interpretation of its delegated authority,<sup>181</sup> a joint resolution of disapproval should not be interpreted to apply too broadly if an agency wishes to use its authority to

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<sup>173</sup> *Id.* § 1(b)(1) ("Notwithstanding any other provision of law, not later than 2 years after the date of enactment of this Act, the Secretary of Labor shall, in accordance with section 6 of the [OSH Act], issue a final rule relating to ergonomics.").

<sup>174</sup> *See id.* § 1(a).

<sup>175</sup> *Cf. supra* note 121, at 72 (statement of Elaine L. Chao, Secretary, U.S. Department of Labor) (hesitating to "expend valuable--and limited--resources on a new effort" to regulate workplace ergonomics following Congress's 2001 veto).

<sup>176</sup> *See* **5 U.S.C. § 802** (2006) (requiring that a joint resolution of disapproval read: "That Congress disapproves the rule submitted by the \_\_ relating to \_\_, and such rule shall have no force or effect").

<sup>177</sup> Rosenberg, *supra* note 75, at 1065.

<sup>178</sup> *Id.* at 1066.

<sup>179</sup> *See, e.g.,* 147 CONG. REC. 2843-44 (2001) (statement of Sen. Nickles) (expressing support for a "more cost effective" ergonomics rule).

<sup>180</sup> Rosenberg, *supra* note 75, at 1066.

<sup>181</sup> *See infra* Part IV.C.1.

promulgate one or more rules addressing the same issues as the repealed rule. There are, however, two important limitations to this general principle of deference that may apply to agency actions taking place after Congress overturns a rule. First, where Congress overturns a rule because it believes the agency acted outside the scope of its delegated authority under the organic statute, a court might choose to weigh this congressional intent as a factor against deference to the agency, if the reissued rule offends against this principle in a similar way. Second, where Congress overturns a rule because it finds that the agency was "lawmaking," this raises another statutory--if not constitutional--reason why agency deference might not be applied. This section presents the issue of deference generally, and then lays forth the two exceptions to this general rule.

### 1. Chevron Deference

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the Supreme Court held that, unless the organic statute is itself clear and contrary, a court should defer to an agency's reasonable interpretation of its own delegated authority.<sup>182</sup> The Court's decision was based on the notion of agency expertise: since agencies are more familiar with the subject matter over which they regulate, they are better equipped than courts to understand their grant of rulemaking authority.<sup>183</sup> Where Congress delegates rulemaking authority to an administrative agency, it is inevitable that the delegation will include some ambiguities or gaps.<sup>184</sup> But in order [\*752] for an agency to effectively carry out its delegated authority, there must be a policy in place that fills the gaps left by Congress. In *Chevron*, the Court reasoned that gaps were delegations, either express or implicit, granting the agency the authority "to elucidate a specific provision of the statute by regulation."<sup>185</sup> Explaining the reason for deference to agencies, the Court has recognized that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."<sup>186</sup> The *Chevron* Court thus created a two-part test that respects agency expertise by deferring to reasonable interpretations of ambiguity in a delegation of authority. First, a court must determine "whether Congress has directly spoken to the precise question at issue."<sup>187</sup> If so, both the court and the agency "must give effect to the unambiguously expressed intent of Congress."<sup>188</sup> If Congress has not spoken to the issue directly, however, the second step of *Chevron* requires a court to defer to the agency's construction of the statute if it is a "permissible" interpretation, whether or not the court agrees that the interpretation is the correct one.<sup>189</sup>

Because a resolution repealing a rule under the CRA limits an agency's delegated authority by prohibiting it from promulgating a rule that is substantially similar, the *Chevron* doctrine should apply here. The CRA proscription against an agency reissuing a vetoed rule "in substantially the same form" is an ambiguous limitation to an agency's delegated authority. That limitation could have been made less hazy but probably not made crystal clear, since a detailed elucidation of the substantial similarity standard would necessarily be rather complex in order to cover the wide range of agencies whose rules are reviewable by Congress. However, the other relevant statutory text, the joint resolution of disapproval itself, does not resolve the ambiguity. It cannot provide any evidence that Congress

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<sup>182</sup> 467 U.S. 837(1984).

<sup>183</sup> Id. at 866.

<sup>184</sup> See Morton v. Ruiz, 415 U.S. 199, 231 (1974) (noting that such a "gap" may be explicit or implicit).

<sup>185</sup> Chevron, 467 U.S. at 843-44.

<sup>186</sup> Id. at 866.

<sup>187</sup> Id. at 842.

<sup>188</sup> Id. at 842-43.

<sup>189</sup> Id. at 843.

has "directly spoken to the precise question at issue"<sup>190</sup> --namely, what form of regulation would constitute a substantially similar reissuance of the rejected rule--because the text can only effect a repeal of the rule and no more.<sup>191</sup> Although a court, in the absence of clear, enacted statutory [\*753] language, might look to legislative history to determine whether Congress has "spoken to" the issue, too many disparate (and perhaps disingenuous) arguments on the floor make this unworkable as a judicial doctrine without any textual hook to hang it on.<sup>192</sup>

*Chevron* step one, then, cannot end the inquiry; we must proceed to step two. The agency's interpretation, if permissible, should then receive deference. While some minor transposition of a rejected rule's language effecting no substantive change could certainly be deemed impermissible under the CRA, changes that are significant enough to affect the cost-benefit ratio are similar to the "policy choices" that the Court has held are not within the responsibility of the Judiciary to balance.<sup>193</sup> Thus, comparing side-by-side the language of a vetoed rule and the subsequently promulgated rule is inadequate without considering the substantive changes effected by any difference in language, however minor. Under the reasoning in *Chevron*, a court should give substantial deference to an agency in determining whether, for purposes of the CRA, a rule is substantially different from the vetoed rule.

## 2. *Ultra Vires* Limitation

Admittedly, there are important considerations that may counsel against applying *Chevron* deference in particular situations. One such situation might occur if Congress's original veto were built upon a finding that the agency misunderstood its own power under the organic statute. In that case, a court might choose to consider Congress's findings as a limitation on the applicability of *Chevron* deference. Such a consideration provided the background for the Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court struck down regulation of tobacco products by the Food and Drug Administration (FDA).<sup>194</sup> The Court looked to congressional intent in determining the boundaries of FDA's authority under the Food, Drug and Cosmetic Act (FDCA), finding that the statute's use of the words *drug* and *device* clearly did not grant FDA the power to regulate tobacco products, and the regulation thus failed the first [\*754] prong of the *Chevron* test.<sup>195</sup> The FDCA "clearly" spoke to the issue, according to the Court, and therefore FDA's contrary interpretation of its power was not entitled to deference. Importantly, the Court found this clarity not within the text of the FDCA itself, but in other legislative actions since the FDCA's enactment. In writing for the majority, Justice O'Connor pointed out that, in the decades following the FDCA's enactment, Congress had passed various pieces of legislation restricting--but not entirely prohibiting--certain behavior of the tobacco industry, indicating a congressional presumption that sale of tobacco products

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<sup>190</sup> *Id.* at 842.

<sup>191</sup> See *supra* Part IV.B (discussing the limited text of the joint resolution and its effect on severability). Trying to infer congressional intent, however, may be relevant to the scope of an agency's authority following action under the CRA in cases where the subject matter is politically and economically significant, and where there is a broader legislative scheme in place. See *infra* Part IV.C.2 (discussing the effect of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), on the application of the *Chevron* doctrine).

<sup>192</sup> See, e.g., *Zedner v. United States*, 547 U.S. 489, 509-11 (2006) (Scalia, J., concurring) (filing a separate opinion for the specific purpose of admonishing the majority's citation to legislative history, noting that use of legislative history in statutory interpretation "accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole").

<sup>193</sup> *Chevron*, 467 U.S. at 866.

<sup>194</sup> 529 U.S. 120(2000).

<sup>195</sup> *Id.* at 160-61 ("It is . . . clear, based on the [Food, Drug, and Cosmetic Act's (FDCA's)] overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the [Food and Drug Administration (FDA)] from regulating tobacco products.").

would still be permitted.<sup>196</sup> The Court found that this presumption clearly contradicted FDA's interpretation that "drug" and "device" in the FDCA included tobacco products because, if FDA's interpretation were correct, the agency would be *required* to ban the sale of tobacco products because safety is a prerequisite for sale of a drug or device under the FDCA, and no tobacco product is "safe."<sup>197</sup> The four dissenting Justices criticized the majority's reliance on inferred congressional intent, arguing that the *Chevron* approach to statutory interpretation should principally focus on the text of the organic statute.<sup>198</sup>

If Congress, in enacting a joint resolution pursuant to the CRA, was to make clear that it thought an agency's regulation was outside the scope of its statutory grant of authority,<sup>199</sup> a court might consider this a factor limiting its deference to the agency. In other words, the CRA veto might be considered a "clarification" of the organic statute in a way similar to the tobacco-related legislative activity considered by the Court in *Brown & Williamson*.<sup>200</sup> Republicans hinted at this issue in the congressional debates over the ergonomics rule, where they argued that part of the rule contravened a provision in the OSH Act because, under their [\*755] interpretation, the regulation superseded state worker's compensation laws.<sup>201</sup> In a more obvious instance of an agency acting outside of its delegated authority, however, *Brown & Williamson* might require (or at least encourage) a court to consider the congressional rationale for overturning a rule as a factor in evaluating the validity of a new rule issued in the same area. Like the decision in *Brown & Williamson*, however, the factor might only be compelling if there was also a broader legislative scheme in place.

### 3. Lawmaking Limitation

Another limiting principle on agency discretion is found where the agency action blurs the lines of regulation and steps into the field of lawmaking. Where such an action takes place, the nondelegation doctrine is implicated and can present questions of constitutionality and agency adherence to its limited grant of authority. In the debates over the ergonomics rule, opponents of the regulation contended that OSHA was writing the "law of the land" and that the elected members of Congress, not bureaucrats, are supposed to exercise that sort of authority.<sup>202</sup> Senator Nickles made clear that he saw the ergonomics rule as a usurpation of Congress's legislative power. He referred to the rule as "legislation" and argued, "we are the legislative body. If we want to legislate in this area, introduce a bill and we will consider it."<sup>203</sup> This argument that an administrative agency has exercised legislative power has

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<sup>196</sup> *Id.* at 137-39.

<sup>197</sup> *Id.* at 133-35 ("These findings logically imply that, if tobacco products were 'devices' under the FDCA, the FDA would be required to remove them from the market.").

<sup>198</sup> *Id.* at 167-81 (Breyer, J., dissenting) (arguing for a "literal" interpretation of the FDCA).

<sup>199</sup> Because of the one-sentence limit on the text of the CRA joint resolution, see **5 U.S.C. § 802** (2006), the clarity would have to come from other legislative enactments as in *Brown & Williamson*, see *529 U.S. at 137-39*, or from the legislative history of the joint resolution. *But see supra* note 192 and accompanying text (criticizing reliance on legislative history). Alternatively, if Congress were to amend the CRA to allow alteration of the resolution's text, a clear legislative intent might be more easily discerned. See *infra* Part VII.

<sup>200</sup> See *supra* note 196 and accompanying text.

<sup>201</sup> See Occupational Safety and Health Act of 1970 § 4(b)(4), *29 U.S.C. § 653(b)(4)* (2006) ("Nothing in this [Act] shall be construed to supersede or in any manner affect any workmen's compensation law . . . ."); 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) ("[OSHA] ignored, in issuing its ergo standard, the clear statutory mandate in section 4 of the OSH Act not to regulate in the area of workmen's compensation law."). Senator Nickles argued that, even if it were within OSHA's delegated power, the regulation would supersede "more generous" state worker's compensation law. 147 CONG. REC. 2817 (statement of Sen. Nickles). We argue below that this interpretation may have been incorrect on its face. See *infra* Part VLB.

<sup>202</sup> 147 CONG. REC. 2817 (statement of Sen. Nickles).

<sup>203</sup> *Id.*

constitutional implications. Article I of the Constitution provides that the Senate and House of Representatives have the sole legislative power.<sup>204</sup> In the administrative state, this constitutional provision has given rise to the nondelegation doctrine, by which Congress may not delegate its lawmaking authority to an executive agency.<sup>205</sup> To meet constitutional requirements [\*756] under this doctrine, the organic statute needs to provide the agency with an "intelligible principle to which [the agency] is directed to conform."<sup>206</sup>

Violations of the nondelegation doctrine, however, are rarely found. Instead, the courts employ a canon of constitutional avoidance to minimize delegation problems. Under this canon of interpretation, a court confronted with a statute that appears to delegate lawmaking power to an agency will search for a narrower, constitutionally permissible interpretation of the statute. If such an interpretation is available, the court will not invalidate the statute, but will instead strike down agency action that exceeds the (narrower, constitutionally permissible) grant of authority.<sup>207</sup> The *Benzene Case* is one example in which the Supreme Court has employed this canon to avoid striking down a delegation of authority to an administrative agency.<sup>208</sup> In that case, the Court considered an OSHA rule which limited permissible workplace exposure levels to airborne benzene to one part per million (ppm). OSHA set that standard pursuant to the statutory delegation of authority instructing it to implement standards "reasonably necessary or appropriate to provide safe or healthful employment."<sup>209</sup> Rather than finding that the "reasonably necessary or appropriate" standard was unintelligible and unconstitutionally broad, the Court instead held that OSHA exceeded its rulemaking authority because the agency did not make the necessary scientific findings and based its exposure rule on impermissible qualitative assumptions about the relationship between cancer risks and small exposures to benzene, rather than on a quantitative assessment that found a "significant risk" predicate for regulating to one ppm.<sup>210</sup>

[\*757] If Congress vetoes an agency regulation on the ground that it is lawmaking, this may be taken to mean one of two things: either Congress believes that the agency was acting outside of its delegated authority, or it believes that the organic statute unconstitutionally grants the agency legislative power. Since, reflecting the avoidance

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<sup>204</sup> U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

<sup>205</sup> See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that the National Industrial Recovery Act's authorization to the President to prescribe "codes of fair competition" was an unconstitutional delegation of legislative power because the statutory standard was insufficient to curb the discretion of the Executive Branch).

<sup>206</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>207</sup> See generally Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 835-39 (1997) (describing the canon of constitutional avoidance and arguing that "the criteria bearing on constitutionality figure in the best interpretation of statutes, at least where statutes are otherwise taken to be indeterminate").

<sup>208</sup> *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607 (1980).

<sup>209</sup> *Id.* at 613 (quoting *Am. Petroleum Inst. v. OSHA*, 581 F.2d 493, 502 (1978)).

<sup>210</sup> *Id.* at 662. For two contrasting views on whether the *Benzene Case* either curtailed OSHA's ability to regulate effectively, or gave OSHA a license (that it has failed to employ) to use science to promulgate highly worker-protective standards, compare Wendy Wagner, Univ. of Tex. Sch. of Law, Presentation at the Society for Risk Analysis Annual Meeting 2010, *The Bad Side of Benzene* (Dec. 6, 2010), <http://birenheide.com/sra/2010AM/program/presentations/M4-A.3%20Wagner.pdf>, with Adam M. Finkel, Exec. Dir., Penn Program on Regulation, Univ. of Pa., Presentation at the Society for Risk Analysis Annual Meeting 2010, *Waiting for the Cavalry: The Role of Risk Assessors in an Enlightened Occupational Health Policy* (Dec. 6, 2010), <http://birenheide.com/sra/2010AM/program/presentations/M4-A.4%20Finkel.pdf>.



canon, unconstitutional delegations have only been found twice<sup>211</sup> in the history of our administrative state, and since repealing a single rule would be insufficient to correct that type of constitutional defect in the organic statute, it seems clear that by "lawmaking" Congress must mean that the agency exceeded its lawfully-granted statutory authority.<sup>212</sup> In other words, if Congress actually did mean that the organic statute is impermissibly broad, the legislature's responsibilities lie far beyond vetoing the single rule, and would seem to require curing the constitutional defect by amending the organic statute. But if instead the veto means only that the agency has exceeded its authority, this brings us back to the *Brown & Williamson* issue, discussed above, where an agency still deserves deference in promulgating subsequent rules, although congressional intent may limit that deference if there is a legislative scheme in place.<sup>213</sup>

On the other hand, it is possible--even likely--that Senator Nickles and his colleagues were merely speaking colloquially in accusing OSHA of lawmaking, and meant that the agency was "legislating" in a softer, nonconstitutional sense. If their objection meant that they found the regulation a statutorily--but not constitutionally--excessive exercise, then they are in essence making the ultra vires objection discussed above.<sup>214</sup> Alternatively, if their objection meant that OSHA did have both the statutory and constitutional authority to promulgate the regulation, but that the agency was flexing more power than it should simply as a matter of policy, then a veto on those grounds would in essence be an attempt to [\*758] retract some of the authority that Congress had delegated to the agency. As discussed below, Congress should be hesitant to use the CRA to substantively change an intelligible principle provided in the organic statute, and a court should hesitate to interpret the CRA to allow for such a sweeping change--the CRA process is an expedited mechanism that decreases deliberativeness by imposing strict limitations on time and procedure.<sup>215</sup>

In any case, the lawmaking objection during a congressional veto essentially folds back up into one of the problems discussed previously--either it presents an issue of the agency exceeding its statutory authority and possibly affecting the deference due subsequent agency actions, or, failing that, it means that some members of Congress are attempting to grab back via an expedited process some authority properly delegated to the agency.

In summary, the issue of deference to an agency ought not differ too much between the CRA and the traditional (pre-1996) context. Both of these contexts involve an agency's judgment about what policies it can make under its authorizing legislation, since the "substantial similarity" provision is an after-the-fact limitation on the agency's statutorily-authorized rulemaking power. Neither the CRA nor its joint resolution template provide enough guidance to end the inquiry at *Chevron* step one. A court, then, should employ a narrow interpretation of the CRA's substantial similarity provision, giving significant deference to an agency's determination that the new version of a rejected rule is not "substantially similar" to its vetoed predecessor. This interpretation would, however, be limited by the permissibility requirement of *Chevron* step two.

#### D. Good Government Principles

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<sup>211</sup> The two cases are *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). For a discussion of the constitutionality of OSHA's organic statute, see Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407(2008).

<sup>212</sup> In this respect, it is worth noting that the Republicans' lawmaking objections during the ergonomics rule debate were rather nonspecific. The legislators did not point to any "unintelligible" principle under which the rule was promulgated, or define what characteristics of the ergonomics rule brought it out of the normal rulemaking category and into the realm of lawmaking, besides voicing their displeasure with some of its substance. Indeed, the lawmaking argument was apparently conflated with the notion that OSHA had acted outside of its authority, properly delegated. See *supra* note 201 and accompanying text.

<sup>213</sup> See *supra* Part IV.C.2.

<sup>214</sup> See *id.*

<sup>215</sup> See *infra* Part IV.D.1.

Various members of Congress argued during the ergonomics floor debate that OSHA and other regulatory agencies should be chastened when they stray from their mission (regulation) into congressional territory (legislation). Arguably, Congress itself should also eschew legislation by regulation, even though Congress clearly has the legislative authority. In this section, we argue that Congress should not use a veto of an isolated piece of rulemaking to effect statutory change--it should do so through a direct and deliberative process that the CRA does not offer. In addition, we offer a second "good government" rationale for interpreting "substantially the same" in a narrow way.

**[\*759]** 1. *Reluctance to Amend Congress's Delegation to the Agency*

One should be hesitant to interpret the substantial similarity provision too broadly, because doing so could allow expedited joint resolutions to serve as de facto amendments to the original delegation of authority under the relevant organic statute. If the bar against reissuing a rule "in substantially the same form" applied to a wide swath of rules that could be promulgated within the agency's delegated rulemaking authority, this would be tantamount to substantively amending the organic statute.

The OSHA ergonomics regulation illustrates this point nicely. Section 6 of the OSH Act grants OSHA broad authority to promulgate regulations setting workplace safety and health standards.<sup>216</sup> With the exception of one aspect of the ergonomics rule,<sup>217</sup> congressional Republicans admitted that OSHA's broad authority did in fact include the power to promulgate the regulation as issued.<sup>218</sup> If it is within OSHA's delegated authority to promulgate rules setting ergonomics standards, and enactment of the joint resolution would prevent OSHA from promulgating any ergonomics standards in the future, then the joint resolution would constitute a significant amendment to the organic statute. Indeed, one of the two parts of OSHA's mission as put in place by the OSH Act--the responsibility to promulgate and enforce standards that lessen the risk of chronic occupational disease, as opposed to instantaneous occupational accidents--in turn involves regulating four basic types of risk factors: chemical, biological, radiological, and ergonomic hazards. In this case, vetoing the topic by vetoing one rule within that rubric would amount to taking a significant subset of the entire agency mission away from the Executive Branch, without actually opening up the statute to any scrutiny.

We see two major reasons why courts should not interpret the CRA in such a way that would allow it effectively to amend an organic statute via an expedited joint resolution. First, there is a rule of statutory interpretation whereby, absent clear intent by Congress to overturn a prior law, legislation should not be read to conflict with the prior law.<sup>219</sup> Second, **[\*760]** it seems especially doubtful that Congress would intend to allow modification of an organic statute via an expedited legislative process.<sup>220</sup> Significant changes, such as major changes to a federal agency's

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<sup>216</sup> See OSH Act § 6, *29 U.S.C. § 655* (2006); see also 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) ("OSHA, of course, has enormously broad regulatory authority. Section 6 of the OSH Act is a grant of broad authority to issue workplace safety and health standards.").

<sup>217</sup> See *supra* note 201 and accompanying text.

<sup>218</sup> See 147 CONG. REC. 2822 (statement of Sen. Enzi) ("The power for OSHA to write this rule did not materialize out of thin air. We in Congress did give that authority to OSHA . . .").

<sup>219</sup> See, e.g., *Finley v. United States*, 490 U.S. 545, 554 (1989) ("[N]o changes in law or policy are to be presumed from changes of language in [a] revision unless an intent to make such changes is clearly expressed." (internal quotation marks omitted) (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957))), *superseded by statute*, *28 U.S.C. § 1367* (2006); *Williams v. Taylor*, 529 U.S. 362, 379 (2000) (plurality opinion) (arguing that if Congress intended the Antiterrorism and Effective Death Penalty Act to overturn prior rules regarding deference to state courts on questions of federal law in habeas proceedings, then Congress would have expressed that intent more clearly); cf. *United States v. Republic Steel Corp.*, 264 F.2d 289, 299 (7th Cir. 1959) ("[T]here should not be attributed to Congress an intent to produce such a drastic change, in the absence of clear and compelling statutory language."), *rev'd on other grounds*, ***362 U.S. 482 (1960)***.

<sup>220</sup> See also Rosenberg, *supra* note 75, at 1066 (noting that the CRA "contemplates a speedy, definitive and limited process").

statutory grant of rulemaking authority, generally take more deliberation and debate. The CRA process, on the other hand, creates both a ten-hour limit for floor debates and a shortened time frame in which Congress may consider the rule after the agency reports it.<sup>221</sup> For these reasons, it would be implausible to read the substantial similarity provision as barring reissuance of a rule simply because it dealt with the same subject as a repealed rule.

## 2. A Cost-Benefit Justification for Rarely Invoking the Circumvention Argument

Allowing an agency to reissue a vetoed rule with a significantly more favorable cost-benefit balance is a victory for congressional oversight, not a circumvention of it. "Substantially the same" is unavoidably a subjective judgment, so we urge that such judgments give the benefit of the doubt to the agency--not so that a prior veto would immunize the agency against bad conduct, but so that the second rule would allow the agency (through its allies in Congress, if any) to defend the rule a second time on its merits, rather than having it summarily dismissed as a circumvention. A "meta-cost-benefit" analysis of the decision to allow a rule of arguable dissimilarity back into the CRA veto process would look something like this: the cost of allowing debate on a rule that the majority comes to agree is either a circumvention of § 801 (b)(2), or needs to be struck down a second time on the merits, can be measured in person-hours--roughly 10 hours or less of debate in each house. The benefits of allowing such a debate to proceed can be measured in the positive net benefit accruing to society from allowing the rule to take effect--assuming that Congress will act to veto a rule with negative net benefit.<sup>222</sup> The benefits of the additional [\*761] discussion will not always outweigh the costs thereof, but we suggest that whenever "substantially the same" is a controversial or close call, the opportunity for another brief discussion of the rule's merits is a safer and more sensible call to make than a "silent veto" invoking § 801(b)(2).

## V. WHAT DOES "SUBSTANTIALLY THE SAME" REALLY MEAN?

In light of the foregoing analysis, we contend that only among the first four interpretations in Part III.A above can the correct meaning of "substantially the same" possibly be found. Again, to comport literally with the proper instructions of § 801 (b)(2) does not insulate the agency against a subsequent veto on substantive grounds, but it should force Congress to debate the reissued rule on its merits, rather than the "faster fast-track" of simply declaring it to be an invalid circumvention of the original resolution of disapproval. To home in more closely on exactly what we think "substantially the same" requires, we will examine each of the four more "permissive" interpretations in Part III.A, in reverse order of their presentation--and we will argue that any of the four, except for Interpretation 1, might be correct in particular future circumstances.

Interpretation 4 (the agency must change the cost-benefit balance and must fix any problems Congress identified when it vetoed the rule) has some appeal, but only if Congress either would amend the CRA to require a vote on a bill of particulars listing the specific reasons for the veto, or at least did so sua sponte in future cases.<sup>223</sup> Arguably, the agency should not have unfettered discretion to change the costs and benefits of a rule as it sees fit, if Congress had already objected to specific provisions that contributed to the overall failure of a benefit-cost test. A new ergonomics rule that had far lower costs, far greater benefits, or both, but that persisted in establishing a payout system that made specific reference to state workers' compensation levels, might come across as "substantially the same" in a way Congress could interpret as OSHA being oblivious to the previous veto.<sup>224</sup> However, absent a clear statement of particulars from Congress, the agencies should not be forced to read Congress's mind. A member who strenuously objected to a particular provision should be free to urge a second

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<sup>221</sup> See *supra* Part I.B.3 (describing the CRA procedure).

<sup>222</sup> As for the number of such possibly cost-ineffective debates, we simply observe that if OSHA were to repropose an ergonomics rule, and Congress were to allow brief debate on it despite possible arguments that any ergonomics rule would be a circumvention of § 801(b)(2), this would be the first such "wasteful" debate in at least ten years.

<sup>223</sup> See *infra* Part VII.

<sup>224</sup> In this specific case, though, we might argue that OSHA could instead better explain how Congress misinterpreted the original provision in the rule. See *infra* Part VI.B.

veto if the reissued rule contains an unchanged version of that provision, but if she cannot convince a majority in each house to call for that specific provision's removal, Congress, or a court, should not dismiss as "substantially the same" a rule containing a provision that might have been, and might still be, supported by most or nearly all members.

**[\*762]** Interpretation 3 (the agency's task is to significantly improve the cost-benefit balance, nothing more) makes the most sense in light of our analysis and should become the commonly understood default position. The CRA is essentially the ad hoc version of the failed Dole-Johnston regulatory reform bill<sup>225</sup> --rather than requiring agencies to produce cost-beneficial rules, and prescribing how Congress thought they should do so, the CRA simply reserves to Congress the right to reject on a case-by-case basis any rule whose stated costs exceed stated benefits, or, if the votes are there, one for which third-party assertions about costs exceed stated or asserted benefits. The way to reissue something distinctly different is to craft a rule whose benefit-cost balance is much more favorable. Again, this could be effected with a one-word change in a massive document, if that word, for example, halved the stringency as compared to the original, halved the cost, or both. Or, a rule missing one word--thereby exempting an industry-sector that the original rule would have regulated--could be "distinctly different" with far lower costs. If the original objection had merit this change would not drastically diminish total benefits, and it could arouse far less opposition than the previous nearly identical rule.

Interpretation 2 (even an identical rule can be reissued under "substantially different" external conditions), while it may seem to make a mockery of § 801(b)(2), also has merit. Congress clearly did not want agencies to circumvent the CRA by waiting for the vote count to change, or for the White House to change hands and make a simple majority in Congress no longer sufficient, and then reissuing an identical rule. Even that might not be such a bad outcome; after all, a parent's answer to a sixteen-year-old's question, "Can I have the car keys?," might be different if the child waits patiently and asks again in two years. But we accept that the passage of time alone should not be an excuse for trying out an identical rule again. However, time can also change everything, and the CRA needs to be interpreted such that time can make an identical rule into something "substantially different" than what used to be. Indeed, the Nickles-Reid signing statement already acknowledged how important this is, when it cited the following as a good reason for an initial veto: "agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change."<sup>226</sup> In other words, a particular rule Congress might have favored at the time it created the organic statute might not be appropriate anymore when finally promulgated because time can change **[\*763]** both problems and solutions. We fail to see any difference between that idea and the following related assertion: "During the time lapse between *the veto of a rule and its subsequent reissuance*, the nature of the problem addressed, and its proper solution, can change." It may, of course, change such that the original rule seems even less sensible, but what if it changes such that the costs of the original rule have plummeted and the benefits have skyrocketed? In such a circumstance, we believe it would undercut the entire purpose of regulatory oversight and reform to refuse to debate on the merits a reissued rule whose costs and benefits--even if not its regulatory text--were far different than they were when the previous iteration was struck down.

Interpretation 1 (anything goes so long as the agency merely *asserts* that external conditions have changed), on the other hand, would contravene all the plain language and explanatory material in the CRA. Even if the agency believes it now has better explanations for an identical reissued rule, the appearance of asking the same question until you get a different answer is offensive enough to bedrock good government principles that the regulation should be required to have different costs and benefits after a veto, not just new rhetoric about them.<sup>227</sup>

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<sup>225</sup> See *supra* Part I.B.2.

<sup>226</sup> 142 CONG. REC. 8197 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>227</sup> We conclude this notwithstanding the irony that in one sense, the congressional majority did just that in the ergonomics case--it delayed the rule for several years to require the National Academy of Sciences (NAS) to study the problem, and when it did not like the NAS conclusion that ergonomics was a serious public health problem with cost-effective solutions, it forced NAS to

We therefore believe Interpretation 3 is the most reasonable general case, but that Interpretations 2 or 4 may be more appropriate in various particular situations. But there is one additional burden we think agencies should be asked to carry, even though it is nowhere mentioned in the CRA. The process by which a rule is developed can undermine its content, and beneficial changes in that content may not fix a suspect process, even though Congress modified with "substantially the same" the word "form," not the word "process." Indeed, much of the floor debate about ergonomics decried various purported procedural lapses: the OSHA [\*764] leadership allegedly paid expert witnesses for their testimony, edited their submissions, and made closed-minded conclusory statements about the science and economics while the rulemaking record was still open, among other flaws.<sup>228</sup> We think agencies should be expected to fix procedural flaws specifically identified as such by Congress during a veto debate, even if this is not needed to effectuate a "substantially different form."<sup>229</sup>

## VI. PRACTICAL IMPLICATIONS FOR OSHA OF A COST-BENEFIT INTERPRETATION OF THE CRA

We have argued above that the agency's fundamental obligation under the CRA is to craft a reissued rule with substantially greater benefits, substantially lower costs, or both, than the version that Congress vetoed. As a practical matter, we contend it should focus on aspects of the regulation that Congress identified as driving the overall unfavorable cost-benefit balance. When, as is often the case, the regulation hinges on a single quantitative judgment about stringency (How low should the ambient ozone concentration be? How many miles per gallon must each automobile manufacturer's fleet achieve? What trace amount of fat per serving can a product contain and still be labeled fat-free?), a new rule can be made "substantially different" with a single change in the regulatory text to change the stringency, along with, of course, parallel changes to the Regulatory Impact Analysis tracking the new estimates of costs and benefits. The 2000 OSHA ergonomics rule does not fit this pattern, however. Although we think it might be plausible for OSHA to argue that the underlying science, the methods of control, and the political landscape have changed enough after a decade of federal inactivity on ergonomic issues that the 2000 rule could be repropounded verbatim as a solution to a "substantially different" problem, we recognize the political impracticality of such a strategy. But changing the costs and benefits of the 2000 rule will require major thematic and textual revisions, because the original rule had flaws much more to do with regulatory design and philosophy than with [\*765] stringency per se. In this Part, therefore, we offer some broad suggestions for how OSHA could make substantially more favorable the costs and benefits of a new ergonomics regulation.

### A. *Preconditions for a Sensible Discussion About the Stringency of an Ergonomics Rule*

In our opinion, reasonable observers have little room to question the fact of an enormous market failure in which occupational ergonomic stressors cause musculoskeletal disorders (MSDs) in hundreds of thousands of U.S.

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convene a different panel and answer the question again. See, e.g., *Ergonomics in the Workplace; NewsHour with Jim Lehrer* (PBS television broadcast Nov. 22, 1999), [www.pbs.org/newshour/bb/business/july-dec99/ergonomics\\_11-22.html](http://www.pbs.org/newshour/bb/business/july-dec99/ergonomics_11-22.html) ("We've already had one [NAS] study . . . [T]hey brought in experts, they looked at all the evidence in this area and they reached the conclusion that workplace factors cause these injuries and that they can be prevented. The industry didn't like the results of that study so they went to their Republican friends in the Congress and got another study asking the exact same seven questions . . . The study is basically just being used as a way to delay a regulation, to delay protection for workers. We'll get the same answers from the NAS-2 that we got from NAS-1." (Peg Seminario, Director, Occupational Safety and Health for the AFL-CIO)). For the NAS studies, see *infra* note 231.

<sup>228</sup> See 147 CONG. REC. 2823 (2001) (statement of Sen. Enzi) ("Maybe OSHA didn't think it needed to pay attention to these [public] comments because it could get all the information it wanted from its hired guns. . . . OSHA paid some 20 contractors \$ 10,000 each to testify on the proposed rule. They not only testified on it; they had their testimony edited by the Department . . . . Then--and this is the worst part of it all--they paid those witnesses to tear apart the testimony of the other folks who were testifying, at their own expense. . . . Regardless of whether these tactics actually violate any law, it clearly paints OSHA as a zealous advocate, not an impartial decisionmaker.").

<sup>229</sup> See *infra* Part VI.B (urging OSHA to consider, among many possible substantive changes to the 2000 ergonomics rule, specific changes in the process by which it might be analyzed and promulgated).

workers annually.<sup>230</sup> Hundreds of peer-reviewed epidemiologic studies have concluded that prolonged or repeated exposures to risk factors such as lifting heavy objects, undertaking relentless fine-motor actions, and handling tools that vibrate forcefully can cause debilitating MSDs that affect the hands, wrists, neck, arms, legs, back, and other body parts.<sup>231</sup> Most of these studies have also documented dose--response relationships: more intense, frequent, or forceful occupational stress results in greater population incidence, more severe individual morbidity, or both. In this respect, ergonomic risk factors resemble the chemical, radiological, and [\*766] biological exposures OSHA has regulated for decades under the OSH Act and the 1980 Supreme Court decision in the *Benzene Case*--if prevailing exposures are sufficient to cause a "significant risk" of serious impairment of health, OSHA can impose "highly protective"<sup>232</sup> controls to reduce the risk substantially, as long as the controls are technologically feasible and not so expensive that they threaten the fundamental competitive structure<sup>233</sup> of an entire industry.<sup>234</sup>

The fundamental weakness of OSHA's ergonomics regulation was that it did not target ergonomic risk factors specifically or directly, but instead would have required an arguably vague, indirect, and potentially never-ending

<sup>230</sup> According to the Bureau of Labor Statistics, there were more than 560,000 injuries, resulting in one or more lost workdays, from the category of "sprains, strains, tears"; by 2009, that number had declined, for whatever reason(s), to roughly 380,000. See *Nonfatal Cases Involving Days Away from Work: Selected Characteristics (2003)*, U.S. BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/CHU00X021XXX6N100> (last visited Nov. 14, 2011).

<sup>231</sup> For a very comprehensive survey of the epidemiologic literature as it existed at the time OSHA was writing its 1999 ergonomics proposal, see NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEPT OF HEALTH & HUMAN SERVS., *MUSCULOSKELETAL DISORDERS AND WORKPLACE FACTORS: A CRITICAL REVIEW OF EPIDEMIOLOGIC EVIDENCE FOR WORK-RELATED MUSCULOSKELETAL DISORDERS OF THE NECK, UPPER EXTREMITY, AND LOW BACK*, NO. 97B141 (Bruce P. Bernard ed., 1997), <http://www.cdc.gov/niosh/docs/97-141/pdfs/97-141.pdf>. See also PANEL ON MUSCULOSKELETAL DISORDERS & THE WORKPLACE, COMM'N ON BEHAVIORAL & SOC. SCIS. & EDUC., NAT'L RESEARCH COUNCIL & INST. OF MED., *MUSCULOSKELETAL DISORDERS AND THE WORKPLACE: LOW BACK AND UPPER EXTREMITIES* (2001), available at <http://www.nap.edu/catalog/10032.html> (reviewing the complexities of factors that cause or elevate the risk of musculoskeletal injury); STEERING COMM. FOR THE WORKSHOP ON WORK-RELATED MUSCULOSKELETAL INJURIES: THE RESEARCH BASE, NAT'L RESEARCH COUNCIL, *WORK-RELATED MUSCULOSKELETAL DISORDERS: REPORT, WORKSHOP SUMMARY, AND WORKSHOP PAPERS* (1999), available at <http://www.nap.edu/catalog/6431.html> (examining the state of research on work-related musculoskeletal disorders); STEERING COMM. FOR THE WORKSHOP ON WORK-RELATED MUSCULOSKELETAL INJURIES: THE RESEARCH BASE, NAT'L RESEARCH COUNCIL, *WORK-RELATED MUSCULOSKELETAL DISORDERS: A REVIEW OF THE EVIDENCE* (1998), available at <http://www.nap.edu/catalog/6309.html> (reflecting on the role that work procedures, physical features of the employee, and other similar factors have on musculoskeletal disorders).

<sup>232</sup> *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607, 643 n.48 (1980).

<sup>233</sup> See *Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case)*, 452 U.S. 490, 513 (1981).

<sup>234</sup> Ergonomic stressors may appear to be very different from chemical exposures, in that person-to-person variation in fitness obviously affects the MSD risk. Some people cannot lift a seventy-five-pound package even once, whereas others can do so over and over again without injury. However, substantial (though often unacknowledged) inter-individual variability is known to exist in susceptibility to chemical hazards as well. See COMM. ON IMPROVING RISK ANALYSIS APPROACHES USED BY THE U.S. EPA, NAT'L RESEARCH COUNCIL, *SCIENCE AND DECISIONS: ADVANCING RISK ASSESSMENT* ch.5 (2009), available at <http://www.nap.edu/catalog/12209.html> (recommending that the EPA adjust its estimates of risk for carcinogens upwards to account for the above-average susceptibility to carcinogenesis of substantial portions of the general population); COMM. ON RISK ASSESSMENT OF HAZARDOUS AIR POLLUTANTS, NAT'L RESEARCH COUNCIL, *SCIENCE AND JUDGMENT IN RISK ASSESSMENT* ch.10 (1994), available at <http://www.nap.edu/catalog/2125.html>. For both kinds of hazards, each person has his or her own dose-response curve, and regulatory agencies can reduce population morbidity and mortality by reducing exposures (and hence risks) for relatively "resistant," relatively "sensitive" individuals, or both--with or without special regulatory tools to benefit these subgroups differentially. See Adam M. Finkel, *Protecting People in Spite of--or Thanks to--the "Veil of Ignorance,"* in *GENOMICS AND ENVIRONMENTAL REGULATION: SCIENCE, ETHICS, AND LAW* 290, 290-341 (Richard R. Sharp et al. eds., 2008) (arguing that the government should use its technological capacities to estimate individualized assessments of risk and benefit).

series of ill-defined improvements in broader industrial management systems at the firm level, ones that in turn could have reduced stressors and thereby reduced MSDs. The decision to craft a management-based regulation<sup>235</sup> rather than one that directly specified improvements in technological controls (a design standard) or reductions in specific exposures (a performance standard) was perhaps an understandable [\*767] reaction on OSHA Assistant Secretary Charles Jeffress' part to history and contemporary political pressures.

In 1995, OSHA drafted a complete regulatory text and preamble to a proposed ergonomics regulation that would have specified performance targets for the common risk factors in many industrial sectors. Of necessity, these targets in some cases involved slightly more complicated benchmarks than the one-dimensional metrics industry was used to seeing from OSHA (e.g., ppm of some contaminant in workplace air). For example, a "lifting limit" might have prohibited employers from requiring a worker to lift more than X objects per hour, each weighing Y pounds, if the lifting maneuver required rotating the trunk of the body through an angle of more than Z degrees. OSHA circulated this proposed rule widely, and it generated such intense opposition from the regulated community, and such skepticism during informal review by the Office of Information and Regulatory Affairs, that the agency withdrew it and went back to the drawing board. Because the most vehement opposition arose in response to the easily caricatured extent of "micro-management" in the 1995 text,<sup>236</sup> when OSHA began to rework the ergonomics rule in 1998, it acted as if the most important complexion of the new rule would be its reversal of each feature of the old one. Where the 1995 text was proactive and targeted exposures, the 2000 text<sup>237</sup> was reactive, and imposed on an employer no obligation to control exposures until at least one employee in a particular job category had already developed a work-related MSD. Where the 1995 text provided performance goals so an employer could know, but also object to, how much exposure reduction would satisfy an OSHA inspector, the revised text emphasized that inspectors would be looking for evidence of management leadership in creating an ergonomically appropriate workplace and employee participation in decisions about ergonomic design.

OSHA intended this pendulum swing with respect to the earlier version [\*768] in large part to provide the opposition with what it said it wanted--a "user-friendly" rule that allowed each employer to reduce MSDs according to the unique circumstances of his operation and workforce. Instead, these attributes doomed the revised ergonomics rule, but with hindsight they provide a partial blueprint for how OSHA could sensibly craft a "substantially different" regulation in the future. American business interpreted OSHA's attempt to eschew one-size-fits-all requirements not as a concession to the opposition around the 1995 text, but as a declaration of war. The "flexibility" to respond idiosyncratically to the unique ergonomic problems in each workplace was almost universally interpreted by industry trade associations as the worst kind of vagueness. Having beaten back a rule that seemed to tell employers exactly what to do, industry now argued that a rule with too much flexibility was a rule without any clear indication of where

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<sup>235</sup> See, e.g., Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 *LAW & SOC'Y REV.* 691, 726 (2003) ("The challenge for governmental enforcement of management-based regulation may be made more difficult because the same conditions that make it difficult for government to impose technological and performance standards may also tend to make it more difficult for government to determine what constitutes 'good management.'").

<sup>236</sup> n236 For two examples cited by Congressmen of each political party, see *OSHA's Regulatory Activities and Processes Regarding Ergonomics: Hearing Before the Subcomm. on Nat'l Econ. Growth, Natural Res. & Regulatory Affairs of the H. Comm. on Gov't Reform & Oversight*, 104th Cong. (1995). At that hearing, Republican Representative David McIntosh stated:

A questionnaire in the draft proposal asks employers of computer users if their employees are allowed to determine their own pace, and discourages employers from using any incentives to work faster. In other words, employers would not be allowed to encourage productivity. If the Ergonomics rulemaking is truly dead, we have saved more than just the enormous cost involved.

*Id.* at 7 (statement of Rep. McIntosh). Similarly, Democratic Representative Collin Peterson expressed concern about governmental micromanagement of industrial processes: "I have to say that I am skeptical that any bureaucrat can sit around and try to figure out this sort of thing." *Id.* at 9 (statement of Rep. Peterson).

<sup>237</sup> See Ergonomics Program, 64 *Fed. Reg.* 65,768 (proposed Nov. 23, 1999).

the compliance burden would end. Small business in particular characterized the lack of specific marching orders as being "left to their own devices," in the sense of federal abdication of responsibility to state plainly what would suffice.<sup>238</sup> But in light of what had already transpired in 1995, and exacerbated by the publication of the final rule after the votes were cast in the Bush v. Gore election, but before the outcome was known, it turned out that OSHA opened itself up to much worse than charges of insufficient detail—it became dogged by charges that the regulatory text was a Trojan horse, hiding an apparatus that was specific and onerous, but one it was keeping secret.<sup>239</sup> The requirement—not found in the OSH Act or in its interpretations in the *Benzene Case* or *Cotton Dust Case*,<sup>240</sup> but having [\*769] evolved out of OSHA's deference to the instructions issued by OIRA—that OSHA compare the costs and benefits of compliance with each final rule<sup>241</sup> played into this conspiratorial interpretation: because OSHA provided cost information, it was reasonable for industry to infer that OSHA knew what kinds of controls it would be requiring, and that inspectors would be evaluating these controls rather than management leadership and employee participation to gauge the presence of violations and the severity of citations. Both the extreme flexibility of the rule and the detail of the cost-benefit information may have been a road paved with good intentions, but ironically or otherwise these factors combined to fuel the opposition and to provide a compelling narrative of a disingenuous agency, a story that receptive ears in Congress were happy to amplify.

Not only was OSHA's attempt to write a regulation whose crux was "choose your controls" misinterpreted as "choose our controls by reading our minds," but it undermined any tendency of Congress to defer to the agency's conclusion that the rule had a favorable benefit-cost balance. Because the projected extent of compliance expenditures depended crucially on how many firms would have to create or improve their ergonomics management systems, and what those improvements would end up looking like, rather than on the more traditional cost accounting scenario—the price of specified controls multiplied by the number of controls necessary for regulated firms to come into compliance—opponents of the rule did not need to contest OSHA's data or price estimates; they simply needed to assert that the extreme ambiguity of the regulatory target could lead to much greater expenditures than OSHA's rosy scenarios predicted. The ominous pronouncements of ergonomic costs<sup>242</sup> were the single most important factor in justifying the congressional veto, on the grounds that the costs of the regulation swamped benefits it would deliver, and the vagueness of the rule played into the hands of those who could benefit from fancifully large cost estimates. The reactive nature of the rule—most of the new controls would not have to be implemented until one or more MSD injuries occurred in a given job category in a particular workplaces—also made OSHA's benefits estimates precarious. All estimates of reduced health effects as a function

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<sup>238</sup> 147 CONG. REC. 2837 (2001) (statement of Sen. Bond) ("The Clinton OSHA ergonomics regulation . . . will be devastating both to small businesses and their employers because it is incomprehensible and outrageously burdensome. Too many of the requirements are . . . like posting a speed limit on the highway that says, 'Do not drive too fast,' but you never know what 'too fast' is until a State trooper pulls you over and tells you that you were driving too fast.").

<sup>239</sup> n239 One author opined:

The [2000] ergonomics standard . . . is one of the most vague standards OSHA has ever adopted. It leaves the agency with tremendous discretion to shape its actual impact on industry through enforcement strategy. In other words, OSHA's information guidance documents will likely play a large role in the practical meaning of the standard. This will allow the agency to work out details while bypassing the rigors of notice-and-comment rulemaking. However, it will also expose OSHA to more accusations of "back door" rulemaking.

Timothy G. Pepper, *Understanding OSHA: A Look at the Agency's Complex Legal and Political Environment*, 46 PROF. SAFETY, Feb. 2001, at 14, 16, available at <http://www.allbusiness.com/government/government-bodies-offices-legislative/1443343-1.html>.

<sup>240</sup> *Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case)*, 452 U.S. 490, 513 (1981).

<sup>241</sup> See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 745 (2006).

<sup>242</sup> For cost estimates ranging up to \$ 125 billion annually, see *supra* note 101. See also Editorial, *supra* note 90 ("Although the Occupational Safety and Health Administration puts the price tag on its rules at \$ 4.5 billion, the Economic Policy Foundation gauges the cost to business at a staggering \$ 125.6 billion.").



of reduced exposures involve uncertainty in dose-response, whether or not the promulgating agency quantifies that uncertainty, but to make future costs and benefits contingent [\*770] on future cases of harm, not merely on exposures, added another level of (unacknowledged) uncertainty to the exercise.

Whatever the reasons for a veto under the CRA, we argued above that the affected agency's first responsibility, if it wants to avoid being thwarted by the "substantially similar" trap, is to craft a revised rule with a much more favorable balance of benefits to costs. But because the 2000 ergonomics rule had chosen no particular stringency per se, at least not one whose level the agency and its critics could even begin to agree existed, OSHA cannot tweak the benefit-cost balance with any straightforward concessions. In the case of ergonomics, we contend that OSHA probably needs to abandon the strategy of a flexible, management-based standard, since that approach probably guarantees pushback on the grounds that the true cost of complying with a vague set of mandates dwarfs any credible estimates of benefits, in addition to pushing the hot button of the "hidden enforcement manual." In the next section, we list some practical steps OSHA could take to comport with the CRA, motivated by a catalog of the strongest criticisms made during the floor debate on the 2000 rule, as well as our own observations about costs, benefits, and regulatory design.

### *B. Specific Suggestions for Worthwhile Revisions to the Ergonomics Rule*

A "substantially different" ergonomics rule would have benefits that exceeded costs, to a high degree of confidence. We believe OSHA could navigate between the rock of excessive flexibility--leading to easy condemnation that costs would swamp benefits--and the hard place of excessive specificity--leading essentially to condemnation that the unmeasured cost of losing control of one's own industrial process would dwarf any societal benefits--simply by combining the best features of each approach. The basic pitfall of the technology-based approach to setting standards--other than, of course, the complaint from the left wing that it freezes improvements based on what can be achieved technologically, rather than what needs to be achieved from a moral vantage point--is that it precludes clever businesses from achieving or surpassing the desired level of performance using cheaper methods. However, a hybrid rule--one that provides enough specificity about how to comply that small businesses cannot claim they are adrift without guidance, and that also allows innovation so long as it is at least as effective as the recommended controls would be--could perhaps inoculate the issuing agency against claims of too little or too much intrusiveness. From a cost--benefit perspective, such a design would also yield the very useful output of a lower bound on the net benefit estimate because by definition any of the more efficient controls some firms would freely opt to undertake would either lower total costs, [\*771] reap additional benefits, or both. It would also yield a much less controversial, and less easily caricatured, net benefit estimate because the lower-bound estimate would be based not on OSHA's hypotheses of how much management leadership and employee participation would cost and how many MSDs these programs would avert, but on the documented costs of controls and the documented effectiveness of specific workplace interventions on MSD rates. In other words, we urge OSHA to take a fresh look at the 1995 ergonomics proposal, but to recast specific design and exposure-reduction requirements therein as recommended controls--the specifications would become safe harbors that employers could implement and know they are in compliance, but that they could choose to safely ignore in favor of better site-specific, one-size-fits-one solutions to reduce intolerable ergonomic stressors.

The other major philosophical step toward a "substantially different" rule we urge OSHA to consider involves replacing ergonomic "exposure floors" with "exposure ceilings." With the intention of reassuring many employers that they would have no compliance burden if their employees were subjected only to minimal to moderate ergonomic stressors, OSHA created a Basic Screening Tool demarcating exposures above which employers *might* have to implement controls.<sup>243</sup> For example, even if one or more employees developed a work-related MSD, the employer would have no obligation to assess the jobs or tasks for possible exposure controls, unless the affected employees were routinely exposed to stressors at or above the screening levels. These levels are low, as befits a screening tool used to exclude trivial hazards; for example, only a task that involved lifting twenty-five pounds or more with arms fully extended, more than twenty-five times per workday, would exceed the screening level and possibly trigger the obligation to further assess the situation. Unfortunately, it was easy for trade associations and

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<sup>243</sup> See Ergonomics Program, 65 Fed. Reg. 68,262, 68,848-49 (Nov. 14, 2000).

their allies in Congress to misrepresent these floors as ceilings, as if OSHA had set out to eliminate *all* "twenty-five times twenty-five pounds workdays" rather than to treat any lifting injuries caused by occupational duties below this level as the employee's tough luck.<sup>244</sup> Hence the debate degenerated into warnings about "the end of Thanksgiving" under an OSHA rule that "prohibited" grocery checkout workers from lifting twenty-six-pound turkeys off the conveyor belt.<sup>245</sup> In a [\*772] revised rule, approaching the dose-response continuum from above rather than from below might make much more practical and political sense. As with all of its health standards for chemicals, OSHA's goal, as reinforced by the "significant risk" language of the *Benzene* decision, is to eliminate where feasible exposures that are intolerably high; defining instead exposures that are not insignificantly low may help narrow this window, but it obviously backfired in the case of ergonomics. Making the tough science-policy decisions about which levels of ergonomic stressors must be ameliorated wherever feasible, just as OSHA and other agencies do routinely for toxic substances with observed or modeled dose-response relationships, would have four huge advantages: (1) it would clearly transform the ergonomics rule into something "substantially different" than the 2000 version; (2) it would ally OSHA with the science of MSD dose-response--because the 2000 version triggered controls upon the appearance of an MSD, instead of treating certain exposures as intolerably risky regardless of whether they had already been associated with demonstrable harm, it certainly made it at least appear that OSHA regarded MSDs as mysterious events, rather than the logical result of specific conditions;<sup>246</sup> (3) it could insulate OSHA from some of the political wrangling that caused it to exempt some obviously risky major industries (e.g., construction) from the rule entirely, while subjecting less risky industries to the specter of costly controls, because controlling intolerable exposures wherever they are found is a neutral means of delimiting the scope of the rule; and (4) it would shift the rhetorical burden from government having to argue that small exertions might be worthy of attention to industry having to argue that herculean exertions must be permitted. Adjusting the ceiling to focus mandatory controls on the most intolerable conditions is, of course, the quintessential regulatory act and the most direct force that keeps costs down and pushes benefits up--and this is the act that OSHA's management-based ergonomics rule abdicated.

Continuing with recommendations that improve the cost-benefit [\*773] balance and also respond to specific hot buttons from the congressional veto debate, we believe that OSHA should also consider targeting an ergonomics rule more squarely at MSDs that are truly caused or exacerbated by occupational risk factors. The 2000 rule defined a work-related MSD as one that workplace exposure "caused or contributed to,"<sup>247</sup> but the latter part of this definition, intentionally or otherwise, subsumes MSDs that primarily arise from off-the-job activity and that repetitive motion merely *accompanied* (the easily mocked tennis elbow hypothetical). On the other hand, a redefinition that simply required a medical opinion that *the MSD would not have occurred absent the occupational exposure(s)* would cover any exposures that pushed a worker over the edge to a full-blown injury (and, of course, any exposures that alone sufficed to cause the injury), but not those that added marginally to off-work exposures that were already sufficient by themselves to cause the MSD. In this regard, however, it will be important for OSHA to correct an egregious misinterpretation of the science of ergonomics bandied about freely during the congressional veto debate. Various members made much of the fact that one of the NAS panel reports concluded that "[n]one of

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<sup>244</sup> For example, Republican Senator Don Nickles of Oklahoma began the Senate debate on the rule by flatly stating, "Federal bureaucrats are saying you can do this; you can't do that. You can only move 25 pounds 25 times a day . . . Employees would say: I have to stop; it is 8:25 [a.m.], but I have already moved 25 things. Time out. Hire more people." 147 CONG. REC. 2817 (statement of Sen. Nickles).

<sup>245</sup> Republican Representative Ric Keller of Florida said, "It is also true that if a bagger in a grocery store lifts a turkey up and we are in the Thanksgiving season, that is 16 pounds, he is now violating Federal law in the minds of some OSHA bureaucrats because they think you should not be able to lift anything over 15 pounds. We need a little common sense here." 147 CONG. REC. 3059-60 (statement of Rep. Keller). Although the Basic Screening Tool nowhere mentions fifteen pounds (but rather twenty-five), or fewer than twenty-five repetitions per day, this exaggeration is over and above the basic misinterpretation of the function of the screening level.

<sup>246</sup> The decision to make the ergonomics rule reactive rather than proactive arguably played right into the hands of opponents, who essentially argued that OSHA had come to agree with them that science did not support any dose-response conclusions about MSD origins.

<sup>247</sup> Ergonomics Program, 65 Fed. Reg. at 68,854 (defining work-related).

the common MSDs is uniquely caused by work exposures." <sup>248</sup> Senator Kit Bond and others took this literally true statement about the totality of all cases of one single kind of MSD--for example, all the cases of carpal tunnel syndrome, all the cases of Raynaud's phenomenon--and made it sound as if it referred to every individual MSD case, which is of course ridiculous. "Crashing your car into a telephone pole is not uniquely caused by drunk driving," to be sure--of the thousands of such cases each year, some are certainly unrelated to alcohol, but this in no way means that we cannot be quite sure that what was to blame in a *particular* case in which the victim was found with a blood alcohol concentration of, say, 0.25 percent by volume, enough to cause stupor. Many individual MSDs are caused solely by occupational exposure, and any regulation worth anything must effect reductions in those exposures that make a resulting MSD inevitable or nearly so.

The other hot-button issue specifically mentioned repeatedly in the veto debate was OSHA's supposed attempt to create a separate workers' compensation system for injured employees. Paragraph (r) of the final ergonomics rule <sup>249</sup> would have required employers who had to remove an employee from her job due to a work-related MSD to pay her at least ninety percent of her salary for a maximum of ninety days, or until a health care professional determined that her injury would prevent her from ever [\*774] resuming that job, whichever came first. OSHA deemed such a "work restriction protection" program necessary so that employees would not be deterred from admitting they were injured and risk losing their jobs immediately. But various members of Congress decried this provision of the rule as "completely overrid[ing] the State's rights to make an independent determination about what constitutes a work-related injury and what level of compensation injured workers should receive." <sup>250</sup> Worse yet, because § 4(b)(4) of the OSH Act states that "[n]othing in this [Act] shall be construed to supersede or in any manner affect any workmen's compensation law," <sup>251</sup> various members argued that OSHA "exceeded [its] constitutional authority" by legislating a new workers' compensation system rather than regulating. <sup>252</sup> Other members disputed these allegations, noting that providing temporary and partial restoration of salary that would otherwise be lost during a period of incapacity is very different from compensating someone for an injury. As Senator Edward Kennedy said, "It has virtually nothing to do with workers compensation, other than what has been done traditionally with other kinds of OSHA rules and regulations such as for cadmium and lead." <sup>253</sup> Indeed, the Court of Appeals for the District of Columbia Circuit settled this issue years ago in upholding the much more generous eighteen-month protection program in the OSHA lead standard. In *United Steelworkers of America v. Marshall*, <sup>254</sup> that court held that § 4(b)(4) of the OSH Act bars workers from using an OSHA standard to assert a private cause of action against their employers and from obtaining state compensation for a noncompensable injury just because OSHA may protect a worker against such an injury. <sup>255</sup> But more generally, the circuit court concluded that "the statute and the legislative history both demonstrate unmistakably that OSHA's statutory mandate is, as a general matter, broad enough to include such a regulation as [medical removal protection (MRP)]." <sup>256</sup>

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<sup>248</sup> 147 CONG. REC. 2838 (statement of Sen. Bond).

<sup>249</sup> Ergonomics Program, 65 Fed. Reg. at 68,851.

<sup>250</sup> 147 CONG. REC. 2824 (statement of Sen. Enzi)

<sup>251</sup> OSH Act § 4(b)(4), 29 U.S.C. § 653 (2006).

<sup>252</sup> 147 CONG. REC. 2817 (2001) (statement of Sen. Nickles); see also *supra* Part II.A.

<sup>253</sup> 147 CONG. REC. 2818 (2001) (statement of Sen. Kennedy).

<sup>254</sup> 647 F.2d 1189 (D.C. Cir. 1980).

<sup>255</sup> Id. at 1235-36.

<sup>256</sup> Id. at 1230. Medical removal protection (MRP) is the provision of salary while an employee with a high blood lead level (or a similar biomarker of exposure to cadmium, methylene chloride, etc.) is removed from ongoing exposure until his level declines. See *id.* at 1206. The court's decision stated in relevant part: "We conclude that though MRP may indeed have a great practical effect on workmen's compensation claims, it leaves the state schemes wholly intact as a *legal* matter, and so does not violate Section 4(b)(4)." Id. at 1236.

It is ironic, therefore, that the only mention of workers' compensation in the vetoed ergonomics rule was a provision that allowed the employer to [\*775] reduce the work restriction reimbursement dollar for dollar by any amount that the employee receives under her state's compensation program!<sup>257</sup> If OSHA had not explicitly sought to prohibit double dipping, the ergonomics rule would never have even trespassed semantically on the workers' compensation system. It is tempting, then, to suggest that OSHA could make the work restriction program "substantially different" by removing the reference to workers' compensation and making it a more expensive program for employers to implement. However, both the spirit of responding to specific congressional objections and of improving the cost-benefit balance would argue against such a tactic, as would the practical danger of arousing congressional ire by turning its objections against the interests of its favored constituents. It is possible that an exposure-based ergonomics rule that does not rely on the discovery of an MSD to trigger possible controls would reduce the disincentive for workers to self-report injuries, but the problem remains that without some form of insurance against job loss, workers will find it tempting to hide injuries until they become debilitating and possibly irreversible. Perhaps the Administration could approach Congress before OSHA issued a new ergonomics proposal, and suggest it consider creating a trust fund for temporary benefits for the victims of MSD injuries, as has been done for black lung disease and vaccine-related injuries.<sup>258</sup> Employers might find work-restriction payments from a general fund less offensive than they apparently found the notion of using company funds alone to help their own injured workers.

OSHA could obviously consider a wide variety of other revisions to make a new ergonomics rule "substantially different" and more likely to survive a second round of congressional review. Some of the other changes that would accede to specific congressional concerns from 2001--such as making sure that businesses could obtain all the necessary guidance materials to implement an ergonomics program free of charge, rather than having to purchase them from private vendors at a possible cost of several hundred dollars<sup>259</sup>--are presumably no-brainers; this one being even easier to accommodate now than it would have been before the boom in online [\*776] access to published reports. Other redesigns are up to OSHA to choose among based on its appraisal of the scientific and economic information with, we would recommend, an eye toward changes that would most substantially increase total benefits, reduce total costs, or both.

There is one other category of change that we recommend even though it calls for more work for the agency than any literal reading of "substantially the same form" would require. The CRA is concerned with rules that reappear in the same "form," but it is also true that the process leading up to the words on the page matters to proponents and opponents of every regulation. The ergonomics rule faced withering criticism for several purported deficiencies in how it was produced.<sup>260</sup> We think the CRA imposes no legal obligation upon OSHA to develop a "substantially different" process the second time around--after all, "form" is essentially perpendicular to "process," and had Congress wanted to force an agency to change how it arrived at an offensive form, it surely could have said "reissued in substantially the same form or via substantially the same process" in § 801(b)(2). Nevertheless, well-founded complaints about flawed process should, we believe, be addressed at the same time an agency is attempting to improve the rule's form in the cost-benefit sense. Although courts have traditionally been very reluctant to rescind rules signed by an agency head who has telegraphed his personal views on the subject at

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<sup>257</sup> See Ergonomics Program, 65 Fed. Reg. 68,262, 68,851 (Nov. 14, 2000) ("Your obligation to provide [work restriction protection] benefits . . . is reduced to the extent that the employee receives compensation for earnings lost during the work restriction period from either a publicly or an employer-funded compensation or insurance program . . .").

<sup>258</sup> See 26 U.S.C. § 9501 (2006) (creating the Black Lung Disability Trust Fund with the purpose of providing benefits to those who were injured from the Black Lung); *id.* § 9510 (forming the Vaccine Injury Compensation Trust Fund for the purpose of providing benefits to those who were injured by certain vaccinations).

<sup>259</sup> See 147 CONG. REC. 2825-26 (2001) (statement of Sen. Enzi).

<sup>260</sup> See *supra* note 228 and accompanying text.

issue,<sup>261</sup> we assume the Obama Administration or a future Executive would be more careful to avoid the appearance of a general bias for regulation as a "thrill" (or, for that matter, against it as a "menace") by the career official leading the regulatory effort.<sup>262</sup> We, however, do not expect OSHA to overreact to ten-year-old complaints about the zeal with which it may have sought to regulate then. Other complaints about the rulemaking process in ergonomics may motivate a "substantially different" process, if OSHA seeks to re-promulgate. For example, Senator Tim Hutchinson accused OSHA of orchestrating a process with "witnesses who were paid, instructed, coached, practiced, to arrive at a preordained outcome,"<sup>263</sup> and although an agency need not confine itself to outside experts who will testify pro bono, we suggest it would be politically unwise for OSHA to edit again the testimony of the experts it enlists. Similarly, a different ergonomics rule that still had the cloud of improper and undisclosed conflict of interest in [\*777] the choice of specific outside contractors to do the bulk of the regulatory impact analysis work<sup>264</sup> would, we believe, fail to comport with the spirit of § 801(b)(2), in that it would have circumvented the instructions of at least some in Congress to "clean up" the process.

On the other hand, we think some objections to the process by which a rule is developed ought more properly to be the subject of judicial review rather than congressional interference. Some members of Congress accused OSHA of not having enough time to read, let alone digest and thoughtfully respond to, the more than 7000 public comments received as late as August 10, 2000, before the final rule was issued barely three months later.<sup>265</sup> Senator Enzi also said that OSHA "took the comments they got, and they opposed everything and incorporated things in this that were worse than in the law that was passed."<sup>266</sup> But although a reviewing court could not punish OSHA per se for crafting a rule with costs exceeding benefits, or for engaging in conduct with expert witnesses that Congress might find unseemly, the courts are empowered and required to judge whether OSHA arbitrarily ignored evidence in the record, or twisted its meaning.<sup>267</sup> The CRA, therefore, should emphasize those substantive--and procedural--concerns for which aggrieved parties have no other remedy.

## VII. RECOMMENDATIONS TO AMEND THE CRA

Congress has voted on just one attempt to amend the CRA in the fourteen years since its passage: the inconsequential Congressional Review Act Improvement Act, which unanimously passed the House in June 2009, and that would have eliminated the requirement that an agency transmit each final rule to each house of Congress, leaving the Comptroller General as the only recipient.<sup>268</sup> Here we suggest several more substantive changes

<sup>261</sup> See, e.g., *United Steelworkers of Am. v Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (finding that the head of OSHA "served her agency poorly by making statements so susceptible to an inference of bias," but also finding that she was not "so biased as to be incapable of finding facts and setting policy on the basis of the objective record before her").

<sup>262</sup> See *supra* note 100.

<sup>263</sup> 147 CONG. REC. 2832 (statement of Sen. Hutchinson).

<sup>264</sup> See Letter from Rep. David M. McIntosh, Chairman, Subcomm. on Nat'l Econ. Growth, to Alexis M. Herman, Sec'y of Labor, U.S. Dep't of Labor (Oct. 30, 2000), available at <http://insidehealthpolicy.com/Inside-OSHA/Inside-OSHA-11/13/2000/mcintosh-letter-to-herman/menu-id-219.html>. McIntosh alleged that the career OSHA official who led the ergonomics rulemaking did (with OSHA's approval) assign task orders to a consulting firm that she had been an owner of before coming to government (and after signing a Conflict of Interest Disqualification requiring her to recuse herself from any such contractual decisions involving her former firm).

<sup>265</sup> See, e.g., 147 CONG. REC. 2823 (statement of Sen. Enzi).

<sup>266</sup> *Id.* at 2821.

<sup>267</sup> See **5 U.S.C. § 706(2)(A)** (2006) (mandating that the reviewing court shall set aside arbitrary and capricious agency actions, findings, and conclusions).

<sup>268</sup> See Congressional Review Act Improvement Act, H.R. 2247, 111th Cong. (2009) (as passed by House of Representatives, June 16, 2009); 155 CONG. REC. H6849 (daily ed. June 16, 2009) (recording the House roll call vote). The Senate did not take

[\*779] Congress should consider to improve the CRA, emphasizing the reissued-rules problem but including broader suggestions as well. We make these suggestions in part to contrast with several of the pending proposals to change the CRA that have been criticized as mischievous and possibly unconstitutional.<sup>269</sup>

**Improvement 1: Codification of the Cost-Benefit-Based Standard.** First, Congress should explicitly clarify within the CRA text the meaning of "substantially the same" along the lines we suggest: any rule with a substantially more favorable balance between benefits and costs should be considered "substantially different" and not vulnerable to a preemptory veto. In the rare cases where a prior congressional mandate to produce a narrowly tailored rule collides head-on with the veto of the rule [\*780] as promulgated, Congress has already admitted that it owes it to the agency to "make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval."<sup>270</sup> But there is currently no legal obligation for Congress to do so. In a hypothetical case where Congress has effectively said, "Promulgate this particular rule," and then vetoed a good-faith attempt to do just that, it seems particularly inappropriate for Congress not to bind itself to resolve the paradox. But we believe it is also inappropriate for Congress to perpetuate the ambiguity of "substantially the same" for the much more common cases in which the agency is not obligated to try again, but for good reasons wishes to.

**Improvement 2A: Severability.** The CRA veto process might also be improved by permitting a resolution of disapproval to strike merely the offending portion(s) of a proposed rule, leaving the rest intact. If, as a clearly hypothetical example, the only thing that Congress disliked about the ergonomics regulation was the additional entitlement to benefits different from those provided by state workers' compensation laws, it could have simply struck that provision. Charles Tiefer has made the interesting observation that one would not want to close military bases this way (but rather craft a take-it-or-leave-it approach for the proposed list as a whole) to avoid horse-trading,<sup>271</sup> but a set of regulatory provisions can be different: it is not zero-sum in the same way. The allowance for severability would pinpoint the offending portion(s) of a proposed regulation and therefore give the agency clearer guidance as to what sort of provisions are and are not approved.

Severability would have the added benefit of lowering the chances of there being a null set of reasons for veto. In other words, a generic joint resolution may be passed and overturn a regulation even though no single substantive reason has majority support in Congress. Suppose, for example, that the FAA proposed an updated comprehensive passenger safety regulation that included two unrelated provisions. First, due to passengers' disobeying the limitations on in-flight use of personal electronic devices and mobile phones, the rule banned possession of personal electronics as carry-on items. Second, in order to ensure the dexterity and mobility of those assisting with an emergency evacuation, the rule increased the minimum age for exit-row seating from fifteen to eighteen. If thirty

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significant action on the bill. See *H.R. 2247: Congressional Review Act Improvement Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2247> (last visited Nov. 14, 2011).

Various legislators have drafted other bills that have not made it to a vote. Recently, Republican Senator Mike Johanns of Nebraska introduced a bill that would bring administrative "guidance documents" within the purview of the CRA, making them subject to the expedited veto if they meet the same economic impact guidelines that subject rules to congressional scrutiny under the CRA in its current form. See *Closing Regulatory Loopholes Act of 2011*, S. 1530, 112th Cong. (2011) (as referred to committee, Sept. 8, 2011); cf. *supra* note 69 (describing the economic criteria currently used to determine whether a rule is subject to congressional review). Importantly, the bill would make vetoed guidance documents subject to the CRA's "substantially the same" provision. See S. 1530 § 2(b)(1)(B). Supporters of the bill have argued that agencies have used such guidance documents to craft enforceable policies while sidestepping congressional review, while opponents take issue with the potential new costs the bill would impose on agencies. See Stephen Lee, *Agency Guidance Would Be Subject To Congressional Review Under House Bill*, 41 OCCUPATIONAL SAFETY & HEALTH REP. 788, 788-89 (Sept. 15, 2011). At the time this Article went to press, the bill had only been introduced and referred to committee. See *S. 1530: Closing Regulatory Loopholes Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-1530> (last visited Nov. 14, 2011).

<sup>269</sup> See *supra* note 268.

<sup>270</sup> 142 CONG. REC. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>271</sup> Tiefer, *supra* note 136, at 479 & n.311 (relying on the Supreme Court's reasoning in *Dalton v. Spector*, 511 U.S. 462 (1994)).

senators disliked solely the electronics ban, but thirty different senators disliked only the exit row seating restriction, then under the current law the [\*781] entire regulation is at risk of veto even though a majority of Senators approved of all of the rule's provisions. An ability to strike just the offending portion of a regulation decreases the potential<sup>272</sup> for this sort of null set veto.

**Improvement 2B: Codified Rationale.** On the other hand, some might well consider a scalpel to be a dangerous tool when placed into the hands of Congress. Although Congress may understand what it means to send an agency back to square one with a rule under the current procedure, the availability of a partial veto might lead to overuse of the CRA, turning it into a forum for tinkering with specific words in complicated regulations produced with fidelity to the science and to public comment, perhaps in ways that a court would consider arbitrary and capricious if done by the issuing agency.

Alternatively, Congress could also go much further than the limited resolution template<sup>273</sup> and take on more responsibility by living up to the literal promise embodied in the signing statement. The drafters of the CRA stated: "The authors intend the debate on *any* resolution of disapproval to focus on the law that authorized the rule . . . ." <sup>274</sup> This goal would be served (though admittedly at the expense of some speed) by requiring the joint resolution of disapproval to include a statement of the reason(s) for the veto. That is to say, whenever Congress disapproves of a rule, it should surround what Cohen and Strauss called the "Delphic 'No!'" <sup>275</sup> with some attempt to explain the "why 'No'?" question the agency will rightly be preoccupied with as it regroups or retreats. From the agency's point of view, it is bad enough that Congress can undo in ten hours what it took OSHA ten years to craft, but to do so without a single word of explanation, beyond the ping-pong balls of opposing rhetoric during a floor debate, smacks more of Congress flexing its muscle than truly teaching the agency a lesson. Indeed, it is quite possible that the act of articulating an explanatory statement to be voted on might reveal that there

"That Congress disapproves the rule submitted by the \_\_\_ relating to \_\_\_, and such rule shall have no force or effect"). [\*782] might be fifty or more unhappy Senators, but no majority for any particular view of whether and why the rule should be scrapped.

**Improvement 3: Early Veto.** We hasten to add, however, that this bow to transparency and logic should be a two-way street; we also enthusiastically endorse the proposal Professor Strauss made in 1997 that the CRA should be "amended to provide that an agency adopting the same or 'substantially the same' rule to one that has been disapproved must fully explain in its statement of basis and purpose how any issues ventilated during the initial disapproval process have been met." <sup>276</sup> We would go further, however, and suggest that the overwhelmingly logical time to have the discussion about whether a reissued rule runs afoul of the "substantially the same" provision is when the new rule is *proposed*, not after it is later issued as a final rule. Surely, needless costs will be incurred by the agency and the interested public, needless uncertainty will plague the regulated industries, and other benefits will be needlessly foregone in the bargain, if Congress silently watches a regulatory proposal go through notice and comment that it believes may be invalid on "substantially the same" grounds, only to veto it at

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<sup>272</sup> Admittedly, severability would not entirely eliminate this possibility- the risk would still remain where dueling minorities of legislators opposed the *same* provision but for different reasons. For example, if the Environmental Protection Agency were to propose an ozone standard of 60 parts per billion (ppb), the regulation is at risk of being vetoed if thirty senators think the standard should be 25 ppb while another thirty Senators think it should be 200 ppb.

<sup>273</sup> See 5 U.S.C. § 802 (2006) (requiring that a joint resolution of disapproval read:

<sup>274</sup> 142 CONG. REG. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

<sup>275</sup> Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 105(1997).

<sup>276</sup> *Hearing on CRA, supra* note 83, at 135 (statement of Peter L. Strauss, Betts Professor of Law, Columbia University). Assuming that our proposal immediately above was adopted, we would interpret Strauss' amendment as then applying only to issues specifically called out in the list of particulars contained in the expanded text of the actual resolution of disapproval--not necessarily to every issue raised by any individual member of Congress during the floor debate.

the finish line. We suggest that whenever an agency is attempting to reissue a vetoed rule on the grounds that it is not "substantially the same," it should be obligated to transmit the notice of proposed rulemaking (NPRM) to both houses, and then that Congress should have a window of time--we suggest sixty legislative days--to decide whether the proposal should not be allowed to go forward on "substantially the same" grounds, with silence denoting assent. Under this process, failure to halt the NPRM would preclude Congress from raising a "substantially the same" objection at the time of final promulgation, but it would of course not preclude a second veto on any substantive grounds.<sup>277</sup> The [\*783] agency would still be vulnerable to charges that it had found a second way to issue a rule that did more harm than good. With this major improvement in place, a vague prohibition against reissuing a similar rule would at worst cause an agency to waste half of its rulemaking resources in an area.

**Improvement 4: Agency Confrontation.** Currently, the CRA does not afford the agency issuing a rule the opportunity that a defendant would have under the Confrontation Clause<sup>278</sup> to face his accusers about the conduct at issue. Even within the confines of an expedited procedure, and recognizing that the floor of Congress is a place for internecine debate as opposed to a hearing, the CRA could still be amended to allow some limited dialogue between the agency whose work is being undone and the members. Perhaps in conjunction with a requirement that Congress specify the reasons for a resolution of disapproval, the agency should be allowed to enter a response into the official record indicating any concerns about misinterpretation of the rule or the accompanying risk and cost analyses. This could, of course, become somewhat farcical in a case (like the ergonomics standard) where the leadership of the agency had changed hands between the time of promulgation and the time of the vote on the disapproval--presumably, Secretary Chao would have declined the opportunity to defend the previous administration's ergonomics standard on factual grounds. However, each agency's Regulatory Policy Officer could be empowered to craft such a statement.<sup>279</sup>

## CONCLUSION

The CRA can be a helpful hurdle to check excesses and spur more favorable actions from a CBA standpoint, but it makes no sense to foreclose the agency from doing what Congress wants under the guise of the substantial similarity provision. OSHA should not reissue the ergonomics rule in anything like its past form--not because of "substantial similarity," but because it was such a flawed rule in the first place. But a different rule with a more favorable cost-benefit ratio has been needed for decades, and [\*784] "substantial similarity" should not be raised again lightly, especially since at least ten years will have passed and times will have changed.

The history and structure of the CRA, and its role in the larger system of administrative law, indicate that the substantial similarity provision should be interpreted narrowly. More specifically, it seems that if, following disapproval of a rule, the agency changes its provisions enough that it alters the cost-benefit ratio in a significant and favorable way, and at least tries in good faith to fix substantive and procedural flaws, then the new rule should

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<sup>277</sup> Enforcement of a limit on tardy congressional "substantial similarity" vetoes would require additional amendments to the CRA. First, the section governing judicial review would need to be amended so that a court can review and invalidate a CRA veto on the basis that Congress was making an after-the-fact "substantial similarity" objection. Cf. 5 U.S.C. § 805 ("No determination, finding, action, or omission under this chapter shall be subject to judicial review."). Second, Congress would need to insert its substantive basis for the veto into the text of the joint resolution, which is currently not allowed (but which we recommend as Improvement 2B above). Absent a textual explanation of the substantive basis for a veto, the ban on a tardy congressional "substantial similarity" veto would be an empty prohibition; members of Congress could vote in favor of a blanket veto without any substantive reason, and courts would likely decline to review the veto under the political question doctrine.

<sup>278</sup> See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

<sup>279</sup> Note that these officers usually were career appointees, who would therefore generally hold over when administrations changed. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 745 (2006). President Bush issued an executive order that redefined these officers as being political appointees, but President Obama rescinded that order in January 2009, redefining these officials as careerists who might be better able to fulfill this function objectively. See Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *invalidating* Exec. Order No. 13,422, 3 C.F.R. 191 (2007).



not be barred under the CRA. The rule can still be vetoed a second time, but for substantive reasons rather than for a technicality. The framers of the CRA were concerned with federal agencies creating costly regulatory burdens with few benefits, and this consideration arose again in the debates over the OSHA ergonomics rule. The disapproval procedure--with its expedited debates, narrow timeframe, and failure to provide for severability of rule provisions--suggests that the substantial similarity provision is not intended to have broad effects on an agency's power to issue rules under its organic statute, especially in a system in which we generally defer to agencies in interpreting their own delegated authority. Instead, the history and structure of the procedure suggest that the CRA is intended to give agencies a second chance to "get it right." In an ideal world, Congress would monitor major regulations and weigh in at the proposal stage, but sending them back to the drawing board, even though regrettably not until after the eleventh hour, is what the CRA most fundamentally does, and therefore it is fundamentally important that such a drawing board not be destroyed. If one believes, as we do, that well-designed regulations are among "those wise restraints that make us free," then Congress should not preclude wise regulations as it seeks to detect and rework regulations it deems deficient.

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# EXTENSIONS OF REMARKS

PROVIDING FOR CONSIDERATION OF H.R. 3136, CONTRACT WITH AMERICA ADVANCEMENT ACT OF 1996

SPEECH OF

**HON. HENRY J. HYDE**

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Thursday, March 28, 1996

Mr. HYDE. Mr. Speaker, I submit for the RECORD a summary of the Small Business Regulatory Enforcement Fairness Act, included in H.R. 3136.

**SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT VIEWS OF THE HOUSE COMMITTEES OF JURISDICTION ON THE CONGRESSIONAL INTENT REGARDING THE "SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996"**

I. SUMMARY OF THE LEGISLATION

The Hyde amendment to H.R. 3136 replaced Title III of the Contract with America Advancement Act of 1996 to incorporate a revised version of the Small Business Regulatory Enforcement Fairness Act of 1996 (the "Act"). As enacted, Title III of H.R. 3136 became Title II of Public Law 104 121. This legislation was originally passed by the Senate as S. 942. The Hyde amendment makes a number of changes to the Senate bill to better implement certain recommendations of the 1995 White House Conference on Small Business regarding the development and enforcement of Federal regulations, including judicial review of agency actions under the Regulatory Flexibility Act (RFA). The amendment also provides for expedited procedures for Congress to review agency rules and to enact Resolutions of Disapproval voiding agency rules.

The goal of the legislation is to foster a more cooperative, less threatening regulatory environment among agencies, small businesses and other small entities. The legislation provides a framework to make federal regulators more accountable for their enforcement actions by providing small entities with an opportunity for redress of arbitrary enforcement actions. The centerpiece of the legislation is the RFA which requires a regulatory flexibility analysis of all rules that have a "significant economic impact on a substantial number" of small entities. Under the RFA, this term "small entities" includes small businesses, small non profit organizations, and small governmental units.

II. SECTION BY SECTION ANALYSIS

Section 101

This section entitles the Act the "Small Business Regulatory Enforcement Fairness Act of 1996."

Section 202

This section of the Act sets forth findings as to the need for a strong small business sector, the disproportionate impact of regulations on small businesses, the recommendations of the 1995 White House Conference on Small Business, and the need for judicial review of the Regulatory Flexibility Act.

Section 203

This section of the Act sets forth the purposes of this legislation. These include the

need to address some of the key Federal regulatory recommendations of the 1995 White House Conference on Small Business. The White House Conference produced a consensus that small businesses should be included earlier and more effectively in the regulatory process. The Act seeks to create a more cooperative and less threatening regulatory environment to help small businesses in their compliance efforts. The Act also provides small businesses with legal redress from arbitrary enforcement actions by making Federal regulators accountable for their actions. Additionally, the Act provides for judicial review of the RFA.

Subtitle A Regulatory Compliance Simplification

Agencies would be required to publish easily understood guides to assist small businesses in complying with regulations and provide them informal, non binding advice about regulatory compliance. This subtitle creates permissive authority for Small Business Development Centers to offer regulatory compliance information to small businesses and to establish resource centers to disseminate reference materials. Federal agencies are directed to cooperate with states to create guides that fully integrate Federal and state regulatory requirements on small businesses.

Section 211

This section defines certain terms as used in this subtitle. The term "small entity" is currently defined in the RFA (5 U.S.C. 601) to include small business concerns, as defined by section 3(a) of the Small Business Act (15 U.S.C. 632(a)) small nonprofit organizations and small governmental jurisdictions. The process of determining whether a given business qualifies as a small business is straightforward, using size standard thresholds established by the SBA based on Standard Industrial Classification codes. The RFA also defines small organization and small governmental jurisdiction (5 U.S.C. 601). Any definition established by an agency for purposes of implementing the RFA would also apply to this Act.

Section 212

This section requires agencies to publish "small entity compliance guides" to assist small entities in complying with regulations which are the subject of a final regulatory flexibility analysis. The bill does not allow judicial review of the guide itself. However, the agency's claim that the guide provides "plain English" assistance would be a matter of public record. In addition, the small business compliance guide would be available as evidence of the reasonableness of any proposed fine on the small entity.

Agencies should endeavor to make these "plain English" guides available to small entities through a coordinated distribution system for regulatory compliance information utilizing means such as the SBA's U.S. Business Advisor, the Small Business Ombudsman at the Environmental Protection Agency, state run compliance assistance programs established under section 507 of the Clean Air Act, Manufacturing Technology Centers or Small Business Development Centers established under the Small Business Act.

Section 213

This section directs agencies that regulate small entities to answer inquiries of small

entities seeking information on and advice about regulatory compliance. Some agencies already have established successful programs to provide compliance assistance and the amendment intends to encourage these efforts. For example, the IRS, SEC and the Customs Service have an established practice of issuing private letter rulings applying the law to a particular set of facts. This legislation does not require other agencies to establish programs with the same level of formality as found in the current practice of issuing private letter rulings. The use of toll free telephone numbers and other informal means of responding to small entities is encouraged. This legislation does not mandate changes in current programs at the IRS, SEC and Customs Service, but these agencies should consider establishing less formal means of providing small entities with informal guidance in accordance with this section.

This section gives agencies discretion to establish procedures and conditions under which they would provide advice to small entities. There is no requirement that the agency's advice to small entities be binding as to the legal effects of the actions of other entities. Any guidance provided by the agency applying statutory or regulatory provisions to facts supplied by the small entity would be available as relevant evidence of the reasonableness of any subsequently proposed fine on the small entity.

Section 214

This section creates permissive authority for Small Business Development Centers (SBDC) to provide information to small businesses regarding compliance with regulatory requirements. SBDCs would not become the predominant source of regulatory information, but would supplement agency efforts to make such information widely available. This section is not intended to grant an exclusive franchise to SBDCs for providing information on regulatory compliance.

There are small business information and technical assistance programs, both Federal and state, in various forms throughout this country. Some of the manufacturing technology centers and other similar extension programs administered by the National Institute of Standards and Technology are providing environmental compliance assistance in addition to general technology assistance. The small business stationary source technical and environmental compliance assistance programs established under section 507 of the Clean Air Act Amendments of 1990 is also providing compliance assistance to small businesses. This section is designed to add to the currently available resources for small businesses.

Compliance assistance programs can save small businesses money, improve their environmental performance and increase their competitiveness. They can help small businesses learn about cost saving pollution prevention programs and new environmental technologies. Most importantly, they can help small business owners avoid potentially costly regulatory citations and adjudications. Comments from small business representatives in a variety of fora support the need for expansion of technical information assistance programs.

Section 215

This section directs agencies to cooperate with states to create guides that fully integrate Federal and state requirements on

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Matter set in this typeface indicates words inserted or appended, rather than spoken, by a Member of the House on the floor.

small entities. Separate guides may be created for each state, or states may modify or supplement a guide to Federal requirements. Since different types of small entities are affected by different agency regulations, or are affected in different ways, agencies should consider preparing separate guides for the various sectors of the small business community and other small entities subject to their jurisdiction. Priority in producing these guides should be given to areas of law where rules are complex and where the regulated community tend to be small entities. Agencies may contract with outside providers to produce these guides and, to the extent practicable, agencies should utilize entities with the greatest experience in developing similar guides.

#### Section 216

This section provides that the effective date for this subtitle is 90 days after the date of enactment. The requirement for agencies to publish compliance guides applies to final rules published after the effective date. Agencies have one year from the date of enactment to develop their programs for informal small entity guidance, but these programs should assist small entities with regulatory questions regardless of the date of publication of the regulation at issue.

#### Subtitle B Regulatory Enforcement Reforms

This subtitle creates a Small Business and Agriculture Regulatory Enforcement Ombudsman at the Small Business Administration to give small businesses a confidential means to comment on and rate the performance of agency enforcement personnel. It also creates Regional Small Business Regulatory Fairness Boards at the Small Business Administration to coordinate with the Ombudsman and to provide small businesses a greater opportunity to come together on a regional basis to assess the enforcement activities of the various Federal regulatory agencies.

This subtitle directs all Federal agencies that regulate small entities to develop policies or programs providing for waivers or reductions of civil penalties for violations by small entities, under appropriate circumstances.

#### Section 221

This section provides definitions for the terms as used in the subtitle. [See discussion set forth under "Section 211" above.]

#### Section 222

The Act creates a Small Business and Agriculture Regulatory Enforcement Ombudsman at the SBA to give small businesses a confidential means to comment on Federal regulatory agency enforcement activities. This might include providing toll free telephone numbers, computer access points, or mail in forms allowing businesses to comment on the enforcement activities of inspectors, auditors and other enforcement personnel. As used in this section of the bill, the term "audit" is not intended to refer to audits conducted by Inspectors General. This Ombudsman would not replace or diminish any similar ombudsman programs in other agencies.

Concerns have arisen in the Inspector General community that this Ombudsman might have new enforcement powers that would conflict with those currently held by the Inspectors General. Nothing in the Act is intended to supersede or conflict with the provisions of the Inspector General Act of 1978, as amended, or to otherwise restrict or interfere with the activities of any Office of the Inspector General.

The Ombudsman will compile the comments of small businesses and provide an annual evaluation similar to a "customer satisfac-

tion" rating for different agencies, regions, or offices. The goal of this rating system is to see whether agencies and their personnel are in fact treating small businesses more like customers than potential criminals. Agencies will be provided an opportunity to comment on the Ombudsman's draft report, as is currently the practice with reports by the General Accounting Office. The final report may include a section in which an agency can address any concerns that the Ombudsman does not choose to address.

The Act states that the Ombudsman shall "work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on site inspection, compliance assistance effort, or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by such personnel." The SBA shall publicize the existence of the Ombudsman generally to the small business community and also work cooperatively with enforcement agencies to make small businesses aware of the program at the time of agency enforcement activity. The Ombudsman shall report annually to Congress based on substantiated comments received from small business concerns and the Boards, evaluating the enforcement activities of agency personnel including a rating of the responsiveness to small business of the various regional and program offices of each regulatory agency. The report to Congress shall in part be based on the findings and recommendation of the Boards as reported by the Ombudsman to affected agencies. While this language allows for comment on the enforcement activities of agency personnel in order to identify potential abuses of the regulatory process, it does not provide a mandate for the boards and the Ombudsman to create a public performance rating of individual agency employees.

The goal of this section is to reduce the instances of excessive and abusive enforcement actions. Those actions clearly originate in the acts of individual enforcement personnel. Sometimes the problem is with the policies of an agency, and the goal of this section is also to change the culture and policies of Federal regulatory agencies. At other times, the problem is not agency policy, but individuals who violate the agency's enforcement policy. To address this issue, the legislation includes a provision to allow the Ombudsman, where appropriate, to refer serious problems with individuals to the agency's Inspector General for proper action.

The intent of the Act is to give small businesses a voice in evaluating the overall performances of agencies and agency offices in their dealings with the small business community. The purpose of the Ombudsman's reports is not to rate individual agency personnel, but to assess each program's or agency's performance as a whole. The Ombudsman's report to Congress should not single out individual agency employees by name or assign an individual evaluation or rating that might interfere with agency management and personnel policies.

The Act also creates Regional Small Business Regulatory Fairness Boards at the SBA to coordinate with the Ombudsman and to provide small businesses a greater opportunity to track and comment on agency enforcement policies and practices. These boards provide an opportunity for representatives of small businesses to come together on a regional basis to assess the enforcement activities of the various federal regulatory agencies. The boards may meet to collect information about these activities, and report and make recommendations to the Ombuds-

man about the impact of agency enforcement policies or practices on small businesses. The boards will consist of owners, operators or officers of small entities who are appointed by the Administrator of the Small Business Administration. Prior to appointing any board members, the Administrator must consult with the leadership of the House and Senate Small Business Committees. There is nothing in the bill that would exempt the boards from the Federal Advisory Committee Act, which would apply according to its terms. The Boards may accept donations of services such as the use of a regional SBA office for conducting their meetings.

#### Section 223

The Act directs all federal agencies that regulate small entities to develop policies or programs providing for waivers or reductions of civil penalties for violations by small entities in certain circumstances. This section builds on the current Executive Order on small business enforcement practices and is intended to allow agencies flexibility to tailor their specific programs to their missions and charters. Agencies should also consider the ability of a small entity to pay in determining penalty assessments under appropriate circumstances. Each agency would have discretion to condition and limit the policy or program on appropriate conditions. For purposes of illustration, these could include requiring the small entity to act in good faith, requiring that violations be discovered through participation in agency supported compliance assistance programs, or requiring that violations be corrected within a reasonable time.

An agency's policy or program could also provide for suitable exclusions. Again, for purposes of illustration, these could include circumstances where the small entity has been subject to multiple enforcement actions, the violation involves criminal conduct, or poses a grave threat to worker safety, public health, safety or the environment.

In establishing their programs, it is up to each agency to develop the boundaries of their program and the specific circumstances for providing for a waiver or reduction of penalties; but once established, an agency must implement its program in an evenhanded fashion. Agencies may distinguish among types of small entities and among classes of civil penalties. Some agencies have already established formal or informal policies or programs that would meet the requirements of this section. For example, the Environmental Protection Agency has adopted a small business enforcement policy that satisfies this section. While this legislation sets out a general requirement to establish penalty waiver and reduction programs, some agencies may be subject to other statutory requirements or limitations applicable to the agency or to a particular program. For example, this section is not intended to override, amend or affect provisions of the Occupational Safety and Health Act or the Mine Safety and Health Act that may impose specific limitations on the operation of penalty reduction or waiver programs.

#### Section 224

This section provides that this subtitle takes effect 90 days after the date of enactment.

#### Subtitle C Equal Access to Justice Act Amendments

The Equal Access to Justice Act (EAJA) provides a means for prevailing parties to recover their attorneys fees in a wide variety of civil and administrative actions between eligible parties and the government. This Act amends EAJA to create a new avenue for parties to recover a portion of their attorneys fees and costs where the government

makes excessive demands in enforcing compliance with a statutory or regulatory requirement, either in an adversary adjudication or judicial review of the agency's enforcement action, or in a civil enforcement action. While this is a significant change from current law, the legislation is not intended to result in the awarding of attorneys fees as a matter of course. Rather, the legislation is intended to assist in changing the culture among government regulators to increase the reasonableness and fairness of their enforcement practices. Past agency practice too often has been to treat small businesses like suspects. One goal of this bill is to encourage government regulatory agencies to treat small businesses as partners sharing in a common goal of informed regulatory compliance. Government enforcement attorneys often take the position that they must zealously advocate for their client, in this case a regulatory agency, to the maximum extent permitted by law, as if they were representing an individual or other private party. But in the new regulatory climate for small businesses under this legislation, government attorneys with the advantages and resources of the federal government behind them in dealing with small entities must adjust their actions accordingly and not routinely issue original penalties or other demands at the high end of the scale merely as a way of pressuring small entities to agree to quick settlements.

*Sections 231 and 232*

H.R. 3136 will allow parties which do not prevail in a case involving the government to nevertheless recover a portion of their fees and cost in certain circumstances. The test for recovering attorneys fees is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case and is unreasonable when compared to the final outcome (whether a fine, injunctive relief or damages) under the facts and circumstances of the case.

For purposes of this Act, the term "party" is amended to include a "small entity" as that term is defined in section 601(6) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This will ensure consistency of coverage between the provisions of this subtitle and those of the Small Business Act (15 U.S.C. 632 (a)). This broadening of the term "party" is intended solely for purposes of the amendments to the EAJA effected under this subtitle. Other portions of the EAJA will continue to be governed by the definition of "party" as appears in current law.

The comparison called for in the Act is all ways between a "demand" by the government for injunctive and monetary relief taken as a whole and the final outcome of the case in terms of injunctive and monetary relief taken as a whole. As used in these amendments, the term "demand" means an express written demand that leads directly to an adversary adjudication or civil action. Thus, the "demand" at issue would be the government's demand that was pending upon commencement of the adjudication or action. A written demand by the government for performance or payment qualifies under this section regardless of form; it would include, but not be limited to, a fine, penalty notice, demand letter or citation. In the case of an adversary adjudication, the demand would often be a statement of the "Definitive Penalty Amount." In the case of a civil action brought by the United States, the demand could be in the form of a demand for settlement issued prior to commencement of the litigation. In a civil action to review the determination of an administrative proceeding, the demand could be the demand that led to such proceeding. However, the term

"demand" should not be read to extend to a mere recitation of facts and law in a complaint. The bill's definition of the term "demand" expressly excludes a recitation of the maximum statutory penalty in the complaint or elsewhere when accompanied by an express demand for a lesser amount. This definition is not intended to suggest that a statement of the maximum statutory penalty somewhere other than the complaint, which is not accompanied by an express demand for a lesser amount, is per se a demand, but would depend on the circumstances.

This test should not be a simple mathematical comparison. The Committee intends for it to be applied in such a way that it identifies and corrects situations where the agency's demand is so far in excess of the true value of the case, as compared to the final outcome, and where it appears the agency's assessment or enforcement action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case.

In addition, the bill excludes awards in connection with willful violations, bad faith actions and in special circumstances that would make such an award unjust. These additional factors are intended to provide a "safety valve" to ensure that the government is not unduly deterred from advancing its case in good faith. Whether a violation is "willful" should be determined in accordance with existing judicial construction of the subject matter to which the case relates. Special circumstances are intended to include both legal and factual considerations which may make it unjust to require the public to pay attorneys fees and costs, even in situations where the ultimate award is significantly less than the amount demanded. Special circumstances could include instances where the party seeking fees engaged in a flagrant violation of the law, endangered the lives of others, or engaged in some other type of conduct that would make the award of the fees unjust. The actions covered by "bad faith" include the conduct of the party seeking fees both at the time of the underlying violation, and during the enforcement action. For example, if the party seeking fees attempted to elude government officials, cover up its conduct, or otherwise impede the government's law enforcement activities, then attorneys' fees and costs should not be awarded.

The Committee does not intend by this provision to compensate a party for fees and costs which it would have been expended even had the government demand been reasonable under the circumstances. The amount of the award which a party may recover under this section is limited to the proportion of attorneys' fees and costs at tributable to the excessive demand. Thus, for example, if the ultimate decision of the administrative law judge or the judgment of the court is twenty percent of the relevant government demand, the defendant might be entitled to eighty percent of fees and costs. The ultimate determination of the amount of fees and costs to be awarded is to be made by the administrative law judge or the court, based on the facts and circumstances of each case.

The Act also increases the maximum hourly rate for attorneys fees under the EAJA from \$75 to \$125. Agencies could avoid the possibility of paying attorneys fees by settling with the small entity prior to final judgement. The Committee anticipates that if a settlement is reached, all further claims of either party, including claims for attorneys fees, could be included as part of the settlement. The government may obtain a release specifically including attorneys fees under EAJA.

Additional language is included in the Act to ensure that the legislation did not violate of the PAYGO requirements of the Budget Act. This language requires agencies to satisfy any award of attorneys fees or expenses arising from an agency enforcement action from their discretionary appropriated funds, but does not require that an agency seek or obtain an individual line item or earmarked appropriation for these amounts.

*Section 233*

The new provisions of the EAJA apply to civil actions and adversary adjudications commenced on or after the date of enactment.

Subtitle D Regulatory Flexibility Act Amendments

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), was first enacted in 1980. Under its terms, federal agencies are directed to consider the special needs and concerns of small entities small businesses, small local governments, farmers, etc. whenever they engage in a rulemaking subject to the Administrative Procedure Act. The agencies must then prepare and publish a regulatory flexibility analysis of the impact of the proposed rule on small entities, unless the head of the agency certifies that the proposed rule will not "have a significant economic impact on a substantial number of small entities."

Under current law, there is no provision for judicial review of agency action under the RFA. This makes the agencies completely unaccountable for their failure to comply with its requirements. This current prohibition on judicial enforcement of the RFA is contrary to the general principle of administrative law, and it has long been criticized by small business owners. Many small business owners believe that agencies have given lip service at best to the RFA, and small entities have been denied legal recourse to enforce the Act's requirements. Subtitle D gives teeth to the RFA by specifically providing for judicial review of selected sections.

*Section 241*

H.R. 3136 expands the coverage of the RFA to include Internal Revenue Service interpretative rules that provide for a "collection of information" from small entities. Many IRS rulemakings involve "interpretative rules" that IRS contends need not be promulgated pursuant to section 553 of the Administrative Procedures Act. However, these interpretative rules may have significant economic effects on small entities and should be covered by the RFA. The amendment applies to those IRS interpretative rulemakings that are published in the Federal Register for notice and comment and that will be codified in the Code of Federal Regulations. This limitation is intended to exclude from the RFA other, less formal IRS publications such as revenue rulings, revenue procedures, announcements, publications or private letter rulings.

The requirement that IRS interpretative rules comply with the RFA is further limited to those involving a "collection of information." The term "collection of information" is defined in the Act to include the obtaining, causing to be obtained, soliciting of facts or opinions by an agency through a variety of means that would include the use of written report forms, schedules, or reporting or other record keeping requirements. It would also include any requirements that require the disclosure to third parties of any information. The intent of this phrase "collection of information" in the context of the RFA is to include all IRS interpretative rules of general applicability that lead to or result in small entities keeping records, filing reports or otherwise providing information to IRS or third parties.

While the term "collection of information" also is used in the Paperwork Reduction Act (44 U.S.C. 3502(4)) ("PRA"), the purpose of the term in the context of the RFA is different than the purpose of the term in the PRA. Thus, while some courts have interpreted the PRA to exempt from its requirements certain recordkeeping requirements that are explicitly required by statute, such an interpretation would be inappropriate in the context of the RFA. If a collection of information is explicitly required by a regulation that will ultimately be codified in the Code of Federal Regulations ("CFR"), the effect might be to limit the possible regulatory alternatives available to the IRS in the proposed rulemaking, but would not exempt the IRS from conducting a regulatory flexibility analysis.

Some IRS interpretative rules merely reiterate or restate the statutorily required tax liability. While a small entity's tax liability may be a burden, the RFA cannot act to supersede the statutorily required tax rate. However, most IRS interpretative rules involve some aspect of defining or establishing requirements for compliance with the CFR, or otherwise require small entities to maintain records to comply with the CFR now being covered by the RFA. One of the primary purposes of the RFA is to reduce the compliance burdens on small entities whenever possible under the statute. To accomplish this purpose, the IRS should take an expansive approach in interpreting the phrase "collection of information" when considering whether to conduct a regulatory flexibility analysis.

The courts generally are given broad discretion to formulate appropriate remedies under the facts and circumstances of each individual case. The rights of judicial review and remedial authority of the courts provided in the Act as to IRS interpretative rules should be applied in a manner consistent with the purposes of the Anti Injunction Act (26 U.S.C. 7421), which may limit remedies available in particular circumstances. The RFA, as amended by the Act, permits the court to remand a rule to an Agency for further consideration of the rule's impact on small entities. The amendment also directs the court to consider the public interest in determining whether or not to delay enforcement of a rule against small entities pending agency compliance with the court's findings. The filing of an action requesting judicial review pursuant to this section does not automatically stay the implementation of the rule. Rather, the court has discretion in determining whether enforcement of the rule shall be deferred as it relates to small entities. In the context of IRS interpretative rulemakings, this language should be read to require the court to give appropriate deference to the legitimate public interest in the assessment and collection of taxes reflected by the Anti Injunction Act. The court should not exercise its discretion more broadly than necessary under the circumstances or in a way that might encourage excessive litigation.

If an agency is required to publish an initial regulatory flexibility analysis, the agency also must publish a final regulatory flexibility analysis. In the final regulatory flexibility analysis, agencies will be required to describe the impacts of the rule on small entities and to specify the actions taken by the agency to modify the proposed rule to minimize the regulatory impact on small entities. Nothing in the bill directs the agency to choose a regulatory alternative that is not authorized by the statute granting regulatory authority. The goal of the final regulatory flexibility analysis is to demonstrate how the agency has minimized the impact on small entities consistent with the underlying statute and other applicable legal requirements.

#### Section 242

H.R. 3136 removes the current prohibition on judicial review of agency compliance with certain sections of the RFA. It allows adversely affected small entities to seek judicial review of agency compliance with the RFA within one year after final agency action, except where a provision of law requires a shorter period for challenging a final agency action. The amendment is not intended to encourage or allow spurious law suits which might hinder important governmental functions. The Act does not subject all regulations issued since the enactment of the RFA to judicial review. The one year limitation on seeking judicial review ensures that this legislation will not permit indefinite, retroactive application of judicial review.

For rules promulgated after the effective date, judicial review will be available pursuant to this Act. The procedures and standards for review to be used are those set forth in the Administrative Procedure Act at Chapter 7 of Title 5. If the court finds that a final agency action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, the court may set aside the rule or order the agency to take other corrective action. The court may also decide that the failure to comply with the RFA warrants remanding the rule to the agency or delaying the application of the rule to small entities pending completion of the court ordered corrective action. However, in some circumstances, the court may find that there is good cause to allow the rule to be enforced and to remain in effect pending the corrective action.

Judicial review of the RFA is limited to agency compliance with the requirements of sections 601, 604, 605(b), 608(b) and 610. Review under these sections is not limited to the agency's compliance with the procedural aspects of the RFA; final agency action under these sections will be subject to the normal judicial review standards of Chapter 7 of Title 5. While the Committees determined that agency compliance with sections 607 and 609(a) of the RFA is important, it did not believe that a party should be entitled to judicial review of agency compliance with those sections in the absence of a judicable claim for review of agency compliance with section 604. Therefore, under the Act, an agency's failure to comply with sections 607 or 609(a) may be reviewed only in conjunction with a challenge under section 604 of the RFA.

#### Section 243

Section 243 of the Act alters the content of the statement which an agency must publish when making a certification under section 605 of the RFA that a regulation will not impose a significant economic impact on a substantial number of small entities. Current law requires only that the agency publish a "succinct statement explaining the reasons for such certification." The Committee believes that more specific justification for its determination should be provided by the agency. Under the amendment, the agency must state its factual basis for the certification. This will provide a record upon which a court may review the agency's determination in accordance with the judicial review provisions of the Administrative Procedure Act.

#### Section 244

H.R. 3136 amends the existing requirements of section 609 of the RFA for small business participation in the rulemaking process by incorporating a modified version of S. 917, the Small Business Advocacy Act, which was introduced by Senator Domenici, to provide early input from small businesses into the

regulatory process. For proposed rules with a significant economic impact on a substantial number of small entities, EPA and OSHA would have to collect advice and recommendations from small businesses to better inform the agency's regulatory flexibility analysis on the potential impacts of the rule. The House version drops the provision of the Senate bill that would have required the panels to reconvene prior to publication of the final rule.

The agency promulgating the rule would consult with the SBA's Chief Counsel for Advocacy to identify individuals who are representative of affected small businesses. The agency would designate a senior level official to be responsible for implementing this section and chairing an interagency review panel for the rule. Before the publication of an initial regulatory flexibility analysis for a proposed EPA or OSHA rule, the SBA's Chief Counsel for Advocacy will gather information from individual representatives of small businesses and other small entities, such as small local governments, about the potential impacts of that proposed rule. This information will then be reviewed by a panel composed of members from EPA or OSHA, OIRA, and the Chief Counsel for Advocacy. The panel will then issue a report on those individuals' comments, which will become part of the rulemaking record. The review panel's report and related rulemaking information will be placed in the rulemaking record in a timely fashion so that others who are interested in the proposed rule may have an opportunity to review that information and submit their own responses for the record before the close of the agency's public comment period for the proposed rule. The legislation includes limits on the period during which the review panel conducts its review. It also creates a limited process allowing the Chief Counsel for Advocacy to waive certain requirements of the section after consultation with the Office of Information and Regulatory Affairs and small businesses.

#### Section 245

This section provides that the effective date of subtitle D is 90 days after enactment. Proposed rules published after the effective date must be accompanied by an initial regulatory flexibility analysis or a certification under section 605 of the RFA. Final rules published after the effective date must be accompanied by a final regulatory flexibility analysis or a certification under section 605 of the RFA, regardless of when the rule was first proposed. Thus judicial review shall apply to any final regulation published after the effective date regardless of when the rule was proposed. However, IRS interpretative rules proposed prior to enactment will not be subject to the amendments made in this subchapter expanding the scope of the RFA to include IRS interpretative rules. Thus, the IRS could finalize previously proposed interpretative rules according to the terms of currently applicable law, regardless of when the final interpretative rule is published.

Subtitle E Congressional review subtitle E adds a new chapter to the Administrative Procedure Act (APA), "Congressional Review of Agency Rulemaking," which is codified in the United States Code as chapter 8 of title 5. The congressional review chapter creates a special mechanism for Congress to review new rules issued by federal agencies (including modification, repeal, or reissuance of existing rules). During the review period, Congress may use expedited procedures to enact joint resolutions of disapproval to overrule the federal rulemaking actions. In the 104th Congress, four slightly different versions of this legislation passed the Senate and two different versions passed the House. Yet, no formal legislative history

document was prepared to explain the legislation or the reasons for changes in the final language negotiated between the House and Senate. This joint statement of the committees of jurisdiction on the congressional review subtitle is intended to cure this deficiency.

#### Background

As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulation is often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

This legislation establishes a government wide congressional review mechanism for most new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects. Congress may find a rule to be too burdensome, excessive, inappropriate or duplicative. Subtitle E uses the mechanism of a joint resolution of disapproval which requires passage by both houses of Congress and the President (or veto by the President and a two thirds' override by Congress) to be effective. In other words, enactment of a joint resolution of disapproval is the same as enactment of a law.

Congress has considered various proposals for reviewing rules before they take effect for almost twenty years. Use of a simple (one house), concurrent (two house), or joint (two houses plus the President) resolution are among the options that have been debated and in some cases previously implemented on a limited basis. In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court struck down as unconstitutional any procedure where executive action could be overturned by less than the full process required under the Constitution to make laws—that is, approval by both houses of Congress and presentment to the President. That narrowed Congress' options to use a joint resolution of disapproval. The one house or two house legislative veto (as procedures involving simple and concurrent resolutions were previously called), was thus voided.

Because Congress often is unable to anticipate the numerous situations to which the laws it passes must apply, Executive Branch agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change. Rules can be surprisingly different from the expectations of Congress or the public. Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules. If these concerns are sufficiently serious, Congress can stop the rule.

#### Brief procedural history of congressional review chapter

In the 104th Congress, the congressional review legislation originated as S. 348, the "Regulatory Oversight Act," which was introduced on February 2, 1995. The text of S. 348 was offered by its sponsors, Senators Don Nickles and Harry Reid, as a substitute amendment to S. 219, the "Regulatory Transition Act of 1995." As amended, S. 219 provided for a 45 day delay on the effectiveness of a major rule, and provided expedited procedures that Congress could use to pass resolutions disapproving of the rule. On March 29, 1995, the Senate passed the amended version of S. 219 by a vote of 100-0. The Senate later substituted the text of S. 219 for the text of H.R. 450, the House passed "Regulatory Transition Act of 1995." Although the House did not agree to a conference on H.R. 450 and S. 219, both Houses continued to incorporate the congressional review provisions in other legislative packages. On May 25, the Senate Governmental Affairs Committee reported out S. 343, the "Comprehensive Regulatory Reform Act of 1995," and S. 291, the "Regulatory Reform Act of 1995," both with congressional review provisions. On May 26, 1995, the Senate Judiciary Committee reported out a different version of S. 343, the "Comprehensive Regulatory Reform Act of 1995," which also included a congressional review provision. The congressional review provision in S. 343 that was debated by the Senate was quite similar to S. 219, except that the delay period in the effectiveness of a major rule was extended to 60 days and the legislation did not apply to rules issued prior to enactment. A filibuster of S. 343, unrelated to the congressional review provisions, led to the withdrawal of that bill.

The House next took up the congressional review legislation by attaching a version of it (as section 3006) to H.R. 2586, the first debt limit extension bill. The House made several changes in the legislation that was attached to H.R. 2586, including a provision that would allow the expedited procedures also to apply to resolutions disapproving of proposed rules, and provisions that would have extended the 60 day delay on the effectiveness of a major rule for any period when the House or Senate was in recess for more than three days. On November 9, 1995 both the House and Senate passed this version of the congressional review legislation as part of the first debt limit extension bill. President Clinton vetoed the bill a few days later, for reasons unrelated to the congressional review provision.

On February 29, 1996, a House version of the congressional review legislation was published in the Congressional Record as title III of H.R. 994, which was scheduled to be brought to the House floor in the coming weeks. The congressional review title was almost identical to the legislation approved by both Houses in H.R. 2586. On March 19, 1996, the Senate adopted a congressional review amendment by voice vote to S. 942, which bill passed the Senate 100-0. The congressional review legislation in S. 942 was similar to the original version of S. 219 that passed the Senate on March 29, 1995.

Soon after passage of S. 942, representatives of the relevant House and Senate committees and principal sponsors of the congressional review legislation met to craft a congressional review subtitle that was acceptable to both Houses and would be added to the debt limit bill that was scheduled to be taken up in Congress the week of March 24. The final compromise language was the result of these joint discussions and negotiations.

On March 28, 1996, the House and Senate passed title III, the "Small Business Regu-

latory Enforcement Fairness Act of 1996," as part of the second debt limit bill, H.R. 3136. There was no separate vote in either body on the congressional review subtitle or on title III of H.R. 3136. However, title III received broad support in the House and the entire bill passed in the Senate by unanimous consent. The President signed H.R. 3136 into law on March 29, 1996, exactly one year after the first congressional review bill passed the Senate.

#### Submission of rules to Congress and to GAO

Pursuant to subsection 801(a)(1)(A), a federal agency promulgating a rule must submit a copy of the rule and a brief report about it to each House of Congress and to the Comptroller General before the rule can take effect. In addition to a copy of the rule, the report shall contain a concise general statement relating to the rule, including whether it is a major rule under the chapter, and the proposed effective date of the rule. Because most rules covered by the chapter must be published in the Federal Register before they can take effect, it is not expected that the submission of the rule and the report to Congress and the Comptroller General will lead to any additional delay.

Section 808 provides the only exception to the requirement that rules must be submitted to each House of Congress and the Comptroller General before they can take effect. Subsection 808(1) excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping. Subsection 808(2) excepts certain rules that are not subject to notice and comment procedures. It provides that if the relevant agency finds "for good cause ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, [such rules] shall take effect at such time as the Federal agency promulgating the rule determines." Although rules described in section 808 shall take effect when the relevant Federal agency determines pursuant to other provisions of law, the federal agency still must submit such rules and the accompanying report to each House of Congress and to the Comptroller General as soon as practicable after promulgation. Thus, rules described in section 808 are subject to congressional review and the expedited procedures governing joint resolutions of disapproval. Moreover, the congressional review period will not begin to run until such rules and the accompanying reports are submitted to each House of Congress and the Comptroller General.

In accordance with current House and Senate rules, covered agency rules and the accompanying report must be separately addressed and transmitted to the Speaker of the House (the Capitol, Room H 209), the President of the Senate (the Capitol, Room S 212), and the Comptroller General (GAO Building, 441 G Street, N.W., Room 1139). Except for rules described in section 808, any covered rule not submitted to Congress and the Comptroller General will remain ineffective until it is submitted pursuant to subsection 801(a)(1)(A). In almost all cases, there will be sufficient time for an agency to submit notice and comment rules or other rules that must be published to these legislative officers during normal office hours. There may be a rare instance, however, when a federal agency must issue an emergency rule that is effective upon actual notice and does not meet one of the section 808 exceptions. In such a rare case, the federal agency may provide contemporaneous notice to the Speaker of the House, the President of the Senate, and the Comptroller General. These legislative officers have accommodated the receipt of similar, emergency communications in the past and will utilize the same means to

receive emergency rules and reports during non business hours. If no other means of delivery is possible, delivery of the rule and related report by telefax to the Speaker of the House, the President of the Senate, and the Comptroller General shall satisfy the requirements of subsection 801(a)(1)(A).

*Additional delay in the effectiveness of major rules*

Subsection 553(d) of the APA requires publication or service of most substantive rules at least 30 days prior to their effective date. Pursuant to subsection 801(a)(3)(A), a major rule (as defined in subsection 804(2)) shall not take effect until at least 60 calendar days after the later of the date on which the rule and accompanying information is submitted to Congress or the date on which the rule is published in the Federal Register, if it is so published. If the Congress passes a joint resolution of disapproval and the President vetoes such resolution, the delay in the effectiveness of a major rule is extended by subsection 801(a)(3)(B) until the earlier date on which either House of Congress votes and fails to override the veto or 30 session days<sup>1</sup> after the date on which the Congress receives the veto and objections from the President. By necessary implication, if the Congress passes a joint resolution of disapproval within the 60 calendar days provided in subsection 801(a)(3)(A), the delay period in the effectiveness of a major rule must be extended at least until the President acts on the joint resolution or until the time expires for the President to act. Any other result would be inconsistent with subsection 801(a)(3)(B), which extends the delay in the effectiveness of a major rule for a period of time after the President vetoes a resolution.

Of course, if Congress fails to pass a joint resolution of disapproval within the 60 day period provided by subsection 801(a)(3)(A), subsection 801(a)(3)(B) would not apply and would not further delay the effective date of the rule. Moreover, pursuant to subsection 801(a)(5), the effective date of a rule shall not be delayed by this chapter beyond the date on which either house of Congress votes to reject a joint resolution of disapproval.

Although it is not expressly provided in the congressional review chapter, it is the committees' intent that a rule may take effect if an adjournment of Congress prevents the President from returning his veto and objections within the meaning of the Constitution. Such will be the case if the President does not act on a joint resolution within 10 days (Sundays excepted) after it is presented to him, and "the Congress by their Adjournment prevent its Return" within the meaning of Article I, §7, cl. 2, or when the President affirmatively vetoes a resolution during such an adjournment. This is the logical result because Congress cannot act to override these vetoes. Congress would have to begin anew, pass a second resolution, and present it to the President in order for it to become law. It is also the committees' intent that a rule may take effect immediately if the President returns a veto and his objections to Congress but Congress adjourns its last session sine die before the expiration of time provided in subsection 801(a)(3)(B). Like the situations described immediately above, no subsequent Congress can act further on the veto, and the next Congress would have to begin anew, pass a second resolution of

disapproval, and present it to the President in order for it to become law.

*Purpose of and exceptions to the delay of major rules*

The reason for the delay in the effectiveness of a major rule beyond that provided in APA subsection 553(d) is to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule. Congress may continue to use the expedited procedures to pass resolutions of disapproval for a period of time after a major rule takes effect, but it would be preferable for Congress to act during the delay period so that fewer resources would be wasted. To increase the likelihood that Congress would act before a major rule took effect, the committees agreed on an approximately 60 day delay period in the effective date of a major rule, rather than an approximately 45 day delay period in some earlier versions of the legislation.

There are four exceptions to the required delay in the effectiveness of a major rule in the congressional review chapter. The first is in subsection 801(c), which provides that a major rule is not subject to the delay period of subsection 801(a)(3) if the President determines in an executive order that one of four specified situations exist and notifies Congress of his determination. The second is in subsection 808(1), which excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3). The third is in subsection 808(2), which excepts certain rules from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3) if the relevant agency finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This "good cause" exception in subsection 808(2) is taken from the APA and applies only to rules which are exempt from notice and comment under subsection 553(b)(B) or an analogous statute. The fourth exception is in subsection 804(2). Any rule promulgated under the Telecommunications Act of 1996 or any amendments made by that Act that otherwise could be classified as a "major rule" is exempt from that definition and from the 60 day delay in section 801(a)(3). However, such an issuance still would fall within the definition of "rule" and would be subject to the requirements of the legislation for non major rules. A determination under subsection 801(c), subsection 804(2), or section 808 shall have no effect on the procedures to enact joint resolutions of disapproval.

*A court may not stay or suspend the effectiveness of a rule beyond the period specified in section 801 simply because a resolution of disapproval is pending in Congress*

The committees discussed the relationship between the period of time that a major rule is delayed and the period of time during which Congress could use the expedited procedures in section 802 to pass a resolution of disapproval. Although it would be best for Congress to act pursuant to this chapter before a major rule goes into effect, it was recognized that Congress could not often act immediately after a rule was issued because it may be issued during a recesses of Congress, shortly before such recesses, or during other periods when Congress cannot devote the time to complete prompt legislative action. Accordingly, the committees determined that the proper public policy was to give Congress an adequate opportunity to de-

liberate and act on joint resolutions of disapproval, while ensuring that major rules could go into effect without unreasonable delay. In short, the committees decided that major rules could take effect after an approximate 60 day delay, but the period governing the expedited procedures in section 802 for review of joint resolution of disapproval would extend for a period of time beyond that.

Accordingly, courts may not stay or suspend the effectiveness of any rule beyond the periods specified in section 801 simply because a joint resolution is pending before Congress. Such action would be contrary to the many express provisions governing when different types of rules may take effect. Such court action also would be contrary to the committees' intent because it would upset an important compromise on how long a delay there should be on the effectiveness of a major rule. The final delay period was selected as a compromise between the period specified in the version that passed the Senate on March 19, 1995 and the version that passed both Houses on November 9, 1995. It is also the committees' belief that such court action would be inconsistent with the principles of (and potentially violate) the Constitution, art. I, §7, cl. 2, in that courts may not give legal effect to legislative action unless it results in the enactment of law pursuant to that Clause. See *INS v. Chadha*, 462 U.S. 919 (1983). Finally, the committees believe that a court may not predicate a stay on the basis of possible future congressional action because it would be improper for a court to rule that the movant had demonstrated a "likelihood of success on the merits," unless and until a joint resolution is enacted into law. A judicial stay prior to that time would raise serious separation of powers concerns because it would be tantamount to the court making a prediction of what Congress is likely to do and then exercising its own power in furtherance of that prediction. Indeed, the committees believe that Congress may have been reluctant to pass congressional review legislation at all if its action or inaction pursuant to this chapter would be treated differently than its action or inaction regarding any other bill or resolution.

*Time periods governing passage of joint resolutions of disapproval*

Subsection 802(a) provides that a joint resolution disapproving of a particular rule may be introduced in either House beginning on the date the rule and accompanying report are received by Congress until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress). But if Congress did not have sufficient time in a previous session to introduce or consider a resolution of disapproval, as set forth in subsection 801(d), the rule and accompanying report will be treated as if it were first received by Congress on the 15th session day in the Senate, or 15th legislative day in the House, after the start of its next session. When a rule was submitted near the end of a Congress or prior to the start of the next Congress, a joint resolution of disapproval regarding that rule may be introduced in the next Congress beginning on the 15th session day in the Senate or the 15th legislative day in the House until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during the session) regardless of whether such a resolution was introduced in the prior Congress. Of course, any joint resolution pending from the first session of a Congress, may be considered further in the next session of the same Congress.

Subsections 802(c) (d) specify special procedures that apply to the consideration of a

<sup>1</sup> In the Senate, a "session day" is a calendar day in which the Senate is in session. In the House of Representatives, the same term is normally expressed as a "legislative day." In the congressional review chapter, however, the term "session day" means both a "session day" of the Senate and a "legislative day" of the House of Representatives unless the context of the sentence or paragraph indicates otherwise.

joint resolution of disapproval in the Senate. Subsection 802(c) allows 30 Senators to petition for the discharge of resolution from a Senate committee after a specified period of time (the later of 20 calendar days after the rule is submitted to Congress or published in the Federal Register, if it is so published). Subsection 802(d) specifies procedures for the consideration of a resolution on the Senate floor. Such a resolution is highly privileged, points of order are waived, a motion to postpone consideration is not in order, the resolution is unamendable, and debate on the joint resolution and "on all debatable motions and appeals in connection therewith" (including a motion to proceed) is limited to no more than 10 hours.

Subsection 802(e) provides that the special Senate procedures specified in subsections 802(c) (d) shall not apply to the consideration of any joint resolution of disapproval of a rule after 60 session days of the Senate beginning with the later date that rule is submitted to Congress or published, if it is so published. However, if a rule and accompanying report are submitted to Congress shortly before the end of a session or during an intercession recess as described in subsection 801(d)(1), the special Senate procedures specified in subsections 802(c) (d) shall expire 60 session days after the 15th session day of the succeeding session of Congress or on the 75th session day after the succeeding session of Congress first convenes. For purposes of subsection 802(e), the term "session day" refers only to a day the Senate is in session, rather than a day both Houses are in session. However, in computing the time specified in subsection 801(d)(1), that subsection specifies that there shall be an additional period of review in the next session if either House did not have an adequate opportunity to complete action on a joint resolution. Thus, if either House of Congress did not have adequate time to consider a joint resolution in a given session (60 session days in the Senate and 60 legislative days in the House), resolutions of disapproval may be introduced or re-introduced in both Houses in the next session, and the special Senate procedures specified in subsection 802(c) (d) shall apply in the next session of the Senate.

If a joint resolution of disapproval is pending when the expedited Senate procedures specified in subsections 802(c) (d) expire, the resolution shall not die in either House but shall simply be considered pursuant to the normal rules of either House with one exception. Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.

*Effect of enactment of a joint resolution of disapproval*

Subsection 801(b)(1) provides that: "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, enacted under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproved rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution of disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The committees intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

*Limitation on judicial review of congressional or administrative actions*

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter." Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings," U.S. Const., art. I, §5, cl. 2, which includes being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determination or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval," or by implication, when it has not

yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the committees expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).

*Enactment of a joint resolution of disapproval for a rule that was already in effect*

Subsection 801(f) provides that: "Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect." Application of this subsection should be consistent with existing judicial precedents on rules that are deemed never to have taken effect.

*Agency information required to be submitted to GAO*

Pursuant to subsection 801(a)(1)(B), the federal agency promulgating the rule shall submit to the Comptroller General (and make available to each House) (i) a complete copy of the cost benefit analysis of the rule, if any, (ii) the agency's actions related to the Regulatory Flexibility Act, (iii) the agency's actions related to the Unfunded Mandates Reform Act, and (iv) "any other relevant information or requirements under any other Act and any relevant Executive Orders." Pursuant to subsection 801(a)(1)(B), this information must be submitted to the Comptroller General on the day the agency submits the rule to Congress and to GAO.

The committees intend information supplied in conformity with subsection 801(a)(1)(B)(iv) to encompass both agency specific statutes and government wide statutes and executive orders that impose requirements relevant to each rule. Examples of agency specific statutes include information regarding compliance with the law that authorized the rule and any agency specific procedural requirements, such as section 9 of the Consumer Product Safety Act, as amended, 15 U.S.C. §2054 (procedures for consumer product safety rules); section 6 of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §655 (promulgation of standards); section 307(d) of the Clean Air Act, as amended, 42 U.S.C. §7607(d) (promulgation of rules); and section 501 of the Department of Energy Organization Act, 42 U.S.C. §7191 (procedure for issuance of rules, regulations, and orders). Examples of government wide statutes include other chapters of the Administrative Procedure Act, 5 U.S.C. §§551 559 and 701 706; and the Paperwork Reduction Act, as amended, 44 U.S.C. §§3501 3520.

Examples of relevant executive orders include E.O. No. 12866 (Sept. 30, 1993) (Regulatory Planning and Review); E.O. No. 12606 (Sept. 2, 1987) (Family Considerations in Policy Formulation and Implementation); E.O. No. 12612 (Oct. 26, 1987) (Federalism Considerations in Policy Formulation and Implementation); E.O. No. 12630 (Mar. 15, 1988) (Government Actions and Interference with Constitutionally Protected Property Rights); E.O. No. 12875 (Oct. 26, 1993) (Enhancing the Intergovernmental Partnership); E.O. No. 12778 (Oct. 23, 1991) (Civil Justice Reform); E.O. No. 12988 (Feb. 5, 1996) (Civil Justice Reform) (effective May 5, 1996).

*GAO reports on major rules*

Fifteen days after the federal agency submits a copy of a major rule and report to each House of Congress and the Comptroller General, the Comptroller General shall prepare and provide a report on the major rule



to the committees of jurisdiction in each House. Subsection 801(a)(2)(B) requires agencies to cooperate with the Comptroller General in providing information relevant to the Comptroller General's reports on major rules. Given the 15 day deadline for these reports, it is essential that the agencies' initial submission to the General Accounting Office (GAO) contain all of the information necessary for GAO to conduct its analysis. At a minimum, the agency's submission must include the information required of all rules pursuant to 801(a)(1)(B). Whenever possible, OMB should work with GAO to alert GAO when a major rule is likely to be issued and to provide as much advance information to GAO as possible on such proposed major rule. In particular, OMB should attempt to provide the complete cost benefit analysis on a major rule, if any, well in advance of the final rule's promulgation.

It also is essential for the agencies to present this information in a format that will facilitate the GAO's analysis. The committees expect that GAO and OMB will work together to develop, to the greatest extent practicable, standard formats for agency submissions. OMB also should ensure that agencies follow such formats. The committees also expect that agencies will provide expeditiously any additional information that GAO may require for a thorough report. The committees do not intend the Comptroller General's reports to be delayed beyond the 15 day deadline due to lack of information or resources unless the committees of jurisdiction indicate a different preference. Of course, the Comptroller General may supplement his initial report at any time with any additional information, on its own, or at the request of the relevant committees of jurisdiction.

*Covered agencies and entities in the executive branch*

The committees intend this chapter to be comprehensive in the agencies and entities that are subject to it. The term "Federal agency" in subsection 804(1) was taken from 5 U.S.C. §551(l). That definition includes "each authority of the Government" that is not expressly excluded by subsection 551(1)(A) (H). With those few exceptions, the objective was to cover each and every government entity, whether it is a department, independent agency, independent establishment, or government corporation. This is because Congress is enacting the congressional review chapter, in large part, as an exercise of its oversight and legislative responsibility. Regardless of the justification for excluding or granting independence to some entities from the coverage of other laws, that justification does not apply to this chapter, where Congress has an interest in exercising its constitutional oversight and legislative responsibility as broadly as possible over all agencies and entities within its legislative jurisdiction.

In some instances, federal entities and agencies issue rules that are not subject to the traditional 5 U.S.C. §553(c) rulemaking process. However, the committees intend the congressional review chapter to cover every agency, authority, or entity covered by subsection 551(l) that establishes policies affecting any segment of the general public. Where it was necessary, a few special exceptions were provided, such as the exclusion for the monetary policy activities of the Board of Governors of the Federal Reserve System, rules of particular applicability, and rules of agency management and personnel. Where it was not necessary, no exemption was provided and no exemption should be inferred from other law. This is made clear by the provision of section 806 which states that the Act applies notwithstanding any other provision of law.

*Definition of a "major rule"*

The definition of a "major rule" in subsection 804(2) is taken from President Reagan's Executive Order 12291. Although President Clinton's Executive Order 12866 contains a definition of a "significant regulatory action" that is seemingly as broad, several of the Administration's significant rule determinations under Executive Order 12866 have been called into question. The committees intend the term "major rule" in this chapter to be broadly construed, including the non numerical factors contained in the subsections 804(2) (B) and (C).

Pursuant to subsection 804(2), the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget (the Administrator) must make the major rule determination. The committees believe that centralizing this function in the Administrator will lead to consistency across agency lines. Moreover, from 1981-93, OIRA staff interpreted and applied the same major rule definition under E.O. 12291. Thus, the Administrator should rely on guidance documents prepared by OIRA during that time and previous major rule determinations from that Office as a guide in applying the statutory definition to new rules.

Certain covered agencies, including many "independent agencies," include their proposed rules in the Unified Regulatory Agenda published by OMB but do not normally submit their final rules to OMB for review. Moreover, interpretative rules and general statements of policy are not normally submitted to OMB for review. Nevertheless, it is the Administrator that must make the major rule determination under this chapter whenever a new rule is issued. The Administrator may request the recommendation of any agency covered by this chapter on whether a proposed rule is a major rule within the meaning of subsection 804(2), but the Administrator is responsible for the ultimate determination. Thus, all agencies or entities covered by this chapter will have to coordinate their rulemaking activity with OIRA so that the Administrator may make the final, major rule determination.

*Scope of rules covered*

The committees intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review. The term "rule" in subsection 804(3) begins with the definition of a "rule" in subsection 551(4) and excludes three subsets of rules that are modeled on APA sections 551 and 553. This definition of a rule does not turn on whether a given agency must normally comply with the notice and comment provisions of the APA, or whether the rule at issue is subject to any other notice and comment procedures. The definition of "rule" in subsection 551(4) covers a wide spectrum of activities. First, there is formal rulemaking under section 553 that must adhere to procedures of sections 556 and 557 of title 5. Second, there is informal rulemaking, which must comply with the notice and comment requirements of subsection 553(c). Third, there are rules subject to the requirements of subsection 552(a)(1) and (2). This third category of rules normally either must be published in the Federal Register before they can adversely affect a person, or must be indexed and made available for inspection and copying or purchase before they can be used as precedent by an agency against a non agency party. Documents covered by subsection 552(a) include statements of general policy, interpretations of general applicability, and administrative staff manuals and instructions to staff that affect a member of the public. Fourth, there is a body of materials that fall within the APA definition of "rule" and are the product of

agency process, but that meet none of the procedural specifications of the first three classes. These include guidance documents and the like. For purposes of this section, the term rule also includes any rule, rule change, or rule interpretation by a self regulatory organization that is approved by a Federal agency. Accordingly, all "rules" are covered under this chapter, whether issued at the agency's initiative or in response to a petition, unless they are expressly excluded by subsections 804(3)(A) (C). The committees are concerned that some agencies have attempted to circumvent notice and comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The committees admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.

The definition of a rule in subsection 551(4) covers most agency statements of general applicability and future effect. Subsection 804(3)(A) excludes "any rule of particular applicability, including a rule that approves or prescribes rates, wages, prices, services, or allowances therefore, corporate and financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing" from the definition of a rule. Many agencies, including the Treasury, Justice, and Commerce Departments, issue letter rulings or other opinion letters to individuals who request a specific ruling on the facts of their situation. These letter rulings are sometimes published and relied upon by other people in similar situations, but the agency is not bound by the earlier rulings even on facts that are analogous. Thus, such letter rulings or opinion letters do not fall within the definition of a rule within the meaning of subsection 804(3).

The different types of rules issued pursuant to the internal revenue laws of the United States are good examples of the distinction between rules of general and particular applicability. IRS private letter rulings and Customs Service letter rulings are classic examples of rules of particular applicability, notwithstanding that they may be cited as authority in transactions involving the same circumstances. Examples of substantive and interpretative rules of general applicability will include most temporary and final Treasury regulations issued pursuant to notice and comment rulemaking procedures, and most revenue rulings, revenue procedures, IRS notices, and IRS announcements. It does not matter that these later types of rules are issued without notice and comment rulemaking procedures or that they are accorded less deference by the courts than notice and comment rules. In fact, revenue rulings have been described by the courts as the "classic example of an interpretative rul[e]" within the meaning of the APA. See *Wing v. Commissioner*, 81 T.C. 17, 26 (1983). The test is whether such rules announce a general statement of policy or an interpretation of law of general applicability.

Most rules or other agency actions that grant an approval, license, registration, or similar authority to a particular person or particular entities, or grant or recognize an exemption or relieve a restriction for a particular person or particular entities, or permit new or improved applications of technology for a particular person or particular entities, or allow the manufacture, distribution, sale, or use of a substance or product are exempted under subsection 804(3)(A) from the definition of a rule. This is probably the largest category of agency actions excluded from the definition of a rule. Examples include import and export licenses, individual

rate and tariff approvals, wetlands permits, grazing permits, plant licenses or permits, drug and medical device approvals, new source review permits, hunting and fishing take limits, incidental take permits and habitat conservation plans, broadcast licenses, and product approvals, including approvals that set forth the conditions under which a product may be distributed.

Subsection 804(3)(B) excludes "any rule relating to agency management or personnel" from the definition of a rule. Pursuant to subsection 804(3)(C), however, a "rule of agency organization, procedure, or practice," is only excluded if it "does not substantially affect the rights or obligations of non agency parties." The committees' intent in these subsections is to exclude matters of purely internal agency management and organization, but to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights or obligations of non agency parties.

GRAND OPENING OF MAIN  
BRANCH, SAN FRANCISCO LIBRARY

HON. TOM LANTOS

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 18, 1996

Mr. LANTOS. Mr. Speaker, I rise today, on the 90th anniversary of the devastating 1906 San Francisco earthquake, to celebrate with the city of San Francisco a monumental achievement of community cooperation and commitment. I invite my colleagues to join me in conveying our congratulations and admiration to the people of San Francisco who have committed their precious resources to the construction of the new main branch of the San Francisco Library, a beautiful and highly functional testament to the love that San Franciscans have for their city and for books and education. It is a love that has found its voice through the coordinated efforts of corporations, foundations, and individuals.

A library should reflect the pride, the culture, and the values of the diverse communities that it serves. The San Francisco main library will undoubtedly be successful in reaching this goal. The library will be home to special centers dedicated to the history and interests of African Americans, Chinese Americans, Filipino Americans, Latino Americans, and gays and lesbians. The library will be designed to serve the specialized needs of the business man as well as the immigrant newcomer. It will become home to the diverse communities that make San Francisco unique among metropolitan areas of the world. It will also become a home, most importantly, that serves to unite.

The new San Francisco main library represents an opportunity to preserve and disperse the knowledge of times long since passed. The book serves as man's most lasting testament and the library serves as our version of a time machine into the past, the present and the future. This library, built upon the remains of the old City Hall destroyed 90 years ago today, is a befitting tribute to the immortality of thought. Buildings will come as they will most definitely pass, but the books of this new library and the information that they hold are eternal and serve as an indelible

foundation that cannot be erased by the passage of time.

The expanded areas of the new main library will provide space for numerous hidden treasures that no longer will be hidden. The people of San Francisco will have the opportunity to reacquire themselves with numerous literary treasures previously locked behind the dusty racks of unsightly storage rooms.

Although the new San Francisco main library serves as a portal into our past, it also serves to propel us into the future. It is an edifice designed to stoke the imagination by providing access to the numerous streams of information that characterize our society today. The technologically designed library will provide hundreds of public computer terminals to locate materials on line, 14 multimedia stations, as well as access to data bases and the Information Superhighway. It will provide education and access for those previously unable to enter the "computer revolution." The library will provide vital access and communication links so that it can truly serve as a resource for the city and for other libraries and educational institutions throughout the region. The new library will serve as an outstanding model for libraries around the world to emulate.

Like an educational institution, the San Francisco Library will be a repository of human knowledge, organized and made accessible for writers, students, lifelong learners and leisure readers. It will serve to compliment and expand San Francisco's existing civic buildings City Hall, Davies Symphony Hall, Brooks Hall, and the War Memorial and Performing Arts Center. The library serves as a symbiotic commitment between the city of San Francisco and its people. In 1988, when electorates across the country refused to support new bond issues, the people of San Francisco committed themselves to a \$109.5 million bond measure to build the new main library building and to strengthen existing branch libraries. Eight years later those voices are still clearly heard and they resonate with the dedication of this unique library, built by a community to advance themselves and their neighbors.

Mr. Speaker, on this day, when we celebrate the opening of the new main branch of the San Francisco Library, I ask my colleagues to join me in congratulating the community of San Francisco for their admirable accomplishments and outstanding determination.

TRIBUTE TO DAVID J. WHEELER

HON. WES COOLEY

OF OREGON

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 18, 1996

Mr. COOLEY of Oregon. Mr. Speaker, on February 1, 1996, the President signed H.R. 2061, a bill to designate the Federal building in Baker City, OR in honor of the late David J. Wheeler. As the congressional representative for Baker City, and as the sponsor of H.R. 2061, I recently returned to Baker City for the building dedication ceremony. Mr. Wheeler, a Forest Service employee, was a model father and an active citizen. In honor of Mr. Wheeler, I would like to submit, for the record, my speech at the dedication ceremony.

Thank you for inviting me here today. It has been an honor to sponsor the congress

sional bill to designate this building in memory of David Wheeler. I did not have the privilege of knowing Mr. Wheeler myself, but from my discussions with Mayor Griffith and from researching his accomplishments I've come to know what a fine man he was. I know that Mr. Wheeler was a true community leader, and I know that the community is that much poorer for his passing. With or without this dedication, his spirit will remain within the Baker City community.

Mayor Griffith, I have brought a copy of H.R. 2061 the law to honor David Wheeler. The bill has been signed by the President of the United States, by the Speaker of the House, and by the President of the Senate. Hopefully, this bill will find a suitable place within the new David J. Wheeler Federal Building.

I'd like to offer my deepest sympathy to the Wheeler family, and to everyone here who knew him. And, I'd like to offer a few words from Henry Wadsworth Longfellow who once commented on the passing away of great men. His words I think describe Mr. Wheeler well:

If a star were quenched on high,  
For ages would its light,  
Still traveling down from the sky,  
Shine on our mortal sight.

So when a great man dies,  
For years beyond our ken,  
The light he leaves behind him lies  
Upon the paths of men."

So too with David Wheeler. His light will shine on the paths of us all particularly of his family for the rest of our days.

THE MINIMUM WAGE

HON. LEE H. HAMILTON

OF INDIANA

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 18, 1996

Mr. HAMILTON. Mr. Speaker, I would like to insert my Washington Report for Wednesday, April 17, 1996, into the CONGRESSIONAL RECORD.

RAISING THE MINIMUM WAGE

Rewarding work is a fundamental American value. There are many ways to achieve that goal, including deficit reduction to boost the economy, opening markets abroad to our products, improving education and skills training, and investing in technology and infrastructure. Increasing wages must be a central objective of government policies.

The economy is improving. It has in recent years reduced the unemployment rate of 5.6%, cut the budget deficit nearly in half, and spurred the creation of 8.4 million additional jobs. Real hourly earning has now begun to rise modestly, and the tax cut in 1993 for 15 million working families helped spur economic growth.

But much work needs to be done. We must build on the successes of the last few years, and address the key challenges facing our economy, including the problem of stagnant wages. This problem will not be solved overnight, but one action we can take immediately, and which I support, is to raise the minimum wage.

RAISING THE MINIMUM WAGE

The minimum wage was established in 1938 in an attempt to assist the working poor, usually non union workers with few skills and little bargaining power. The wage has been increased 17 times, from 25 cents per hour in 1938 to \$4.25 per hour in 1991. Currently some 5 million people work for wages at or below \$4.25 per hour, and most of them are adults rather than teenagers.

percent since 1960. In 1982, the tax share stood at 19.8 percent of GDP. By 1989, the tax share had declined slightly to 19.2 percent of GDP—much the same as it had been back in 1960.

In short, whether we have raised or lowered tax rates, the percentage of GDP in taxes has hovered at 19 percent. The issue, of course, is 19 percent of what? Is it 19 percent of a large and growing GDP, or of an anemic, stagnant one?

Here again, the real numbers destroy the myths and tell the true story. According to the federal Office of Management and Budget (OMB), in 1982, the year the tax cuts were implemented, tax receipts stood at \$617.8 billion. By 1989, tax receipts had increased to \$990.7 billion.

How did this come about? By lowering taxes, the government freed up capital and entrepreneurial spirit, creating jobs and wealth and expanding the size of the economic pie. From 1982 to 1989, GDP increased from \$3.1 to \$5.4 trillion. Therefore, while tax revenues as a share of GDP remained relatively constant at just over 19 percent, the dollar amount of tax revenues collected by the federal government rose dramatically, because the economy grew dramatically.

Tax cuts will increase economic growth and thereby reduce the deficit. The question is, by how much? Economist Bruce Bartlett, a former assistant secretary of the Treasury, notes that the OMB figures show that increases in real GDP significantly reduce the deficit. By the year 2000, the deficit would be diminished by more than \$150 billion if the economy grew just 1 percent faster than currently projected over the next five years.

Of course, Bartlett says, there is no guarantee that the Republican tax cuts will achieve a 1 percent faster growth rate. But there is no doubt they will increase growth above what would otherwise have occurred. If growth is just 0.4 percent faster per year it would be enough to make the tax cut deficit neutral, based on the OMB data.

Thus, a dispassionate review of the figures shatters the myth that the Reagan tax cuts increased the deficit. The problem was not our revenue stream, either in terms of the percentage of GDP paid in taxes, or in real tax dollars received. The problem was too much spending. From 1982 to 1989, government spending rose from \$745 billion to \$1.14 trillion, a 53 percent jump.

Tax cuts in the 1990s can help produce the same type of economic growth they generated in the 1980s. This growth in turn will help us reduce the deficit. All we must do is reduce the rate at which government spending grows. CBO figures show that, if we simply hold the rate at which federal spending grows to a little over 2 percent per year, we can cut taxes by \$189 billion and balance the budget by the year 2002.

MYTH NO. 3

But this reference to tax cuts brings us face to face with another myth, namely, that tax cuts disproportionately benefit the rich at the expense of the poor.

The myth explodes, however, on contact with IRS data conclusively show that lower income tax rates actually increase the percentage of the total tax bill paid by the rich while decreasing the tax burden on the poor.

There is an amazing historical correlation between decreases in the marginal tax rate and increases in the share of revenue paid by the top 1 percent of income earners. And, of course, along with this increase in taxes paid by the most wealthy went a decrease in the taxes paid by the lower 50 percent of income earners.

For example, by 1988, the share of income taxes paid by the bottom 50 percent of taxpayers assumed just 5.7 percent of the in-

come tax burden. Also in 1988, the average tax payment of the top 1 percent of taxpayers amounted to 27.5 percent of the total.

On the other hand, after the budget summit deal of 1990, the top marginal tax rate was increased from 28 to 31 percent. This produced a 3.5 percent decrease in the revenue share paid by the top 1 percent—down to 24.6 percent of the total. That is, as marginal rates decreased, the rich paid more, and as marginal rates increased the rich paid less, leaving more for the middle class and poor to pay.

Clearly, then, if we want to help the middle class, the last thing we should do is increase marginal tax rates. Such an increase will lead to lower productivity, lower tax revenues from the rich, and an increased tax burden for those who are not rich.

The answer to our dilemma, then, is not to keep our current high taxes but to cut taxes while bringing spending under control.

By bringing together disparate kinds of tax cuts, from a \$500 per child tax credit to a reduction in the capital gains tax rate that will strengthen small businesses and entrepreneurs, we can increase the well being and productivity of America's middle class families. These tax cuts would allow middle class families to build a better future for their children.

The proposed \$500 per child tax credit directly benefits the middle class. The Joint Committee on Taxation has reported that three quarters of the benefits from this tax cut will go to people with incomes less than \$75,000.

A capital gains tax cut will accrue to the middle class as well. IRS data show that 55 percent of taxpayers who report long term capital gains earn \$50,000 or less. And 75 percent of them earn \$75,000 or less.

These tax cuts will bring real relief to America's middle class. They will help the economy and thereby help lower the deficit.

The 1980s teach us—if only we will examine their lessons properly—that a vibrant economy, spurred by low taxes and fewer regulations, will produce balanced budgets and economic well being for the middle class. We need only trust Americans to spend and invest their own money as they see fit. We need only trust the people, rather than government, to make their own decisions about how to take care of their families and improve their lot in life. ●

CONGRESSIONAL REVIEW TITLE OF H.R. 3136

● Mr. NICKLES. Mr. President, I will submit for the RECORD a statement which serves to provide a detailed explanation and a legislative history for the congressional review title of H.R. 3136, the Small Business Regulatory Enforcement Fairness Act of 1996. H.R. 3136 was passed by the Senate on March 28, 1996, and was signed by the President the next day. Ironically, the President signed the legislation on the first anniversary of the passage of S. 219, the forerunner to the congressional review title. Last year, S. 219, passed the Senate by a vote of 100 to 0 on March 29, 1995. Because title III of H.R. 3136 was the product of negotiation with the Senate and did not go through the committee process, no other expression of its legislative history exists other than the joint statement made by Senator REID and myself immediately before passage of H.R. 3136 on March 28. I am submitting a joint

statement to be printed in the RECORD on behalf of myself, as the sponsor of the S. 219, Senator REID, the prime co-sponsor of S. 219, and Senator STEVENS, the chairman of the Committee on Governmental Affairs. This joint statement is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms. The same statement has been submitted today in the House by the chairmen of the committees of jurisdiction over the congressional review legislation.

The joint statement follows:

STATEMENT FOR THE RECORD BY SENATORS NICKLES, REID, AND STEVENS

SUBTITLE E CONGRESSIONAL REVIEW SUBTITLE

Subtitle E adds a new chapter to the Administrative Procedure Act (APA), "Congressional Review of Agency Rulemaking," which is codified in the United States Code as chapter 8 of title 5. The congressional review chapter creates a special mechanism for Congress to review new rules issued by federal agencies (including modification, repeal, or reissuance of existing rules). During the review period, Congress may use expedited procedures to enact joint resolutions of disapproval to overrule the federal rulemaking actions. In the 104th Congress, four slightly different versions of this legislation passed the Senate and two different versions passed the House. Yet, no formal legislative history document was prepared to explain the legislation or the reasons for changes in the final language negotiated between the House and Senate. This joint statement of the authors on the congressional review subtitle is intended to cure this deficiency.

Background

As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulations are often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

This legislation establishes a government wide congressional review mechanism for most new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects. Congress may find a rule to be too burdensome, excessive, inappropriate or duplicative. Subtitle E uses the mechanism of a joint resolution of disapproval which requires passage by both houses of Congress and the President (or veto by the President and a two thirds' override by Congress) to be effective. In other words, enactment of a joint resolution of disapproval is the same as enactment of a law.

Congress has considered various proposals for reviewing rules before they take effect

for almost twenty years. Use of a simple (one house), concurrent (two house), or joint (two houses plus the President) resolution are among the options that have been debated and in some cases previously implemented on a limited basis. In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court struck down as unconstitutional any procedure where executive action could be overturned by less than the full process required under the Constitution to make laws that is, approval by both houses of Congress and presentment to the President. That narrowed Congress' options to use a joint resolution of disapproval. The one house or two house legislative veto (as procedures involving simple and concurrent resolutions were previously called), was thus voided.

Because Congress often is unable to anticipate the numerous situations to which the laws it passes must apply, Executive Branch agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change. Rules can be surprisingly different from the expectations of Congress or the public. Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules. If these concerns are sufficiently serious, Congress can stop the rule.

*Brief procedural history of congressional review chapter*

In the 104th Congress, the congressional review legislation originated as S. 348, the "Regulatory Oversight Act," which was introduced on February 2, 1995. The text of S. 348 was offered by its sponsors, Senators Don Nickles and Harry Reid, as a substitute amendment to S. 219, the "Regulatory Transition Act of 1995." As amended, S. 219 provided for a 45 day delay on the effectiveness of a major rule, and provided expedited procedures that Congress could use to pass resolutions disapproving of the rule. On March 29, 1995, the Senate passed the amended version of S. 219 by a vote of 100-0. The Senate later substituted the text of S. 219 for the text of H.R. 450, the House passed "Regulatory Transition Act of 1995." Although the House did not agree to a conference on H.R. 450 and S. 219, both Houses continued to incorporate the congressional review provisions in other legislative packages. On May 25, the Senate Governmental Affairs Committee reported out S. 343, the "Comprehensive Regulatory Reform Act of 1995," and S. 291, the "Regulatory Reform Act of 1995," both with congressional review provisions. On May 26, 1995, the Senate Judiciary Committee reported out a different version of S. 343, the "Comprehensive Regulatory Reform Act of 1995," which also included a congressional review provision. The congressional review provision in S. 343 that was debated by the Senate was quite similar to S. 219, except that the delay period in the effectiveness of a major rule was extended to 60 days and the legislation did not apply to rules issued prior to enactment. A filibuster of S. 343, unrelated to the congressional review provisions, led to the withdrawal of that bill.

The House next took up the congressional review legislation by attaching a version of it (as section 3006) to H.R. 2586, the first debt limit extension bill. The House made several changes in the legislation that was attached to H.R. 2586, including a provision that would allow the expedited procedures also to apply to resolutions disapproving of proposed rules, and provisions that would extend the 60 day delay on the effectiveness of a major rule for any period when the House or Senate was in recess for more than

three days. On November 9, 1995 both the House and Senate passed this version of the congressional review legislation as part of the first debt limit extension bill. President Clinton vetoed the bill a few days later, for reasons unrelated to the congressional review provision.

On February 29, 1996, a House version of the congressional review legislation was published in the Congressional Record as title III of H.R. 994, which was scheduled to be brought to the House floor in the coming weeks. The congressional review title was almost identical to the legislation approved by both Houses in H.R. 2586. On March 19, 1996, the Senate adopted a congressional review amendment by voice vote to S. 942, which bill passed the Senate 100-0. The congressional review legislation in S. 942 was similar to the original version of S. 219 that passed the Senate on March 29, 1995.

Soon after passage of S. 942, representatives of the relevant House and Senate committees and principal sponsors of the congressional review legislation met to craft a congressional review subtitle that was acceptable to both Houses and would be added to the debt limit bill that was scheduled to be taken up in Congress the week of March 24. The final compromise language was the result of these joint discussions and negotiations.

On March 28, 1996, the House and Senate passed title III, the "Small Business Regulatory Enforcement Fairness Act of 1996," as part of the second debt limit bill, H.R. 3136. There was no separate vote in either body on the congressional review subtitle or on title III of H.R. 3136. However, title III received broad support in the House and the entire bill passed in the Senate by unanimous consent. The President signed H.R. 3136 into law on March 29, 1996, exactly one year after the first congressional review bill passed the Senate.

*Submission of rules to Congress and to GAO*

Pursuant to subsection 801(a)(1)(A), a federal agency promulgating a rule must submit a copy of the rule and a brief report about it to each House of Congress and to the Comptroller General before the rule can take effect. In addition to a copy of the rule, the report shall contain a concise general statement relating to the rule, including whether it is a major rule under the chapter, and the proposed effective date of the rule. Because most rules covered by the chapter must be published in the Federal Register before they can take effect, it is not expected that the submission of the rule and the report to Congress and the Comptroller General will lead to any additional delay.

Section 808 provides the only exception to the requirement that rules must be submitted to each House of Congress and the Comptroller General before they can take effect. Subsection 808(1) excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping. Subsection 808(2) excepts certain rules that are not subject to notice and comment procedures. It provides that if the relevant agency finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, [such rules] shall take effect at such time as the Federal agency promulgating the rule determines." Although rules described in section 808 shall take effect when the relevant Federal agency determines pursuant to other provisions of law, the federal agency still must submit such rules and the accompanying report to each House of Congress and to the Comptroller General as soon as practicable after promulgation. Thus, rules described in section 808 are subject to congressional review and the expedited proce-

dures governing joint resolutions of disapproval. Moreover, the congressional review period will not begin to run until such rules and the accompanying reports are submitted to each House of Congress and the Comptroller General.

In accordance with current House and Senate rules, covered agency rules and the accompanying report must be separately addressed and transmitted to the Speaker of the House (the Capitol, Room H 209), the President of the Senate (the Capitol, Room S 212), and the Comptroller General (GAO Building, 441 G Street, N.W., Room 1139). Except for rules described in section 808, any covered rule not submitted to Congress and the Comptroller General will remain ineffective until it is submitted pursuant to subsection 801(a)(1)(A). In almost all cases, there will be sufficient time for an agency to submit notice and comment rules or other rules, that must be published to these legislative officers during normal office hours. There may be rare instance, however, when a federal agency must issue an emergency rule that is effective upon actual notice and does not meet one of the section 808 exceptions. In such a rare case, the federal agency may provide contemporaneous notice to the Speaker of the House, the President of the Senate, and the Comptroller General. These legislative officers have accommodated the receipt of similar, emergency communications in the past and will utilize the same means to receive emergency rules and reports during nonbusiness hours. If no other means of delivery is possible, delivery of the rule and related report by telefax to the Speaker of the House, the President of the Senate, and the Comptroller General shall satisfy the requirements of subsection 801(a)(1)(A).

*Addition of delay in the effectiveness of major rules*

Subsection 553(d) of the APA requires publication or service of most substantive rules at least 30 days prior to their effective date. Pursuant to subsection 801(a)(3)(A), a major rule (as defined in subsection 804(2)) shall not take effect until at least 60 calendar days after the later of the date on which the rule and accompanying information is submitted to Congress or the date on which the rule is published in the Federal Register, if it is so published. If the Congress passes a joint resolution of disapproval and the President vetoes such resolution, the delay in the effectiveness of a major rule is extended by subsection 801(a)(3)(B) until the earlier date on which either House of Congress votes and fails to override the veto or 30 session days<sup>1</sup> after the date on which the Congress receives the veto and objections from the President. By necessary implication, if the Congress passes a joint resolution of disapproval within the 60 calendar days provided in subsection 801(a)(3)(A), the delay period in the effectiveness of a major rule must be extended at least until the President acts on the joint resolution or until the time expires for the President to act. Any other result would be inconsistent with subsection 801(a)(3)(B), which extends the delay in the effectiveness of a major rule for a period of time after the President vetoes a resolution.

Of course, if Congress fails to pass a joint resolution of disapproval within the 60 day period provided by subsection 801(a)(3)(A), subsection 801(a)(3)(B) would not apply and

<sup>1</sup>In the Senate, a "session day" is a calendar day in which the Senate is in session. In the House of Representatives, the same term is normally expressed as a "legislative day." In the congressional review chapter, however, the term "session day" means both a "session day" of the Senate and a "legislative day" of the House of Representatives unless the context of the sentence or paragraph indicates otherwise.

would not further delay the effective date of the rule. Moreover, pursuant to subsection 801(a)(5), the effective date of a rule shall not be delayed by this chapter beyond the date on which either house of Congress votes to reject a joint resolution of disapproval.

Although it is not expressly provided in the congressional review chapter, it is the authors' intent that a rule may take effect if an adjournment of Congress prevents the President from returning his veto and objections within the meaning of the Constitution. Such will be the case if the President does not act on a joint resolution within 10 days (Sundays excepted) after it is presented to him, and "the Congress by their Adjournment prevent its Return" within the meaning of Article I, §7, cl. 2, or when the President affirmatively vetoes a resolution during such an adjournment. This is the logical result because Congress cannot act to override these vetoes. Congress would have to begin anew, pass a second resolution, and present it to the President in order for it to become law. It is also the authors' intent that a rule may take effect immediately if the President returns a veto and his objections to Congress but Congress adjourns its last session sine die before the expiration of time provided in subsection 801(a)(3)(B). Like the situations described immediately above, no subsequent Congress can act further on the veto, and the next Congress would have to begin anew, pass a second resolution of disapproval, and present it to the President in order for it to become law.

*Purpose of and exceptions to the delay of major rules*

The reason for the delay in the effective ness of a major rule beyond that provided in APA subsection 553(d) is to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule. Congress may continue to use the expedited procedures to pass resolutions of disapproval for a period of time after a major rule takes effect, but it would be preferable for Congress to act during the delay period so that fewer resources would be wasted. To increase the likelihood that Congress would act before a major rule took effect, the authors agreed on an approximately 60 day delay period in the effective date of a major rule, rather than an approximately 45 day delay period in some earlier versions of the legislation.

There are four exceptions to the required delay in the effectiveness of a major rule in the congressional review chapter. The first is in subsection 801(c), which provides that a major rule is not subject to the delay period of subsection 801(a)(3) if the President determines in an executive order that one of four specified situations exist and notifies Congress of his determination. The second is in subsection 808(1), which excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3). The third is in subsection 808(2), which excepts certain rules from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3) if the relevant agency finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This "good cause" exception in subsection 808(2) is taken from the APA and applies only to rules which are exempt from notice and comment under subsection 553(b)(B) or an analogous statute. The fourth exception is in subsection 804(2). Any rule promulgated

under the Telecommunications Act of 1996 or any amendments made by that Act that otherwise could be classified as a "major rule" is exempt from that definition and from the 60 day delay in section 801(a)(3). However, such an issuance still would fall within the definition of "rule" and would be subject to the requirements of the legislation for non major rules. A determination under subsection 801(c), subsection 804(2), or section 808 shall have no effect on the procedures to enact joint resolutions of disapproval.

*A court may not stay or suspend the effectiveness of a rule beyond the period specified in section 801 simply because a resolution of disapproval is pending in Congress*

The authors discussed the relationship between the period of time that a major rule is delayed and the period of time during which Congress could use the expedited procedures in section 802 to pass a resolution of disapproval. Although it would be best for Congress to act pursuant to this chapter before a major rule goes into effect, it was recognized that Congress could not often act immediately after a rule was issued because it may be issued during a recesses of Congress, shortly before such recesses, or during other periods when Congress cannot devote the time to complete prompt legislative action. Accordingly, the authors determined that the proper public policy was to give Congress an adequate opportunity to deliberate and act on joint resolutions of disapproval, while ensuring that major rules could go into effect without unreasonable delay. In short, the authors decided that major rules could take effect after an approximate 60 day delay, but the period governing the expedited procedures in section 802 for review of joint resolution of disapproval would extend for a period of time beyond that.

Accordingly, courts may not stay or suspend the effectiveness of any rule beyond the periods specified in section 801 simply because a joint resolution is pending before Congress. Such action would be contrary to the many express provisions governing when different types of rules may take effect. Such court action also would be contrary to the authors' intent because it would upset an important compromise on how long a delay there should be on the effectiveness of a major rule. The final delay period was selected as a compromise between the period specified in the version that passed the Senate on March 19, 1995, and the version that passed both Houses on November 9, 1995. It is also the authors' belief that such court action would be inconsistent with the principles of (and potentially violate) the Constitution, art. I, §7, cl. 2, in that courts may not give legal effect to legislative action unless it results in the enactment of law pursuant to Clause. See *INS v. Chadha*, 462 U.S. 919 (1983). Finally, the authors intend that a court may not predicate a stay on the basis of possible future congressional action because it would be improper for a court to rule that the movant had demonstrated a "likelihood of success on the merits," unless and until a joint resolution is enacted into law. A judicial stay prior to that time would raise serious separation of powers concerns because it would be tantamount to the court making a prediction of what Congress is likely to do and then exercising its own power in furtherance of that prediction. Indeed, the authors intend that Congress may have been reluctant to pass congressional review legislation at all if its action or inaction pursuant to this chapter would be treated differently than its action or inaction regarding any other bill or resolution.

*Time periods governing passage of joint resolutions of disapproval*

Subsection 802(a) provides that a joint resolution disapproving of a particular rule may

be introduced in either House beginning on the date of the rule and accompanying report are received by Congress until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress). But if Congress did not have sufficient time in a previous session to introduce or consider a resolution of disapproval, as set forth in subsection 801(d), the rule and accompanying report will be treated as if it were first received by Congress on the 15th session day in the Senate, or 15th legislative day in the House, after the start of its next session. When a rule was submitted near the end of a Congress or prior to the start of the next Congress, a joint resolution of disapproval regarding that rule may be introduced in the next Congress beginning on the 15th session day in the Senate or the 15th legislative day in the House until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during the session) regardless of whether such a resolution was introduced in the prior Congress. Of course, any joint resolution pending from the first session of a Congress, may be considered further in the next session of the same Congress.

Subsections 802(c) (d) specify special procedures that apply to the consideration of a joint resolution of disapproval in the Senate. Subsection 803(c) allows 30 Senators to petition for the discharge of resolution from a Senate committee after a specified period of time (the later of 20 calendar days after the rule is submitted to Congress or published in the Federal Register, if it is so published). Subsection 802(d) specifies procedures for the consideration of a resolution on the Senate floor. Such a resolution is highly privileged, points or order are waived, a motion to postpone consideration is not in order, the resolution is unamendable, and debate on the joint resolution and "on all debatable motions and appeals in connection therewith" (including a motion to proceed) is limited to no more than 10 hours.

Subsection 802(e) provides that the special Senate procedures specified in subsections 802(c) (d) shall not apply to the consideration of any joint resolution of disapproval of a rule after 60 session days of the Senate beginning with the later date that rule is submitted to Congress or published, if it is so published. However, if a rule and accompanying report are submitted to Congress shortly before the end of a session or during an intercession recess as described in subsection 801(d)(1), the special Senate procedures specified in subsections 802(c) (d) shall expire 60 session days after the 15th session day of the succeeding session of Congress or on the 75th session day after the succeeding session of Congress first convenes. For purposes of subsection 802(e), the term "session day" refers only to a day the Senate is in session, rather than a day both Houses are in session. However, in computing the time specified in subsection 801(d)(1), that subsection specifies that there shall be an additional period of review in the next session if either House did not have an adequate opportunity to complete action on a joint resolution. Thus, if either House of Congress did not have adequate time to consider a joint resolution in a given session (60 session days in the Senate and 60 legislative days in the House), resolutions of disapproval may be introduced or re introduced in both Houses in the next session, and the special Senate procedures specified in subsection 802(c) (d) shall apply in the next session of the Senate.

If a joint resolution of disapproval is pending when the expedited Senate procedures specified in subsections 802(c) (d) expire, the resolution shall not die in either House but shall simply be considered pursuant to the

normal rules of either House with one exception. Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.

*Effect of enactment of a joint resolution of disapproval*

Subsection 801(b)(1) provides that: "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproved rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

*Limitation on judicial review of congressional or administrative actions*

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter." Thus, the major rule determinations made by the Administrator of

the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings," U.S. Const., art. I, §5, cl. 2, which includes being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determination or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval," or by implication, when it has not yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).

*Enactment of a joint resolution of disapproval for a rule that was already in effect*

Subsection 801(f) provides that: "Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect." Application of this subsection should be consistent with existing judicial precedents on rules that are deemed never to have taken effect.

*Agency information required to be submitted to GAO*

Pursuant to subsection 801(a)(1)(B), the federal agency promulgating the rule shall submit to the Comptroller General (and make available to each House) (i) a complete copy of the cost benefit analysis of the rule, if any, (ii) the agency's actions related to the Regulatory Flexibility Act, (iii) the agency's actions related to the Unfunded Mandates Reform Act, and (iv) "any other relevant information or requirements under any other Act and any relevant Executive Orders." Pursuant to subsection 801(a)(1)(B), this information must be submitted to the Comptroller General on the day the agency submits the rule to Congress and to GAO.

The authors intend information supplied in conformity with subsection 801(a)(1)(B)(iv) to encompass both agency specific statutes and government wide statutes and executive orders that impose requirements relevant to each rule. Examples of agency specific statutes include information regarding compliance with the law that authorized the rule and any agency specific procedural requirements, such as section 9 of the Consumer Product Safety Act, as amended, 15 U.S.C. §2054 (procedures for consumer product safety rules); section 6 of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §655 (promulgation of standards); section 307(d) of the Clean Air Act, as amended,

42 U.S.C. §7607(d) (promulgation of rules); and section 501 of the Department of Energy Organization Act, 42 U.S.C. §7191 (procedure for issuance of rules, regulations, and orders). Examples of government wide statutes include other chapters of the Administrative Procedure Act, 5 U.S.C. §§551 559 and 701 706; and the Paperwork Reduction Act, as amended, 44 U.S.C. §§3501 3520.

Examples of relevant executive orders include E.O. No. 12866 (Sept. 30, 1993) (Regulatory Planning and Review); E.O. No. 12606 (Sept. 2, 1987) (Family Considerations in Policy Formulation and Implementation); E.O. No. 12612 (Oct. 26, 1987) (Federalism Considerations in Policy Formulation and Implementation); E.O. No. 12630 (Mar. 15, 1988) (Government Actions and Interference with Constitutionally Protected Property Rights); E.O. No. 23875 (Oct. 26, 1993) (Enhancing the Intergovernmental Partnership); E.O. No. 12778 (Oct. 23, 1991) (Civil Justice Reform); E.O. No. 12988 (Feb. 5, 1996) (Civil Justice Reform) (effective May 5, 1996).

*GAO reports on major rules*

Fifteen days after the federal agency submits a copy of a major rule and report to each House of Congress and the Comptroller General, the Comptroller General shall prepare and provide a report on the major rule to the committee of jurisdiction in each House. Subsection 801(a)(2)(B) requires agencies to cooperate with the Comptroller General in providing information relevant to the Comptroller General's reports on major rules. Given the 15 day deadline for these reports, it is essential that the agencies' initial submission to the General Accounting Office (GAO) contain all of the information necessary for GAO to conduct its analysis. At a minimum, the agency's submission must include the information required of all rules pursuant to 801(a)(1)(B). Whenever possible, OMB should work with GAO to alert GAO when a major rule is likely to be issued and to provide as much advance information to GAO as possible on such proposed major rule. In particular, OMB should attempt to provide the complete cost benefit analysis on a major rule, if any, well in advance of the final rule's promulgation.

It also is essential for the agencies to present this information in a format that will facilitate the GAO's analysis. The authors expect that GAO and OMB will work together to develop, to the greatest extent practicable, standard formats for agency submissions. OMB also should ensure that agencies follow such formats. The authors also expect that agencies will provide expeditiously any additional information that GAO may require for a thorough report. The authors do not intend the Comptroller General's reports to be delayed beyond the 15 day deadline due to lack of information or resources unless the committees of jurisdiction indicate a different preference. Of course, the Comptroller General may supplement his initial report at any time with any additional information, on its own, or at the request of the relevant committees or jurisdiction.

*Covered agencies and entities in the executive branch*

The authors intend this chapter to be comprehensive in the agencies and entities that are subject to it. The term "Federal agency" in subsection 804(1) was taken from 5 U.S.C. §551(1). That definition includes "each authority of the Government" that is not expressly excluded by subsection 551(1)(A) (H). With those few exceptions, the objective was to cover each and every government entity, whether it is a department, independent agency, independent establishment, or government corporation. This is because Congress is enacting the congressional review

chapter, in large part, as an exercise of its oversight and legislative responsibility. Regardless of the justification for excluding or granting independence to some entities from the coverage of other laws, that justification does not apply to this chapter, where Congress has an interest in exercising its constitutional oversight and legislative responsibility as broadly as possible over all agencies and entities within its legislative jurisdiction.

In some instances, federal entities and agencies issue rules that are not subject to the traditional 5 U.S.C. §553(c) rulemaking process. However, the authors intend the congressional review chapter to cover every agency, authority, or entity covered by subsection 551(1) that establishes policies affecting any segment of the general public. Where it was necessary, a few special exceptions were provided, such as the exclusion for the monetary policy activities of the Board of Governors of the Federal Reserve System, rules of particular applicability, and rules of agency management and personnel. Where it was not necessary, no exemption was provided and no exemption should be inferred from other law. This is made clear by the provision of section 806 which states that the Act applies notwithstanding any other provision of law.

#### *Definition of a "major rule"*

The definition of a "major rule" in subsection 804(2) is taken from President Reagan's Executive Order 12291. Although President Clinton's Executive Order 12866 contains a definition of a "significant regulatory action" that is seemingly as broad, several of the Administration's significant rule determinations under Executive Order 12866 have been called into question. The authors intend the term "major rule" in this chapter to be broadly construed, including the non-numerical factors contained in the subsections 804(2)(B) and (C).

Pursuant to subsection 804(2), the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget (the Administrator) must make the major rule determination. The authors intend that centralizing this function in the Administrator will lead to consistency across agency lines. Moreover, from 1981 93 OIRA staff interpreted and applied the same major rule definition under E.O. 12291. Thus, the Administrator should rely on guidance documents prepared by OIRA during that time and previous major rule determinations from that Office as a guide in applying the statutory definition to new rules.

Certain covered agencies, including many "independent agencies," include their proposed rules in the Unified Regulatory Agenda published by OMB but do not normally submit their final rules to OMB for review. Moreover, interpretative rules and general statements of policy are not normally submitted to OMB for review. Nevertheless, it is the Administrator that must make the major rule determination under this chapter whenever a new rule is issued. The Administrator may request the recommendation of any agency covered by this chapter on whether a proposed rule is a major rule within the meaning of subsection 804(2), but the Administrator is responsible for the ultimate determination. Thus, all agencies or entities covered by this chapter will have to coordinate their rulemaking activity with OIRA so that the Administrator may make the final major rule determination.

#### *Scope of rules covered*

The authors intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review. The term "rule" in subsection 804(3) begins with the definition of a

"rule" in subsection 551(4) and excludes three subsets of rules that are modeled on APA sections 551 and 553. This definition of a rule does not turn on whether a given agency must normally comply with the notice and comment provisions of the APA, or whether the rule at issue is subject to any other notice and comment procedures. The definition of "rule" in subsection 551(4) covers a wide spectrum of activities. First, there is formal rulemaking under section 553 that must adhere to procedures of sections 556 and 557 of title 5. Second, there is informal rulemaking, which must comply with the notice and comment requirements of subsection 553(c). Third, there are rules subject to the requirements of subsection 552(a)(1) and (2). This third category of rules normally either must be published in the Federal Register before they can adversely affect a person, or must be indexed and made available for inspection and copying or purchase before they can be used as precedent by an agency against a non-agency party. Documents covered by subsection 552(a) include statements of general policy, interpretations of general applicability, and administrative staff manuals and instructions to staff that affect a member of the public. Fourth, there is a body of materials that fall within the APA definition of "rule" and are the product of agency process, but that meet none of the procedural specifications of the first three classes. These include guidance documents and the like. For purposes of this section, the term rule also includes any rule, rule change, or rule interpretation by a self-regulatory organization that is approved by a Federal agency. Accordingly, all "rules" are covered under this chapter, whether issued at the agency's initiative or in response to a petition, unless they are expressly excluded by subsections 804(3)(A) (C). The authors are concerned that some agencies have attempted to circumvent notice and comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The authors admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.

The definition of a rule in subsection 551(4) covers most agency statements of general applicability and future effect. Subsection 804(3)(A) excludes "any rule of particular applicability, including a rule that approves or prescribes rates, wages, prices, services, or allowances therefore, corporate and financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing" from the definition of a rule. Many agencies, including the Treasury, Justice, and Commerce Departments, issue letter rulings or other opinion letters to individuals who request a specific ruling on the facts of their situation. These letter rulings are sometimes published and relied upon by other people in similar situations, but the agency is not bound by the earlier rulings even on facts that are analogous. Thus, such letter rulings or opinion letters do not fall within the definition of a rule within the meaning of subsection 804(3).

The different types of rules issued pursuant to the internal revenue laws of the United States are good examples of the distinction between rules of general and particular applicability. IRS private letter rulings and Customs Service letter rulings are classic examples of rules of particular applicability, notwithstanding that they may be cited as authority in transactions involving the same circumstances. Examples of substantive and interpretative rules of general applicability will include most temporary and final Treas-

ury regulations issued pursuant to notice and comment rulemaking procedures, and most revenue rulings, revenue procedures, IRS notices, and IRS announcements. It does not matter that these later types of rules are issued without notice and comments rulemaking procedures or that they are accorded less deference by the courts than notice and comment rules. In fact, revenue rulings have been described by the courts as the "classic example of an interpretative rule[e]" within the meaning of the APA. See *Wing v. Commissioner*, 81 T.C. 17, 26 (1983). The test is whether such rules announce a general statement of policy or an interpretation of law of general applicability.

Most rules or other agency actions that grant an approval, license, registration, or similar authority to a particular person or particular entities, or grant or recognize an exemption or relieve a restriction for a particular person or particular entities, or permit new or improved applications of technology for a particular person or particular entities, or allow the manufacture, distribution, sale, or use of a substance or product are exempted under subsection 804(3)(A) from the definition of a rule. This is probably the largest category of agency actions excluded from the definition of a rule. Examples include import and export licenses, individual rate and tariff approvals, wetlands permits, grazing permits, plant licenses or permits, drug and medical device approvals, new source review permits, hunting and fishing take limits, incidental take permits and habitat conservation plans, broadcast licenses, and product approvals, including approvals that set forth the conditions under which a product may be distributed.

Subsection 804(3)(B) excludes "any rule relating to agency management or personnel" from the definition of a rule. Pursuant to subsection 804(3)(C), however, a "rule of agency organization, procedure, or practice," is only excluded if it "does not substantially affect the rights or obligations of non-agency parties." The authors' intent in these subsections is to exclude matters of purely internal agency management and organization, but to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights or obligations of non-agency parties.●

#### 10TH ANNIVERSARY OF CHERNOBYL

● Mr. LEVIN. Mr. President, on April 26, 1986, reactor number 4 at the V.I. Lenin Atomic Power Plant in Chernobyl near Kiev, Ukraine exploded. The explosion released a cloud of radioactive steam into the atmosphere reported to contain about 200 times more radio activity than was released at Hiroshima and Nagasaki.

The explosion took an enormous toll on the people directly exposed to the radiation emitted from the plant. Shortly after the explosion, Soviet officials admitted to 31 deaths among reactor operators and the team attempting to contain the damage. Thousands of workers were eventually exposed at the site.

However, children have been the first among the general population to suffer from the effects of the explosion at Chernobyl. Children are most susceptible to the radioactive iodine emitted from Chernobyl because of their active

**Montanans for Multiple Use v. Barbouletos**, 568 F.3d 225, 229 (D.C. Cir. 2009): when confronted with a claim that an agency action should be invalidated based on the agency's failure to comply with the submission requirements of the CRA, found that "the language in § 805 is unequivocal and precludes review of this claim...."

**Via Christi Reg'l Med. Ctr. V. Leavitt**, 509 F.3d 1259, 1271 n. 11 (10<sup>th</sup> Cir. 2007): "[t]he Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms."

The 5th Circuit affirmed, without discussion of the CRA, a district court opinion that concluded "the language could not be plainer" and that the alleged failure to comply with the CRA "is not subject to review by this [c]ourt." **Tex. Savings and Cmty Bankers Assoc. v. Fed. Hous. Fin. Bd.**, 1998 U.S. Dist. LEXIS 13470, 27 (W.D. Tex. 1998), *aff'd* **Tex. Savings & Cmty Bankers Assoc. v. Fed. Hous. Fin. Bd.**, 201 F.3d 551 (5th Cir. 2000); *see also* **United States v. Calson**, 2013 U.S. Dist. LEXIS 130893 (D. Minn. 2013); **United States v. Ameren Mo.**, 2012 U.S. Dist. LEXIS 95065 (E.D. Mo. 2012); **Forsyth Mem'l Hosp. v. Sebelius**, 667 F.Supp. 2d 143, 150 (D.D.C. 2009); **New York v. Am. Elec. Power Serv. Corp.**, 2006 U.S. Dist. LEXIS 32829 (S.D. Ohio 2006).

*But see* **United States v. S. Ind. Gas & Elec. Comp.**, 2002 U.S. Dist. LEXIS 20936 (S.D. Ind. 2002).



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[Con Rec E571 Hyde Remarks 4-19-96.pdf](#)  
[Con Rec S3683 Nickles Remarks 4-18-96.pdf](#)  
[Judicial Citations CRA 3-15-17.docx](#)

Mary Grace: thanks again for your time on Wednesday. We wanted to share the following information that was requested during the meeting.

- The joint statements read into the record in 1996 in lieu of legislative history for the Congressional Review Act.
- A list of the judicial opinions referenced Wednesday.
- The 2011 law review article we referenced yesterday, entitled "A Cost Benefit Interpretation of the 'Substantially Similar' Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E Word (Ergonomics) Again?"
  - Note: these commentators cite the joint statement and conclude that "[a]lthough the text of the CRA significantly limits judicial review of a congressional veto (or failure to veto), the statute does *not* prohibit judicial review for noncompliance with the substantial similarity clause of a rule promulgated after a congressional veto." (P. 732). Note also that the authors' interpretation of the joint statement does not necessarily comport with judicial interpretation of the judicial limitation provision as they suggest that the limitation applies only to congressional action under the CRA.

Please let us know if you need anything else.

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percent since 1960. In 1982, the tax share stood at 19.8 percent of GDP. By 1989, the tax share had declined slightly to 19.2 percent of GDP—much the same as it had been back in 1960.

In short, whether we have raised or lowered tax rates, the percentage of GDP in taxes has hovered at 19 percent. The issue, of course, is 19 percent of what? Is it 19 percent of a large and growing GDP, or of an anemic, stagnant one?

Here again, the real numbers destroy the myths and tell the true story. According to the federal Office of Management and Budget (OMB), in 1982, the year the tax cuts were implemented, tax receipts stood at \$617.8 billion. By 1989, tax receipts had increased to \$990.7 billion.

How did this come about? By lowering taxes, the government freed up capital and entrepreneurial spirit, creating jobs and wealth and expanding the size of the economic pie. From 1982 to 1989, GDP increased from \$3.1 to \$5.4 trillion. Therefore, while tax revenues as a share of GDP remained relatively constant at just over 19 percent, the dollar amount of tax revenues collected by the federal government rose dramatically, because the economy grew dramatically.

Tax cuts will increase economic growth and thereby reduce the deficit. The question is, by how much? Economist Bruce Bartlett, a former assistant secretary of the Treasury, notes that the OMB figures show that increases in real GDP significantly reduce the deficit. By the year 2000, the deficit would be diminished by more than \$150 billion if the economy grew just 1 percent faster than currently projected over the next five years.

Of course, Bartlett says, there is no guarantee that the Republican tax cuts will achieve a 1 percent faster growth rate. But there is no doubt they will increase growth above what would otherwise have occurred. If growth is just 0.4 percent faster per year it would be enough to make the tax cut deficit neutral, based on the OMB data.

Thus, a dispassionate review of the figures shatters the myth that the Reagan tax cuts increased the deficit. The problem was not our revenue stream, either in terms of the percentage of GDP paid in taxes, or in real tax dollars received. The problem was too much spending. From 1982 to 1989, government spending rose from \$745 billion to \$1.14 trillion, a 53 percent jump.

Tax cuts in the 1990s can help produce the same type of economic growth they generated in the 1980s. This growth in turn will help us reduce the deficit. All we must do is reduce the rate at which government spending grows. CBO figures show that, if we simply hold the rate at which federal spending grows to a little over 2 percent per year, we can cut taxes by \$189 billion and balance the budget by the year 2002.

MYTH NO. 3

But this reference to tax cuts brings us face to face with another myth, namely, that tax cuts disproportionately benefit the rich at the expense of the poor.

The myth explodes, however, on contact with IRS data conclusively show that lower income tax rates actually increase the percentage of the total tax bill paid by the rich while decreasing the tax burden on the poor.

There is an amazing historical correlation between decreases in the marginal tax rate and increases in the share of revenue paid by the top 1 percent of income earners. And, of course, along with this increase in taxes paid by the most wealthy went a decrease in the taxes paid by the lower 50 percent of income earners.

For example, by 1988, the share of income taxes paid by the bottom 50 percent of taxpayers assumed just 5.7 percent of the in-

come tax burden. Also in 1988, the average tax payment of the top 1 percent of taxpayers amounted to 27.5 percent of the total.

On the other hand, after the budget summit deal of 1990, the top marginal tax rate was increased from 28 to 31 percent. This produced a 3.5 percent decrease in the revenue share paid by the top 1 percent—down to 24.6 percent of the total. That is, as marginal rates decreased, the rich paid more, and as marginal rates increased the rich paid less, leaving more for the middle class and poor to pay.

Clearly, then, if we want to help the middle class, the last thing we should do is increase marginal tax rates. Such an increase will lead to lower productivity, lower tax revenues from the rich, and an increased tax burden for those who are not rich.

The answer to our dilemma, then, is not to keep our current high taxes but to cut taxes while bringing spending under control.

By bringing together disparate kinds of tax cuts, from a \$500 per child tax credit to a reduction in the capital gains tax rate that will strengthen small businesses and entrepreneurs, we can increase the well being and productivity of America's middle class families. These tax cuts would allow middle class families to build a better future for their children.

The proposed \$500 per child tax credit directly benefits the middle class. The Joint Committee on Taxation has reported that three quarters of the benefits from this tax cut will go to people with incomes less than \$75,000.

A capital gains tax cut will accrue to the middle class as well. IRS data show that 55 percent of taxpayers who report long term capital gains earn \$50,000 or less. And 75 percent of them earn \$75,000 or less.

These tax cuts will bring real relief to America's middle class. They will help the economy and thereby help lower the deficit.

The 1980s teach us—if only we will examine their lessons properly—that a vibrant economy, spurred by low taxes and fewer regulations, will produce balanced budgets and economic well being for the middle class. We need only trust Americans to spend and invest their own money as they see fit. We need only trust the people, rather than government, to make their own decisions about how to take care of their families and improve their lot in life. ●

CONGRESSIONAL REVIEW TITLE OF H.R. 3136

● Mr. NICKLES. Mr. President, I will submit for the RECORD a statement which serves to provide a detailed explanation and a legislative history for the congressional review title of H.R. 3136, the Small Business Regulatory Enforcement Fairness Act of 1996. H.R. 3136 was passed by the Senate on March 28, 1996, and was signed by the President the next day. Ironically, the President signed the legislation on the first anniversary of the passage of S. 219, the forerunner to the congressional review title. Last year, S. 219, passed the Senate by a vote of 100 to 0 on March 29, 1995. Because title III of H.R. 3136 was the product of negotiation with the Senate and did not go through the committee process, no other expression of its legislative history exists other than the joint statement made by Senator REID and myself immediately before passage of H.R. 3136 on March 28. I am submitting a joint

statement to be printed in the RECORD on behalf of myself, as the sponsor of the S. 219, Senator REID, the prime co-sponsor of S. 219, and Senator STEVENS, the chairman of the Committee on Governmental Affairs. This joint statement is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms. The same statement has been submitted today in the House by the chairmen of the committees of jurisdiction over the congressional review legislation.

The joint statement follows:

STATEMENT FOR THE RECORD BY SENATORS NICKLES, REID, AND STEVENS

SUBTITLE E CONGRESSIONAL REVIEW SUBTITLE

Subtitle E adds a new chapter to the Administrative Procedure Act (APA), "Congressional Review of Agency Rulemaking," which is codified in the United States Code as chapter 8 of title 5. The congressional review chapter creates a special mechanism for Congress to review new rules issued by federal agencies (including modification, repeal, or reissuance of existing rules). During the review period, Congress may use expedited procedures to enact joint resolutions of disapproval to overrule the federal rulemaking actions. In the 104th Congress, four slightly different versions of this legislation passed the Senate and two different versions passed the House. Yet, no formal legislative history document was prepared to explain the legislation or the reasons for changes in the final language negotiated between the House and Senate. This joint statement of the authors on the congressional review subtitle is intended to cure this deficiency.

Background

As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulations are often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

This legislation establishes a government wide congressional review mechanism for most new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects. Congress may find a rule to be too burdensome, excessive, inappropriate or duplicative. Subtitle E uses the mechanism of a joint resolution of disapproval which requires passage by both houses of Congress and the President (or veto by the President and a two thirds' override by Congress) to be effective. In other words, enactment of a joint resolution of disapproval is the same as enactment of a law.

Congress has considered various proposals for reviewing rules before they take effect

for almost twenty years. Use of a simple (one house), concurrent (two house), or joint (two houses plus the President) resolution are among the options that have been debated and in some cases previously implemented on a limited basis. In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court struck down as unconstitutional any procedure where executive action could be overturned by less than the full process required under the Constitution to make laws that is, approval by both houses of Congress and presentment to the President. That narrowed Congress' options to use a joint resolution of disapproval. The one house or two house legislative veto (as procedures involving simple and concurrent resolutions were previously called), was thus voided.

Because Congress often is unable to anticipate the numerous situations to which the laws it passes must apply, Executive Branch agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change. Rules can be surprisingly different from the expectations of Congress or the public. Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules. If these concerns are sufficiently serious, Congress can stop the rule.

*Brief procedural history of congressional review chapter*

In the 104th Congress, the congressional review legislation originated as S. 348, the "Regulatory Oversight Act," which was introduced on February 2, 1995. The text of S. 348 was offered by its sponsors, Senators Don Nickles and Harry Reid, as a substitute amendment to S. 219, the "Regulatory Transition Act of 1995." As amended, S. 219 provided for a 45 day delay on the effectiveness of a major rule, and provided expedited procedures that Congress could use to pass resolutions disapproving of the rule. On March 29, 1995, the Senate passed the amended version of S. 219 by a vote of 100-0. The Senate later substituted the text of S. 219 for the text of H.R. 450, the House passed "Regulatory Transition Act of 1995." Although the House did not agree to a conference on H.R. 450 and S. 219, both Houses continued to incorporate the congressional review provisions in other legislative packages. On May 25, the Senate Governmental Affairs Committee reported out S. 343, the "Comprehensive Regulatory Reform Act of 1995," and S. 291, the "Regulatory Reform Act of 1995," both with congressional review provisions. On May 26, 1995, the Senate Judiciary Committee reported out a different version of S. 343, the "Comprehensive Regulatory Reform Act of 1995," which also included a congressional review provision. The congressional review provision in S. 343 that was debated by the Senate was quite similar to S. 219, except that the delay period in the effectiveness of a major rule was extended to 60 days and the legislation did not apply to rules issued prior to enactment. A filibuster of S. 343, unrelated to the congressional review provisions, led to the withdrawal of that bill.

The House next took up the congressional review legislation by attaching a version of it (as section 3006) to H.R. 2586, the first debt limit extension bill. The House made several changes in the legislation that was attached to H.R. 2586, including a provision that would allow the expedited procedures also to apply to resolutions disapproving of proposed rules, and provisions that would extend the 60 day delay on the effectiveness of a major rule for any period when the House or Senate was in recess for more than

three days. On November 9, 1995 both the House and Senate passed this version of the congressional review legislation as part of the first debt limit extension bill. President Clinton vetoed the bill a few days later, for reasons unrelated to the congressional review provision.

On February 29, 1996, a House version of the congressional review legislation was published in the Congressional Record as title III of H.R. 994, which was scheduled to be brought to the House floor in the coming weeks. The congressional review title was almost identical to the legislation approved by both Houses in H.R. 2586. On March 19, 1996, the Senate adopted a congressional review amendment by voice vote to S. 942, which bill passed the Senate 100-0. The congressional review legislation in S. 942 was similar to the original version of S. 219 that passed the Senate on March 29, 1995.

Soon after passage of S. 942, representatives of the relevant House and Senate committees and principal sponsors of the congressional review legislation met to craft a congressional review subtitle that was acceptable to both Houses and would be added to the debt limit bill that was scheduled to be taken up in Congress the week of March 24. The final compromise language was the result of these joint discussions and negotiations.

On March 28, 1996, the House and Senate passed title III, the "Small Business Regulatory Enforcement Fairness Act of 1996," as part of the second debt limit bill, H.R. 3136. There was no separate vote in either body on the congressional review subtitle or on title III of H.R. 3136. However, title III received broad support in the House and the entire bill passed in the Senate by unanimous consent. The President signed H.R. 3136 into law on March 29, 1996, exactly one year after the first congressional review bill passed the Senate.

*Submission of rules to Congress and to GAO*

Pursuant to subsection 801(a)(1)(A), a federal agency promulgating a rule must submit a copy of the rule and a brief report about it to each House of Congress and to the Comptroller General before the rule can take effect. In addition to a copy of the rule, the report shall contain a concise general statement relating to the rule, including whether it is a major rule under the chapter, and the proposed effective date of the rule. Because most rules covered by the chapter must be published in the Federal Register before they can take effect, it is not expected that the submission of the rule and the report to Congress and the Comptroller General will lead to any additional delay.

Section 808 provides the only exception to the requirement that rules must be submitted to each House of Congress and the Comptroller General before they can take effect. Subsection 808(1) excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping. Subsection 808(2) excepts certain rules that are not subject to notice and comment procedures. It provides that if the relevant agency finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, [such rules] shall take effect at such time as the Federal agency promulgating the rule determines." Although rules described in section 808 shall take effect when the relevant Federal agency determines pursuant to other provisions of law, the federal agency still must submit such rules and the accompanying report to each House of Congress and to the Comptroller General as soon as practicable after promulgation. Thus, rules described in section 808 are subject to congressional review and the expedited proce-

dures governing joint resolutions of disapproval. Moreover, the congressional review period will not begin to run until such rules and the accompanying reports are submitted to each House of Congress and the Comptroller General.

In accordance with current House and Senate rules, covered agency rules and the accompanying report must be separately addressed and transmitted to the Speaker of the House (the Capitol, Room H 209), the President of the Senate (the Capitol, Room S 212), and the Comptroller General (GAO Building, 441 G Street, N.W., Room 1139). Except for rules described in section 808, any covered rule not submitted to Congress and the Comptroller General will remain ineffective until it is submitted pursuant to subsection 801(a)(1)(A). In almost all cases, there will be sufficient time for an agency to submit notice and comment rules or other rules, that must be published to these legislative officers during normal office hours. There may be rare instance, however, when a federal agency must issue an emergency rule that is effective upon actual notice and does not meet one of the section 808 exceptions. In such a rare case, the federal agency may provide contemporaneous notice to the Speaker of the House, the President of the Senate, and the Comptroller General. These legislative officers have accommodated the receipt of similar, emergency communications in the past and will utilize the same means to receive emergency rules and reports during nonbusiness hours. If no other means of delivery is possible, delivery of the rule and related report by telefax to the Speaker of the House, the President of the Senate, and the Comptroller General shall satisfy the requirements of subsection 801(a)(1)(A).

*Addition of delay in the effectiveness of major rules*

Subsection 553(d) of the APA requires publication or service of most substantive rules at least 30 days prior to their effective date. Pursuant to subsection 801(a)(3)(A), a major rule (as defined in subsection 804(2)) shall not take effect until at least 60 calendar days after the later of the date on which the rule and accompanying information is submitted to Congress or the date on which the rule is published in the Federal Register, if it is so published. If the Congress passes a joint resolution of disapproval and the President vetoes such resolution, the delay in the effectiveness of a major rule is extended by subsection 801(a)(3)(B) until the earlier date on which either House of Congress votes and fails to override the veto or 30 session days<sup>1</sup> after the date on which the Congress receives the veto and objections from the President. By necessary implication, if the Congress passes a joint resolution of disapproval within the 60 calendar days provided in subsection 801(a)(3)(A), the delay period in the effectiveness of a major rule must be extended at least until the President acts on the joint resolution or until the time expires for the President to act. Any other result would be inconsistent with subsection 801(a)(3)(B), which extends the delay in the effectiveness of a major rule for a period of time after the President vetoes a resolution.

Of course, if Congress fails to pass a joint resolution of disapproval within the 60 day period provided by subsection 801(a)(3)(A), subsection 801(a)(3)(B) would not apply and

<sup>1</sup>In the Senate, a "session day" is a calendar day in which the Senate is in session. In the House of Representatives, the same term is normally expressed as a "legislative day." In the congressional review chapter, however, the term "session day" means both a "session day" of the Senate and a "legislative day" of the House of Representatives unless the context of the sentence or paragraph indicates otherwise.

would not further delay the effective date of the rule. Moreover, pursuant to subsection 801(a)(5), the effective date of a rule shall not be delayed by this chapter beyond the date on which either house of Congress votes to reject a joint resolution of disapproval.

Although it is not expressly provided in the congressional review chapter, it is the authors' intent that a rule may take effect if an adjournment of Congress prevents the President from returning his veto and objections within the meaning of the Constitution. Such will be the case if the President does not act on a joint resolution within 10 days (Sundays excepted) after it is presented to him, and "the Congress by their Adjournment prevent its Return" within the meaning of Article I, §7, cl. 2, or when the President affirmatively vetoes a resolution during such an adjournment. This is the logical result because Congress cannot act to override these vetoes. Congress would have to begin anew, pass a second resolution, and present it to the President in order for it to become law. It is also the authors' intent that a rule may take effect immediately if the President returns a veto and his objections to Congress but Congress adjourns its last session sine die before the expiration of time provided in subsection 801(a)(3)(B). Like the situations described immediately above, no subsequent Congress can act further on the veto, and the next Congress would have to begin anew, pass a second resolution of disapproval, and present it to the President in order for it to become law.

*Purpose of and exceptions to the delay of major rules*

The reason for the delay in the effective ness of a major rule beyond that provided in APA subsection 553(d) is to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule. Congress may continue to use the expedited procedures to pass resolutions of disapproval for a period of time after a major rule takes effect, but it would be preferable for Congress to act during the delay period so that fewer resources would be wasted. To increase the likelihood that Congress would act before a major rule took effect, the authors agreed on an approximately 60 day delay period in the effective date of a major rule, rather than an approximately 45 day delay period in some earlier versions of the legislation.

There are four exceptions to the required delay in the effectiveness of a major rule in the congressional review chapter. The first is in subsection 801(c), which provides that a major rule is not subject to the delay period of subsection 801(a)(3) if the President determines in an executive order that one of four specified situations exist and notifies Congress of his determination. The second is in subsection 808(1), which excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3). The third is in subsection 808(2), which excepts certain rules from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3) if the relevant agency finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This "good cause" exception in subsection 808(2) is taken from the APA and applies only to rules which are exempt from notice and comment under subsection 553(b)(B) or an analogous statute. The fourth exception is in subsection 804(2). Any rule promulgated

under the Telecommunications Act of 1996 or any amendments made by that Act that otherwise could be classified as a "major rule" is exempt from that definition and from the 60 day delay in section 801(a)(3). However, such an issuance still would fall within the definition of "rule" and would be subject to the requirements of the legislation for non major rules. A determination under subsection 801(c), subsection 804(2), or section 808 shall have no effect on the procedures to enact joint resolutions of disapproval.

*A court may not stay or suspend the effectiveness of a rule beyond the period specified in section 801 simply because a resolution of disapproval is pending in Congress*

The authors discussed the relationship between the period of time that a major rule is delayed and the period of time during which Congress could use the expedited procedures in section 802 to pass a resolution of disapproval. Although it would be best for Congress to act pursuant to this chapter before a major rule goes into effect, it was recognized that Congress could not often act immediately after a rule was issued because it may be issued during a recesses of Congress, shortly before such recesses, or during other periods when Congress cannot devote the time to complete prompt legislative action. Accordingly, the authors determined that the proper public policy was to give Congress an adequate opportunity to deliberate and act on joint resolutions of disapproval, while ensuring that major rules could go into effect without unreasonable delay. In short, the authors decided that major rules could take effect after an approximate 60 day delay, but the period governing the expedited procedures in section 802 for review of joint resolution of disapproval would extend for a period of time beyond that.

Accordingly, courts may not stay or suspend the effectiveness of any rule beyond the periods specified in section 801 simply because a joint resolution is pending before Congress. Such action would be contrary to the many express provisions governing when different types of rules may take effect. Such court action also would be contrary to the authors' intent because it would upset an important compromise on how long a delay there should be on the effectiveness of a major rule. The final delay period was selected as a compromise between the period specified in the version that passed the Senate on March 19, 1995, and the version that passed both Houses on November 9, 1995. It is also the authors' belief that such court action would be inconsistent with the principles of (and potentially violate) the Constitution, art. I, §7, cl. 2, in that courts may not give legal effect to legislative action unless it results in the enactment of law pursuant to Clause. See *INS v. Chadha*, 462 U.S. 919 (1983). Finally, the authors intend that a court may not predicate a stay on the basis of possible future congressional action because it would be improper for a court to rule that the movant had demonstrated a "likelihood of success on the merits," unless and until a joint resolution is enacted into law. A judicial stay prior to that time would raise serious separation of powers concerns because it would be tantamount to the court making a prediction of what Congress is likely to do and then exercising its own power in furtherance of that prediction. Indeed, the authors intend that Congress may have been reluctant to pass congressional review legislation at all if its action or inaction pursuant to this chapter would be treated differently than its action or inaction regarding any other bill or resolution.

*Time periods governing passage of joint resolutions of disapproval*

Subsection 802(a) provides that a joint resolution disapproving of a particular rule may

be introduced in either House beginning on the date of the rule and accompanying report are received by Congress until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress). But if Congress did not have sufficient time in a previous session to introduce or consider a resolution of disapproval, as set forth in subsection 801(d), the rule and accompanying report will be treated as if it were first received by Congress on the 15th session day in the Senate, or 15th legislative day in the House, after the start of its next session. When a rule was submitted near the end of a Congress or prior to the start of the next Congress, a joint resolution of disapproval regarding that rule may be introduced in the next Congress beginning on the 15th session day in the Senate or the 15th legislative day in the House until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during the session) regardless of whether such a resolution was introduced in the prior Congress. Of course, any joint resolution pending from the first session of a Congress, may be considered further in the next session of the same Congress.

Subsections 802(c) (d) specify special procedures that apply to the consideration of a joint resolution of disapproval in the Senate. Subsection 803(c) allows 30 Senators to petition for the discharge of resolution from a Senate committee after a specified period of time (the later of 20 calendar days after the rule is submitted to Congress or published in the Federal Register, if it is so published). Subsection 802(d) specifies procedures for the consideration of a resolution on the Senate floor. Such a resolution is highly privileged, points or order are waived, a motion to postpone consideration is not in order, the resolution is unamendable, and debate on the joint resolution and "on all debatable motions and appeals in connection therewith" (including a motion to proceed) is limited to no more than 10 hours.

Subsection 802(e) provides that the special Senate procedures specified in subsections 802(c) (d) shall not apply to the consideration of any joint resolution of disapproval of a rule after 60 session days of the Senate beginning with the later date that rule is submitted to Congress or published, if it is so published. However, if a rule and accompanying report are submitted to Congress shortly before the end of a session or during an intercession recess as described in subsection 801(d)(1), the special Senate procedures specified in subsections 802(c) (d) shall expire 60 session days after the 15th session day of the succeeding session of Congress or on the 75th session day after the succeeding session of Congress first convenes. For purposes of subsection 802(e), the term "session day" refers only to a day the Senate is in session, rather than a day both Houses are in session. However, in computing the time specified in subsection 801(d)(1), that subsection specifies that there shall be an additional period of review in the next session if either House did not have an adequate opportunity to complete action on a joint resolution. Thus, if either House of Congress did not have adequate time to consider a joint resolution in a given session (60 session days in the Senate and 60 legislative days in the House), resolutions of disapproval may be introduced or re introduced in both Houses in the next session, and the special Senate procedures specified in subsection 802(c) (d) shall apply in the next session of the Senate.

If a joint resolution of disapproval is pending when the expedited Senate procedures specified in subsections 802(c) (d) expire, the resolution shall not die in either House but shall simply be considered pursuant to the

normal rules of either House with one exception. Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.

*Effect of enactment of a joint resolution of disapproval*

Subsection 801(b)(1) provides that: "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproved rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

*Limitation on judicial review of congressional or administrative actions*

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter." Thus, the major rule determinations made by the Administrator of

the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings," U.S. Const., art. I, §5, cl. 2, which includes being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determination or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval," or by implication, when it has not yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).

*Enactment of a joint resolution of disapproval for a rule that was already in effect*

Subsection 801(f) provides that: "Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect." Application of this subsection should be consistent with existing judicial precedents on rules that are deemed never to have taken effect.

*Agency information required to be submitted to GAO*

Pursuant to subsection 801(a)(1)(B), the federal agency promulgating the rule shall submit to the Comptroller General (and make available to each House) (i) a complete copy of the cost benefit analysis of the rule, if any, (ii) the agency's actions related to the Regulatory Flexibility Act, (iii) the agency's actions related to the Unfunded Mandates Reform Act, and (iv) "any other relevant information or requirements under any other Act and any relevant Executive Orders." Pursuant to subsection 801(a)(1)(B), this information must be submitted to the Comptroller General on the day the agency submits the rule to Congress and to GAO.

The authors intend information supplied in conformity with subsection 801(a)(1)(B)(iv) to encompass both agency specific statutes and government wide statutes and executive orders that impose requirements relevant to each rule. Examples of agency specific statutes include information regarding compliance with the law that authorized the rule and any agency specific procedural requirements, such as section 9 of the Consumer Product Safety Act, as amended, 15 U.S.C. §2054 (procedures for consumer product safety rules); section 6 of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §655 (promulgation of standards); section 307(d) of the Clean Air Act, as amended,

42 U.S.C. §7607(d) (promulgation of rules); and section 501 of the Department of Energy Organization Act, 42 U.S.C. §7191 (procedure for issuance of rules, regulations, and orders). Examples of government wide statutes include other chapters of the Administrative Procedure Act, 5 U.S.C. §§551 559 and 701 706; and the Paperwork Reduction Act, as amended, 44 U.S.C. §§3501 3520.

Examples of relevant executive orders include E.O. No. 12866 (Sept. 30, 1993) (Regulatory Planning and Review); E.O. No. 12606 (Sept. 2, 1987) (Family Considerations in Policy Formulation and Implementation); E.O. No. 12612 (Oct. 26, 1987) (Federalism Considerations in Policy Formulation and Implementation); E.O. No. 12630 (Mar. 15, 1988) (Government Actions and Interference with Constitutionally Protected Property Rights); E.O. No. 23875 (Oct. 26, 1993) (Enhancing the Intergovernmental Partnership); E.O. No. 12778 (Oct. 23, 1991) (Civil Justice Reform); E.O. No. 12988 (Feb. 5, 1996) (Civil Justice Reform) (effective May 5, 1996).

*GAO reports on major rules*

Fifteen days after the federal agency submits a copy of a major rule and report to each House of Congress and the Comptroller General, the Comptroller General shall prepare and provide a report on the major rule to the committee of jurisdiction in each House. Subsection 801(a)(2)(B) requires agencies to cooperate with the Comptroller General in providing information relevant to the Comptroller General's reports on major rules. Given the 15 day deadline for these reports, it is essential that the agencies' initial submission to the General Accounting Office (GAO) contain all of the information necessary for GAO to conduct its analysis. At a minimum, the agency's submission must include the information required of all rules pursuant to 801(a)(1)(B). Whenever possible, OMB should work with GAO to alert GAO when a major rule is likely to be issued and to provide as much advance information to GAO as possible on such proposed major rule. In particular, OMB should attempt to provide the complete cost benefit analysis on a major rule, if any, well in advance of the final rule's promulgation.

It also is essential for the agencies to present this information in a format that will facilitate the GAO's analysis. The authors expect that GAO and OMB will work together to develop, to the greatest extent practicable, standard formats for agency submissions. OMB also should ensure that agencies follow such formats. The authors also expect that agencies will provide expeditiously any additional information that GAO may require for a thorough report. The authors do not intend the Comptroller General's reports to be delayed beyond the 15 day deadline due to lack of information or resources unless the committees of jurisdiction indicate a different preference. Of course, the Comptroller General may supplement his initial report at any time with any additional information, on its own, or at the request of the relevant committees or jurisdiction.

*Covered agencies and entities in the executive branch*

The authors intend this chapter to be comprehensive in the agencies and entities that are subject to it. The term "Federal agency" in subsection 804(1) was taken from 5 U.S.C. §551(1). That definition includes "each authority of the Government" that is not expressly excluded by subsection 551(1)(A) (H). With those few exceptions, the objective was to cover each and every government entity, whether it is a department, independent agency, independent establishment, or government corporation. This is because Congress is enacting the congressional review

chapter, in large part, as an exercise of its oversight and legislative responsibility. Regardless of the justification for excluding or granting independence to some entities from the coverage of other laws, that justification does not apply to this chapter, where Congress has an interest in exercising its constitutional oversight and legislative responsibility as broadly as possible over all agencies and entities within its legislative jurisdiction.

In some instances, federal entities and agencies issue rules that are not subject to the traditional 5 U.S.C. §553(c) rulemaking process. However, the authors intend the congressional review chapter to cover every agency, authority, or entity covered by subsection 551(1) that establishes policies affecting any segment of the general public. Where it was necessary, a few special exceptions were provided, such as the exclusion for the monetary policy activities of the Board of Governors of the Federal Reserve System, rules of particular applicability, and rules of agency management and personnel. Where it was not necessary, no exemption was provided and no exemption should be inferred from other law. This is made clear by the provision of section 806 which states that the Act applies notwithstanding any other provision of law.

#### *Definition of a "major rule"*

The definition of a "major rule" in subsection 804(2) is taken from President Reagan's Executive Order 12291. Although President Clinton's Executive Order 12866 contains a definition of a "significant regulatory action" that is seemingly as broad, several of the Administration's significant rule determinations under Executive Order 12866 have been called into question. The authors intend the term "major rule" in this chapter to be broadly construed, including the non-numerical factors contained in the subsections 804(2)(B) and (C).

Pursuant to subsection 804(2), the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget (the Administrator) must make the major rule determination. The authors intend that centralizing this function in the Administrator will lead to consistency across agency lines. Moreover, from 1981 93 OIRA staff interpreted and applied the same major rule definition under E.O. 12291. Thus, the Administrator should rely on guidance documents prepared by OIRA during that time and previous major rule determinations from that Office as a guide in applying the statutory definition to new rules.

Certain covered agencies, including many "independent agencies," include their proposed rules in the Unified Regulatory Agenda published by OMB but do not normally submit their final rules to OMB for review. Moreover, interpretative rules and general statements of policy are not normally submitted to OMB for review. Nevertheless, it is the Administrator that must make the major rule determination under this chapter whenever a new rule is issued. The Administrator may request the recommendation of any agency covered by this chapter on whether a proposed rule is a major rule within the meaning of subsection 804(2), but the Administrator is responsible for the ultimate determination. Thus, all agencies or entities covered by this chapter will have to coordinate their rulemaking activity with OIRA so that the Administrator may make the final major rule determination.

#### *Scope of rules covered*

The authors intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review. The term "rule" in subsection 804(3) begins with the definition of a

"rule" in subsection 551(4) and excludes three subsets of rules that are modeled on APA sections 551 and 553. This definition of a rule does not turn on whether a given agency must normally comply with the notice and comment provisions of the APA, or whether the rule at issue is subject to any other notice and comment procedures. The definition of "rule" in subsection 551(4) covers a wide spectrum of activities. First, there is formal rulemaking under section 553 that must adhere to procedures of sections 556 and 557 of title 5. Second, there is informal rulemaking, which must comply with the notice and comment requirements of subsection 553(c). Third, there are rules subject to the requirements of subsection 552(a)(1) and (2). This third category of rules normally either must be published in the Federal Register before they can adversely affect a person, or must be indexed and made available for inspection and copying or purchase before they can be used as precedent by an agency against a non-agency party. Documents covered by subsection 552(a) include statements of general policy, interpretations of general applicability, and administrative staff manuals and instructions to staff that affect a member of the public. Fourth, there is a body of materials that fall within the APA definition of "rule" and are the product of agency process, but that meet none of the procedural specifications of the first three classes. These include guidance documents and the like. For purposes of this section, the term rule also includes any rule, rule change, or rule interpretation by a self-regulatory organization that is approved by a Federal agency. Accordingly, all "rules" are covered under this chapter, whether issued at the agency's initiative or in response to a petition, unless they are expressly excluded by subsections 804(3)(A) (C). The authors are concerned that some agencies have attempted to circumvent notice and comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The authors admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.

The definition of a rule in subsection 551(4) covers most agency statements of general applicability and future effect. Subsection 804(3)(A) excludes "any rule of particular applicability, including a rule that approves or prescribes rates, wages, prices, services, or allowances therefore, corporate and financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing" from the definition of a rule. Many agencies, including the Treasury, Justice, and Commerce Departments, issue letter rulings or other opinion letters to individuals who request a specific ruling on the facts of their situation. These letter rulings are sometimes published and relied upon by other people in similar situations, but the agency is not bound by the earlier rulings even on facts that are analogous. Thus, such letter rulings or opinion letters do not fall within the definition of a rule within the meaning of subsection 804(3).

The different types of rules issued pursuant to the internal revenue laws of the United States are good examples of the distinction between rules of general and particular applicability. IRS private letter rulings and Customs Service letter rulings are classic examples of rules of particular applicability, notwithstanding that they may be cited as authority in transactions involving the same circumstances. Examples of substantive and interpretative rules of general applicability will include most temporary and final Treas

ury regulations issued pursuant to notice and comment rulemaking procedures, and most revenue rulings, revenue procedures, IRS notices, and IRS announcements. It does not matter that these later types of rules are issued without notice and comments rulemaking procedures or that they are accorded less deference by the courts than notice and comment rules. In fact, revenue rulings have been described by the courts as the "classic example of an interpretative rul[e]" within the meaning of the APA. See *Wing v. Commissioner*, 81 T.C. 17, 26 (1983). The test is whether such rules announce a general statement of policy or an interpretation of law of general applicability.

Most rules or other agency actions that grant an approval, license, registration, or similar authority to a particular person or particular entities, or grant or recognize an exemption or relieve a restriction for a particular person or particular entities, or permit new or improved applications of technology for a particular person or particular entities, or allow the manufacture, distribution, sale, or use of a substance or product are exempted under subsection 804(3)(A) from the definition of a rule. This is probably the largest category of agency actions excluded from the definition of a rule. Examples include import and export licenses, individual rate and tariff approvals, wetlands permits, grazing permits, plant licenses or permits, drug and medical device approvals, new source review permits, hunting and fishing take limits, incidental take permits and habitat conservation plans, broadcast licenses, and product approvals, including approvals that set forth the conditions under which a product may be distributed.

Subsection 804(3)(B) excludes "any rule relating to agency management or personnel" from the definition of a rule. Pursuant to subsection 804(3)(C), however, a "rule of agency organization, procedure, or practice," is only excluded if it "does not substantially affect the rights or obligations of non-agency parties." The authors' intent in these subsections is to exclude matters of purely internal agency management and organization, but to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights or obligations of non-agency parties. •

#### 10TH ANNIVERSARY OF CHERNOBYL

• Mr. LEVIN. Mr. President, on April 26, 1986, reactor number 4 at the V.I. Lenin Atomic Power Plant in Chernobyl near Kiev, Ukraine exploded. The explosion released a cloud of radioactive steam into the atmosphere reported to contain about 200 times more radio activity than was released at Hiroshima and Nagasaki.

The explosion took an enormous toll on the people directly exposed to the radiation emitted from the plant. Shortly after the explosion, Soviet officials admitted to 31 deaths among reactor operators and the team attempting to contain the damage. Thousands of workers were eventually exposed at the site.

However, children have been the first among the general population to suffer from the effects of the explosion at Chernobyl. Children are most susceptible to the radioactive iodine emitted from Chernobyl because of their active

# EXTENSIONS OF REMARKS

PROVIDING FOR CONSIDERATION OF H.R. 3136, CONTRACT WITH AMERICA ADVANCEMENT ACT OF 1996

SPEECH OF

**HON. HENRY J. HYDE**

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Thursday, March 28, 1996

Mr. HYDE. Mr. Speaker, I submit for the RECORD a summary of the Small Business Regulatory Enforcement Fairness Act, included in H.R. 3136.

**SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT VIEWS OF THE HOUSE COMMITTEES OF JURISDICTION ON THE CONGRESSIONAL INTENT REGARDING THE "SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996"**

I. SUMMARY OF THE LEGISLATION

The Hyde amendment to H.R. 3136 replaced Title III of the Contract with America Advancement Act of 1996 to incorporate a revised version of the Small Business Regulatory Enforcement Fairness Act of 1996 (the "Act"). As enacted, Title III of H.R. 3136 became Title II of Public Law 104 121. This legislation was originally passed by the Senate as S. 942. The Hyde amendment makes a number of changes to the Senate bill to better implement certain recommendations of the 1995 White House Conference on Small Business regarding the development and enforcement of Federal regulations, including judicial review of agency actions under the Regulatory Flexibility Act (RFA). The amendment also provides for expedited procedures for Congress to review agency rules and to enact Resolutions of Disapproval voiding agency rules.

The goal of the legislation is to foster a more cooperative, less threatening regulatory environment among agencies, small businesses and other small entities. The legislation provides a framework to make federal regulators more accountable for their enforcement actions by providing small entities with an opportunity for redress of arbitrary enforcement actions. The centerpiece of the legislation is the RFA which requires a regulatory flexibility analysis of all rules that have a "significant economic impact on a substantial number" of small entities. Under the RFA, this term "small entities" includes small businesses, small non profit organizations, and small governmental units.

II. SECTION BY SECTION ANALYSIS

Section 101

This section entitles the Act the "Small Business Regulatory Enforcement Fairness Act of 1996."

Section 202

This section of the Act sets forth findings as to the need for a strong small business sector, the disproportionate impact of regulations on small businesses, the recommendations of the 1995 White House Conference on Small Business, and the need for judicial review of the Regulatory Flexibility Act.

Section 203

This section of the Act sets forth the purposes of this legislation. These include the

need to address some of the key Federal regulatory recommendations of the 1995 White House Conference on Small Business. The White House Conference produced a consensus that small businesses should be included earlier and more effectively in the regulatory process. The Act seeks to create a more cooperative and less threatening regulatory environment to help small businesses in their compliance efforts. The Act also provides small businesses with legal redress from arbitrary enforcement actions by making Federal regulators accountable for their actions. Additionally, the Act provides for judicial review of the RFA.

Subtitle A Regulatory Compliance Simplification

Agencies would be required to publish easily understood guides to assist small businesses in complying with regulations and provide them informal, non binding advice about regulatory compliance. This subtitle creates permissive authority for Small Business Development Centers to offer regulatory compliance information to small businesses and to establish resource centers to disseminate reference materials. Federal agencies are directed to cooperate with states to create guides that fully integrate Federal and state regulatory requirements on small businesses.

Section 211

This section defines certain terms as used in this subtitle. The term "small entity" is currently defined in the RFA (5 U.S.C. 601) to include small business concerns, as defined by section 3(a) of the Small Business Act (15 U.S.C. 632(a)) small nonprofit organizations and small governmental jurisdictions. The process of determining whether a given business qualifies as a small business is straightforward, using size standard thresholds established by the SBA based on Standard Industrial Classification codes. The RFA also defines small organization and small governmental jurisdiction (5 U.S.C. 601). Any definition established by an agency for purposes of implementing the RFA would also apply to this Act.

Section 212

This section requires agencies to publish "small entity compliance guides" to assist small entities in complying with regulations which are the subject of a final regulatory flexibility analysis. The bill does not allow judicial review of the guide itself. However, the agency's claim that the guide provides "plain English" assistance would be a matter of public record. In addition, the small business compliance guide would be available as evidence of the reasonableness of any proposed fine on the small entity.

Agencies should endeavor to make these "plain English" guides available to small entities through a coordinated distribution system for regulatory compliance information utilizing means such as the SBA's U.S. Business Advisor, the Small Business Ombudsman at the Environmental Protection Agency, state run compliance assistance programs established under section 507 of the Clean Air Act, Manufacturing Technology Centers or Small Business Development Centers established under the Small Business Act.

Section 213

This section directs agencies that regulate small entities to answer inquiries of small

entities seeking information on and advice about regulatory compliance. Some agencies already have established successful programs to provide compliance assistance and the amendment intends to encourage these efforts. For example, the IRS, SEC and the Customs Service have an established practice of issuing private letter rulings applying the law to a particular set of facts. This legislation does not require other agencies to establish programs with the same level of formality as found in the current practice of issuing private letter rulings. The use of toll free telephone numbers and other informal means of responding to small entities is encouraged. This legislation does not mandate changes in current programs at the IRS, SEC and Customs Service, but these agencies should consider establishing less formal means of providing small entities with informal guidance in accordance with this section.

This section gives agencies discretion to establish procedures and conditions under which they would provide advice to small entities. There is no requirement that the agency's advice to small entities be binding as to the legal effects of the actions of other entities. Any guidance provided by the agency applying statutory or regulatory provisions to facts supplied by the small entity would be available as relevant evidence of the reasonableness of any subsequently proposed fine on the small entity.

Section 214

This section creates permissive authority for Small Business Development Centers (SBDC) to provide information to small businesses regarding compliance with regulatory requirements. SBDCs would not become the predominant source of regulatory information, but would supplement agency efforts to make such information widely available. This section is not intended to grant an exclusive franchise to SBDCs for providing information on regulatory compliance.

There are small business information and technical assistance programs, both Federal and state, in various forms throughout this country. Some of the manufacturing technology centers and other similar extension programs administered by the National Institute of Standards and Technology are providing environmental compliance assistance in addition to general technology assistance. The small business stationary source technical and environmental compliance assistance programs established under section 507 of the Clean Air Act Amendments of 1990 is also providing compliance assistance to small businesses. This section is designed to add to the currently available resources for small businesses.

Compliance assistance programs can save small businesses money, improve their environmental performance and increase their competitiveness. They can help small businesses learn about cost saving pollution prevention programs and new environmental technologies. Most importantly, they can help small business owners avoid potentially costly regulatory citations and adjudications. Comments from small business representatives in a variety of fora support the need for expansion of technical information assistance programs.

Section 215

This section directs agencies to cooperate with states to create guides that fully integrate Federal and state requirements on

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Matter set in this typeface indicates words inserted or appended, rather than spoken, by a Member of the House on the floor.

small entities. Separate guides may be created for each state, or states may modify or supplement a guide to Federal requirements. Since different types of small entities are affected by different agency regulations, or are affected in different ways, agencies should consider preparing separate guides for the various sectors of the small business community and other small entities subject to their jurisdiction. Priority in producing these guides should be given to areas of law where rules are complex and where the regulated community tend to be small entities. Agencies may contract with outside providers to produce these guides and, to the extent practicable, agencies should utilize entities with the greatest experience in developing similar guides.

#### Section 216

This section provides that the effective date for this subtitle is 90 days after the date of enactment. The requirement for agencies to publish compliance guides applies to final rules published after the effective date. Agencies have one year from the date of enactment to develop their programs for informal small entity guidance, but these programs should assist small entities with regulatory questions regardless of the date of publication of the regulation at issue.

#### Subtitle B Regulatory Enforcement Reforms

This subtitle creates a Small Business and Agriculture Regulatory Enforcement Ombudsman at the Small Business Administration to give small businesses a confidential means to comment on and rate the performance of agency enforcement personnel. It also creates Regional Small Business Regulatory Fairness Boards at the Small Business Administration to coordinate with the Ombudsman and to provide small businesses a greater opportunity to come together on a regional basis to assess the enforcement activities of the various Federal regulatory agencies.

This subtitle directs all Federal agencies that regulate small entities to develop policies or programs providing for waivers or reductions of civil penalties for violations by small entities, under appropriate circumstances.

#### Section 221

This section provides definitions for the terms as used in the subtitle. [See discussion set forth under "Section 211" above.]

#### Section 222

The Act creates a Small Business and Agriculture Regulatory Enforcement Ombudsman at the SBA to give small businesses a confidential means to comment on Federal regulatory agency enforcement activities. This might include providing toll free telephone numbers, computer access points, or mail in forms allowing businesses to comment on the enforcement activities of inspectors, auditors and other enforcement personnel. As used in this section of the bill, the term "audit" is not intended to refer to audits conducted by Inspectors General. This Ombudsman would not replace or diminish any similar ombudsman programs in other agencies.

Concerns have arisen in the Inspector General community that this Ombudsman might have new enforcement powers that would conflict with those currently held by the Inspectors General. Nothing in the Act is intended to supersede or conflict with the provisions of the Inspector General Act of 1978, as amended, or to otherwise restrict or interfere with the activities of any Office of the Inspector General.

The Ombudsman will compile the comments of small businesses and provide an annual evaluation similar to a "customer satisfac-

tion" rating for different agencies, regions, or offices. The goal of this rating system is to see whether agencies and their personnel are in fact treating small businesses more like customers than potential criminals. Agencies will be provided an opportunity to comment on the Ombudsman's draft report, as is currently the practice with reports by the General Accounting Office. The final report may include a section in which an agency can address any concerns that the Ombudsman does not choose to address.

The Act states that the Ombudsman shall "work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on site inspection, compliance assistance effort, or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by such personnel." The SBA shall publicize the existence of the Ombudsman generally to the small business community and also work cooperatively with enforcement agencies to make small businesses aware of the program at the time of agency enforcement activity. The Ombudsman shall report annually to Congress based on substantiated comments received from small business concerns and the Boards, evaluating the enforcement activities of agency personnel including a rating of the responsiveness to small business of the various regional and program offices of each regulatory agency. The report to Congress shall in part be based on the findings and recommendation of the Boards as reported by the Ombudsman to affected agencies. While this language allows for comment on the enforcement activities of agency personnel in order to identify potential abuses of the regulatory process, it does not provide a mandate for the boards and the Ombudsman to create a public performance rating of individual agency employees.

The goal of this section is to reduce the instances of excessive and abusive enforcement actions. Those actions clearly originate in the acts of individual enforcement personnel. Sometimes the problem is with the policies of an agency, and the goal of this section is also to change the culture and policies of Federal regulatory agencies. At other times, the problem is not agency policy, but individuals who violate the agency's enforcement policy. To address this issue, the legislation includes a provision to allow the Ombudsman, where appropriate, to refer serious problems with individuals to the agency's Inspector General for proper action.

The intent of the Act is to give small businesses a voice in evaluating the overall performances of agencies and agency offices in their dealings with the small business community. The purpose of the Ombudsman's reports is not to rate individual agency personnel, but to assess each program's or agency's performance as a whole. The Ombudsman's report to Congress should not single out individual agency employees by name or assign an individual evaluation or rating that might interfere with agency management and personnel policies.

The Act also creates Regional Small Business Regulatory Fairness Boards at the SBA to coordinate with the Ombudsman and to provide small businesses a greater opportunity to track and comment on agency enforcement policies and practices. These boards provide an opportunity for representatives of small businesses to come together on a regional basis to assess the enforcement activities of the various federal regulatory agencies. The boards may meet to collect information about these activities, and report and make recommendations to the Ombuds-

man about the impact of agency enforcement policies or practices on small businesses. The boards will consist of owners, operators or officers of small entities who are appointed by the Administrator of the Small Business Administration. Prior to appointing any board members, the Administrator must consult with the leadership of the House and Senate Small Business Committees. There is nothing in the bill that would exempt the boards from the Federal Advisory Committee Act, which would apply according to its terms. The Boards may accept donations of services such as the use of a regional SBA office for conducting their meetings.

#### Section 223

The Act directs all federal agencies that regulate small entities to develop policies or programs providing for waivers or reductions of civil penalties for violations by small entities in certain circumstances. This section builds on the current Executive Order on small business enforcement practices and is intended to allow agencies flexibility to tailor their specific programs to their missions and charters. Agencies should also consider the ability of a small entity to pay in determining penalty assessments under appropriate circumstances. Each agency would have discretion to condition and limit the policy or program on appropriate conditions. For purposes of illustration, these could include requiring the small entity to act in good faith, requiring that violations be discovered through participation in agency supported compliance assistance programs, or requiring that violations be corrected within a reasonable time.

An agency's policy or program could also provide for suitable exclusions. Again, for purposes of illustration, these could include circumstances where the small entity has been subject to multiple enforcement actions, the violation involves criminal conduct, or poses a grave threat to worker safety, public health, safety or the environment.

In establishing their programs, it is up to each agency to develop the boundaries of their program and the specific circumstances for providing for a waiver or reduction of penalties; but once established, an agency must implement its program in an evenhanded fashion. Agencies may distinguish among types of small entities and among classes of civil penalties. Some agencies have already established formal or informal policies or programs that would meet the requirements of this section. For example, the Environmental Protection Agency has adopted a small business enforcement policy that satisfies this section. While this legislation sets out a general requirement to establish penalty waiver and reduction programs, some agencies may be subject to other statutory requirements or limitations applicable to the agency or to a particular program. For example, this section is not intended to override, amend or affect provisions of the Occupational Safety and Health Act or the Mine Safety and Health Act that may impose specific limitations on the operation of penalty reduction or waiver programs.

#### Section 224

This section provides that this subtitle takes effect 90 days after the date of enactment.

#### Subtitle C Equal Access to Justice Act Amendments

The Equal Access to Justice Act (EAJA) provides a means for prevailing parties to recover their attorneys fees in a wide variety of civil and administrative actions between eligible parties and the government. This Act amends EAJA to create a new avenue for parties to recover a portion of their attorneys fees and costs where the government



makes excessive demands in enforcing compliance with a statutory or regulatory requirement, either in an adversary adjudication or judicial review of the agency's enforcement action, or in a civil enforcement action. While this is a significant change from current law, the legislation is not intended to result in the awarding of attorneys fees as a matter of course. Rather, the legislation is intended to assist in changing the culture among government regulators to increase the reasonableness and fairness of their enforcement practices. Past agency practice too often has been to treat small businesses like suspects. One goal of this bill is to encourage government regulatory agencies to treat small businesses as partners sharing in a common goal of informed regulatory compliance. Government enforcement attorneys often take the position that they must zealously advocate for their client, in this case a regulatory agency, to the maximum extent permitted by law, as if they were representing an individual or other private party. But in the new regulatory climate for small businesses under this legislation, government attorneys with the advantages and resources of the federal government behind them in dealing with small entities must adjust their actions accordingly and not routinely issue original penalties or other demands at the high end of the scale merely as a way of pressuring small entities to agree to quick settlements.

*Sections 231 and 232*

H.R. 3136 will allow parties which do not prevail in a case involving the government to nevertheless recover a portion of their fees and cost in certain circumstances. The test for recovering attorneys fees is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case and is unreasonable when compared to the final outcome (whether a fine, injunctive relief or damages) under the facts and circumstances of the case.

For purposes of this Act, the term "party" is amended to include a "small entity" as that term is defined in section 601(6) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This will ensure consistency of coverage between the provisions of this subtitle and those of the Small Business Act (15 U.S.C. 632 (a)). This broadening of the term "party" is intended solely for purposes of the amendments to the EAJA effected under this subtitle. Other portions of the EAJA will continue to be governed by the definition of "party" as appears in current law.

The comparison called for in the Act is all ways between a "demand" by the government for injunctive and monetary relief taken as a whole and the final outcome of the case in terms of injunctive and monetary relief taken as a whole. As used in these amendments, the term "demand" means an express written demand that leads directly to an adversary adjudication or civil action. Thus, the "demand" at issue would be the government's demand that was pending upon commencement of the adjudication or action. A written demand by the government for performance or payment qualifies under this section regardless of form; it would include, but not be limited to, a fine, penalty notice, demand letter or citation. In the case of an adversary adjudication, the demand would often be a statement of the "Definitive Penalty Amount." In the case of a civil action brought by the United States, the demand could be in the form of a demand for settlement issued prior to commencement of the litigation. In a civil action to review the determination of an administrative proceeding, the demand could be the demand that led to such proceeding. However, the term

"demand" should not be read to extend to a mere recitation of facts and law in a complaint. The bill's definition of the term "demand" expressly excludes a recitation of the maximum statutory penalty in the complaint or elsewhere when accompanied by an express demand for a lesser amount. This definition is not intended to suggest that a statement of the maximum statutory penalty somewhere other than the complaint, which is not accompanied by an express demand for a lesser amount, is per se a demand, but would depend on the circumstances.

This test should not be a simple mathematical comparison. The Committee intends for it to be applied in such a way that it identifies and corrects situations where the agency's demand is so far in excess of the true value of the case, as compared to the final outcome, and where it appears the agency's assessment or enforcement action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case.

In addition, the bill excludes awards in connection with willful violations, bad faith actions and in special circumstances that would make such an award unjust. These additional factors are intended to provide a "safety valve" to ensure that the government is not unduly deterred from advancing its case in good faith. Whether a violation is "willful" should be determined in accordance with existing judicial construction of the subject matter to which the case relates. Special circumstances are intended to include both legal and factual considerations which may make it unjust to require the public to pay attorneys fees and costs, even in situations where the ultimate award is significantly less than the amount demanded. Special circumstances could include instances where the party seeking fees engaged in a flagrant violation of the law, endangered the lives of others, or engaged in some other type of conduct that would make the award of the fees unjust. The actions covered by "bad faith" include the conduct of the party seeking fees both at the time of the underlying violation, and during the enforcement action. For example, if the party seeking fees attempted to elude government officials, cover up its conduct, or otherwise impede the government's law enforcement activities, then attorneys' fees and costs should not be awarded.

The Committee does not intend by this provision to compensate a party for fees and costs which it would have been expended even had the government demand been reasonable under the circumstances. The amount of the award which a party may recover under this section is limited to the proportion of attorneys' fees and costs at tributable to the excessive demand. Thus, for example, if the ultimate decision of the administrative law judge or the judgment of the court is twenty percent of the relevant government demand, the defendant might be entitled to eighty percent of fees and costs. The ultimate determination of the amount of fees and costs to be awarded is to be made by the administrative law judge or the court, based on the facts and circumstances of each case.

The Act also increases the maximum hourly rate for attorneys fees under the EAJA from \$75 to \$125. Agencies could avoid the possibility of paying attorneys fees by settling with the small entity prior to final judgement. The Committee anticipates that if a settlement is reached, all further claims of either party, including claims for attorneys fees, could be included as part of the settlement. The government may obtain a release specifically including attorneys fees under EAJA.

Additional language is included in the Act to ensure that the legislation did not violate of the PAYGO requirements of the Budget Act. This language requires agencies to satisfy any award of attorneys fees or expenses arising from an agency enforcement action from their discretionary appropriated funds, but does not require that an agency seek or obtain an individual line item or earmarked appropriation for these amounts.

*Section 233*

The new provisions of the EAJA apply to civil actions and adversary adjudications commenced on or after the date of enactment.

Subtitle D Regulatory Flexibility Act Amendments

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), was first enacted in 1980. Under its terms, federal agencies are directed to consider the special needs and concerns of small entities small businesses, small local governments, farmers, etc. whenever they engage in a rulemaking subject to the Administrative Procedure Act. The agencies must then prepare and publish a regulatory flexibility analysis of the impact of the proposed rule on small entities, unless the head of the agency certifies that the proposed rule will not "have a significant economic impact on a substantial number of small entities."

Under current law, there is no provision for judicial review of agency action under the RFA. This makes the agencies completely unaccountable for their failure to comply with its requirements. This current prohibition on judicial enforcement of the RFA is contrary to the general principle of administrative law, and it has long been criticized by small business owners. Many small business owners believe that agencies have given lip service at best to the RFA, and small entities have been denied legal recourse to enforce the Act's requirements. Subtitle D gives teeth to the RFA by specifically providing for judicial review of selected sections.

*Section 241*

H.R. 3136 expands the coverage of the RFA to include Internal Revenue Service interpretative rules that provide for a "collection of information" from small entities. Many IRS rulemakings involve "interpretative rules" that IRS contends need not be promulgated pursuant to section 553 of the Administrative Procedures Act. However, these interpretative rules may have significant economic effects on small entities and should be covered by the RFA. The amendment applies to those IRS interpretative rulemakings that are published in the Federal Register for notice and comment and that will be codified in the Code of Federal Regulations. This limitation is intended to exclude from the RFA other, less formal IRS publications such as revenue rulings, revenue procedures, announcements, publications or private letter rulings.

The requirement that IRS interpretative rules comply with the RFA is further limited to those involving a "collection of information." The term "collection of information" is defined in the Act to include the obtaining, causing to be obtained, soliciting of facts or opinions by an agency through a variety of means that would include the use of written report forms, schedules, or reporting or other record keeping requirements. It would also include any requirements that require the disclosure to third parties of any information. The intent of this phrase "collection of information" in the context of the RFA is to include all IRS interpretative rules of general applicability that lead to or result in small entities keeping records, filing reports or otherwise providing information to IRS or third parties.

While the term "collection of information" also is used in the Paperwork Reduction Act (44 U.S.C. 3502(4)) ("PRA"), the purpose of the term in the context of the RFA is different than the purpose of the term in the PRA. Thus, while some courts have interpreted the PRA to exempt from its requirements certain recordkeeping requirements that are explicitly required by statute, such an interpretation would be inappropriate in the context of the RFA. If a collection of information is explicitly required by a regulation that will ultimately be codified in the Code of Federal Regulations ("CFR"), the effect might be to limit the possible regulatory alternatives available to the IRS in the proposed rulemaking, but would not exempt the IRS from conducting a regulatory flexibility analysis.

Some IRS interpretative rules merely reiterate or restate the statutorily required tax liability. While a small entity's tax liability may be a burden, the RFA cannot act to supersede the statutorily required tax rate. However, most IRS interpretative rules involve some aspect of defining or establishing requirements for compliance with the CFR, or otherwise require small entities to maintain records to comply with the CFR now being covered by the RFA. One of the primary purposes of the RFA is to reduce the compliance burdens on small entities whenever possible under the statute. To accomplish this purpose, the IRS should take an expansive approach in interpreting the phrase "collection of information" when considering whether to conduct a regulatory flexibility analysis.

The courts generally are given broad discretion to formulate appropriate remedies under the facts and circumstances of each individual case. The rights of judicial review and remedial authority of the courts provided in the Act as to IRS interpretative rules should be applied in a manner consistent with the purposes of the Anti Injunction Act (26 U.S.C. 7421), which may limit remedies available in particular circumstances. The RFA, as amended by the Act, permits the court to remand a rule to an Agency for further consideration of the rule's impact on small entities. The amendment also directs the court to consider the public interest in determining whether or not to delay enforcement of a rule against small entities pending agency compliance with the court's findings. The filing of an action requesting judicial review pursuant to this section does not automatically stay the implementation of the rule. Rather, the court has discretion in determining whether enforcement of the rule shall be deferred as it relates to small entities. In the context of IRS interpretative rulemakings, this language should be read to require the court to give appropriate deference to the legitimate public interest in the assessment and collection of taxes reflected by the Anti Injunction Act. The court should not exercise its discretion more broadly than necessary under the circumstances or in a way that might encourage excessive litigation.

If an agency is required to publish an initial regulatory flexibility analysis, the agency also must publish a final regulatory flexibility analysis. In the final regulatory flexibility analysis, agencies will be required to describe the impacts of the rule on small entities and to specify the actions taken by the agency to modify the proposed rule to minimize the regulatory impact on small entities. Nothing in the bill directs the agency to choose a regulatory alternative that is not authorized by the statute granting regulatory authority. The goal of the final regulatory flexibility analysis is to demonstrate how the agency has minimized the impact on small entities consistent with the underlying statute and other applicable legal requirements.

#### Section 242

H.R. 3136 removes the current prohibition on judicial review of agency compliance with certain sections of the RFA. It allows adversely affected small entities to seek judicial review of agency compliance with the RFA within one year after final agency action, except where a provision of law requires a shorter period for challenging a final agency action. The amendment is not intended to encourage or allow spurious law suits which might hinder important governmental functions. The Act does not subject all regulations issued since the enactment of the RFA to judicial review. The one year limitation on seeking judicial review ensures that this legislation will not permit indefinite, retroactive application of judicial review.

For rules promulgated after the effective date, judicial review will be available pursuant to this Act. The procedures and standards for review to be used are those set forth in the Administrative Procedure Act at Chapter 7 of Title 5. If the court finds that a final agency action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, the court may set aside the rule or order the agency to take other corrective action. The court may also decide that the failure to comply with the RFA warrants remanding the rule to the agency or delaying the application of the rule to small entities pending completion of the court ordered corrective action. However, in some circumstances, the court may find that there is good cause to allow the rule to be enforced and to remain in effect pending the corrective action.

Judicial review of the RFA is limited to agency compliance with the requirements of sections 601, 604, 605(b), 608(b) and 610. Review under these sections is not limited to the agency's compliance with the procedural aspects of the RFA; final agency action under these sections will be subject to the normal judicial review standards of Chapter 7 of Title 5. While the Committees determined that agency compliance with sections 607 and 609(a) of the RFA is important, it did not believe that a party should be entitled to judicial review of agency compliance with those sections in the absence of a judicable claim for review of agency compliance with section 604. Therefore, under the Act, an agency's failure to comply with sections 607 or 609(a) may be reviewed only in conjunction with a challenge under section 604 of the RFA.

#### Section 243

Section 243 of the Act alters the content of the statement which an agency must publish when making a certification under section 605 of the RFA that a regulation will not impose a significant economic impact on a substantial number of small entities. Current law requires only that the agency publish a "succinct statement explaining the reasons for such certification." The Committee believes that more specific justification for its determination should be provided by the agency. Under the amendment, the agency must state its factual basis for the certification. This will provide a record upon which a court may review the agency's determination in accordance with the judicial review provisions of the Administrative Procedure Act.

#### Section 244

H.R. 3136 amends the existing requirements of section 609 of the RFA for small business participation in the rulemaking process by incorporating a modified version of S. 917, the Small Business Advocacy Act, which was introduced by Senator Domenici, to provide early input from small businesses into the

regulatory process. For proposed rules with a significant economic impact on a substantial number of small entities, EPA and OSHA would have to collect advice and recommendations from small businesses to better inform the agency's regulatory flexibility analysis on the potential impacts of the rule. The House version drops the provision of the Senate bill that would have required the panels to reconvene prior to publication of the final rule.

The agency promulgating the rule would consult with the SBA's Chief Counsel for Advocacy to identify individuals who are representative of affected small businesses. The agency would designate a senior level official to be responsible for implementing this section and chairing an interagency review panel for the rule. Before the publication of an initial regulatory flexibility analysis for a proposed EPA or OSHA rule, the SBA's Chief Counsel for Advocacy will gather information from individual representatives of small businesses and other small entities, such as small local governments, about the potential impacts of that proposed rule. This information will then be reviewed by a panel composed of members from EPA or OSHA, OIRA, and the Chief Counsel for Advocacy. The panel will then issue a report on those individuals' comments, which will become part of the rulemaking record. The review panel's report and related rulemaking information will be placed in the rulemaking record in a timely fashion so that others who are interested in the proposed rule may have an opportunity to review that information and submit their own responses for the record before the close of the agency's public comment period for the proposed rule. The legislation includes limits on the period during which the review panel conducts its review. It also creates a limited process allowing the Chief Counsel for Advocacy to waive certain requirements of the section after consultation with the Office of Information and Regulatory Affairs and small businesses.

#### Section 245

This section provides that the effective date of subtitle D is 90 days after enactment. Proposed rules published after the effective date must be accompanied by an initial regulatory flexibility analysis or a certification under section 605 of the RFA. Final rules published after the effective date must be accompanied by a final regulatory flexibility analysis or a certification under section 605 of the RFA, regardless of when the rule was first proposed. Thus judicial review shall apply to any final regulation published after the effective date regardless of when the rule was proposed. However, IRS interpretative rules proposed prior to enactment will not be subject to the amendments made in this subchapter expanding the scope of the RFA to include IRS interpretative rules. Thus, the IRS could finalize previously proposed interpretative rules according to the terms of currently applicable law, regardless of when the final interpretative rule is published.

Subtitle E Congressional review subtitle E adds a new chapter to the Administrative Procedure Act (APA), "Congressional Review of Agency Rulemaking," which is codified in the United States Code as chapter 8 of title 5. The congressional review chapter creates a special mechanism for Congress to review new rules issued by federal agencies (including modification, repeal, or reissuance of existing rules). During the review period, Congress may use expedited procedures to enact joint resolutions of disapproval to overrule the federal rulemaking actions. In the 104th Congress, four slightly different versions of this legislation passed the Senate and two different versions passed the House. Yet, no formal legislative history

document was prepared to explain the legislation or the reasons for changes in the final language negotiated between the House and Senate. This joint statement of the committees of jurisdiction on the congressional review subtitle is intended to cure this deficiency.

#### Background

As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulation is often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

This legislation establishes a government wide congressional review mechanism for most new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects. Congress may find a rule to be too burdensome, excessive, inappropriate or duplicative. Subtitle E uses the mechanism of a joint resolution of disapproval which requires passage by both houses of Congress and the President (or veto by the President and a two thirds' override by Congress) to be effective. In other words, enactment of a joint resolution of disapproval is the same as enactment of a law.

Congress has considered various proposals for reviewing rules before they take effect for almost twenty years. Use of a simple (one house), concurrent (two house), or joint (two houses plus the President) resolution are among the options that have been debated and in some cases previously implemented on a limited basis. In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court struck down as unconstitutional any procedure where executive action could be overturned by less than the full process required under the Constitution to make laws—that is, approval by both houses of Congress and presentment to the President. That narrowed Congress' options to use a joint resolution of disapproval. The one house or two house legislative veto (as procedures involving simple and concurrent resolutions were previously called), was thus voided.

Because Congress often is unable to anticipate the numerous situations to which the laws it passes must apply, Executive Branch agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change. Rules can be surprisingly different from the expectations of Congress or the public. Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules. If these concerns are sufficiently serious, Congress can stop the rule.

#### Brief procedural history of congressional review chapter

In the 104th Congress, the congressional review legislation originated as S. 348, the "Regulatory Oversight Act," which was introduced on February 2, 1995. The text of S. 348 was offered by its sponsors, Senators Don Nickles and Harry Reid, as a substitute amendment to S. 219, the "Regulatory Transition Act of 1995." As amended, S. 219 provided for a 45 day delay on the effectiveness of a major rule, and provided expedited procedures that Congress could use to pass resolutions disapproving of the rule. On March 29, 1995, the Senate passed the amended version of S. 219 by a vote of 100-0. The Senate later substituted the text of S. 219 for the text of H.R. 450, the House passed "Regulatory Transition Act of 1995." Although the House did not agree to a conference on H.R. 450 and S. 219, both Houses continued to incorporate the congressional review provisions in other legislative packages. On May 25, the Senate Governmental Affairs Committee reported out S. 343, the "Comprehensive Regulatory Reform Act of 1995," and S. 291, the "Regulatory Reform Act of 1995," both with congressional review provisions. On May 26, 1995, the Senate Judiciary Committee reported out a different version of S. 343, the "Comprehensive Regulatory Reform Act of 1995," which also included a congressional review provision. The congressional review provision in S. 343 that was debated by the Senate was quite similar to S. 219, except that the delay period in the effectiveness of a major rule was extended to 60 days and the legislation did not apply to rules issued prior to enactment. A filibuster of S. 343, unrelated to the congressional review provisions, led to the withdrawal of that bill.

The House next took up the congressional review legislation by attaching a version of it (as section 3006) to H.R. 2586, the first debt limit extension bill. The House made several changes in the legislation that was attached to H.R. 2586, including a provision that would allow the expedited procedures also to apply to resolutions disapproving of proposed rules, and provisions that would have extended the 60 day delay on the effectiveness of a major rule for any period when the House or Senate was in recess for more than three days. On November 9, 1995 both the House and Senate passed this version of the congressional review legislation as part of the first debt limit extension bill. President Clinton vetoed the bill a few days later, for reasons unrelated to the congressional review provision.

On February 29, 1996, a House version of the congressional review legislation was published in the Congressional Record as title III of H.R. 994, which was scheduled to be brought to the House floor in the coming weeks. The congressional review title was almost identical to the legislation approved by both Houses in H.R. 2586. On March 19, 1996, the Senate adopted a congressional review amendment by voice vote to S. 942, which bill passed the Senate 100-0. The congressional review legislation in S. 942 was similar to the original version of S. 219 that passed the Senate on March 29, 1995.

Soon after passage of S. 942, representatives of the relevant House and Senate committees and principal sponsors of the congressional review legislation met to craft a congressional review subtitle that was acceptable to both Houses and would be added to the debt limit bill that was scheduled to be taken up in Congress the week of March 24. The final compromise language was the result of these joint discussions and negotiations.

On March 28, 1996, the House and Senate passed title III, the "Small Business Regu-

latory Enforcement Fairness Act of 1996," as part of the second debt limit bill, H.R. 3136. There was no separate vote in either body on the congressional review subtitle or on title III of H.R. 3136. However, title III received broad support in the House and the entire bill passed in the Senate by unanimous consent. The President signed H.R. 3136 into law on March 29, 1996, exactly one year after the first congressional review bill passed the Senate.

#### Submission of rules to Congress and to GAO

Pursuant to subsection 801(a)(1)(A), a federal agency promulgating a rule must submit a copy of the rule and a brief report about it to each House of Congress and to the Comptroller General before the rule can take effect. In addition to a copy of the rule, the report shall contain a concise general statement relating to the rule, including whether it is a major rule under the chapter, and the proposed effective date of the rule. Because most rules covered by the chapter must be published in the Federal Register before they can take effect, it is not expected that the submission of the rule and the report to Congress and the Comptroller General will lead to any additional delay.

Section 808 provides the only exception to the requirement that rules must be submitted to each House of Congress and the Comptroller General before they can take effect. Subsection 808(1) excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping. Subsection 808(2) excepts certain rules that are not subject to notice and comment procedures. It provides that if the relevant agency finds "for good cause ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, [such rules] shall take effect at such time as the Federal agency promulgating the rule determines." Although rules described in section 808 shall take effect when the relevant Federal agency determines pursuant to other provisions of law, the federal agency still must submit such rules and the accompanying report to each House of Congress and to the Comptroller General as soon as practicable after promulgation. Thus, rules described in section 808 are subject to congressional review and the expedited procedures governing joint resolutions of disapproval. Moreover, the congressional review period will not begin to run until such rules and the accompanying reports are submitted to each House of Congress and the Comptroller General.

In accordance with current House and Senate rules, covered agency rules and the accompanying report must be separately addressed and transmitted to the Speaker of the House (the Capitol, Room H 209), the President of the Senate (the Capitol, Room S 212), and the Comptroller General (GAO Building, 441 G Street, N.W., Room 1139). Except for rules described in section 808, any covered rule not submitted to Congress and the Comptroller General will remain ineffective until it is submitted pursuant to subsection 801(a)(1)(A). In almost all cases, there will be sufficient time for an agency to submit notice and comment rules or other rules that must be published to these legislative officers during normal office hours. There may be a rare instance, however, when a federal agency must issue an emergency rule that is effective upon actual notice and does not meet one of the section 808 exceptions. In such a rare case, the federal agency may provide contemporaneous notice to the Speaker of the House, the President of the Senate, and the Comptroller General. These legislative officers have accommodated the receipt of similar, emergency communications in the past and will utilize the same means to

receive emergency rules and reports during non business hours. If no other means of delivery is possible, delivery of the rule and related report by telefax to the Speaker of the House, the President of the Senate, and the Comptroller General shall satisfy the requirements of subsection 801(a)(1)(A).

*Additional delay in the effectiveness of major rules*

Subsection 553(d) of the APA requires publication or service of most substantive rules at least 30 days prior to their effective date. Pursuant to subsection 801(a)(3)(A), a major rule (as defined in subsection 804(2)) shall not take effect until at least 60 calendar days after the later of the date on which the rule and accompanying information is submitted to Congress or the date on which the rule is published in the Federal Register, if it is so published. If the Congress passes a joint resolution of disapproval and the President vetoes such resolution, the delay in the effectiveness of a major rule is extended by subsection 801(a)(3)(B) until the earlier date on which either House of Congress votes and fails to override the veto or 30 session days<sup>1</sup> after the date on which the Congress receives the veto and objections from the President. By necessary implication, if the Congress passes a joint resolution of disapproval within the 60 calendar days provided in subsection 801(a)(3)(A), the delay period in the effectiveness of a major rule must be extended at least until the President acts on the joint resolution or until the time expires for the President to act. Any other result would be inconsistent with subsection 801(a)(3)(B), which extends the delay in the effectiveness of a major rule for a period of time after the President vetoes a resolution.

Of course, if Congress fails to pass a joint resolution of disapproval within the 60 day period provided by subsection 801(a)(3)(A), subsection 801(a)(3)(B) would not apply and would not further delay the effective date of the rule. Moreover, pursuant to subsection 801(a)(5), the effective date of a rule shall not be delayed by this chapter beyond the date on which either house of Congress votes to reject a joint resolution of disapproval.

Although it is not expressly provided in the congressional review chapter, it is the committees' intent that a rule may take effect if an adjournment of Congress prevents the President from returning his veto and objections within the meaning of the Constitution. Such will be the case if the President does not act on a joint resolution within 10 days (Sundays excepted) after it is presented to him, and "the Congress by their Adjournment prevent its Return" within the meaning of Article I, §7, cl. 2, or when the President affirmatively vetoes a resolution during such an adjournment. This is the logical result because Congress cannot act to override these vetoes. Congress would have to begin anew, pass a second resolution, and present it to the President in order for it to become law. It is also the committees' intent that a rule may take effect immediately if the President returns a veto and his objections to Congress but Congress adjourns its last session sine die before the expiration of time provided in subsection 801(a)(3)(B). Like the situations described immediately above, no subsequent Congress can act further on the veto, and the next Congress would have to begin anew, pass a second resolution of

disapproval, and present it to the President in order for it to become law.

*Purpose of and exceptions to the delay of major rules*

The reason for the delay in the effectiveness of a major rule beyond that provided in APA subsection 553(d) is to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule. Congress may continue to use the expedited procedures to pass resolutions of disapproval for a period of time after a major rule takes effect, but it would be preferable for Congress to act during the delay period so that fewer resources would be wasted. To increase the likelihood that Congress would act before a major rule took effect, the committees agreed on an approximately 60 day delay period in the effective date of a major rule, rather than an approximately 45 day delay period in some earlier versions of the legislation.

There are four exceptions to the required delay in the effectiveness of a major rule in the congressional review chapter. The first is in subsection 801(c), which provides that a major rule is not subject to the delay period of subsection 801(a)(3) if the President determines in an executive order that one of four specified situations exist and notifies Congress of his determination. The second is in subsection 808(1), which excepts specified rules relating to commercial, recreational, or subsistence hunting, fishing, and camping from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3). The third is in subsection 808(2), which excepts certain rules from the initial delay specified in subsection 801(a)(1)(A) and from the delay in the effective date of a major rule provided in subsection 801(a)(3) if the relevant agency finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This "good cause" exception in subsection 808(2) is taken from the APA and applies only to rules which are exempt from notice and comment under subsection 553(b)(B) or an analogous statute. The fourth exception is in subsection 804(2). Any rule promulgated under the Telecommunications Act of 1996 or any amendments made by that Act that otherwise could be classified as a "major rule" is exempt from that definition and from the 60 day delay in section 801(a)(3). However, such an issuance still would fall within the definition of "rule" and would be subject to the requirements of the legislation for non major rules. A determination under subsection 801(c), subsection 804(2), or section 808 shall have no effect on the procedures to enact joint resolutions of disapproval.

*A court may not stay or suspend the effectiveness of a rule beyond the period specified in section 801 simply because a resolution of disapproval is pending in Congress*

The committees discussed the relationship between the period of time that a major rule is delayed and the period of time during which Congress could use the expedited procedures in section 802 to pass a resolution of disapproval. Although it would be best for Congress to act pursuant to this chapter before a major rule goes into effect, it was recognized that Congress could not often act immediately after a rule was issued because it may be issued during a recesses of Congress, shortly before such recesses, or during other periods when Congress cannot devote the time to complete prompt legislative action. Accordingly, the committees determined that the proper public policy was to give Congress an adequate opportunity to de-

liberate and act on joint resolutions of disapproval, while ensuring that major rules could go into effect without unreasonable delay. In short, the committees decided that major rules could take effect after an approximate 60 day delay, but the period governing the expedited procedures in section 802 for review of joint resolution of disapproval would extend for a period of time beyond that.

Accordingly, courts may not stay or suspend the effectiveness of any rule beyond the periods specified in section 801 simply because a joint resolution is pending before Congress. Such action would be contrary to the many express provisions governing when different types of rules may take effect. Such court action also would be contrary to the committees' intent because it would upset an important compromise on how long a delay there should be on the effectiveness of a major rule. The final delay period was selected as a compromise between the period specified in the version that passed the Senate on March 19, 1995 and the version that passed both Houses on November 9, 1995. It is also the committees' belief that such court action would be inconsistent with the principles of (and potentially violate) the Constitution, art. I, §7, cl. 2, in that courts may not give legal effect to legislative action unless it results in the enactment of law pursuant to that Clause. See *INS v. Chadha*, 462 U.S. 919 (1983). Finally, the committees believe that a court may not predicate a stay on the basis of possible future congressional action because it would be improper for a court to rule that the movant had demonstrated a "likelihood of success on the merits," unless and until a joint resolution is enacted into law. A judicial stay prior to that time would raise serious separation of powers concerns because it would be tantamount to the court making a prediction of what Congress is likely to do and then exercising its own power in furtherance of that prediction. Indeed, the committees believe that Congress may have been reluctant to pass congressional review legislation at all if its action or inaction pursuant to this chapter would be treated differently than its action or inaction regarding any other bill or resolution.

*Time periods governing passage of joint resolutions of disapproval*

Subsection 802(a) provides that a joint resolution disapproving of a particular rule may be introduced in either House beginning on the date the rule and accompanying report are received by Congress until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress). But if Congress did not have sufficient time in a previous session to introduce or consider a resolution of disapproval, as set forth in subsection 801(d), the rule and accompanying report will be treated as if it were first received by Congress on the 15th session day in the Senate, or 15th legislative day in the House, after the start of its next session. When a rule was submitted near the end of a Congress or prior to the start of the next Congress, a joint resolution of disapproval regarding that rule may be introduced in the next Congress beginning on the 15th session day in the Senate or the 15th legislative day in the House until 60 calendar days thereafter (excluding days either House of Congress is adjourned for more than 3 days during the session) regardless of whether such a resolution was introduced in the prior Congress. Of course, any joint resolution pending from the first session of a Congress, may be considered further in the next session of the same Congress.

Subsections 802(c) (d) specify special procedures that apply to the consideration of a

<sup>1</sup> In the Senate, a "session day" is a calendar day in which the Senate is in session. In the House of Representatives, the same term is normally expressed as a "legislative day." In the congressional review chapter, however, the term "session day" means both a "session day" of the Senate and a "legislative day" of the House of Representatives unless the context of the sentence or paragraph indicates otherwise.

joint resolution of disapproval in the Senate. Subsection 802(c) allows 30 Senators to petition for the discharge of resolution from a Senate committee after a specified period of time (the later of 20 calendar days after the rule is submitted to Congress or published in the Federal Register, if it is so published). Subsection 802(d) specifies procedures for the consideration of a resolution on the Senate floor. Such a resolution is highly privileged, points of order are waived, a motion to postpone consideration is not in order, the resolution is unamendable, and debate on the joint resolution and "on all debatable motions and appeals in connection therewith" (including a motion to proceed) is limited to no more than 10 hours.

Subsection 802(e) provides that the special Senate procedures specified in subsections 802(c) (d) shall not apply to the consideration of any joint resolution of disapproval of a rule after 60 session days of the Senate beginning with the later date that rule is submitted to Congress or published, if it is so published. However, if a rule and accompanying report are submitted to Congress shortly before the end of a session or during an intercession recess as described in subsection 801(d)(1), the special Senate procedures specified in subsections 802(c) (d) shall expire 60 session days after the 15th session day of the succeeding session of Congress or on the 75th session day after the succeeding session of Congress first convenes. For purposes of subsection 802(e), the term "session day" refers only to a day the Senate is in session, rather than a day both Houses are in session. However, in computing the time specified in subsection 801(d)(1), that subsection specifies that there shall be an additional period of review in the next session if either House did not have an adequate opportunity to complete action on a joint resolution. Thus, if either House of Congress did not have adequate time to consider a joint resolution in a given session (60 session days in the Senate and 60 legislative days in the House), resolutions of disapproval may be introduced or re-introduced in both Houses in the next session, and the special Senate procedures specified in subsection 802(c) (d) shall apply in the next session of the Senate.

If a joint resolution of disapproval is pending when the expedited Senate procedures specified in subsections 802(c) (d) expire, the resolution shall not die in either House but shall simply be considered pursuant to the normal rules of either House with one exception. Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.

*Effect of enactment of a joint resolution of disapproval*

Subsection 801(b)(1) provides that: "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, enacted under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproved rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution of disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The committees intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

*Limitation on judicial review of congressional or administrative actions*

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter." Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings," U.S. Const., art. I, §5, cl. 2, which includes being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determination or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval," or by implication, when it has not

yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the committees expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).

*Enactment of a joint resolution of disapproval for a rule that was already in effect*

Subsection 801(f) provides that: "Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect." Application of this subsection should be consistent with existing judicial precedents on rules that are deemed never to have taken effect.

*Agency information required to be submitted to GAO*

Pursuant to subsection 801(a)(1)(B), the federal agency promulgating the rule shall submit to the Comptroller General (and make available to each House) (i) a complete copy of the cost benefit analysis of the rule, if any, (ii) the agency's actions related to the Regulatory Flexibility Act, (iii) the agency's actions related to the Unfunded Mandates Reform Act, and (iv) "any other relevant information or requirements under any other Act and any relevant Executive Orders." Pursuant to subsection 801(a)(1)(B), this information must be submitted to the Comptroller General on the day the agency submits the rule to Congress and to GAO.

The committees intend information supplied in conformity with subsection 801(a)(1)(B)(iv) to encompass both agency specific statutes and government wide statutes and executive orders that impose requirements relevant to each rule. Examples of agency specific statutes include information regarding compliance with the law that authorized the rule and any agency specific procedural requirements, such as section 9 of the Consumer Product Safety Act, as amended, 15 U.S.C. §2054 (procedures for consumer product safety rules); section 6 of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §655 (promulgation of standards); section 307(d) of the Clean Air Act, as amended, 42 U.S.C. §7607(d) (promulgation of rules); and section 501 of the Department of Energy Organization Act, 42 U.S.C. §7191 (procedure for issuance of rules, regulations, and orders). Examples of government wide statutes include other chapters of the Administrative Procedure Act, 5 U.S.C. §§551 559 and 701 706; and the Paperwork Reduction Act, as amended, 44 U.S.C. §§3501 3520.

Examples of relevant executive orders include E.O. No. 12866 (Sept. 30, 1993) (Regulatory Planning and Review); E.O. No. 12606 (Sept. 2, 1987) (Family Considerations in Policy Formulation and Implementation); E.O. No. 12612 (Oct. 26, 1987) (Federalism Considerations in Policy Formulation and Implementation); E.O. No. 12630 (Mar. 15, 1988) (Government Actions and Interference with Constitutionally Protected Property Rights); E.O. No. 12875 (Oct. 26, 1993) (Enhancing the Intergovernmental Partnership); E.O. No. 12778 (Oct. 23, 1991) (Civil Justice Reform); E.O. No. 12988 (Feb. 5, 1996) (Civil Justice Reform) (effective May 5, 1996).

*GAO reports on major rules*

Fifteen days after the federal agency submits a copy of a major rule and report to each House of Congress and the Comptroller General, the Comptroller General shall prepare and provide a report on the major rule

to the committees of jurisdiction in each House. Subsection 801(a)(2)(B) requires agencies to cooperate with the Comptroller General in providing information relevant to the Comptroller General's reports on major rules. Given the 15 day deadline for these reports, it is essential that the agencies' initial submission to the General Accounting Office (GAO) contain all of the information necessary for GAO to conduct its analysis. At a minimum, the agency's submission must include the information required of all rules pursuant to 801(a)(1)(B). Whenever possible, OMB should work with GAO to alert GAO when a major rule is likely to be issued and to provide as much advance information to GAO as possible on such proposed major rule. In particular, OMB should attempt to provide the complete cost benefit analysis on a major rule, if any, well in advance of the final rule's promulgation.

It also is essential for the agencies to present this information in a format that will facilitate the GAO's analysis. The committees expect that GAO and OMB will work together to develop, to the greatest extent practicable, standard formats for agency submissions. OMB also should ensure that agencies follow such formats. The committees also expect that agencies will provide expeditiously any additional information that GAO may require for a thorough report. The committees do not intend the Comptroller General's reports to be delayed beyond the 15 day deadline due to lack of information or resources unless the committees of jurisdiction indicate a different preference. Of course, the Comptroller General may supplement his initial report at any time with any additional information, on its own, or at the request of the relevant committees of jurisdiction.

*Covered agencies and entities in the executive branch*

The committees intend this chapter to be comprehensive in the agencies and entities that are subject to it. The term "Federal agency" in subsection 804(1) was taken from 5 U.S.C. §551(l). That definition includes "each authority of the Government" that is not expressly excluded by subsection 551(1)(A) (H). With those few exceptions, the objective was to cover each and every government entity, whether it is a department, independent agency, independent establishment, or government corporation. This is because Congress is enacting the congressional review chapter, in large part, as an exercise of its oversight and legislative responsibility. Regardless of the justification for excluding or granting independence to some entities from the coverage of other laws, that justification does not apply to this chapter, where Congress has an interest in exercising its constitutional oversight and legislative responsibility as broadly as possible over all agencies and entities within its legislative jurisdiction.

In some instances, federal entities and agencies issue rules that are not subject to the traditional 5 U.S.C. §553(c) rulemaking process. However, the committees intend the congressional review chapter to cover every agency, authority, or entity covered by subsection 551(l) that establishes policies affecting any segment of the general public. Where it was necessary, a few special exceptions were provided, such as the exclusion for the monetary policy activities of the Board of Governors of the Federal Reserve System, rules of particular applicability, and rules of agency management and personnel. Where it was not necessary, no exemption was provided and no exemption should be inferred from other law. This is made clear by the provision of section 806 which states that the Act applies notwithstanding any other provision of law.

*Definition of a "major rule"*

The definition of a "major rule" in subsection 804(2) is taken from President Reagan's Executive Order 12291. Although President Clinton's Executive Order 12866 contains a definition of a "significant regulatory action" that is seemingly as broad, several of the Administration's significant rule determinations under Executive Order 12866 have been called into question. The committees intend the term "major rule" in this chapter to be broadly construed, including the non numerical factors contained in the subsections 804(2) (B) and (C).

Pursuant to subsection 804(2), the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget (the Administrator) must make the major rule determination. The committees believe that centralizing this function in the Administrator will lead to consistency across agency lines. Moreover, from 1981-93, OIRA staff interpreted and applied the same major rule definition under E.O. 12291. Thus, the Administrator should rely on guidance documents prepared by OIRA during that time and previous major rule determinations from that Office as a guide in applying the statutory definition to new rules.

Certain covered agencies, including many "independent agencies," include their proposed rules in the Unified Regulatory Agenda published by OMB but do not normally submit their final rules to OMB for review. Moreover, interpretative rules and general statements of policy are not normally submitted to OMB for review. Nevertheless, it is the Administrator that must make the major rule determination under this chapter whenever a new rule is issued. The Administrator may request the recommendation of any agency covered by this chapter on whether a proposed rule is a major rule within the meaning of subsection 804(2), but the Administrator is responsible for the ultimate determination. Thus, all agencies or entities covered by this chapter will have to coordinate their rulemaking activity with OIRA so that the Administrator may make the final, major rule determination.

*Scope of rules covered*

The committees intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review. The term "rule" in subsection 804(3) begins with the definition of a "rule" in subsection 551(4) and excludes three subsets of rules that are modeled on APA sections 551 and 553. This definition of a rule does not turn on whether a given agency must normally comply with the notice and comment provisions of the APA, or whether the rule at issue is subject to any other notice and comment procedures. The definition of "rule" in subsection 551(4) covers a wide spectrum of activities. First, there is formal rulemaking under section 553 that must adhere to procedures of sections 556 and 557 of title 5. Second, there is informal rulemaking, which must comply with the notice and comment requirements of subsection 553(c). Third, there are rules subject to the requirements of subsection 552(a)(1) and (2). This third category of rules normally either must be published in the Federal Register before they can adversely affect a person, or must be indexed and made available for inspection and copying or purchase before they can be used as precedent by an agency against a non agency party. Documents covered by subsection 552(a) include statements of general policy, interpretations of general applicability, and administrative staff manuals and instructions to staff that affect a member of the public. Fourth, there is a body of materials that fall within the APA definition of "rule" and are the product of

agency process, but that meet none of the procedural specifications of the first three classes. These include guidance documents and the like. For purposes of this section, the term rule also includes any rule, rule change, or rule interpretation by a self regulatory organization that is approved by a Federal agency. Accordingly, all "rules" are covered under this chapter, whether issued at the agency's initiative or in response to a petition, unless they are expressly excluded by subsections 804(3)(A) (C). The committees are concerned that some agencies have attempted to circumvent notice and comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The committees admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.

The definition of a rule in subsection 551(4) covers most agency statements of general applicability and future effect. Subsection 804(3)(A) excludes "any rule of particular applicability, including a rule that approves or prescribes rates, wages, prices, services, or allowances therefore, corporate and financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing" from the definition of a rule. Many agencies, including the Treasury, Justice, and Commerce Departments, issue letter rulings or other opinion letters to individuals who request a specific ruling on the facts of their situation. These letter rulings are sometimes published and relied upon by other people in similar situations, but the agency is not bound by the earlier rulings even on facts that are analogous. Thus, such letter rulings or opinion letters do not fall within the definition of a rule within the meaning of subsection 804(3).

The different types of rules issued pursuant to the internal revenue laws of the United States are good examples of the distinction between rules of general and particular applicability. IRS private letter rulings and Customs Service letter rulings are classic examples of rules of particular applicability, notwithstanding that they may be cited as authority in transactions involving the same circumstances. Examples of substantive and interpretative rules of general applicability will include most temporary and final Treasury regulations issued pursuant to notice and comment rulemaking procedures, and most revenue rulings, revenue procedures, IRS notices, and IRS announcements. It does not matter that these later types of rules are issued without notice and comment rulemaking procedures or that they are accorded less deference by the courts than notice and comment rules. In fact, revenue rulings have been described by the courts as the "classic example of an interpretative rul[e]" within the meaning of the APA. See *Wing v. Commissioner*, 81 T.C. 17, 26 (1983). The test is whether such rules announce a general statement of policy or an interpretation of law of general applicability.

Most rules or other agency actions that grant an approval, license, registration, or similar authority to a particular person or particular entities, or grant or recognize an exemption or relieve a restriction for a particular person or particular entities, or permit new or improved applications of technology for a particular person or particular entities, or allow the manufacture, distribution, sale, or use of a substance or product are exempted under subsection 804(3)(A) from the definition of a rule. This is probably the largest category of agency actions excluded from the definition of a rule. Examples include import and export licenses, individual

rate and tariff approvals, wetlands permits, grazing permits, plant licenses or permits, drug and medical device approvals, new source review permits, hunting and fishing take limits, incidental take permits and habitat conservation plans, broadcast licenses, and product approvals, including approvals that set forth the conditions under which a product may be distributed.

Subsection 804(3)(B) excludes "any rule relating to agency management or personnel" from the definition of a rule. Pursuant to subsection 804(3)(C), however, a "rule of agency organization, procedure, or practice," is only excluded if it "does not substantially affect the rights or obligations of non agency parties." The committees' intent in these subsections is to exclude matters of purely internal agency management and organization, but to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights or obligations of non agency parties.

GRAND OPENING OF MAIN  
BRANCH, SAN FRANCISCO LIBRARY

HON. TOM LANTOS

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 18, 1996

Mr. LANTOS. Mr. Speaker, I rise today, on the 90th anniversary of the devastating 1906 San Francisco earthquake, to celebrate with the city of San Francisco a monumental achievement of community cooperation and commitment. I invite my colleagues to join me in conveying our congratulations and admiration to the people of San Francisco who have committed their precious resources to the construction of the new main branch of the San Francisco Library, a beautiful and highly functional testament to the love that San Franciscans have for their city and for books and education. It is a love that has found its voice through the coordinated efforts of corporations, foundations, and individuals.

A library should reflect the pride, the culture, and the values of the diverse communities that it serves. The San Francisco main library will undoubtedly be successful in reaching this goal. The library will be home to special centers dedicated to the history and interests of African Americans, Chinese Americans, Filipino Americans, Latino Americans, and gays and lesbians. The library will be designed to serve the specialized needs of the business man as well as the immigrant newcomer. It will become home to the diverse communities that make San Francisco unique among metropolitan areas of the world. It will also become a home, most importantly, that serves to unite.

The new San Francisco main library represents an opportunity to preserve and disperse the knowledge of times long since passed. The book serves as man's most lasting testament and the library serves as our version of a time machine into the past, the present and the future. This library, built upon the remains of the old City Hall destroyed 90 years ago today, is a befitting tribute to the immortality of thought. Buildings will come as they will most definitely pass, but the books of this new library and the information that they hold are eternal and serve as an indelible

foundation that cannot be erased by the passage of time.

The expanded areas of the new main library will provide space for numerous hidden treasures that no longer will be hidden. The people of San Francisco will have the opportunity to reacquire themselves with numerous literary treasures previously locked behind the dusty racks of unsightly storage rooms.

Although the new San Francisco main library serves as a portal into our past, it also serves to propel us into the future. It is an edifice designed to stoke the imagination by providing access to the numerous streams of information that characterize our society today. The technologically designed library will provide hundreds of public computer terminals to locate materials on line, 14 multimedia stations, as well as access to data bases and the Information Superhighway. It will provide education and access for those previously unable to enter the "computer revolution." The library will provide vital access and communication links so that it can truly serve as a resource for the city and for other libraries and educational institutions throughout the region. The new library will serve as an outstanding model for libraries around the world to emulate.

Like an educational institution, the San Francisco Library will be a repository of human knowledge, organized and made accessible for writers, students, lifelong learners and leisure readers. It will serve to compliment and expand San Francisco's existing civic buildings City Hall, Davies Symphony Hall, Brooks Hall, and the War Memorial and Performing Arts Center. The library serves as a symbiotic commitment between the city of San Francisco and its people. In 1988, when electorates across the country refused to support new bond issues, the people of San Francisco committed themselves to a \$109.5 million bond measure to build the new main library building and to strengthen existing branch libraries. Eight years later those voices are still clearly heard and they resonate with the dedication of this unique library, built by a community to advance themselves and their neighbors.

Mr. Speaker, on this day, when we celebrate the opening of the new main branch of the San Francisco Library, I ask my colleagues to join me in congratulating the community of San Francisco for their admirable accomplishments and outstanding determination.

TRIBUTE TO DAVID J. WHEELER

HON. WES COOLEY

OF OREGON

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 18, 1996

Mr. COOLEY of Oregon. Mr. Speaker, on February 1, 1996, the President signed H.R. 2061, a bill to designate the Federal building in Baker City, OR in honor of the late David J. Wheeler. As the congressional representative for Baker City, and as the sponsor of H.R. 2061, I recently returned to Baker City for the building dedication ceremony. Mr. Wheeler, a Forest Service employee, was a model father and an active citizen. In honor of Mr. Wheeler, I would like to submit, for the record, my speech at the dedication ceremony.

Thank you for inviting me here today. It has been an honor to sponsor the congress

sional bill to designate this building in memory of David Wheeler. I did not have the privilege of knowing Mr. Wheeler myself, but from my discussions with Mayor Griffith and from researching his accomplishments I've come to know what a fine man he was. I know that Mr. Wheeler was a true community leader, and I know that the community is that much poorer for his passing. With or without this dedication, his spirit will remain within the Baker City community.

Mayor Griffith, I have brought a copy of H.R. 2061 the law to honor David Wheeler. The bill has been signed by the President of the United States, by the Speaker of the House, and by the President of the Senate. Hopefully, this bill will find a suitable place within the new David J. Wheeler Federal Building.

I'd like to offer my deepest sympathy to the Wheeler family, and to everyone here who knew him. And, I'd like to offer a few words from Henry Wadsworth Longfellow who once commented on the passing away of great men. His words I think describe Mr. Wheeler well:

If a star were quenched on high,  
For ages would its light,  
Still traveling down from the sky,  
Shine on our mortal sight.

So when a great man dies,  
For years beyond our ken,  
The light he leaves behind him lies  
Upon the paths of men."

So too with David Wheeler. His light will shine on the paths of us all particularly of his family for the rest of our days.

THE MINIMUM WAGE

HON. LEE H. HAMILTON

OF INDIANA

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 18, 1996

Mr. HAMILTON. Mr. Speaker, I would like to insert my Washington Report for Wednesday, April 17, 1996, into the CONGRESSIONAL RECORD.

RAISING THE MINIMUM WAGE

Rewarding work is a fundamental American value. There are many ways to achieve that goal, including deficit reduction to boost the economy, opening markets abroad to our products, improving education and skills training, and investing in technology and infrastructure. Increasing wages must be a central objective of government policies.

The economy is improving. It has in recent years reduced the unemployment rate of 5.6%, cut the budget deficit nearly in half, and spurred the creation of 8.4 million additional jobs. Real hourly earning has now begun to rise modestly, and the tax cut in 1993 for 15 million working families helped spur economic growth.

But much work needs to be done. We must build on the successes of the last few years, and address the key challenges facing our economy, including the problem of stagnant wages. This problem will not be solved overnight, but one action we can take immediately, and which I support, is to raise the minimum wage.

RAISING THE MINIMUM WAGE

The minimum wage was established in 1938 in an attempt to assist the working poor, usually non union workers with few skills and little bargaining power. The wage has been increased 17 times, from 25 cents per hour in 1938 to \$4.25 per hour in 1991. Currently some 5 million people work for wages at or below \$4.25 per hour, and most of them are adults rather than teenagers.

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## Document (1)

1. ARTICLE:A COST-BENEFIT INTERPRETATION OF THE "SUBSTANTIALLY SIMILAR" HURDLE IN THE CONGRESSIONAL REVIEW ACT: CAN OSHA EVER UTTER THE E-WORD (ERGONOMICS) AGAIN?, 63 ADMIN. L. REV. 707

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# ARTICLE: A COST-BENEFIT INTERPRETATION OF THE "SUBSTANTIALLY SIMILAR" HURDLE IN THE CONGRESSIONAL REVIEW ACT: CAN OSHA EVER UTTER THE E-WORD (ERGONOMICS) AGAIN?

Fall 2011

## Reporter

63 ADMIN. L. REV. 707 \*

**Length:** 42998 words

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## Text

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### [\*708] INTRODUCTION

Congress has always had the power to overturn a specific regulation promulgated by an executive branch agency and, as the author of the underlying statutes under which the agencies regulate, has also always been able to amend those statutes so as to thwart entire lines of regulatory activity before they begin. But in 1996, Congress carved out for itself a shortcut path to regulatory oversight with the passage of the Congressional Review Act (CRA),<sup>1</sup> and can now veto a regulation by passing a joint resolution rather than by passing a law.<sup>2</sup> There is no question that Congress can now kill a regulation with relative ease, although it has only exercised that ability once in the fifteen years since the passage of the [\*709] CRA.<sup>3</sup> It remains ambiguous, however, whether Congress can use this new mechanism to, in effect, due to a regulation what the Russian nobles reputedly did to Rasputin--poison it, shoot it, stab it, and throw its weighted body into a river--that is, to veto not only the instant rule it objects to, but forever bar an agency from regulating in that area. From the point of view of the agency, the question is, "What kind of phoenix, if any, is allowed to rise from the ashes of a dead regulation?" This subject has, in our view, been surrounded by mystery and misinterpretations, and is the area we hope to clarify via this Article.

A coherent and correct interpretation of the key clause in the CRA, which bars an agency from issuing a new rule that is "substantially the same" as one vetoed under the CRA,<sup>4</sup> matters most generally as a verdict on the precise

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<sup>1</sup> Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868-74 (codified as amended at 5 U.S.C. §§ 801-808 (2006)).

<sup>2</sup> See 5 U.S.C. §§ 801-802 (2006).

<sup>3</sup> See *infra* Parts II.A and IV.A.4 (discussing the Occupational Safety and Health Administration (OSHA) ergonomics rule and the congressional veto thereof in 2001).

<sup>4</sup> 5 U.S.C. § 801(b)(2).

demarcation of the relative power of Congress and the Executive. It matters broadly for the administrative state, as all agencies puzzle out what danger they court by issuing a rule that Congress might veto (can they and their affected constituents be worse off for having awakened the sleeping giant than had they issued no rule at all?). And it matters most specifically for the U.S. Occupational Safety and Health Administration (OSHA), whose new Assistant Secretary<sup>5</sup> is almost certainly concerned whether any attempt by the agency to regulate musculoskeletal disorders ("ergonomic" hazards) in any fashion would run afoul of the "substantially the same" prohibition in the CRA.

The prohibition is a crucial component of the CRA, as without it the CRA is merely a reassertion of authority Congress always had, albeit with a streamlined process. But whereas prior to the CRA Congress would have had to pass a law invalidating a rule *and* specifically state exactly what the agency could not do to reissue it, Congress can now kill certain future rules semiautomatically and perhaps render them unenforceable in court. This judicial component is vital to an understanding of the "substantially the same" prohibition as a legal question, in addition to a political one: whereas Congress can choose whether to void a subsequent rule that is substantially similar to an earlier vetoed rule (either for violation of the "substantially the same" prohibition or on a new substantive basis), if a court rules that a reissued rule is in fact "substantially the same" it would be obligated to treat the new rule as void *ab initio* even if Congress had failed to enact a new veto.<sup>6</sup>

[\*710] In this Article, we offer the most reasonable interpretation of the three murky words "substantially the same" in the CRA. Because neither Congress nor any reviewing court has yet been faced with the need to consider a reissued regulation for substantial similarity to a vetoed one, this is "uncharted legal territory."<sup>7</sup> The range of plausible interpretations runs the gamut from the least daunting to the most ominous (from the perspective of the agencies), as we will describe in detail in Part III.A. To foreshadow the extreme cases briefly, it is conceivable that even a verbatim identical rule might not be "substantially similar" if scientific understanding of the hazard or the technology to control it had changed radically over time. At the other extreme, it is also conceivable that any subsequent attempt to regulate in any way whatsoever in the same broad topical area would be barred.<sup>8</sup> We will show, however, that considering the legislative history of the CRA, the subsequent expressions of congressional intent issued during the one legislative veto of an agency rule to date, and the bedrock principles of good government in the administrative state, an interpretation of "substantially similar" much closer to the former than the latter end of this spectrum is most reasonable and correct. *We conclude that the CRA permits an agency to reissue a rule that is very similar in content to a vetoed rule, so long as it produces a rule with a significantly more favorable balance of costs and benefits than the vetoed rule.*<sup>9</sup>

We will assert that our interpretation of "substantially similar" is not only legally appropriate, but arises naturally when one grounds the interpretation in the broader context that motivated the passage of the CRA and that has come to dominate both legislative and executive branch oversight of the regulatory agencies: the insistence that regulations should generate benefits in excess of their costs. We assert that even if the hazards addressed match exactly those covered in the vetoed rule, if a reissued rule has a substantially different cost-benefit equation than

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<sup>5</sup> David Michaels was confirmed December 3, 2009. See 155 CONG. REC. S12,351 (daily ed. Dec. 3, 2009).

<sup>6</sup> See *infra* notes 122-125 and accompanying text.

<sup>7</sup> Kristina Sherry, 'Substantially the Same' Restriction Poses Legal Question Mark for Ergonomics, INSIDE OSHA, Nov. 9, 2009, at 1, 1, 8.

<sup>8</sup> See *infra* Part III.A.

<sup>9</sup> For a thorough defense of cost-benefit (CBA) analysis as a valuable tool in saving lives, rather than an antiregulatory sword, see generally John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008). *But cf.* James K. Hammitt, *Saving Lives: Benefit-Cost Analysis and Distribution*, 157 U. PA. L. REV. PENNUMBRA 189 (2009), <http://www.pennumbra.com/responses/03-2009/Hammitt.pdf> (noting the difficulties in accounting for equitable distribution of benefits and harms among subpopulations when using cost-benefit analysis).

the vetoed rule, then it cannot be regarded as "substantially similar" in the sense in which those words were (and also should have been) intended.

The remainder of this Article will consist of seven Parts. In Part I, we [\*711] will lay out the political background of the 104th Congress, and then explain both the substance and the legislative history of the Congressional Review Act. In Part II, we discuss the one instance in which the fast-track congressional veto procedure has been successfully used, and mention other contexts in which Congress has considered using it to repeal regulations. In this Part, we also discuss the further "uncharted legal territory" of how the courts might handle a claim that a reissued rule was "substantially similar." In Part III, we present a detailed hierarchy of possible interpretations of "substantially similar," and in Part IV, we explain why the substantial similarity provision should be interpreted in among the least ominous ways available. In Part V, we summarize the foregoing arguments and give a brief verdict on exactly where, in the seven-level hierarchy we developed, we think the interpretation of "substantially similar" must fall. In Part VI, we discuss some of the practical implications of our interpretation for OSHA as it considers its latitude to propose another ergonomics rule. Finally, in Part VII, we recommend some changes in the system to help achieve Congress's original aspirations with less inefficiency and ambiguity.

## I. REGULATORY REFORM AND THE CONGRESSIONAL REVIEW ACT

The Republican Party's electoral victory in the 1994 midterm elections brought with it the prospect of sweeping regulatory reform. As the Republicans took office in the 104th Congress, they credited their victory to public antigovernment sentiment, especially among the small business community. Regulatory reform was central to the House Republicans' ten-plank Contract with America proposal, which included provisions for congressional review of pending agency regulations and an opportunity for both houses of Congress and the President to veto a pending regulation via an expedited process.<sup>10</sup> This Part discusses the Contract with America and the political climate in which it was enacted.

### A. *The 1994 Midterm Elections and Antiregulatory Sentiment*

An understanding of Congress's goal for regulatory reform requires some brief familiarity with the shift in political power that occurred prior to the enactment of the Contract with America. In the 1994 elections, the Republican Party attained a majority in both houses of Congress. In the House of Representatives, Republicans gained a twenty-six-seat advantage over the House Democrats.<sup>11</sup> Similarly, in the Senate, Republicans turned [\*712] their minority into a four-seat advantage.<sup>12</sup>

The 1994 election included a large increase in participation among the business community. In fact, a significant majority of the incoming Republican legislators were members of that community.<sup>13</sup> Small business issues--and in particular the regulatory burden upon them--were central in the midterm election, and many credited the Republican Party's electoral victory to its antiregulatory position.<sup>14</sup> Of course, it was not only business owners who

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<sup>10</sup> Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, **110 Stat. 868-74** (codified as amended at **5 U.S.C. §§ 801-808** (2006)).

<sup>11</sup> See ROBIN H. CARLE, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 8, 1994, at 50 (1995), [http://clerk.house.gov/member\\_info/electionInfo/1994election.pdf](http://clerk.house.gov/member_info/electionInfo/1994election.pdf) (reporting the results of the 1994 U.S. House elections, in which the Republicans won a majority of 230-204).

<sup>12</sup> See *id.* (reporting the results of the 1994 U.S. Senate elections, after which the Republicans held a majority of 52-48).

<sup>13</sup> Newt Gingrich, *Foreword* to RICHARD LESHER, MELTDOWN ON MAIN STREET: WHY SMALL BUSINESS IS LEADING THE REVOLUTION AGAINST BIG GOVERNMENT, at xi, xiv (1996) ("Of the 73 freshman Republicans elected to the House in 1994, 60 were small businesspeople . . .").

<sup>14</sup> See, e.g., Linda Grant, *Shutting Down the Regulatory Machine*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 70, 70 ("Resentment against excessive government regulation helped deliver election victory to Republicans . . .").

campaigned to decrease the volume of federal regulation--seeking more autonomy and fewer compliance costs, farmers and local governments also aimed to decrease the size of the federal government.<sup>15</sup>

One catalyst for the wave of antigovernment sentiment and the Republicans' related electoral victory was the increasing regulatory burden. By some estimates, the annual costs of federal regulation had increased to more than \$ 600 billion by 1995.<sup>16</sup>

Regulatory reform was not merely an idle campaign promise. Republicans had spent a great deal of effort in prior years to push for fewer regulations, to little avail. When the 104th Congress was sworn in, changes to the regulatory process ranked highly on the Republican Party's agenda.<sup>17</sup> The party leaders were aggressive in their support of regulatory reform. Senator Don Nickles of Oklahoma declared, "We're going to get regulatory reform . . . . We can do it with a rifle or we can do it with a shotgun, but we're going to do it."<sup>18</sup>

**[\*713]** The case that the federal government had been hurtling toward a coercive "nanny state," and the need to deregulate (or at least to slam on the brakes) in response, was bolstered in the early 1990s by a confluence of new ideas, new institutions, and new advocates.<sup>19</sup> The rise of quantitative risk assessment (QRA), and the rapid increase in the capability of analytical chemistry to detect lower and lower amounts of contaminants in all environmental media and human tissues, made possible an ongoing stream of revelations about the apparent failure to provide an ample margin of safety below safe levels of substances capable of causing chronic disease and ecological damage. But at the same time, the successes of the 1970s and 1980s at picking the low-hanging fruit of the most visible manifestations of environmental pollution (for example, flaming rivers or plumes of soot rising from major point sources) made possible a compelling counterargument: that unlike the first generation of efficient remedies for intolerable problems, the mopping up of the purportedly last small increments of pollution threatened to cost far more than the (dubious) benefits achieved. This view was supported by the passage of time and the apparent lack of severe long-term consequences from some of the environmental health crises of the early 1980s (for example, Love Canal, New York and Times Beach, Missouri).<sup>20</sup> In the early 1990s, several influential books advanced the thesis that regulation was imposing (or was poised to impose) severe harm for little or nonexistent benefit. Among the most notable of these were *The Death of Common Sense: How Law Is Suffocating America*,<sup>21</sup> which decried the purported insistence on inflexible and draconian strictures on business, and *Breaking the Vicious Circle*.<sup>22</sup> In this latter book, then-Judge Stephen Breyer posited a cycle of mutual amplification between a public eager to insist on zero risk and a cadre of **[\*714]** risk assessors and bureaucrats happy to invoke

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<sup>15</sup> See *id.* at 72 ("Business has gained a number of allies in its quest to rein in regulation. State and local governments, ranchers and farmers, for example, also want to limit Washington's role in their everyday dealings.").

<sup>16</sup> *Id.* at 70 (reporting the annual costs of federal regulation in 1991 dollars).

<sup>17</sup> See, e.g., Bob Tutt, *Election '94: State; Hutchinson Pledges to Help Change Things*, HOUS. CHRON., NOV. 9, 1994, at A35 (reporting that Senator Kay Bailey Hutchinson of Texas named "reduction of regulations that stifle small business" as one of the items that "had her highest priority").

<sup>18</sup> Stan Crock et al., *A GOP Jihad Against Red Tape*, Bus. WK., NOV. 28, 1994, at 48 (quoting Senator Nickles).

<sup>19</sup> This section, and the subsequent section on the regulatory reform legislation of the mid-1990s, is informed by one of our (Adam Finkel's) experiences as an expert in methods of quantitative risk assessment, and (when he was Director of Health Standards at OSHA from 1995-2000) one of the scientists in the executive agencies providing expertise in risk assessment and cost-benefit analysis during the series of discussions between the Clinton Administration and congressional staff and members.

<sup>20</sup> See generally *Around the Nation: Times Beach, Mo., Board Moves to Seal Off Town*, N.Y. TIMES, Apr. 27, 1983, at A18 (reporting attempts by officials to blockade a St. Louis suburb that had been contaminated by dioxin); Eckardt C. Beck, *The Love Canal Tragedy*, EPA J., Jan. 1979, at 16, available at <http://www.epa.gov/aboutepa/history/topics/lovecanal/01.html> (describing the events following the discovery of toxic waste buried beneath the neighborhood of Love Canal in Niagara Falls, New York).

<sup>21</sup> PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: How LAW IS SUFFOCATING AMERICA* (1995).

<sup>22</sup> STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1994).

conservative interpretations of science to exaggerate the risks that remained uncontrolled.<sup>23</sup> Although the factual basis for the claim that risk assessment is too "conservative" (or even that it does not routinely *underestimate* risk) was and remains controversial,<sup>24</sup> enough of the individual common assumptions used in risk assessment were so clearly "conservative" (for example, the use of the upper confidence limit when fitting a dose-response function to cancer bioassay data) that this claim had considerable intuitive appeal. Around the same time, influential think tanks and trade associations (for example, the Cato Institute and the American Council on Science and Health) echoed the indictment against overregulation, and various media figures (notably John Stossel) advanced the view that the U.S. public was not just desirous of a safer world than common sense would dictate, but had scared itself into irrationality about how dangerous the status quo really was.<sup>25</sup>

The scholars and advocates who made the most headway with Congress in the period leading up to the passage of the CRA made three related, compelling, and in our opinion very politically astute arguments that still influence the landscape of regulation fifteen years later. First, they embraced risk assessment--thereby proffering a "sound science" alternative to the disdain for risk assessment that most mainstream and grassroots environmental groups have historically expressed<sup>26</sup>--although they insisted that each allegedly conservative assumption should be ratcheted back. Second, they advocated for the routine quantitative comparison of benefits (risks reduced) to the cost of regulation, thereby throwing cold water even on large risks if it could be shown that once monetized, the good done by controlling them was outweighed by the economic costs of that control. And perhaps most significantly, they emphasized--particularly in the writings and testimony of John Graham, who went on to lead the White House's Office of Information and Regulatory Affairs (OIRA) in the George W. Bush Administration--that regulatory overkill was tragic not just because it was economically expensive, but because it could ill serve the very goal of maximizing human longevity and quality of life. Some regulations, Graham and others emphasized,<sup>27</sup> could create or exacerbate [\*715] similar or disparate risks and do more harm to health and the environment than inaction would. Many other stringent regulations could produce non-negative net benefits, but far less benefit than smarter regulation could produce. Graham famously wrote and testified that going after trace amounts of environmental pollution, while failing to regulate risky consumer products (for example, bicycle helmet requirements) or to support highly cost-effective medical interventions, amounted to the "statistical murder" of approximately 60,000 Americans annually whose lives could have been saved with *different* regulation, as opposed to deregulation per se.<sup>28</sup>

The stage was thus set for congressional intervention to rationalize (or, perhaps, to undermine) the federal regulatory system.

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<sup>23</sup> See *id.* at 9-13.

<sup>24</sup> See Adam M. Finkel, *Is Risk Assessment Really Too Conservative?: Revising the Revisionists*, 14 COLUM. J. ENVTL. L. 427 (1989) (discussing numerous flaws in the assertion that risk assessment methods systematically exaggerate risk, citing aspects of the methods that work in the opposite direction and citing empirical evidence contrary to the assertion).

<sup>25</sup> *Special Report: Are We Scaring Ourselves to Death? The People Respond* (ABC television broadcast Apr. 21, 1994).

<sup>26</sup> See Alon Tal, *A Failure to Engage*, 14 ENVTL. F., Jan.-Feb. 1997, at 13.

<sup>27</sup> See John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1, 1-5 John D. Graham & Jonathan Baert Wiener eds., 1995); see also Cass R. Sunstein, *Health-Health Tradeoffs* (Chi. Working Papers on Law & Econ., Working Paper No. 42, 1996), available at [http://www.law.uchicago.edu/files/files/42.CRS\\_Health.pdf](http://www.law.uchicago.edu/files/files/42.CRS_Health.pdf).

<sup>28</sup> n28 Republican Representative John Mica stated:

Let me quote John Graham, a Harvard professor, who said, "Sound science means saving the most lives and achieving the most ecological protection with our scarce budgets. Without sound science, we are engaging in a form of 'statistical murder,' where we squander our resources on phantom risks when our families continue to be endangered by real risks.

141 CONG. REC. 6101 (1995) (statement of Rep. Mica).

## B. *The Contract with America and the CRA*

When the Republicans in the 104th Congress first began drafting the Contract with America, they intended to stop the regulatory process in its tracks by imposing a moratorium on the issuance of any new regulations. After the Clinton Administration resisted calls for a moratorium, Congress compromised by instead suggesting an amendment to the Administrative Procedure Act (APA) that allowed Congress and the President to veto pending regulations via an expedited process. This compromise led to a subtitle in the Contract with America now known as the Congressional Review Act of 1996. This Part describes the history of the CRA and its substance as enacted.

### 1. *From Moratorium to Congressional Review*

Even before being sworn in, Republican leaders had their sights set on imposing a moratorium on the issuance of all new federal regulation and urged President Clinton to implement a moratorium himself.<sup>29</sup> When he [\*716] declined to do so,<sup>30</sup> House Republicans called for a legislative solution--they intended to enact a statute that would put a moratorium on new regulations<sup>31</sup> so that Congress could implement regulatory reform without the distraction of having the federal bureaucracy continue to operate. A moratorium would also allow any new procedural or substantive requirements to be applied to all pending regulations without creating a "moral hazard"--agencies rushing to get more rules out (especially more unpalatable ones) in advance of a new set of strictures.<sup>32</sup> Members of Congress put particular emphasis on the importance of cost-benefit analysis (CBA) and risk assessment, noting that the moratorium might be lifted early if stricter CBA guidelines were implemented.<sup>33</sup> These ideas formed the basis of House Bill 450, the proposed Regulatory Transition Act of 1995, which would have imposed a retroactive moratorium period starting November 20, 1994, and lasting until either December 31, 1995, or the date that CBA or risk assessment requirements were imposed, whichever came earlier.<sup>34</sup>

The proposed moratorium, despite passing in the House,<sup>35</sup> met strong opposition in the Senate. Although Senate committees recommended enactment of the moratorium for largely the same reasons as the House leadership,<sup>36</sup> a

<sup>29</sup> See Melissa Healy, *GOP Seeks Moratorium on New Federal Regulations*, L.A. TIMES, Dec. 13, 1994, at A32 (reporting that House Speaker Newt Gingrich of Georgia and Senate Majority Leader Bob Dole of Kansas sent a letter to the White House urging President Clinton to issue an executive order imposing a moratorium on new federal rules).

<sup>30</sup> See Letter from Sally Katzen, Exec. Office of the President, Office of Mgmt. & Budget, to Tom DeLay, U.S. House of Representatives (Dec. 14, 1994), *reprinted in* H.R. REP. NO. 104-39, pt. 1, at 38-39 (1995) (expressing, on behalf of President Clinton, concern about the efficiency of federal regulation but declining to issue an executive order imposing a moratorium on federal regulation).

<sup>31</sup> See Grant, *supra* note 14, at 70 ("To halt the rampant rule making, Rep. David McIntosh . . . co-sponsored a bill with House Republican Whip Tom DeLay that calls for a moratorium on all new federal regulation . . .").

<sup>32</sup> See H.R. REP. NO. 104-39, pt. 1, at 9-10 (1995) ("[A] moratorium will provide both the executive and the legislative branches . . . with more time to focus on ways to fix current regulations and the regulatory system. Everyone involved in the regulatory process will be largely freed from the daily burden of having to review, consider and correct newly promulgated regulations . . . ."); S. REP. No. 104-15, at 5 (1995) (same).

<sup>33</sup> See H.R. REP. NO. 104-39, pt. 1, at 4 ("The moratorium can be lifted earlier, but only if substantive regulatory reforms (cost/benefit analysis and risk assessment) are enacted."); *see also id.* (noting that agencies would not be barred from conducting CBA during the moratorium).

<sup>34</sup> H.R. 450, 104th Cong. §§ 3(a), 6(2) (1995) (as passed by House of Representatives, Feb. 24, 1995).

<sup>35</sup> 141 CONG. REC. 5880 (1995) (recording the House roll call vote of 276-146, **with** 13 Representatives not voting).

<sup>36</sup> See S. 219, 104th Cong. §§ 3(a), 6(2) (1995) (as reported by S. Comm. on Governmental Affairs, Mar. 16, 1995) (proposing a moratorium similar to that considered in the House, but with a retroactivity clause that reached even further back); *see also* S. REP. No. 104-15, at 1 ("The Committee on Governmental Affairs . . . reports favorably [on S. 219] . . . and recommends that the bill . . . pass.").

strong minority joined the Clinton Administration in [\*717] opposition to the bill.<sup>37</sup> Six of the fourteen members of the Senate Committee on Governmental Affairs argued that a moratorium was overbroad and wasteful, and "does not distinguish between good and bad regulations."<sup>38</sup> In their view, a moratorium would hurt more than it would help, since it would "create delays in good regulations, waste money, and create great uncertainty for citizens, businesses, and others."<sup>39</sup> The Republicans, with only a slim majority in the Senate,<sup>40</sup> would face difficulty enacting a moratorium.

While House Bill 450 worked its way through the House, Senate Republicans drafted a more moderate (and, from the Senate's perspective, more realistic) proposal for regulatory reform through congressional oversight. Senate Bill 348 would have set up an expedited congressional review process for all new federal regulations and allowed for their invalidation by enactment of a joint resolution.<sup>41</sup> Faced with a Senate that was closely split over the moratorium bill, Senators Don Nickles of Oklahoma and Harry Reid of Nevada reached a compromise: they introduced the text of Senate Bill 348 as a substitute for the moratorium proposal, which became known as the Nickles-Reid Amendment.<sup>42</sup> Senate Democrats saw the more nuanced review process as a significant improvement over the moratorium's prophylactic approach,<sup>43</sup> and the Nickles-Reid Amendment (Senate Bill 219) passed the chamber by a roll call vote of 100-0.<sup>44</sup>

Disappointed in the defeat of their moratorium proposal, House leaders did not agree to a conference to reconcile House Bill 450 with Senate Bill [\*718] 219.<sup>45</sup> Pro-environment House Republicans eventually convinced House leaders that their antiregulatory plans were too far-reaching,<sup>46</sup> and over the following year, members of Congress attempted to include the review provision in several bills.<sup>47</sup> The provision was finally successfully included in the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), a part of the larger Contract with America

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<sup>37</sup> See S. REP. NO. 104-15, at 25-32 (calling the moratorium "dangerous" and "unnecessary"); see also Letter from Sally Katzen to Tom DeLay, *supra* note 30 (calling the moratorium a "blunderbuss" and noting that it was so overbroad that it would impede regulations addressing tainted meat in the food supply and assisting the diagnosis of illnesses that veterans may have suffered while serving in the Persian Gulf War).

<sup>38</sup> S. REP. No. 104-15, at 25.

<sup>39</sup> *Id.* at 26.

<sup>40</sup> See *supra* note 12 and accompanying text.

<sup>41</sup> S. 348, 104th Cong. (as introduced in Senate, Feb. 2, 1995).

<sup>42</sup> See 141 CONG. REC. 9426-27 (1995) (statement of Sen. Baucus) (noting withdrawal of the moratorium in favor of a fast-track process for congressional review).

<sup>43</sup> See *id.* ("To my mind, this amendment is much closer to the mark . . . Congress can distinguish good rules from bad. . . . [I]f an agency is doing a good job, the rule will go into effect, and public health will not be jeopardized.").

<sup>44</sup> *Id.* at 9580 (recording the roll call vote); see S. 219, 104th Cong. § 103 (as passed by Senate, Mar. 29, 1995) (including the congressional review procedure in lieu of the moratorium proposal).

<sup>45</sup> See 142 CONG. REC. 6926-27 (1996) (statement of Rep. Hyde) (summarizing the procedural history of the Congressional Review Act (CRA)).

<sup>46</sup> See John H. Cushman Jr., *House G. O.P. Chiefs Back Off on Stiff Antiregulatory Plan*, N.Y. TIMES, Mar. 6, 1996, at A19 ("Representative Sherwood Boehlert, a Republican from upstate New York who has emerged as the leader of a block of pro-environment House members, persuaded Speaker Newt Gingrich at a meeting today that this legislation went too far.").

<sup>47</sup> However, each bill eventually failed for reasons unrelated to the congressional review provision. See 142 CONG. REC. 6926-27 (statement of Rep. Hyde) (discussing the procedural history of the CRA).

Advancement Act (CWAA), as Subtitle E.<sup>48</sup> The congressional review provision was ultimately enacted without debate, as more controversial parts of the Contract with America occupied Congress's attention.<sup>49</sup> On March 28, 1996, the CWAA passed both houses of Congress.<sup>50</sup> In a signing statement, President Clinton stated that he had "long supported" the idea of increasing agency accountability via a review procedure, but he also noted his reservations about some of the provision's specific terms, which he said "will unduly complicate and extend" the process.<sup>51</sup>

## 2. Regulatory "Reform"

At the same time as they considered the idea of a regulatory moratorium, both houses of Congress considered far more detailed and sweeping changes to the way federal agencies could regulate. As promised by Speaker Newt Gingrich, within 100 days of the installation of 104th Congress, House Bill 9, the Job Creation and Wage Enhancement Act was [\*719] introduced and voted on.<sup>52</sup> This bill would have required most regulations to be justified by a judicially reviewable QRA, performed under a set of very specific requirements regarding the appropriate models to select and the statistical procedures to use.<sup>53</sup> It also would have required agencies to certify that each rule produced benefits to human health or the environment that justified the costs incurred.<sup>54</sup> Although the House passed this bill by a vote of 277-141, the Republican Senate majority made no public pledge to reform regulation as had their House counterparts,<sup>55</sup> and the analogous Senate Bill 343 (the Comprehensive Regulatory Reform Act, sponsored primarily by Republican Robert Dole of Kansas and Democrat J. Bennett Johnston of Louisiana), occupied that body for months of debate.<sup>56</sup> The Senate took three separate cloture votes during the summer of 1995, the final one falling only two votes shy of the sixty needed to end debate.<sup>57</sup>

Professors Landy and Dell attribute the failure of Senate Bill 343 largely to presidential politics: Senator Dole (who won the Republican nomination that year) may have been unwilling to tone down the judicial review provisions (under which agencies would face remand for deficiencies in their risk assessments or disputes over their cost-benefit pronouncements) because he was looking to his base, while President Clinton threatened a veto as an

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<sup>48</sup> See Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868-74 (codified as amended at 5 U.S.C. §§ 801-808 (2006)).

<sup>49</sup> See 142 CONG. REC. 6922-30 (statement of Rep. Hyde) (inserting documents into the legislative history of the Contract with America Advancement Act (CWAA) several weeks after its enactment, and noting that "no formal legislative history document was prepared to explain the [CRA] or the reasons for changes in the final language negotiated between the House and Senate"); see *also id.* at 8196-8201 (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>50</sup> See *id.* at 6940 (recording the House roll call vote of 328-91 with 12 nonvoting Representatives, including several liberals voting for the bill and several conservatives voting against it); see *also id.* at 6808 (reporting the Senate unanimous consent agreement).

<sup>51</sup> Presidential Statement on Signing the Contract with America Advancement Act of 1996, 32 WEEKLY COMP. PRES. DOC. 593 (Apr. 29, 1996).

<sup>52</sup> See H.R. 9, 104th Cong. §§ 411-24 (1995) (as passed by House, Mar. 3, 1995).

<sup>53</sup> See, e.g., *id.* § 414(b)(2) (setting forth specific requirements for the conduct of risk assessments).

<sup>54</sup> *Id.* § 422(a)(2).

<sup>55</sup> See Marc Landy & Kyle D. Dell, *The Failure of Risk Reform Legislation in the 104th Congress*, 9 DUKE ENVTL. L. & POL'Y F. 113, 115-16 (1998).

<sup>56</sup> S. 343, 104th Cong. (1995) (as introduced in Senate, Feb. 2, 1995).

<sup>57</sup> 141 CONG. REC. 19,661 (1995) (recording the roll call vote of 58-40).



attempt to "tap into the public's longstanding support for environmental regulation."<sup>58</sup> However, serious substantive issues existed as well. Public interest groups actively opposed the bill; with each untoward event in the news as the debate continued (notably a cluster of deaths and illnesses caused by fast-food hamburgers contaminated with E. coli<sup>59</sup>), the [\*720] bill's "green eyeshade" tone (dissect all costs and benefits, giving inaction the seeming benefit of the doubt) became a flashpoint for concern. For its part, the White House aggressively charted its own course of reform, strengthening the executive order giving OIRA broad authority over regulatory agencies and making regulatory transparency and plain language cornerstones of Vice President Gore's broader Reinventing Government initiative.<sup>60</sup> As Professor John Graham concluded, "The Democratic leadership made a calculation that it was more profitable to accuse Republicans of rolling back protections (in the guise of reform) than it was to work collaboratively toward passage of a bipartisan regulatory reform measure."<sup>61</sup>

Nevertheless, the majority of both houses of Congress believed that each federal regulation should be able to pass a formal benefit-cost test, and perhaps that agencies should be required to certify this in each case. Although no law enshrined this requirement or the blueprint for how to quantify benefits and costs, the CRA's passage less than a year after the failure of the Dole-Johnston bill can most parsimoniously be interpreted as Congress asserting that if the agencies remained free to promulgate rules with an unfavorable cost-benefit balance, Congress could veto at the finish line what a regulatory reform law would have instead nipped in the bud.

The CRA can also be interpreted as one of four contemporaneous attempts to salvage as much as possible of the cost-benefit agenda embodied in the failed omnibus regulatory reform legislation.<sup>62</sup> During 1995 and 1996, Congress also enacted the Unfunded Mandates Reform Act (which requires agencies to quantify regulatory costs to state and local governments, and to respond in writing to suggestions from these stakeholders for alternative regulatory provisions that could be more cost-effective),<sup>63</sup> the Regulatory Compliance Simplification Act (which requires [\*721] agencies to prepare compliance guides directed specifically at small businesses),<sup>64</sup> and a series of

<sup>58</sup> See Landy & Dell, *supra* note 55, at 125.

<sup>59</sup> n59 In a hearing on Senate Bill 343, Senator Paul Simon read from a February 22 letter in the *Washington Post*:

"Eighteen months ago, my only child, Alex, died after eating hamburger meat contaminated with E. coli 0157H7 bacteria. Every organ, except for Alex's liver, was destroyed . . . My son's death did not have to happen and would not have happened if we had a meat and poultry inspection system that actually protected our children."

*Regulatory Reform: Hearing on S. 343 Before the S. Comm. on the Judiciary*, 104th Cong. 19 (1995) (statement of Sen. Simon). Simon urged caution in burdening the agencies with new-requirements, saying, "The food we have is safer than for any other people on the face of the earth. I don't think the American people want to move away from that." *Id.*; see also James S. Kunen, *Rats: What's for Dinner? Don't Ask*, NEW YORKER, Mar. 6, 1995, at 7 (discussing the continuing importance of Upton Sinclair's *The Jungle* as it relates to regulation of food contaminants).

<sup>60</sup> See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended* in **5 U.S.C. § 601** app. at 745 (2006); AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993).

<sup>61</sup> John D. Graham, *Legislative Approaches to Achieving More Protection Against Risk at Less Cost*, *1997 U. CHI. LEGAL F.* 13, 57 (1997). However, as a participant in numerous executive-branch and congressional discussions at the time, one of us (Adam Finkel) hastens to add that many in the executive agencies believed that the specific provisions in the Dole-Johnston bill were in fact punitive, and were indeed offered merely "in the guise of reform."

<sup>62</sup> James T. O'Reilly, *EPA Rulemaking After the 104th Congress: Death from Four Near-Fatal Wounds?*, *3 ENVTL. LAW.* 1, 1 (1996).

<sup>63</sup> Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, **109 Stat. 48** (codified in amended at scattered sections of 2 U.S.C.).

<sup>64</sup> Contract with America Advancement Act of 1996, Pub. L. No. 104-121, tit. II, subtit. A, **110 Stat. 858-59** (codified as amended in scattered sections of 2, 5, 15, and 42 U.S.C.).

amendments to the Regulatory Flexibility Act (which makes judicially reviewable the agency's required analysis of why it should not adopt less costly regulatory alternatives favoring small businesses).<sup>65</sup> Against this backdrop, the CRA is more clearly seen as serving the primary purpose of giving special scrutiny--before aggrieved parties would have to plead their case in court--to rules that arguably conflict with other strong signals from Congress about the desired flexibility and cost-effectiveness of agency regulatory proposals.

### 3. *The CRA*

The CRA established a procedure by which Congress can oversee and, with the assent of the President, veto rules promulgated by federal agencies. Before any rule can take effect, the promulgating agency must submit to the Senate, House of Representatives, and the Comptroller General of the Government Accountability Office (GAO) a report containing, among other things, the rule and its complete CBA (if one is required).<sup>66</sup> The report is then submitted for review to the chairman and ranking member of each relevant committee in each chamber.<sup>67</sup> Some rules--for example, rules pertaining to internal agency functioning, or any rule promulgated by the Federal Reserve System--are exempted from this procedure.<sup>68</sup>

During this review process, the effective date of any major rule is postponed.<sup>69</sup> However, the President has discretion to allow a major rule [\*722] that would otherwise be suspended to go into effect for a limited number of purposes, such as national security.<sup>70</sup> The Act also exempts from suspension any rule for which the agency finds "for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>71</sup>

If Congress chooses to repeal any rule through the CRA, it may pass a joint resolution of disapproval via an expedited process. The procedure is expedited "to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule."<sup>72</sup> From the date that the agency submits its report of the rule, Congress has sixty days in session to pass a joint

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<sup>65</sup> *Id.* subtit. D, **110 Stat. 864-68** (codified as amended at **5 U.S.C. §§ 601-605, 609, 611** (2006)).

<sup>66</sup> **5 U.S.C. § 801(a)(1)(A)-(B)** (2006). Senator Pete Domenici of New Mexico inserted the provision requiring submission of the report to the Comptroller General because the Government Accountability Office (GAO) would be able to effectively review the CBA and ensure that the regulation complies with legal requirements, such as unfunded mandates legislation. See 141 CONG. REC. 9428-29 (1995) (statement of Sen. Domenici).

<sup>67</sup> **5 U.S.C. § 801(a)(1)(C)**.

<sup>68</sup> *Id.* § 804(3) (defining *rule* for the purposes of the CRA so as to exclude certain categories); *id.* § 807 (exempting all regulations promulgated by the Federal Reserve and Federal Open Market Committee from CRA requirements).

<sup>69</sup> *Id.* § 801(a)(3). A "major rule" under the CRA is any rule that: (1) has an annual effect on the economy of \$ 100 million or more; (2) results in a "major increase in costs or prices" for various groups, such as consumers and industries; or (3) is likely to result in "significant adverse effects on competition, employment, investment," or other types of enterprise abilities. *Id.* § 804(2). Any rule promulgated under the Telecommunications Act of 1996 is not a major rule for purposes of the CRA. *Id.*

<sup>70</sup> *Id.* § 801(c).

<sup>71</sup> *Id.* § 808. The good cause exception is intended to be limited to only those rules that are exempt from notice and comment by statute. See 142 CONG. REC. 6928 (1996) (statement of Rep. Hyde).

<sup>72</sup> 142 CONG. REC. 8198 (joint statement of Sens. Nickles, Reid, and Stevens); see also 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) (noting that "scarce agency resources are also a concern" that justifies a stay on the enforcement of major rules).

resolution.<sup>73</sup> The procedure is further expedited in the Senate, where debate over a joint resolution of disapproval is limited to a maximum of ten hours, effectively preventing any possibility of a filibuster.<sup>74</sup> The House does not have a similar expedited procedure.<sup>75</sup> When a disapproval resolution passes both houses of Congress, it is presented to the President for signing.<sup>76</sup> The CRA drafters developed this structure to meet the bicameralism and presentment requirements of the Constitution, which had thwarted an earlier congressional attempt to retain veto power over certain agency actions.<sup>77</sup>

[\*723] Upon the enactment of a joint resolution against a federal agency rule, the rule will not take effect.<sup>78</sup> If the rule has already taken effect by the time a joint resolution is enacted—for example, if the rule is not a major rule, or if the President has exercised the authority to override suspension of the rule's effective date<sup>79</sup>—then it cannot continue in force.<sup>80</sup> The effect of a joint resolution of disapproval is also retroactive: any regulation overridden by the CRA process is "treated as though [it] had never taken effect."<sup>81</sup>

The CRA places a further limitation on agency action following a successful veto, which is the focus of this Article. Not only does the regulation not take effect as submitted to Congress, but the agency may not be free to reissue another rule to replace the one vetoed. Specifically, the CRA provides that:

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<sup>73</sup> **5 U.S.C. § 802(a)**. The sixty-day window excludes "days either House of Congress is adjourned for more than 3 days during a session of Congress." *Id.* If an agency submits a report with fewer than sixty days remaining in the session of Congress, the sixty-day window is reset, beginning on the fifteenth day of the succeeding session of Congress. See *id.* § 801(d)(1), (2)(A).

<sup>74</sup> *Id.* § 802(d)(2); cf. STANDING RULES OF THE SENATE R. XXII § 2 (2007) (requiring the affirmative vote of three-fifths of Senators to close debate on most legislative actions).

<sup>75</sup> See Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1063 (1999) (criticizing the CRA for its lack of an expedited House procedure because, "As a practical matter, no expedited procedure will mean engaging the House leadership each time a rule is deemed important enough by a committee or group of members to seek speedy access to the floor").

<sup>76</sup> **5 U.S.C. § 801(a)(3)(B)**. If the President vetoes a resolution disapproving of a major rule, the suspension of the effective date is extended, at a minimum, until the earlier of thirty session days or the date that Congress votes and fails to override the President's veto. *Id.*

<sup>77</sup> U.S. CONST. art. I, § 7, cls. 2-3 (requiring, for a bill to become law, passage by both houses of Congress and either signing by the President or a presidential veto followed by a two-thirds congressional override in each house of Congress). Under these principles, the Supreme Court struck down § 224(c)(2) of the Immigration and Nationality Act, which allowed a single house of Congress to override the Attorney General's determination that deportation of an alien should be suspended. See *INS v. Chadha*, 462 U.S. 919, 959 (1983), invalidating 8 U.S.C. § 1254(c)(2) (1982). Curiously, while the CRA was intended to give respect to the Constitution's bicameralism and presentment requirements, 142 CONG. REC. 6926 (statement of Rep. Hyde) (noting that, after *Chadha*, "the one-house or two-house legislative veto . . . was thus voided," and as a consequence the authors of the CRA developed a procedure that would require passage by both houses and presentment to the President); 142 CONG. REC. 8197 (joint statement of Sens. Nickles, Reid, and Stevens) (same), the 104th Congress enacted the unconstitutional line item veto in violation of those very principles less than two weeks after it had enacted the CRA. See Line Item Veto Act, Pub. L. No. 104-130, **110 Stat. 1200 (1996)** (codified as amended at 2 U.S.C. §§ 691-692 (Supp. II 1997)), *invalidated by Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>78</sup> **5 U.S.C. § 801(b)(1)**.

<sup>79</sup> See *supra* notes 69-70 and accompanying text.

<sup>80</sup> **5 U.S.C. § 801(b)(1)**.

<sup>81</sup> *Id.* § 801(f). For a summary of the disapproval procedure created by the CRA, with emphasis on its possible use as a tool to check midnight regulation, see Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 189-90 (2009).

A rule that does not take effect (or does not continue) under [a joint resolution of disapproval] may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.<sup>82</sup>

An agency's ability to promulgate certain rules after a veto thus turns on the CRA's meaning of "substantially the same form." We will discuss the range of scholarly and editorial interpretations of how ominously executive agencies should regard the prohibition against reissuance of "substantially similar" rules in Part III.B. But to foreshadow the main argument, we [\*724] believe that most commentators have offered an unduly pessimistic reading of this provision. One of the most respected experts in administrative law, Professor Peter Strauss, testified before Congress a year after the enactment of the CRA that the substantial similarity provision has a "doomsday effect."<sup>83</sup> Because, Strauss opined, the provision precludes the affected agency from ever attempting to regulate in the same topical area, Congress may well have tied its own hands and as a result will refrain from vetoing rules altogether.<sup>84</sup> Although we agree wholeheartedly with Strauss's recommendation that Congress should amend the CRA to require a statement of the reasons for the initial veto, we simply observe here that events subsequent to his 1997 testimony demonstrate that Congress did *not* in fact blanch from invoking a veto even when it was not primarily concerned about an agency exceeding its statutory authority: Congress overturned the OSHA ergonomics rule in 2001 ostensibly because of concern about excessive compliance costs and illusory risk-reduction benefits.<sup>85</sup> Therefore, § 801 (b)(2) of the CRA represents a very influential consequence of a veto power that Congress is clearly willing to use, and its correct interpretation is therefore of great importance to administrative law and process.

With very little evidence in the CRA's legislative history discussing this provision,<sup>86</sup> and only one instance in which the congressional veto has actually been carried out,<sup>87</sup> neither Congress nor the Judiciary has clearly established the meaning of this crucial clause. In the next several Parts, we will attempt to give the CRA's substantial similarity provision a coherent and correct meaning by interpreting it in the context of its legislative history, the political climate in which it was enacted and has been applied, and the broader administrative state.

## II. EXERCISE OF THE CONGRESSIONAL VETO

The CRA procedure for congressional override of a federal regulation [\*725] has only been used once.<sup>88</sup> In 2001, when the Bush Administration came into office, Republicans in Congress led an attempt to use the measure to

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<sup>82</sup> **5 U.S.C. § 801(b)(2).**

<sup>83</sup> *Congressional Review Act: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 89 (1997) [hereinafter *Hearing on the CRA*] (statement of Peter L. Strauss, Betts Professor of Law, Columbia University), available at [http://commdocs.house.gov/committees/judiciary/hju40524.000/hju40524\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju40524.000/hju40524_of.htm).

<sup>84</sup> *Id.*

<sup>85</sup> See *infra* Part VI and VII.

<sup>86</sup> See 142 CONG. REC. 6926 (1996) (statement of Rep. Hyde) (noting that, although the measure had already been enacted into law, "no formal legislative history document was prepared to explain the [CRA]"); *id.* at 8197 (joint statement of Sens. Nickles, Reid, and Stevens) (same).

<sup>87</sup> See *infra* Part II.A (discussing Congress's use of the veto in 2001 to disapprove of OSHA's ergonomics rule).

<sup>88</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, CONGRESSIONAL REVIEW ACT (CRA) FAQs, [http://www.gao.gov/legal/congressact/cra\\_faq.html#9](http://www.gao.gov/legal/congressact/cra_faq.html#9) (last visited Nov. 3, 2011) (explaining that the Department of Labor's ergonomics rule is the only rule that Congress has disapproved under the CRA).

strike down a workplace ergonomics regulation promulgated by OSHA.<sup>89</sup> The joint resolution generated much debate, in Washington and nationwide, over whether Congress should use the CRA procedure.<sup>90</sup> This Part discusses the joint resolution disapproving OSHA's ergonomics rule and briefly notes some other instances in which Congress has brought up but has not successfully executed the CRA. It then explores potential means by which the substantial similarity provision might be enforced.

#### A. *The OSHA Ergonomics Rule*

In 1990, Secretary of Labor Elizabeth Dole stated that ergonomic injuries were one "of the nation's most debilitating across-the-board worker safety and health illnesses," and announced that the Labor Department, under President George H.W. Bush, was "committed to taking the most effective steps necessary to address the problem of ergonomic hazards."<sup>91</sup> As we will discuss briefly in Part VI, in 1995 OSHA circulated a complete regulatory text of an ergonomics rule, but it met with such opposition that it was quickly scuttled. Five years after abandoning the first ergonomics proposal, OSHA proposed a new section to Title 20 of the *Code of Federal Regulations* "to reduce the number and severity of musculoskeletal disorders (MSDs) caused by exposure to risk factors in the workplace."<sup>92</sup> The regulation would, among other things, have required employers to provide employees with certain information about ergonomic injuries and MSDs and implement "feasible" controls to reduce MSD hazards if certain [\*726] triggers were met.<sup>93</sup> OSHA published the final rule in the *Federal Register* during the lame-duck period of the Clinton Administration, and it met strong opposition from Republicans and pro-business interest groups.

After the 107th Congress was sworn in, Senate Republicans led the charge against the ergonomics rule and proposed a joint resolution to disapprove of the regulation pursuant to the CRA.<sup>94</sup> Opponents of the OSHA regulation argued that it was the product of a flawed, last-minute rulemaking process in the outgoing Clinton Administration.<sup>95</sup> Although the Department of Labor had been attempting to develop an ergonomics program for at least the previous ten years,<sup>96</sup> the opponents called this particular rule "a regulation crammed through in the last couple of days of the Clinton administration" as a "major gift to organized labor."<sup>97</sup> Senator Mike Enzi of Wyoming argued that the proposed regulation was not published in the *Federal Register* until "a mere 358 days before

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<sup>89</sup> See Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001), *invalidating Ergonomics Program*, 65 Fed. Reg. 68,262 (Nov. 14, 2000).

<sup>90</sup> Compare Robert A. Jordan, *Heavy Lifting Not W's Thing*, BOS. SUNDAY GLOBE, Mar. 11, 2001, at E4 (arguing that President Bush's support of the joint resolution to overturn OSHA's ergonomics rule sends the message, "I do not share--or care about--your pain"), with Editorial, *Roll Back the OSHA Work Rules*, CHI. TRIB., Mar. 6, 2001, at N14 (calling the ergonomics rule "bad rule-making" and arguing that Congress should "undo it"). See generally 147 CONG. REC. 3055-80 (2001) (chronicling the floor debates in the House); *id.* at 2815-74 (chronicling the floor debates in the Senate).

<sup>91</sup> Press Release, Elizabeth H. Dole, Sec'y, Dep't of Labor, Secretary Dole Announces Ergonomics Guidelines to Protect Workers from Repetitive Motion Illnesses/Carpal Tunnel Syndrome (Aug. 30, 1990), *reprinted in* 145 CONG. REC. 24,467-68 (1999).

<sup>92</sup> Ergonomics Program, 65 Fed. Reg. at 68,846; see also Ergonomics Program, 64 Fed. Reg. 65,768-66,078 (proposed Nov. 23, 1999).

<sup>93</sup> Ergonomics Program, 65 Fed. Reg. at 68,847, 68,850-51.

<sup>94</sup> See S.J. Res. 6, 107th Cong. (2001) (enacted).

<sup>95</sup> See, e.g., 147 CONG. REC. 2815-16 (statement of Sen. Jeffords) ("[T]he ergonomics rule certainly qualifies as a 'midnight' regulation . . .").

<sup>96</sup> See Ergonomics Program, 65 Fed. Reg. at 68,264 (presenting an OSHA Ergonomics Chronology); see also *supra* note 91 and accompanying text (noting the Department of Labor's commitment in 1990 to address ergonomic injuries).

<sup>97</sup> 147 CONG. REC. 2817-18 (statement of Sen. Nickles).

[OSHA] made it the law of the land, one-quarter of the time they typically take." <sup>98</sup> He further suggested that OSHA ignored criticisms received during the notice-and-comment period, and instead relied on "hired guns" to provide information and tear apart witness testimony against the rule. <sup>99</sup>

This allegedly flawed and rushed procedure, OSHA's opponents argued, coupled with an overly aggressive posture toward the regulated industries, <sup>100</sup> led to an inefficient and unduly burdensome rule. Congressional Republicans and other critics seemed unconvinced by the agency's estimate of the costs and benefits. OSHA estimated that the regulation would cost \$ 4.5 billion annually, while others projected that it could cost up to \$100 billion--Senator Don Nickles of Oklahoma noted this wide range of estimates and said, "There is no way to know how much this would cost." <sup>101</sup> Democrats, however, argued that the rule was not [\*727] wasteful. Senator Edward Kennedy of Massachusetts said, in contrast, that the ergonomics rule was "flexible and cost-effective for businesses, and . . . overwhelmingly based upon scientific evidence." <sup>102</sup> The rule's proponents also emphasized its benefits, arguing that the rule's true cost of \$ 4.5 billion would be more than offset by a savings of "\$ 9.1 billion annually . . . recouped from the lost productivity, lost tax payments, administrative costs, and workers comp." <sup>103</sup> Critics argued that these benefits were overstated as businesses were naturally becoming more ergonomically friendly on their own. <sup>104</sup> Democrats also noted scientific evidence favoring the rule, including two reports by the National Academy of Sciences (NAS) and the Institute of Medicine reporting the enormous costs of work-related ergonomic injuries. <sup>105</sup> But critics cited reports in their favor, <sup>106</sup> and responded that the NAS report did not endorse the rule and could not possibly have shaped it, as the report was not released until after OSHA went forward with the regulation. <sup>107</sup>

Following expedited debate in Congress during which the legislators argued about the costs and benefits of the OSHA rule, both houses passed the joint resolution in March 2001. <sup>108</sup> When President Bush signed the joint

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<sup>98</sup> *Id.* at 2823 (statement of Sen. Enzi).

<sup>99</sup> *Id.* (estimating that "close to 2 million pages" of materials were submitted to OSHA during the public comment period, yet "there were only 94 days between the end of the public comment period and the date of the OSHA-published [rule]").

<sup>100</sup> See, e.g., Lisa Junker, *Marthe Kent: A Second Life in the Public Eye*, SYNERGIST, May 2000, at 28, 30 (quoting former OSHA Director of Safety Standards as saying: "I was born to regulate.," and "I don't know why, but that's very true. So as long as I'm regulating, I'm happy. . . . I think that's really where the thrill comes from. And it is a thrill; it's a high").

<sup>101</sup> 147 CONG. REC. 2818 (statement of Sen. Nickles); see also Editorial, *supra* note 90, at N14 ("Although [OSHA] puts the price tag on its rules at \$ 4.5 billion, the Economic Policy Foundation gauges the cost to business at a staggering \$ 125.6 billion.").

<sup>102</sup> 147 CONG. REC. 2818 (statement of Sen. Kennedy).

<sup>103</sup> *Id.* at 2827 (statement of Sen. Wellstone).

<sup>104</sup> *Id.* at 2815-16 (statement of Sen. Jeffords). Of course, if a market-driven move toward ergonomically friendly business meant that the future benefits of OSHA's rule were overstated, then its future costs must have been simultaneously overstated as well.

<sup>105</sup> See *id.* at 2830 (statement of Sen. Dodd) (citing a report finding that "nearly 1 million people took time from work to treat or recover from work-related ergonomic injuries" and that the cost was "about \$ 50 billion annually").

<sup>106</sup> See *id.* at 2833-34 (statement of Sen. Hutchinson) (citing a report that "shows that the cost-to-benefit ratio of this rule may be as much as 10 times higher for small businesses than for large businesses").

<sup>107</sup> See *id.* at 3056 (statement of Rep. Boehner) ("OSHA completed its ergonomics regulation without the benefit of the National Academy study.").

<sup>108</sup> See Ergonomics Rule Disapproval, Pub. L. No. 107-5, **115 Stat. 7 (2001)**, *invalidating* Ergonomics Program, **65 Fed. Reg. 68,262** (Nov. 14, 2000); 147 CONG. REC. 3079 (recording the House roll call vote of 223-206, with 4 Representatives not voting); *id.* at 2873 (recording the Senate roll call vote of 56-44).

resolution into law, he emphasized the need for "an understanding of the costs and benefits" and his Administration's intent to continue to "pursue a comprehensive approach to ergonomics."<sup>109</sup>

However, OSHA has never since made any attempt to regulate in this area, although it has issued four sets of voluntary ergonomics guidelines-- [\*728] for nursing homes, retail grocery stores, poultry processing, and the shipbuilding industry. Even without a specific standard, OSHA could use its general duty authority<sup>110</sup> to issue citations for ergonomic hazards that it can show are likely to cause serious physical harm, are recognized as such by a reasonable employer, and can be feasibly abated. However, in the more than ten years after the congressional veto of the ergonomics rule, OSHA issued fewer than one hundred such citations nationwide.<sup>111</sup> For purposes of comparison, in an average year, federal and state OSHA plans collectively issue more than 210,000 violations of all kinds nationwide.<sup>112</sup>

### *B. Midnight Regulations and Other Threats to Use the CRA*

The repeal of the OSHA ergonomics regulation has so far been the only instance in which Congress has successfully used the CRA to veto a federal regulation. However, the option of congressional repeal of rules promulgated by federal agencies has been considered in several other arenas, and in some instances threats by legislators to call for a CRA veto have led to a type of "soft veto" in which the agency responds to the threat by changing its proposed regulation. This has surfaced often, though not always, in the context of possibly repealing so-called midnight regulations.<sup>113</sup>

Some Republican lawmakers argued that the OSHA ergonomics standard circumvented congressional oversight because it was finalized in the closing weeks of the Clinton Administration.<sup>114</sup> Years later, these same arguments were echoed by the Obama Administration and some [\*729] Democrats in the 111th Congress with respect to other rules. As the Bush Administration left office in January 2009, it left behind several last-minute regulations, including rules that would decrease protection of endangered species, allow development of oil shale on some federal lands, and open up oil drilling in the Utah wilderness.<sup>115</sup> The Bush Administration also left behind a conscientious objector regulation that would allow certain healthcare providers to refuse to administer abortions or

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<sup>109</sup> Presidential Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 37 WEEKLY COMP. PRES. DOC. 477 (Mar. 20, 2001).

<sup>110</sup> See Occupational Safety and Health (OSH) Act of 1970 § 5(a)(1), 29 U.S.C. § 654 (2006).

<sup>111</sup> The OSHA website permits users to word-search the text of all general duty violations. See OCCUPATIONAL SAFETY & HEALTH ADMIN., DEPT OF LABOR, GENERAL DUTY STANDARD SEARCH, <http://www.osha.gov/pls/imis/generalsearch.html> (last visited Nov. 3, 2011). A search for all instances of the word *ergonomic* between March 7, 2001, (the day after the congressional veto) and August 18, 2011, (the day we ran this search) yielded sixty violations. The busiest year was 2003 (fifteen violations), and there were eight violations in 2010. An additional search for the term *MSD* yielded thirteen violations during this ten-year span, although some of these were duplicative of the first group of sixty.

<sup>112</sup> See SAFETY & HEALTH DEP'T, AFL-CIO, DEATH TOLL ON THE JOB: THE TOLL OF NEGLECT 61 (19th ed. 2010), [http://www.aflcio.org/issues/safety/memorial/upload/dotj\\_2010.pdf](http://www.aflcio.org/issues/safety/memorial/upload/dotj_2010.pdf).

<sup>113</sup> See Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352, 352 n.1 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/9/LRColl2009n9Beermann.pdf> ("Midnight regulation" is loosely defined as late-term action by an outgoing administration."). Colloquially, the term is usually reserved for situations in which the White House changes parties.

<sup>114</sup> See *supra* notes 95-99 and accompanying text.

<sup>115</sup> See, e.g., Stephen Power, *U.S. Watch: Obama Shelves Rule Easing Environmental Reviews*, WALL ST. J., Mar. 4, 2009, at A4 (noting executive and administrative decisions to "shelve" a Bush Administration rule allowing federal agencies to "bypass" consultation on whether new projects could harm endangered wildlife).

dispense contraception.<sup>116</sup> Congressional Democrats brought up the CRA as an option for repealing the Bush Administration's midnight regulations, while the Obama Administration searched for an executive strategy to scuttle them.<sup>117</sup> Although the CRA may be at its most useful when there is a significant realignment in party control over the Legislative and Executive Branches (as occurred in 2001 and 2009),<sup>118</sup> the Democrats of the **111th** Congress did not use the CRA to achieve their goal of overturning the Bush Administration's regulations--in the end, the Obama Administration used executive procedures.<sup>119</sup>

However, not all threats to use the CRA have occurred immediately [\*730] following a party change. In early 2010, one year after President Obama's inauguration, Senator Lisa Murkowski of Alaska considered proposing a resolution to disapprove of the Environmental Protection Agency's (EPA's) "endangerment finding" that greenhouse gases threaten the environment and human health.<sup>120</sup> Senator Murkowski's idea never came to fruition.

### C. Enforcement of the Substantial Similarity Provision

Since there has never yet been an attempt by an agency to reissue a rule following a CRA veto, there remains ambiguity not only over what kinds of rules are barred, but how any such restrictions would be enforced. In this Part, we briefly discuss three possible ways the substantial similarity provision may affect agency action: one administrative response, one legislative, and one judicial.

One possible means of application of the substantial similarity provision begins in the Executive Branch, most likely within the administrative department whose regulation has been vetoed. With the threat of invalidation hanging overhead, an agency may be deterred from promulgating regulations within a certain area for fear of having its work nullified--or worse, of having ruined for posterity the ability to regulate in a given area (if it interprets the CRA

<sup>116</sup> See Jennifer Lubell, *Conscientious Objectors: Obama Plan to Rescind Rule Draws Catholic Criticism*, MOD. HEALTHCARE, Mar. 23, 2009, at 33 (discussing the Obama Administration's plans to prevent the Bush Administration's conscientious objector rule from going into effect); Charlie Savage, *Democrats Look for Ways to Undo Late Bush Administration Rules*, N.Y. TIMES, Jan. 12, 2009, at A10 ("Democrats are hoping to roll back a series of regulations issued late in the Bush administration that weaken environmental protections and other restrictions.").

<sup>117</sup> See Peter Nicholas & Christi Parsons, *Obama Plans a Swift Start*, L.A. TIMES, Jan. 20, 2009, at A1 (reporting that "Obama aides have been reviewing the so-called midnight regulations" and noting that "Obama can change some Bush policies through executive fiat"); Savage, *supra* note 116 (reporting that "Democrats . . . are also considering using the Congressional Review Act of 1996" to overturn some Bush Administration regulations).

<sup>118</sup> See Brito & de Rugy, *supra* note 81, at 190 ("[T]he CRA will only be an effective check on midnight regulations if the incoming president and the Congress are of the same party. If not, there is little reason to expect that the Congress will use its authority under the CRA to repeal midnight regulations. Conversely, if the president is of the same party as his predecessor and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn his predecessor's last-minute rules." (footnote omitted)). *But see* Rosenberg, *supra* note 75 (pointing out flaws in the CRA and proposing a new scheme of congressional review of federal regulation).

<sup>119</sup> See, e.g., Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," *74 Fed. Reg. 10,207, 10,209-10* (proposed Mar. 10, 2009) (rescinding the Bush Administration's "conscientious objector" rule).

<sup>120</sup> See Editorial, *Ms. Murkowski's Mischief*, NY. TIMES, Jan. 19, 2010, at A30. Note, however, that it is unclear that an agency "finding" is sufficiently final agency action for a CRA veto. *But cf. infra* note 268 (noting attempts to bring a broader range of agency actions under congressional review, including the recently introduced Closing Regulatory Loopholes Act of 2011). Nor is it clear that a joint resolution of disapproval may be inserted as part of a large bill, as Senator Murkowski considered. *Cf. 5 U.S.C. § 802(a)* (2006) (setting forth the exact text to be used in a joint resolution of disapproval). Murkowski intended to insert the resolution into the bill raising the debt ceiling. See Editorial, *supra*. Doing so would not only have run afoul of the provision setting the joint resolution text, but would impermissively have either expanded debate on the resolution, see *5 U.S.C. § 802(d)(2)* (limiting debate in the Senate to ten hours), or limited debate on the debt ceiling bill, which is not subject to the CRA's procedural restrictions.



ominously). In other words, agencies might engage in a sort of self-censorship that itself enforces the CRA. Indeed, the continuous absence of ergonomics from the regulatory agenda for an entire decade following the veto of OSHA's rule--and well into the Obama Administration--arguably provides evidence of such self-censorship. In prepared testimony before a Senate subcommittee of the Committee on Appropriations, Secretary of Labor Elaine Chao testified that, due to the exercise of the veto, the Department of Labor would need to work with Congress to determine what principles to apply to any future regulation in the ergonomics field. She did not want to "expend valuable--and limited--resources on a new effort" if another regulation would be [\*731] invalidated as substantially similar.<sup>121</sup>

In addition to agency self-censorship, there is, of course, a potential Legislative application of the substantial similarity provision. If an agency were to reissue a vetoed rule "in substantially the same form," then Congress could use the substantial similarity provision as a compelling justification for enacting another joint resolution, perhaps voicing its objection to the substance of the new rule, but using "similarity" to bypass a discussion of the merits. For example, if OSHA reissued an ergonomics rule that members of Congress thought was substantially similar to the Clinton Administration rule, then they might be motivated to repeal the rule simply because they would see the new rule as outside the law, and a disrespect to their prior action under the CRA. Of course, as with the original ergonomics rule, the notion that an agency is acting outside its authority may be considered as merely one factor among others--procedural, cost-benefit related, and even political--in determining whether to strike down an agency rule. But a congressional belief that an agency is reissuing a rule in violation of the CRA may cut in favor of enacting a second joint resolution of disapproval, even if certain members of Congress would not be inclined to veto the rule on more substantive grounds. Indeed, this could even turn Congress's gaze away from the rule's substance entirely--a sort of "us against them" drama might be played out in which opponents could use the alleged circumvention as a means to stir [\*732] up opposition to a rule that the majority might find perfectly acceptable if seeing it de novo.

The Judiciary might also weigh in on the issue. If an agency were to reissue a rule that is substantially similar to a vetoed rule, and Congress chose not to exercise its power of veto under the CRA, then a regulated party might convince the courts to strike down the rule as outside of the agency's statutory authority. Although the text of the CRA significantly limits judicial review of a congressional veto (or failure to veto), the statute does *not* prohibit judicial review for noncompliance with the substantial similarity clause of a rule promulgated after a congressional veto.<sup>122</sup> In other words, while Congress may have successfully insulated its own pronouncements from judicial

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<sup>121</sup> *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations for Fiscal Year 2002: Hearing on H.R. 3061/S. 1536 Before a Subcomm. of the S. Comm. on Appropriations*, 107th Cong. 72 (2001) [hereinafter *Hearing on H.R. 3061/S. 1536*] (statement of Elaine L. Chao, Secretary, U.S. Department of Labor). However, Secretary Chao had promised immediately before the veto that she would do exactly the opposite and treat a CRA action as an impetus to reissue an improved rule. See Letter from Elaine L. Chao, Sec'y, U.S. Dep't of Labor, to Arlen Specter, Chairman, Subcomm. on Labor, Health & Human Servs., Educ, S. Comm. on Appropriations, U.S. Senate (Mar. 6, 2001) (promising to take future action to address ergonomics), *reprinted in* 147 CONG. REC. 2844 (2001) (statement of Sen. Specter). More recently, OSHA Assistant Secretary David Michaels, appointed by President Obama, has repeatedly indicated that OSHA has no plans to propose a new ergonomics regulation. For example, in February 2010, he addressed the ORG Worldwide Occupational Safety and Health Group (an audience of corporate health directors for large U.S. companies) and explained his proposal to restore a separate column for musculoskeletal disorder (MSD) cases in the required establishment-specific log of occupational injuries with this caveat: "It appears from press reports that our announcement of this effort may have confused some observers. So, let me be clear: This is *nota* prelude to a broader ergonomics standard." David Michaels, Assistant Sec'y of Labor for Occupational Safety & Health Administration, Remarks at the Quarterly Meeting of the ORC Worldwide Occupational Safety & Health Group & Corp. Health Dirs. Network (Feb. 3, 2010), [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=SPEECHES&p\\_id=2134](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=2134). For a discussion of similar about-faces in statements by members of Congress immediately before and after the veto, see *infra* Part III.B.

<sup>122</sup> See 5 U.S.C. § 805 (2006) ("No determination, finding, action, or omission under this chapter shall be subject to judicial review."). The legislative record makes clear that "a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule." 142 CONG. REC. 8199 (1996) (statement of Sen. Nickles). Indeed, the CRA prohibits a court only

review, that does not stop a plaintiff from asking a court to rule--without considering Congress's silence or statements--whether a rule that was allowed through should have been struck down as substantially similar.

There appear to be two primary ways in which judicial review would arise. First, a party might raise invalidity as a defense if an agency were to try enforcing a rule it arguably did not have authority to promulgate under the CRA. The defendant in the administrative proceedings could appeal agency enforcement of the rule to the federal courts under Chapter 7 of the APA, and a court might then strike down the regulation as a violation of [\*733] the substantial similarity provision.<sup>123</sup> But a regulated party need not wait until an agency attempts to enforce the rule in order to raise a challenge; as a second option, one may go on the offensive and bring suit for declaratory judgment or injunctive relief to prevent the agency from ever enforcing the rule in the first place.<sup>124</sup> In either of these situations, assuming a justiciable case or controversy under Article III,<sup>125</sup> a federal court would need to interpret the CRA to determine whether the reissued rule was substantially similar to a vetoed rule and thus invalid.

Since such a lawsuit has not yet been brought to the federal courts, there is no authoritative interpretation of the CRA to guide agency rulemaking following a congressional veto.<sup>126</sup> Where an agency does not wish to risk invalidation of a rule that merely *may* skirt the outer margins of substantial similarity (whatever those might be), the effect of the CRA may be to overdeter agency action via "self-censorship" even where its regulation may be legally valid. Until the federal courts provide an authoritative interpretation of the CRA, those outer margins of substantial similarity are quite large.<sup>127</sup> For this reason, it is important to provide a workable and realistic interpretation of the CRA to guide agency action and avoid overdeterrence. It is also important to set boundaries with an eye toward the problem of agency *inaction*--agencies should not hide behind the CRA as an excuse not to do anything in an area where the public expects some action and where Congress did not intend to block all rulemaking.

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from inferring the intent of Congress in *refusing* to enact a joint resolution of disapproval, implying that courts should (1) consider congressional intent in considering enacted resolutions, and (2) not infer substantial dissimilarity from Congress's failure to veto a second rule. See 5 U.S.C. § 801(g) ("If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval."); see also 142 CONG. REC. 8199 (statement of Sen. Nickles) (referring to § 801(g) and noting that the "limitation on judicial review in no way prohibits a court from determining whether a rule is in effect"). While some may call into question the constitutionality of such strong limits on judicial review, the CRA drafters' constitutional argument defending the provisions suggests that the limits are meant to address procedure. See *id.* ("This . . . limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to 'determine the Rules of its Proceedings' which includes being the final arbiter of compliance with such Rules." (citing U.S. CONST. art. I, § 5, cl. 2)). Thus, since a court may rule upon whether a rule is in effect, yet lacks the power to weigh Congress's omission of a veto *against* a finding of substantial similarity, a court could conduct its own analysis to determine whether a non-vetoed second rule is substantially similar and hence invalid.

<sup>123</sup> See 5 U.S.C. § 702 (conferring a right of judicial review to persons "suffering legal wrong because of agency action"); *id.* § 706(2)(C) (granting courts the authority to strike down agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); see also *id.* § 704 (requiring that an aggrieved party exhaust its administrative remedies before challenging a final agency action in federal court).

<sup>124</sup> See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (entertaining a declaratory relief action brought by parties challenging a regulation promulgated by the Department of Interior under the Endangered Species Act).

<sup>125</sup> U.S. CONST. art. III, § 2 (granting the federal courts jurisdiction only over cases and controversies); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (explaining the requirement of plaintiff standing); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (requiring that the plaintiffs case be ripe for adjudication).

<sup>126</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>127</sup> See *infra* Part III (providing a spectrum of possible interpretations, and noting the vastly different interpretations of the substantial similarity provision during the debates over the ergonomics rule).

In the next two Parts we will attempt to reconcile the vast spectrum of possible "substantial similarity" interpretations with the political and legislative history of the CRA, with the joint resolution overturning the OSHA ergonomics rule, and with the background principles of CBA and administrative law.

### [\*734] III. THE SPECTRUM OF INTERPRETATIONS OF "SUBSTANTIALLY SIMILAR"

In this Part, we develop seven possible interpretations of the key term "substantially similar," argue that interpretations offered by partisans during the ergonomics debate should be uniformly ignored as posturing, and suggest that interpretations offered after the ergonomics veto are too pessimistic.

#### *A. Hierarchy of Possible Interpretations*

Rather than constructing a definition of "substantially the same" from first principles, we will ground this discussion with reference to the spectrum of plausible interpretations of that key phrase, arrayed in ascending order from the least troublesome to the issuing agency to the most daunting. We use this device not to suggest that the center of gravity in the struggle of competing ideologies in Congress at the time the CRA was enacted should point the way toward a particular region of this spectrum, but rather to erect some markers that can be rejected as implausible interpretations of "substantially the same" and thereby help narrow this range. Although we will support our interpretation with reference to specific items in the legislative history of the CRA, starting out with this hierarchy also allows us to focus on what Congress could have made less frustratingly vague in its attempt to prevent agencies from reissuing rules that would force duplicative congressional debate.

We can imagine at least seven different levels of stringency that Congress could plausibly have chosen when it wrote the CRA and established the "substantially the same" test to govern the reissuance of related rules:

**Interpretation 1: An identical rule can be reissued if the agency asserts that external conditions have changed.** A reissued rule only becomes "substantially the same," in any sense that matters, if Congress votes to veto it again on these grounds. Therefore, an agency could simply wait until the makeup of Congress changes, or the same members indicate a change of heart about the rule at hand or about regulatory politics more generally, and reissue a wholly identical rule. The agency could then simply claim that although the regulation was certainly in "substantially the same form," the effect of the rule is now substantially different from what it would have been the first time around.

**Interpretation 2: An identical rule can be reissued if external conditions truly *have* changed.** We will discuss this possibility in detail in Part V. This interpretation of "substantially the same" recognizes that the effects of regulation--or the estimates of those effects--can change over time even if the rule itself does not change. Our understanding of the [\*735] science or economics behind a rule can change our understanding of its benefits or costs, or those benefits and costs themselves can change as technologies improve or new hazards emerge. For example, a hypothetical Federal Aviation Administration (FAA) rule banning smoking on airliners might have seemed draconian if proposed in 1960, given the understanding of the risks of second-hand smoking at the time, but it was clearly received much differently when actually issued thirty years later.<sup>128</sup> Safety technologies such as antilock brake systems that would have been viewed as experimental and prohibitively expensive when first developed came to be viewed as extremely cost-effective when their costs decreased with time. In either type of situation, an identical rule might become "substantially different" not because the vote count had changed, but because the same regulatory language had evolved a new meaning, and then Congress might welcome another opportunity to evaluate the costs and benefits.

**Interpretation 3: The reissued rule must be altered so as to have significantly greater benefits and/or significantly lower costs than the original rule.** Under this interpretation, the notion of "similar form" would not be judged via a word-by-word comparison of the two versions, but by a common-sense comparison of the stringency and impact of the rule. We will discuss in Part IV a variety of reasons why we believe Congress intended that the

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<sup>128</sup> Prohibition Against Smoking, *55 Fed. Reg. 8364* (Mar. 7, 1990) (codified at 14 C.F.R. pts. 121, 129, 135) (2006).

currency for judging similarity should be costs and benefits rather than the extent of narrative revision to the regulatory text per se or the extent to which a reissued rule contains wholly different provisions or takes a different approach. At this point, it should suffice to point out that as a practical matter, two versions of a regulation that have vastly different impacts on society might contain 99.99% or more of their individual words in common, and thus be almost identical in "form" if that word was used in its most plebian sense. An OSHA rule requiring controls on a toxic substance in the workplace, for example, might contain thousands of words mandating engineering controls, exposure monitoring, recordkeeping, training, issuance of personal protective equipment, and other elements, all triggered when the concentration of the contaminant exceeded some numerical limit. If OSHA reissued a vetoed toxic substance rule *with one single word changed* (the number setting the limit), the costs and burdens could drop precipitously. We suggest it would be bizarre to constrain the agency from attempting to satisfy congressional concerns by fundamentally changing the substance and import of a vetoed rule merely because doing so might affect only a [\*736] small fraction of the individual words in the regulatory text.<sup>129</sup>

**Interpretation 4: In addition to changing the overall costs and benefits of the rule, the agency must fix all of the specific problems Congress identified when it vetoed the rule.** This interpretation would recognize that despite the paramount importance of costs, benefits, and stringency, Congress may have reacted primarily to specific aspects of the regulation. Perhaps it makes little sense for an agency to attempt to reissue a rule that is substantially different in broad terms, but that pushes the same buttons with respect to the way it imposes costs, or treats the favored sectors or constituents that it chooses not to exempt. However, as we will discuss in Part IV.B, the fact that Congress chose not to accompany statements of disapproval with any language explaining the consensus of what the objections were may make it inadvisable to require the agency to fix problems that were never formally defined and that may not even have been seen as problems by more than a few vocal representatives.

**Interpretation 5: In addition to changing the costs and benefits and fixing specific problems, the agency must do more to show it has "learned its lesson."** This interpretation would construe "substantially the same form" in an expansive way befitting the colloquial use of the word *form* as more than, or even perpendicular to, substance. In other words, the original rule deserved a veto because of how it was issued, not just because of what was issued, and the agency needs to change its attitude, not just its output. This interpretation comports with Senator Enzi's view of why the CRA was written, as he expressed during the ergonomics floor debate: "I assume that some agency jerked the Congress around, and Congress believed it was time to jerk them back to reality. Not one of you voted against the CRA."<sup>130</sup> If the CRA was created as a mechanism to assert the reality of congressional power, then merely fixing the regulatory text may not be sufficient to avoid repeating the same purported mistakes that doomed the rule upon its first issuance.

**Interpretation 6: In addition to the above, the agency must devise a wholly different regulatory approach if it wishes to regulate in an area Congress has cautioned it about.** This would interpret the word *form* in the way that scholars of regulation use to distinguish fundamentally different kinds of regulatory instruments--if the [\*737] vetoed rule was, for example, a specification standard, the agency would have to reissue it as a performance standard in order to devise something that was not in "substantially the same form." An even more restrictive reading would divide *form* into the overarching dichotomy between command-and-control and voluntary (or market-based) designs: if Congress nixed a "you must" standard, the agency would have to devise a "you may" alternative to avoid triggering a "substantially similar" determination.

**Interpretation 7: An agency simply cannot attempt to regulate (in any way) in an area where Congress has disapproved of a specific regulation.** This most daunting interpretation would take its cue from a particular reading of the clause that follows the "same form" prohibition: "unless the reissued or new rule is specifically

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<sup>129</sup> It is even conceivable that a wholly identical regulatory text could have very different stringency if the accompanying preamble made clear that it would be enforced in a different way than the agency had intended when it first issued the rule (or that Congress had misinterpreted it when it vetoed the rule).

<sup>130</sup> 147 CONG. REC. 2821 (2001) (statement of Sen. Enzi).

authorized by a law enacted after the date of the joint resolution disapproving the original rule." <sup>131</sup> Such a reading could have been motivating the dire pronouncements of congressional Democrats who argued, as did Senator Russ Feingold of Wisconsin, that a "vote for this resolution is a vote to block any Federal ergonomics standard for the foreseeable future." <sup>132</sup> However, we will argue below that it is clear that Congress meant this interpretation only to apply in the rare cases where the organic statute only allowed the exact rule that the agency brought forward, and thus the veto created a paradox because the agency was never authorized to promulgate a different regulation.

#### *B. How Others Have Interpreted "Substantially the Same"*

By far the majority of all the statements ever made interpreting the meaning of "substantially the same" were uttered by members of Congress during the floor debate over the OSHA ergonomics standard. None of these statements occupied the wide middle ground within the spectrum of possible interpretations presented above. Rather, at one extreme were many statements trivializing the effect of the veto, such as, "the CRA will not act as an impediment to OSHA should the agency decide to engage in ergonomics rulemaking." The members who disagreed with this sanguine assessment did so in stark, almost apocalyptic terms, as in, "make no mistake about the resolution of disapproval that is before us. It is an atom bomb for the ergonomics rule . . . . Until Congress gives it permission, OSHA will be powerless to adopt an ergonomics rule

Surely the Democrats in Congress generally prefer an interpretation of legislative control over the regulatory system that defers maximally to the [\*738] executive agencies, allowing them to regulate with relatively few constraints or delays, while Republicans generally favor an interpretation that gives Congress the power to kill whole swaths of regulatory activity "with extreme prejudice." But in both cases, what they want the CRA to mean in general is the opposite of what they wanted their colleagues to think it meant in the run-up to a vote on a specific resolution of disapproval. Hence the fact that the first quote above, and dozens like it, came not from the left wing but from Republican James Jeffords of Vermont; <sup>133</sup> whereas the "atom bomb" and similarly bleak interpretations of the CRA came from Democrats such as Edward Kennedy of Massachusetts. <sup>134</sup> Clearly, both the trivialization of a possible veto by those hoping to convince swing voters that their disapproval was a glancing blow, as well as the statements cowering before the power of the CRA by those hoping to dissuade swing voters from "dropping the bomb," should not be taken at face value, and should instead be dismissed as posturing to serve an expedient purpose. Indeed, when the smoke cleared after the ergonomics veto, the partisans went back to their usual stances. <sup>135</sup>

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<sup>131</sup> **5 U.S.C. § 801(b)(2)** (2006).

<sup>132</sup> 147 CONG. REC. 2860 (statement of Sen. Feingold).

<sup>133</sup> *Id.* at 2816 (statement of Sen. Jeffords).

<sup>134</sup> *Id.* at 2820 (statement of Sen. Kennedy). This particular pattern was also clearly evident in the House floor debate on ergonomics. Consider, for example, this sanguine assessment from a strident opponent of the OSHA rule, Republican Representative Roy Blunt: "When we look at the legislative history of the Congressional Review Act, it is clear that this issue can be addressed again . . . . [T]he same regulation cannot be sent back essentially with one or two words changed . . . . [But] this set of regulations can be brought back in a much different and better way." *Id.* at 3057 (statement of Rep. Blunt). At the opposite end of the spectrum were proponents of ergonomics regulation such as Democratic Representative Rob Andrews: "Do not be fooled by those who say they want a better ergonomics rule, because if this resolution passes . . . [t]his sends ergonomics to the death penalty . . . ." *Id.* at 3059 (statement of Rep. Andrews).

<sup>135</sup> For example, in June 2001, Republican Senator Judd Gregg strongly criticized the Breaux Bill for encouraging OSHA to promulgate what he called a regulation "like the old Clinton ergonomics rule, super-sized." See James Nash, *Senate Committee Approves Bill Requiring Ergonomics Rule*, EHS TODAY (June 20, 2002, 12:00 AM), [http://ehstoday.com/news/ehs\\_imp\\_35576/](http://ehstoday.com/news/ehs_imp_35576/); see also *infra* Part IV.A.5 (describing the Breaux Bill). But at roughly the same time, Democratic Senator Edward Kennedy was encouraging OSHA to reissue a rule, with no mention of any possible impediment posed by the CRA: "It has been a year now that America's workers have been waiting for the Department of Labor to adopt a new ergonomics standard. We must act boldly to protect immigrant workers from the nation's leading cause of workplace injury." *Workplace Safety and Health for Immigrants*

The set of less opportunistic interpretations of "substantially the same," on the other hand, has a well-defined center of gravity. Indeed, most legal and political science scholars, as well as experts in OSHA rulemaking, seem to agree that a veto under the CRA is at least a harsh punishment, and [\*739] perhaps a death sentence. For example, Charles Tiefer described the substantial similarity provision as a "disabling of the agency from promulgating another rule on the same subject."<sup>136</sup> Morton Rosenberg, the resident expert on the CRA at the Congressional Research Service, wrote after the ergonomics veto that "substantially the same" is ambiguous, but he only reached a sanguine conclusion about one narrow aspect of it: an agency does not need express permission from Congress to reissue a "substantially different" rule when it is compelled to act by a statutory or judicial deadline.<sup>137</sup> He concluded, most generally, that whatever the correct legal interpretation, "[T]he practical effect . . . may be to dissuade an agency from taking any action until Congress provides clear authorization."<sup>138</sup> Similarly, Julie Parks criticized § 801(b)(2) as "unnecessarily vague," but concluded that it at least "potentially withdraws substantive authority from OSHA to issue *any* regulation concerning ergonomics."<sup>139</sup>

Advocates for strong OSHA regulation, who presumably would have no interest in demonizing the CRA after the ergonomics veto had already passed, nevertheless also take a generally somber view. Vernon Mogensen interprets "substantially the same" such that "the agency that issued the regulation is prohibited from promulgating it again without congressional authorization."<sup>140</sup> A.B. (Butch) de Castro—who helped write the ergonomics standard while an OSHA staff member—similarly opined in 2006 that "OSHA is barred from pursuing development of another ergonomics standard unless ordered so by Congress."<sup>141</sup> In 2002, Parks interviewed Charles Jeffress, who was the OSHA Assistant Secretary who "bet the farm" on the ergonomics rule, and he reportedly believed (presumably with chagrin) that "OSHA does not have the authority to issue [\*740] another ergonomics rule, because the substantially similar language is vague and ambiguous."<sup>142</sup>

As we will argue in detail below, we believe that all of these pronouncements ascribe to Congress more power to preemptively bar reissued regulations than the authors of the CRA intended, and certainly more anticipatory power than Congress should be permitted to wield.

#### IV. WHY "SUBSTANTIALLY THE SAME" SHOULD NOT BE INTERPRETED OMINOUSLY

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*and Low Wage Workers: Hearing Before the Subcomm. on Emp't, Safety & Training of the S. Comm. on Health, Educ., Labor & Pensions*, 107th Cong. 3 (2002) (statement of Sen. Kennedy).

<sup>136</sup> Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, *17 J.L. & POL.* 409, 476 (2001).

<sup>137</sup> MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT AFTER NULLIFICATION OF OSHA'S ERGONOMICS STANDARD 23 (2003).

<sup>138</sup> *Id.*

<sup>139</sup> Julie A. Parks, Comment, *Lessons in Politics: Initial Use of the Congressional Review Act*, *55 ADMIN. L. REV.* 187, 200 (2003) (emphasis added); see also Stuart Shapiro, *The Role of Procedural Controls in OSHA's Ergonomics Rulemaking*, 67 PUB. ADMIN. REV. 688, 696 (2007) (concluding that "[a]ttempts to create an ergonomics regulation effectively ended" with the 2001 veto because of the language of § 801(b)(2)).

<sup>140</sup> Vernon Mogensen, *The Slow Rise and Sudden Fall of OSHA's Ergonomics Standard*, WORKINGUSA, Fall 2003, at 54, 72.

<sup>141</sup> A.B. de Castro, *Handle with Care: The American Nurses Association's Campaign to Address Work-Related Musculoskeletal Disorders*, 4 CLINICAL REVS. BONE & MIN. METABOLISM 45, 50 (2006).

<sup>142</sup> Parks, *supra* note 139, at 200 n.69. Note that Jeffress' statement that the language is "vague and ambiguous" expresses uncertainty and risk aversion from within the agency, rather than a confident stance that issuance of another ergonomics standard would actually be illegal. See also *supra* Part II.C (noting agency self-censorship as one means of enforcing the CRA's substantial similarity provision).

In this Part, we argue that so long as the rule as reissued makes enough changes to alter the cost-benefit ratio in a significant and favorable way (and, we recommend, as long as the issuing agency also corrects any procedural flaws that Congress deplored as essentially arbitrary and capricious), the purposes of the CRA will be served, and the new rule should not be barred as "substantially the same" (although it would not be immunized against a second veto on new substantive grounds). We find four sets of reasons for this interpretation of the substantial similarity provision. First, the legislative history--both in the mid-1990s when the Republicans took control of Congress and enacted the CRA, and when Congress struck down the OSHA ergonomics rule in 2001--indicates that CBA and risk assessment were the intended emphases.<sup>143</sup> Congress wanted more efficient regulations, and requiring an agency to go back and rewrite rules that failed a cost-benefit test served Congress's needs.<sup>144</sup> Along with the legislative history, the signing statement interpreting the Act and Senate Bill 2184 introduced in the wake of the ergonomics veto also provide some strong clues as to the intended definition of "substantially the same." Secondly, the constraint that the text of any joint resolution of disapproval must be all-or-nothing--all nonoffending portions of the vetoed rule must fall along with the offending ones--argues for a limited interpretation, as a far-reaching interpretation of "substantially the same" would limit an agency's authority in ways Congress did not intend in exercising the veto. Third, in a system in which courts generally defer to an agency's own interpretation of its authority under an organic statute, agency action [\*741] following a joint resolution of disapproval should also be given deference. Finally, since a joint resolution of disapproval, read along with too broad an interpretation of "substantially the same," could significantly alter the scope of an agency's authority under its organic statute, one should avoid such a broad interpretation, since it seems implausible (or at least unwise) that Congress would intend to significantly alter an agency's delegated authority via the speedy and less-than-deliberative process it created to effect the CRA.

#### A. Congressional Intent and Language

Whether the plain language of the CRA is viewed on its own or in the context of the events leading up to the passage of the statute and the events surrounding the first and only congressional disapproval action in 2001, it is clear that Congress intended the new streamlined regulatory veto process to serve two purposes: one pragmatic and one symbolic. Congress needed to create a chokepoint whereby it could focus its ire on the worst of the worst--those specific regulations that did the greatest offense to the general concept of "do more good than harm" or the ones that gored the oxen of specific interest groups with strong allies in Congress. Congress also felt it needed, as the floor debate on the ergonomics standard made plain, to move the fulcrum on the scales governing the separation of powers so as to assert greater congressional control over the regulatory agencies whose budgets--but not always whose behavior--it authorizes. Neither of these purposes requires Congress to repudiate whole categories of agency activity when it rejects a single rule, as we will discuss in detail below. To use a mundane behavioral analogy, a parent who wants her teenager to bring home the right kind of date will clearly achieve that goal more efficiently, and with less backlash, by rejecting a specific suitor (perhaps with specific detail about how to avoid a repeat embarrassment) than by grounding her or forbidding her from ever dating again. Even if Congress had wanted to be nefarious, with the only goal that of tying the offending agency in knots, it would actually better achieve that goal by vetoing a series of attempts to regulate, one after the other, then by barring the instant rule and all future rules in that area in one fell swoop.

The plain language of the statute also shows that the regulatory veto was intended to preclude repetitious actions, *not to preclude related actions informed by the lessons imparted through the first veto*. Simply put, Congress put so much detail in the CRA about when and how an agency could try to reissue a vetoed rule that it seems bizarre for analysts to interpret "substantially the same" as a blanket prohibition against regulating in an area. We will explain how congressional intent sheds light on the precise meaning of [\*742] "substantially the same" by examining five facets of the legislative arena: (1) the events leading up to the passage of the CRA; (2) the plain text of the statute; (3) the explanatory statement issued a few weeks after the CRA's passage by the three major leaders of the

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<sup>143</sup> See *infra* Parts IV.A. 1, IV.A.4.

<sup>144</sup> *But see* Parks, *supra* note 139, at 199-205 (arguing that in practice the CRA has been used not to increase accountability, but to appease special interest groups, leaving no clear statutory guidance for agencies).

legislation in the Senate (and contemporaneously issued verbatim in the House); (4) the substantive (as opposed to the polemical) aspects of the ergonomics floor debate; and (5) the provisions of Senate Bill 2184 subsequently proposed to restart the ergonomics regulatory process.

### 1. Events Leading up to Passage

One cannot interpret the CRA without looking at the political history behind it--both electoral and legislative. The political climate of the mid-1990s reveals that congressional Republicans sought to reform the administrative process in order to screen for rules whose benefits did not outweigh their costs.<sup>145</sup> A Senate report on the moratorium proposal stated, "As taxpayers, the American people have a right to ask whether they are getting their money's worth. Currently, too few regulations are subjected to stringent cost-benefit analysis or risk assessment based on sound science. Without such protections, regulations can have unintended results."<sup>146</sup> This led to the inclusion in the CRA, for example, of a requirement that agencies submit the report of their rule not only to Congress, but also to GAO so that it can evaluate the CBA.<sup>147</sup> Although there were some complaints about the number or volume of regulations as opposed to merely their efficiency<sup>148</sup> --possibly suggesting that some members of Congress would not support even regulations whose benefits strongly outweighed their costs--the overall political history of the CRA in the period from 1994 to 1996 sends a clear sign that CBA and risk assessment were key. A statute enacted to improve regulation should not be interpreted so as to foreclose regulation.

### 2. Statutory Text

The plain language of the CRA provides at least three hints to the intended meaning and import of the "substantially the same" provision. [\*743] First, we note that in the second sentence of the statute, the first obligation of the agency issuing a rule (other than to submit a copy of the rule itself to the House and Senate) is to submit "a complete copy of the cost-benefit analysis of the rule, if any" to the Comptroller General and each house of Congress.<sup>149</sup> Clearly, as we have discussed above, the CRA is a mechanism for Congress to scrutinize the costs and benefits of individual regulations for possible veto of rules that appear to have costs in excess of benefits (a verdict that Congress either infers in the absence of an agency statement on costs and benefits, makes using evidence contained in the agency CBA, or makes by rejecting conclusions to the contrary in the CBA).<sup>150</sup> Moreover, the CRA's application only to major rules--a phrase defined in terms of the rule's economic impact<sup>151</sup> -- suggests that Congress was primarily concerned with the overall financial cost of regulations. As we discuss in detail below, we believe the first place Congress therefore should and will look to see if the reissued rule is "in substantially the same form" as a vetoed rule is the CBA; a similar-looking rule that has a wholly different (and more favorable) balance between costs and benefit is simply not the same. Such a rule will be different along precisely the key dimension over which Congress expressed paramount concern.

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<sup>145</sup> See *supra* Parts I.A-B; see also *infra* Part IV.D (arguing that allowing an agency to reissue a rule with a significantly better cost-benefit balance is a victory for congressional oversight).

<sup>146</sup> S. REP. NO. 104-15, at 5 (1995).

<sup>147</sup> See 5 U.S.C. § 801(a)(1)(B) (2006); 141 CONG. REC. 9428-29 (1995) (statement of Sen. Domenici).

<sup>148</sup> See, e.g., S. REP. NO. 104-15, at 5 ("Without significant new controls, the volume of regulations will only grow larger.").

<sup>149</sup> 5 U.S.C. § 801(a)(1)(B).

<sup>150</sup> Though not the subject of this Article, it is worth noting that CBA's quantitative nature still leaves plenty of room for argument, particularly in regards to valuation of the benefits being measured. See Graham, *supra* note 9, at 483-516 (defending the use of cost-benefit analysis despite its "technical challenges" as applied to lifesaving regulations).

<sup>151</sup> 5 U.S.C. § 804(2).



In addition, in the very sentence that bars an agency from reissuing a "substantially similar" rule, the Act provides for Congress to specifically authorize it to do just that via a new law enacted after the veto resolution passes.<sup>152</sup> We will discuss below, in the context of the April 1996 signing statement, how Congress in part intended this provision to apply in the special case in which Congress had previously instructed the agency to issue almost precisely the rule it did issue, thereby leaving the agency caught between an affirmative requirement and a prohibition. So, other than needing such a mechanism to cover the rare cases where the agency is obligated to reissue a similar rule, why would Congress have specifically reserved the right to authorize a very similar rule to one it had recently taken the trouble to veto? We assert that there are only two logical explanations for this: (1) Congress might use the new specific authorization to clarify exactly what minor changes that might *appear* to leave the rule [\*744] "substantially the same" would instead be sufficient to reverse all concerns that prompted the original veto; or (2) Congress might come to realize that new information about the harm(s) addressed by the rules or about the costs of remedying them made the original rule desirable (albeit in hindsight). Because the passage of time can make the original veto look unwise (see *supra* interpretations 1 and 2 in the hierarchy in Part III.A), Congress needed a way to allow something "substantially similar" to pass muster despite the prohibition in the first part of § 801(b)(2). Whatever the precise circumstances of such a clarifying or about-face authorization, the very fact that Congress also anticipated occasional instances where similar or even identical rules could be reissued means, logically, that it clearly expected different rules to be reissued, making the interpretation of "substantially the same" as barring all further activity in a given problem area quite far-fetched.

Finally, § 803 of the CRA establishes a special rule for a regulation originally promulgated pursuant to a deadline set by Congress, the courts, or by another regulation. This section gives the agency whose rule is vetoed a one-year period to fulfill the original obligation to regulate. Such deadlines always specify at least the problem area the agency is obligated to address,<sup>153</sup> so there is little or no question that Congress intended to allow agencies to reissue rules covering the same hazard(s) as a vetoed rule, when needed to fulfill an obligation, so long as the revised rule approaches the problem(s) in ways not "substantially the same." Further support for this common-sense interpretation of "substantially the same" is found in the one-year time period established by § 803: one year to repropose and finalize a new rule is a breakneck pace in light of the three or more years it not uncommonly takes agencies to regulate from start to finish.<sup>154</sup> Thus, in § 803, Congress chose a time frame compatible only with a very circumscribed set of "fixes" to respond to the original resolution of disapproval. If "not substantially the same" meant "unrecognizably different from," one year would generally be quite insufficient to re-promulgate under these circumstances. Admittedly, Congress could have [\*745] intended a different meaning for "substantially the same" in cases where no judicial, statutory, or regulatory deadline existed, but then one might well have expected § 803 to cross-reference § 802(b)(2) and make clear that a more liberal interpretation of "substantially the same" only applies to compliance with preexisting deadlines.

### 3. The Signing Statement

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<sup>152</sup> See *id.* § 801(b)(2) ("[A] new rule that is substantially the same as [a vetoed] rule may not be issued, *unless* the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving of the original rule." (emphasis added)).

<sup>153</sup> See, e.g., Needlestick Safety and Prevention Act, Pub. L. No. 106-430, § 5, **114 Stat. 1901, 1903-04 (2000)** (establishing the procedure and deadline by which OSHA was required to promulgate amendments to its rule to decrease worker exposure to bloodborne pathogens). In this case, Congress went further and actually wrote the exact language it required OSHA to insert in amending the existing rule.

<sup>154</sup> See Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 *J.L. & POL.* 393, 416 (2007) (showing that, on average, it takes almost three years for a regulation to move from first publication in the *Unified Agenda* of rules in development to final promulgation, with outliers in both the Clinton and Bush (43) Administrations exceeding ten years in duration).

In the absence of a formal legislative history, the explanatory statement written by the prime sponsors of the CRA<sup>155</sup> serves its intended purpose as "guidance to the agencies, the courts, and other interested parties when interpreting the act's terms."<sup>156</sup> This document contains various elaborations that shed light on congressional expectations regarding agency latitude to reissue rules after disapproval.

The background section clarifies that Congress sought not to "become a super regulatory agency" speaking directly to the regulated community, but needed the CRA to tip the "delicate balance" between congressional enactment and executive branch implementation of laws toward slightly more policymaking authority for Congress.<sup>157</sup> Notably, the sponsors repeatedly referred to "a rule" in the singular noun form, rather than to whole regulatory programs, whenever they discussed the need for review (for example, "Congress may find *a rule* to be too burdensome, excessive, inappropriate or duplicative"<sup>158</sup>). In other words, agencies may take specific actions that usurp policymaking activity from Congress, so the remedy is for Congress to send them back to try again (to regulate consistent with their delegated authority), not to shut down the regulatory apparatus in an area. A CRA that had a "one strike and you're out" mechanism would, we believe, not redress the "delicate balance," but rewrite it entirely.

As discussed above,<sup>159</sup> the passage of time or the advance of knowledge [\*746] can ruin a well-intentioned rule and demand congressional intervention--Nickles, Reid, and Stevens explain how "during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change."<sup>160</sup> The principle that costs and benefits can be a moving target must, we believe, also inform the meaning of "substantially the same." If the "proper solution" Congress envisioned to an environmental or other problem has changed such that an agency regulation no longer comports with congressional expectations, then it must also be possible for circumstances to change *again* such that a vetoed rule could turn out to effect "the proper solution." The signing statement sets up a predicate for intervention when the regulatory solution and the proper solution diverge--which in turn implies that an agency certainly cannot reissue "the same rule in the same fact situation," but in rare cases it should be permitted to argue that what once was improper has now become proper.<sup>161</sup> Whether in the ten years since the ergonomics veto the 2000 rule may still look "improper" does not change the logic that costs and benefits can change by agency action or by exogenous factors, and that the purpose of the CRA is to block rules that fail a cost-benefit test.

The signing statement also offers up the "opportunity to act . . . before regulated parties must invest the significant resources necessary to comply with a major rule"<sup>162</sup> as the sole reason for a law that delays the effectiveness of rules while Congress considers whether to veto them. Again, this perspective is consistent with the purpose of the CRA as a filter against agencies requiring costs in excess of their accompanying benefits, not as a means for Congress to reject all solutions to a particular problem by disapproving one particular way to solve it.

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<sup>155</sup> 142 CONG. REC. 8196-8201 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>156</sup> *Id.* at 8197.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (emphasis added). In one instance only, the authors of this statement refer to "regulatory schemes" as perhaps being "at odds with Congressional expectations," possibly in contrast to individual rules that conflict with those expectations. *Id.* However, four sentences later in the same paragraph, they say that "[i]f these concerns are sufficiently serious, Congress can stop *the rule*," *id.* (emphasis added), suggesting that "schemes" does not connote an entire regulatory program or refer to all conceivable attempts to regulate to control a particular problem area, but simply refers to a single offending rule that constitutes a "scheme."

<sup>159</sup> See *supra* Part III.A.

<sup>160</sup> 142 CONG. REC. 8197 (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>161</sup> See *infra* Part V.

<sup>162</sup> 142 CONG. REC. 8198 (joint statement of Sens. Nickles, Reid, and Stevens).

The (brief) direct explanation of the "substantially the same" paragraph provides additional general impressions of likely congressional intent, as well as some specific elaboration of the remainder of § 801(b)(2). The only mention given to the purpose of the "substantially the same" prohibition is as follows: "Subsection 801 (b)(2) is necessary to prevent circumvention of a resolution [of] disapproval."<sup>163</sup> The use of the pejorative word *circumvention* seems clearly to signal congressional concern that an agency could fight and win a war of attrition simply by continuing to promulgate near-identical variants of a vetoed rule until it finally caught Congress asleep at the switch or wary of having said "no" too many times. This rationale for invoking the substantial similarity prohibition was echoed many times in the [\*747] ergonomics floor debate, notably in this statement by Senator James Jeffords of Vermont: "an agency should not be able to reissue a disapproved rule merely by making minor changes, thereby claiming that the reissued regulation was a different entity."<sup>164</sup> Viewed in this light, "substantially the same" means something akin to "different enough that it is clear the agency is not acting in bad faith."

The remainder of the paragraph explaining § 801 (b)(2) sheds more light on the process whereby Congress can even specifically authorize an agency to reissue a rule that is *not* "substantially different." Here the sponsors made clear that if the underlying statute under which the agency issued the vetoed rule does not constrain the substance of such a rule, "the agency may exercise its broad discretion to issue a substantially different rule."<sup>165</sup> *Notice that the sponsors make no mention of the agency needing any permission from Congress to do so.* However, in some cases Congress has obliged an agency to issue a rule *and* has imposed specific requirements governing what such a rule should and should not contain.<sup>166</sup> When Congress disapproves of this sort of rule, "the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of *any* rule."<sup>167</sup> In these unusual cases, the sponsors clarify, the "debate on any resolution of disapproval . . . [should] make the congressional intent clear regarding the agency's options or lack thereof."<sup>168</sup> If an agency is allowed by the original statute to issue a substantially different rule, Congress has no obligation to speak further, but if the veto and the statute collide, then Congress must explain the seeming paradox. Such a case has never occurred, of course (the Occupational Safety and Health (OSH) Act does not require OSHA to issue any kind of ergonomics rule), but we can offer informed speculation about the likely contours of such an event. Suppose that in 2015, Congress was to pass a law requiring the Department of Transportation (DOT) to issue a regulation by January 1, 2018, prohibiting drivers from writing text messages while driving. But by 2018, suppose the makeup of Congress had changed, as had the party in control of the White House, and the new Congress was not pleased that DOT had followed the old Congress's instructions to the letter. It could veto the rule and make clear that DOT had no options left--perhaps Congress could save face in light of this flip-flop by claiming that new technology had made it possible to text safely, and it could simply assert that the original order to regulate was now moot. [\*748] Or, Congress could observe (or claim) that DOT had followed the original instructions in a particularly clumsy way: perhaps it had brushed aside pleas from certain constituency groups (physicians, perhaps) who asserted that more harm to public safety would ensue if they were not exempted from the regulations. Congress could resolve this paradox by instructing DOT to reissue the rule with one additional sentence carving out such an exemption. That new document would probably be "substantially the same" as the vetoed rule and might have costs and benefits virtually unchanged from those of the previous rule, but it would be permissible because Congress had in effect amended its original instructions from 2015 to express its will more clearly.

Because Congress specifically provided the agency with an escape valve (a written authorization on how to proceed) in the event of a head-on conflict between a statutory obligation and a congressional veto, it is clear that

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<sup>163</sup> See *id.* at 8199.

<sup>164</sup> 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords).

<sup>165</sup> 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>166</sup> See, e.g., *supra* note 153.

<sup>167</sup> 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

<sup>168</sup> *Id.*

no such authorization is needed if the agency can craft on its own a "substantially different" rule that still comports with the original statute. Although Democratic Senators did introduce a bill in the several years after the ergonomics veto that (had it passed) would have required OSHA to promulgate a new ergonomics rule,<sup>169</sup> we believe it is clear that a new law requiring an agency to act (especially when an agency appears more than content with the prior veto) is not necessary to allow that agency to act, as long as it could produce a revision sufficiently different from the original so as not to circumvent the veto. The special process designed to avoid situations when the veto might preclude all regulation in a particular area simply suggests that Congress intended that none of its vetoes should ever have such broad repercussions.

#### 4. *Ergonomics Floor Debate--Substantive Clues*

Although we argued above that many of the general statements about the CRA itself during the ergonomics debate should be dismissed as political posturing, during that debate there were also statements for or against the specific resolution of disapproval that provide clues to the intended meaning of "substantially similar." Statements about the actual rule being debated, rather than the hypothetical future effect of striking it down, can presumably be interpreted at face value--in particular, opponents of the rule would have a disincentive to play down their substantive concerns, lest swing voters decide that the rule was not so bad after all. And yet, while several of the key opponents emphasized very specific concerns with the rule at hand, and stated their objections in heated [\*749] terms, they yet clearly left open the door for OSHA to take specific steps to improve the rule. For example, Republican Representative John Sweeney of New York made plain: "My vote of no confidence on the ergonomics regulations does not mean I oppose an ergonomics standard; I just oppose this one"--primarily in his view because it did not specify impermissible levels of repetitive stress along the key dimensions of workplace ergonomics (force, weight, posture, vibration, etc.) that would give employers confidence they knew what constituted compliance with the regulation.<sup>170</sup> Similarly, Republican Representative Charles Norwood of Georgia emphasized that the vagueness of the OSHA rule "will hurt the workers," and said that "when we have [a rule] that is bad and wrong . . . then we should do away with it and begin again."<sup>171</sup>

Interpretations of "substantially similar" that assume the agency is barred from re-regulating in the same subject area therefore seem to ignore how focused the ergonomics debate was on the consternation of the majority in Congress with the specific provisions of the OSHA final rule. Although opponents might have felt wary of stating emphatically that they opposed any attempt to control ergonomic hazards, it nevertheless was the case that even the staunchest opponents focused on the "wrong ways to solve the ergonomics problem" rather than on the inappropriateness of any rule in this area.

#### 5. *Subsequent Activity*

Legislative activity following the veto of the ergonomics rule might seem to suggest that at least some in Congress thought that OSHA might have required a specific authorization to propose a new ergonomics rule. In particular, in 2002 Senator John Breaux of Louisiana introduced Senate Bill 2184, which included a specific authorization pursuant to the CRA for OSHA to issue a new ergonomics rule.<sup>172</sup> The presence of a specific authorization in Senate Bill 2184 may imply that the bill's sponsors believed that such an authorization was necessary in order for OSHA to promulgate a new ergonomics regulation.

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<sup>169</sup> See *infra* Part IV.A.5.

<sup>170</sup> 147 CONG. REC. 3074-75 (2001) (statement of Rep. Sweeney); see also *infra* Part VLB.

<sup>171</sup> *Id.* at 3056 (statement of Rep. Norwood)

<sup>172</sup> See S. 2184, 107th Cong. § 1(b)(4) (as introduced in the Senate, Apr. 17, 2002) ("Paragraph (1) [which requires OSHA to issue a new ergonomics rule] shall be considered a specific authorization by Congress in accordance with section 801(b)(2) of title 5, United States Code . . ."). Senate Bill 2184 never became law.

Other circumstances, however, suggest more strongly that the inclusion of this specific authorization may have been merely a safeguard rather than [\*750] the purpose of the bill. The bill's mandate that OSHA issue a new rule within two years of the enactment of Senate Bill 2184<sup>173</sup> clearly indicates that the sponsors intended to spur a recalcitrant agency to take some action under the Republican administration. The bill's findings do not state that OSHA had been otherwise prohibited from issuing a new ergonomics rule--indeed, the findings do not mention Congress's 2001 veto at all.<sup>174</sup> Thus, the congressional authorization may have instead served to preempt a Bush Administration belief (or pretext) that Congress's earlier veto prohibited OSHA from further regulating workplace ergonomics.<sup>175</sup>

### B. All or Nothing

Another tool for interpreting the substantial similarity provision lies in the CRA's choice to provide only a "nuclear option" to deal with a troublesome rule. The CRA provides a nonamendable template for any joint resolution of disapproval, which allows only for repealing an entire rule, not just specific provisions.<sup>176</sup> Furthermore, there is "no language anywhere [in the CRA that] expressly refers in any manner to a part of any rule under review."<sup>177</sup> An inability to sever certain provisions while upholding others is consistent with the CRA contemplating a "speedy, definitive and limited process" because "piecemeal consideration would delay and perhaps obstruct legislative resolution."<sup>178</sup>

Because an offending portion of the rule is not severable, Congress has decided to weigh only whether, on balance, the bad aspects of the rule outweigh the good. For example, even when they argued against certain provisions of the OSHA ergonomics regulation, congressional Republicans still noted that they supported some type of ergonomics rule.<sup>179</sup> Since the CRA strikes down an entire rule even though Congress may support certain portions of that rule, it only makes sense to read the substantial [\*751] similarity provision as allowing the nonoffending provisions to be incorporated into a future rule. If an agency were not allowed to even reissue the parts of a rule that Congress does support, that would lead to what some have called "a draconian result"<sup>180</sup>--and what we would be tempted to call a nonsensical result. To the extent that interpreting the CRA prevents agencies from issuing congressionally approved portions of a rule, such an interpretation should be avoided.

### C. Deference to Agency Expertise

Because courts are generally deferential to an agency's interpretation of its delegated authority,<sup>181</sup> a joint resolution of disapproval should not be interpreted to apply too broadly if an agency wishes to use its authority to

<sup>173</sup> *Id.* § 1(b)(1) ("Notwithstanding any other provision of law, not later than 2 years after the date of enactment of this Act, the Secretary of Labor shall, in accordance with section 6 of the [OSH Act], issue a final rule relating to ergonomics.").

<sup>174</sup> *See id.* § 1(a).

<sup>175</sup> *Cf. supra* note 121, at 72 (statement of Elaine L. Chao, Secretary, U.S. Department of Labor) (hesitating to "expend valuable--and limited--resources on a new effort" to regulate workplace ergonomics following Congress's 2001 veto).

<sup>176</sup> *See* 5 U.S.C. § 802 (2006) (requiring that a joint resolution of disapproval read: "That Congress disapproves the rule submitted by the \_\_ relating to \_\_, and such rule shall have no force or effect").

<sup>177</sup> Rosenberg, *supra* note 75, at 1065.

<sup>178</sup> *Id.* at 1066.

<sup>179</sup> *See, e.g.,* 147 CONG. REC. 2843-44 (2001) (statement of Sen. Nickles) (expressing support for a "more cost effective" ergonomics rule).

<sup>180</sup> Rosenberg, *supra* note 75, at 1066.

<sup>181</sup> *See infra* Part IV.C.1.

promulgate one or more rules addressing the same issues as the repealed rule. There are, however, two important limitations to this general principle of deference that may apply to agency actions taking place after Congress overturns a rule. First, where Congress overturns a rule because it believes the agency acted outside the scope of its delegated authority under the organic statute, a court might choose to weigh this congressional intent as a factor against deference to the agency, if the reissued rule offends against this principle in a similar way. Second, where Congress overturns a rule because it finds that the agency was "lawmaking," this raises another statutory--if not constitutional--reason why agency deference might not be applied. This section presents the issue of deference generally, and then lays forth the two exceptions to this general rule.

### 1. Chevron Deference

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the Supreme Court held that, unless the organic statute is itself clear and contrary, a court should defer to an agency's reasonable interpretation of its own delegated authority.<sup>182</sup> The Court's decision was based on the notion of agency expertise: since agencies are more familiar with the subject matter over which they regulate, they are better equipped than courts to understand their grant of rulemaking authority.<sup>183</sup> Where Congress delegates rulemaking authority to an administrative agency, it is inevitable that the delegation will include some ambiguities or gaps.<sup>184</sup> But in order [\*752] for an agency to effectively carry out its delegated authority, there must be a policy in place that fills the gaps left by Congress. In *Chevron*, the Court reasoned that gaps were delegations, either express or implicit, granting the agency the authority "to elucidate a specific provision of the statute by regulation."<sup>185</sup> Explaining the reason for deference to agencies, the Court has recognized that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."<sup>186</sup> The *Chevron* Court thus created a two-part test that respects agency expertise by deferring to reasonable interpretations of ambiguity in a delegation of authority. First, a court must determine "whether Congress has directly spoken to the precise question at issue."<sup>187</sup> If so, both the court and the agency "must give effect to the unambiguously expressed intent of Congress."<sup>188</sup> If Congress has not spoken to the issue directly, however, the second step of *Chevron* requires a court to defer to the agency's construction of the statute if it is a "permissible" interpretation, whether or not the court agrees that the interpretation is the correct one.<sup>189</sup>

Because a resolution repealing a rule under the CRA limits an agency's delegated authority by prohibiting it from promulgating a rule that is substantially similar, the *Chevron* doctrine should apply here. The CRA proscription against an agency reissuing a vetoed rule "in substantially the same form" is an ambiguous limitation to an agency's delegated authority. That limitation could have been made less hazy but probably not made crystal clear, since a detailed elucidation of the substantial similarity standard would necessarily be rather complex in order to cover the wide range of agencies whose rules are reviewable by Congress. However, the other relevant statutory text, the joint resolution of disapproval itself, does not resolve the ambiguity. It cannot provide any evidence that Congress

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<sup>182</sup> 467 U.S. 837(1984).

<sup>183</sup> Id. at 866.

<sup>184</sup> See Morton v. Ruiz, 415 U.S. 199, 231 (1974) (noting that such a "gap" may be explicit or implicit).

<sup>185</sup> Chevron, 467 U.S. at 843-44.

<sup>186</sup> Id. at 866.

<sup>187</sup> Id. at 842.

<sup>188</sup> Id. at 842-43.

<sup>189</sup> Id. at 843.

has "directly spoken to the precise question at issue"<sup>190</sup> --namely, what form of regulation would constitute a substantially similar reissuance of the rejected rule--because the text can only effect a repeal of the rule and no more.<sup>191</sup> Although a court, in the absence of clear, enacted statutory [\*753] language, might look to legislative history to determine whether Congress has "spoken to" the issue, too many disparate (and perhaps disingenuous) arguments on the floor make this unworkable as a judicial doctrine without any textual hook to hang it on.<sup>192</sup>

*Chevron* step one, then, cannot end the inquiry; we must proceed to step two. The agency's interpretation, if permissible, should then receive deference. While some minor transposition of a rejected rule's language effecting no substantive change could certainly be deemed impermissible under the CRA, changes that are significant enough to affect the cost-benefit ratio are similar to the "policy choices" that the Court has held are not within the responsibility of the Judiciary to balance.<sup>193</sup> Thus, comparing side-by-side the language of a vetoed rule and the subsequently promulgated rule is inadequate without considering the substantive changes effected by any difference in language, however minor. Under the reasoning in *Chevron*, a court should give substantial deference to an agency in determining whether, for purposes of the CRA, a rule is substantially different from the vetoed rule.

## 2. *Ultra Vires* Limitation

Admittedly, there are important considerations that may counsel against applying *Chevron* deference in particular situations. One such situation might occur if Congress's original veto were built upon a finding that the agency misunderstood its own power under the organic statute. In that case, a court might choose to consider Congress's findings as a limitation on the applicability of *Chevron* deference. Such a consideration provided the background for the Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court struck down regulation of tobacco products by the Food and Drug Administration (FDA).<sup>194</sup> The Court looked to congressional intent in determining the boundaries of FDA's authority under the Food, Drug and Cosmetic Act (FDCA), finding that the statute's use of the words *drug* and *device* clearly did not grant FDA the power to regulate tobacco products, and the regulation thus failed the first [\*754] prong of the *Chevron* test.<sup>195</sup> The FDCA "clearly" spoke to the issue, according to the Court, and therefore FDA's contrary interpretation of its power was not entitled to deference. Importantly, the Court found this clarity not within the text of the FDCA itself, but in other legislative actions since the FDCA's enactment. In writing for the majority, Justice O'Connor pointed out that, in the decades following the FDCA's enactment, Congress had passed various pieces of legislation restricting--but not entirely prohibiting--certain behavior of the tobacco industry, indicating a congressional presumption that sale of tobacco products

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<sup>190</sup> *Id.* at 842.

<sup>191</sup> See *supra* Part IV.B (discussing the limited text of the joint resolution and its effect on severability). Trying to infer congressional intent, however, may be relevant to the scope of an agency's authority following action under the CRA in cases where the subject matter is politically and economically significant, and where there is a broader legislative scheme in place. See *infra* Part IV.C.2 (discussing the effect of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), on the application of the *Chevron* doctrine).

<sup>192</sup> See, e.g., *Zedner v. United States*, 547 U.S. 489, 509-11 (2006) (Scalia, J., concurring) (filing a separate opinion for the specific purpose of admonishing the majority's citation to legislative history, noting that use of legislative history in statutory interpretation "accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole").

<sup>193</sup> *Chevron*, 467 U.S. at 866.

<sup>194</sup> 529 U.S. 120(2000).

<sup>195</sup> *Id.* at 160-61 ("It is . . . clear, based on the [Food, Drug, and Cosmetic Act's (FDCA's)] overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the [Food and Drug Administration (FDA)] from regulating tobacco products.").

would still be permitted.<sup>196</sup> The Court found that this presumption clearly contradicted FDA's interpretation that "drug" and "device" in the FDCA included tobacco products because, if FDA's interpretation were correct, the agency would be *required* to ban the sale of tobacco products because safety is a prerequisite for sale of a drug or device under the FDCA, and no tobacco product is "safe."<sup>197</sup> The four dissenting Justices criticized the majority's reliance on inferred congressional intent, arguing that the *Chevron* approach to statutory interpretation should principally focus on the text of the organic statute.<sup>198</sup>

If Congress, in enacting a joint resolution pursuant to the CRA, was to make clear that it thought an agency's regulation was outside the scope of its statutory grant of authority,<sup>199</sup> a court might consider this a factor limiting its deference to the agency. In other words, the CRA veto might be considered a "clarification" of the organic statute in a way similar to the tobacco-related legislative activity considered by the Court in *Brown & Williamson*.<sup>200</sup> Republicans hinted at this issue in the congressional debates over the ergonomics rule, where they argued that part of the rule contravened a provision in the OSH Act because, under their [\*755] interpretation, the regulation superseded state worker's compensation laws.<sup>201</sup> In a more obvious instance of an agency acting outside of its delegated authority, however, *Brown & Williamson* might require (or at least encourage) a court to consider the congressional rationale for overturning a rule as a factor in evaluating the validity of a new rule issued in the same area. Like the decision in *Brown & Williamson*, however, the factor might only be compelling if there was also a broader legislative scheme in place.

### 3. Lawmaking Limitation

Another limiting principle on agency discretion is found where the agency action blurs the lines of regulation and steps into the field of lawmaking. Where such an action takes place, the nondelegation doctrine is implicated and can present questions of constitutionality and agency adherence to its limited grant of authority. In the debates over the ergonomics rule, opponents of the regulation contended that OSHA was writing the "law of the land" and that the elected members of Congress, not bureaucrats, are supposed to exercise that sort of authority.<sup>202</sup> Senator Nickles made clear that he saw the ergonomics rule as a usurpation of Congress's legislative power. He referred to the rule as "legislation" and argued, "we are the legislative body. If we want to legislate in this area, introduce a bill and we will consider it."<sup>203</sup> This argument that an administrative agency has exercised legislative power has

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<sup>196</sup> *Id.* at 137-39.

<sup>197</sup> *Id.* at 133-35 ("These findings logically imply that, if tobacco products were 'devices' under the FDCA, the FDA would be required to remove them from the market.").

<sup>198</sup> *Id.* at 167-81 (Breyer, J., dissenting) (arguing for a "literal" interpretation of the FDCA).

<sup>199</sup> Because of the one-sentence limit on the text of the CRA joint resolution, see **5 U.S.C. § 802** (2006), the clarity would have to come from other legislative enactments as in *Brown & Williamson*, see *529 U.S. at 137-39*, or from the legislative history of the joint resolution. *But see supra* note 192 and accompanying text (criticizing reliance on legislative history). Alternatively, if Congress were to amend the CRA to allow alteration of the resolution's text, a clear legislative intent might be more easily discerned. See *infra* Part VII.

<sup>200</sup> See *supra* note 196 and accompanying text.

<sup>201</sup> See Occupational Safety and Health Act of 1970 § 4(b)(4), *29 U.S.C. § 653(b)(4)* (2006) ("Nothing in this [Act] shall be construed to supersede or in any manner affect any workmen's compensation law . . . ."); 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) ("[OSHA] ignored, in issuing its ergo standard, the clear statutory mandate in section 4 of the OSH Act not to regulate in the area of workmen's compensation law."). Senator Nickles argued that, even if it were within OSHA's delegated power, the regulation would supersede "more generous" state worker's compensation law. 147 CONG. REC. 2817 (statement of Sen. Nickles). We argue below that this interpretation may have been incorrect on its face. See *infra* Part VLB.

<sup>202</sup> 147 CONG. REC. 2817 (statement of Sen. Nickles).

<sup>203</sup> *Id.*



constitutional implications. Article I of the Constitution provides that the Senate and House of Representatives have the sole legislative power.<sup>204</sup> In the administrative state, this constitutional provision has given rise to the nondelegation doctrine, by which Congress may not delegate its lawmaking authority to an executive agency.<sup>205</sup> To meet constitutional requirements [\*756] under this doctrine, the organic statute needs to provide the agency with an "intelligible principle to which [the agency] is directed to conform."<sup>206</sup>

Violations of the nondelegation doctrine, however, are rarely found. Instead, the courts employ a canon of constitutional avoidance to minimize delegation problems. Under this canon of interpretation, a court confronted with a statute that appears to delegate lawmaking power to an agency will search for a narrower, constitutionally permissible interpretation of the statute. If such an interpretation is available, the court will not invalidate the statute, but will instead strike down agency action that exceeds the (narrower, constitutionally permissible) grant of authority.<sup>207</sup> The *Benzene Case* is one example in which the Supreme Court has employed this canon to avoid striking down a delegation of authority to an administrative agency.<sup>208</sup> In that case, the Court considered an OSHA rule which limited permissible workplace exposure levels to airborne benzene to one part per million (ppm). OSHA set that standard pursuant to the statutory delegation of authority instructing it to implement standards "reasonably necessary or appropriate to provide safe or healthful employment."<sup>209</sup> Rather than finding that the "reasonably necessary or appropriate" standard was unintelligible and unconstitutionally broad, the Court instead held that OSHA exceeded its rulemaking authority because the agency did not make the necessary scientific findings and based its exposure rule on impermissible qualitative assumptions about the relationship between cancer risks and small exposures to benzene, rather than on a quantitative assessment that found a "significant risk" predicate for regulating to one ppm.<sup>210</sup>

[\*757] If Congress vetoes an agency regulation on the ground that it is lawmaking, this may be taken to mean one of two things: either Congress believes that the agency was acting outside of its delegated authority, or it believes that the organic statute unconstitutionally grants the agency legislative power. Since, reflecting the avoidance

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<sup>204</sup> U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

<sup>205</sup> See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that the National Industrial Recovery Act's authorization to the President to prescribe "codes of fair competition" was an unconstitutional delegation of legislative power because the statutory standard was insufficient to curb the discretion of the Executive Branch).

<sup>206</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>207</sup> See generally Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 835-39 (1997) (describing the canon of constitutional avoidance and arguing that "the criteria bearing on constitutionality figure in the best interpretation of statutes, at least where statutes are otherwise taken to be indeterminate").

<sup>208</sup> *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607 (1980).

<sup>209</sup> *Id.* at 613 (quoting *Am. Petroleum Inst. v. OSHA*, 581 F.2d 493, 502 (1978)).

<sup>210</sup> *Id.* at 662. For two contrasting views on whether the *Benzene Case* either curtailed OSHA's ability to regulate effectively, or gave OSHA a license (that it has failed to employ) to use science to promulgate highly worker-protective standards, compare Wendy Wagner, Univ. of Tex. Sch. of Law, Presentation at the Society for Risk Analysis Annual Meeting 2010, *The Bad Side of Benzene* (Dec. 6, 2010), <http://birenheide.com/sra/2010AM/program/presentations/M4-A.3%20Wagner.pdf>, with Adam M. Finkel, Exec. Dir., Penn Program on Regulation, Univ. of Pa., Presentation at the Society for Risk Analysis Annual Meeting 2010, *Waiting for the Cavalry: The Role of Risk Assessors in an Enlightened Occupational Health Policy* (Dec. 6, 2010), <http://birenheide.com/sra/2010AM/program/presentations/M4-A.4%20Finkel.pdf>.

canon, unconstitutional delegations have only been found twice<sup>211</sup> in the history of our administrative state, and since repealing a single rule would be insufficient to correct that type of constitutional defect in the organic statute, it seems clear that by "lawmaking" Congress must mean that the agency exceeded its lawfully-granted statutory authority.<sup>212</sup> In other words, if Congress actually did mean that the organic statute is impermissibly broad, the legislature's responsibilities lie far beyond vetoing the single rule, and would seem to require curing the constitutional defect by amending the organic statute. But if instead the veto means only that the agency has exceeded its authority, this brings us back to the *Brown & Williamson* issue, discussed above, where an agency still deserves deference in promulgating subsequent rules, although congressional intent may limit that deference if there is a legislative scheme in place.<sup>213</sup>

On the other hand, it is possible--even likely--that Senator Nickles and his colleagues were merely speaking colloquially in accusing OSHA of lawmaking, and meant that the agency was "legislating" in a softer, nonconstitutional sense. If their objection meant that they found the regulation a statutorily--but not constitutionally--excessive exercise, then they are in essence making the ultra vires objection discussed above.<sup>214</sup> Alternatively, if their objection meant that OSHA did have both the statutory and constitutional authority to promulgate the regulation, but that the agency was flexing more power than it should simply as a matter of policy, then a veto on those grounds would in essence be an attempt to [\*758] retract some of the authority that Congress had delegated to the agency. As discussed below, Congress should be hesitant to use the CRA to substantively change an intelligible principle provided in the organic statute, and a court should hesitate to interpret the CRA to allow for such a sweeping change--the CRA process is an expedited mechanism that decreases deliberativeness by imposing strict limitations on time and procedure.<sup>215</sup>

In any case, the lawmaking objection during a congressional veto essentially folds back up into one of the problems discussed previously--either it presents an issue of the agency exceeding its statutory authority and possibly affecting the deference due subsequent agency actions, or, failing that, it means that some members of Congress are attempting to grab back via an expedited process some authority properly delegated to the agency.

In summary, the issue of deference to an agency ought not differ too much between the CRA and the traditional (pre-1996) context. Both of these contexts involve an agency's judgment about what policies it can make under its authorizing legislation, since the "substantial similarity" provision is an after-the-fact limitation on the agency's statutorily-authorized rulemaking power. Neither the CRA nor its joint resolution template provide enough guidance to end the inquiry at *Chevron* step one. A court, then, should employ a narrow interpretation of the CRA's substantial similarity provision, giving significant deference to an agency's determination that the new version of a rejected rule is not "substantially similar" to its vetoed predecessor. This interpretation would, however, be limited by the permissibility requirement of *Chevron* step two.

#### D. Good Government Principles

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<sup>211</sup> The two cases are *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). For a discussion of the constitutionality of OSHA's organic statute, see Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407(2008).

<sup>212</sup> In this respect, it is worth noting that the Republicans' lawmaking objections during the ergonomics rule debate were rather nonspecific. The legislators did not point to any "unintelligible" principle under which the rule was promulgated, or define what characteristics of the ergonomics rule brought it out of the normal rulemaking category and into the realm of lawmaking, besides voicing their displeasure with some of its substance. Indeed, the lawmaking argument was apparently conflated with the notion that OSHA had acted outside of its authority, properly delegated. See *supra* note 201 and accompanying text.

<sup>213</sup> See *supra* Part IV.C.2.

<sup>214</sup> See *id.*

<sup>215</sup> See *infra* Part IV.D.1.

Various members of Congress argued during the ergonomics floor debate that OSHA and other regulatory agencies should be chastened when they stray from their mission (regulation) into congressional territory (legislation). Arguably, Congress itself should also eschew legislation by regulation, even though Congress clearly has the legislative authority. In this section, we argue that Congress should not use a veto of an isolated piece of rulemaking to effect statutory change--it should do so through a direct and deliberative process that the CRA does not offer. In addition, we offer a second "good government" rationale for interpreting "substantially the same" in a narrow way.

**[\*759]** 1. *Reluctance to Amend Congress's Delegation to the Agency*

One should be hesitant to interpret the substantial similarity provision too broadly, because doing so could allow expedited joint resolutions to serve as de facto amendments to the original delegation of authority under the relevant organic statute. If the bar against reissuing a rule "in substantially the same form" applied to a wide swath of rules that could be promulgated within the agency's delegated rulemaking authority, this would be tantamount to substantively amending the organic statute.

The OSHA ergonomics regulation illustrates this point nicely. Section 6 of the OSH Act grants OSHA broad authority to promulgate regulations setting workplace safety and health standards.<sup>216</sup> With the exception of one aspect of the ergonomics rule,<sup>217</sup> congressional Republicans admitted that OSHA's broad authority did in fact include the power to promulgate the regulation as issued.<sup>218</sup> If it is within OSHA's delegated authority to promulgate rules setting ergonomics standards, and enactment of the joint resolution would prevent OSHA from promulgating any ergonomics standards in the future, then the joint resolution would constitute a significant amendment to the organic statute. Indeed, one of the two parts of OSHA's mission as put in place by the OSH Act--the responsibility to promulgate and enforce standards that lessen the risk of chronic occupational disease, as opposed to instantaneous occupational accidents--in turn involves regulating four basic types of risk factors: chemical, biological, radiological, and ergonomic hazards. In this case, vetoing the topic by vetoing one rule within that rubric would amount to taking a significant subset of the entire agency mission away from the Executive Branch, without actually opening up the statute to any scrutiny.

We see two major reasons why courts should not interpret the CRA in such a way that would allow it effectively to amend an organic statute via an expedited joint resolution. First, there is a rule of statutory interpretation whereby, absent clear intent by Congress to overturn a prior law, legislation should not be read to conflict with the prior law.<sup>219</sup> Second, **[\*760]** it seems especially doubtful that Congress would intend to allow modification of an organic statute via an expedited legislative process.<sup>220</sup> Significant changes, such as major changes to a federal agency's

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<sup>216</sup> See OSH Act § 6, *29 U.S.C. § 655* (2006); see also 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) ("OSHA, of course, has enormously broad regulatory authority. Section 6 of the OSH Act is a grant of broad authority to issue workplace safety and health standards.").

<sup>217</sup> See *supra* note 201 and accompanying text.

<sup>218</sup> See 147 CONG. REC. 2822 (statement of Sen. Enzi) ("The power for OSHA to write this rule did not materialize out of thin air. We in Congress did give that authority to OSHA . . .").

<sup>219</sup> See, e.g., *Finley v. United States*, 490 U.S. 545, 554 (1989) ("[N]o changes in law or policy are to be presumed from changes of language in [a] revision unless an intent to make such changes is clearly expressed." (internal quotation marks omitted) (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957))), *superseded by statute*, *28 U.S.C. § 1367* (2006); *Williams v. Taylor*, 529 U.S. 362, 379 (2000) (plurality opinion) (arguing that if Congress intended the Antiterrorism and Effective Death Penalty Act to overturn prior rules regarding deference to state courts on questions of federal law in habeas proceedings, then Congress would have expressed that intent more clearly); cf. *United States v. Republic Steel Corp.*, 264 F.2d 289, 299 (7th Cir. 1959) ("[T]here should not be attributed to Congress an intent to produce such a drastic change, in the absence of clear and compelling statutory language."), *rev'd on other grounds*, ***362 U.S. 482 (1960)***.

<sup>220</sup> See also Rosenberg, *supra* note 75, at 1066 (noting that the CRA "contemplates a speedy, definitive and limited process").

statutory grant of rulemaking authority, generally take more deliberation and debate. The CRA process, on the other hand, creates both a ten-hour limit for floor debates and a shortened time frame in which Congress may consider the rule after the agency reports it.<sup>221</sup> For these reasons, it would be implausible to read the substantial similarity provision as barring reissuance of a rule simply because it dealt with the same subject as a repealed rule.

## 2. A Cost-Benefit Justification for Rarely Invoking the Circumvention Argument

Allowing an agency to reissue a vetoed rule with a significantly more favorable cost-benefit balance is a victory for congressional oversight, not a circumvention of it. "Substantially the same" is unavoidably a subjective judgment, so we urge that such judgments give the benefit of the doubt to the agency--not so that a prior veto would immunize the agency against bad conduct, but so that the second rule would allow the agency (through its allies in Congress, if any) to defend the rule a second time on its merits, rather than having it summarily dismissed as a circumvention. A "meta-cost-benefit" analysis of the decision to allow a rule of arguable dissimilarity back into the CRA veto process would look something like this: the cost of allowing debate on a rule that the majority comes to agree is either a circumvention of § 801 (b)(2), or needs to be struck down a second time on the merits, can be measured in person-hours--roughly 10 hours or less of debate in each house. The benefits of allowing such a debate to proceed can be measured in the positive net benefit accruing to society from allowing the rule to take effect--assuming that Congress will act to veto a rule with negative net benefit.<sup>222</sup> The benefits of the additional [\*761] discussion will not always outweigh the costs thereof, but we suggest that whenever "substantially the same" is a controversial or close call, the opportunity for another brief discussion of the rule's merits is a safer and more sensible call to make than a "silent veto" invoking § 801(b)(2).

## V. WHAT DOES "SUBSTANTIALLY THE SAME" REALLY MEAN?

In light of the foregoing analysis, we contend that only among the first four interpretations in Part III.A above can the correct meaning of "substantially the same" possibly be found. Again, to comport literally with the proper instructions of § 801 (b)(2) does not insulate the agency against a subsequent veto on substantive grounds, but it should force Congress to debate the reissued rule on its merits, rather than the "faster fast-track" of simply declaring it to be an invalid circumvention of the original resolution of disapproval. To home in more closely on exactly what we think "substantially the same" requires, we will examine each of the four more "permissive" interpretations in Part III.A, in reverse order of their presentation--and we will argue that any of the four, except for Interpretation 1, might be correct in particular future circumstances.

Interpretation 4 (the agency must change the cost-benefit balance and must fix any problems Congress identified when it vetoed the rule) has some appeal, but only if Congress either would amend the CRA to require a vote on a bill of particulars listing the specific reasons for the veto, or at least did so sua sponte in future cases.<sup>223</sup> Arguably, the agency should not have unfettered discretion to change the costs and benefits of a rule as it sees fit, if Congress had already objected to specific provisions that contributed to the overall failure of a benefit-cost test. A new ergonomics rule that had far lower costs, far greater benefits, or both, but that persisted in establishing a payout system that made specific reference to state workers' compensation levels, might come across as "substantially the same" in a way Congress could interpret as OSHA being oblivious to the previous veto.<sup>224</sup> However, absent a clear statement of particulars from Congress, the agencies should not be forced to read Congress's mind. A member who strenuously objected to a particular provision should be free to urge a second

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<sup>221</sup> See *supra* Part I.B.3 (describing the CRA procedure).

<sup>222</sup> As for the number of such possibly cost-ineffective debates, we simply observe that if OSHA were to repropose an ergonomics rule, and Congress were to allow brief debate on it despite possible arguments that any ergonomics rule would be a circumvention of § 801(b)(2), this would be the first such "wasteful" debate in at least ten years.

<sup>223</sup> See *infra* Part VII.

<sup>224</sup> In this specific case, though, we might argue that OSHA could instead better explain how Congress misinterpreted the original provision in the rule. See *infra* Part VI.B.

veto if the reissued rule contains an unchanged version of that provision, but if she cannot convince a majority in each house to call for that specific provision's removal, Congress, or a court, should not dismiss as "substantially the same" a rule containing a provision that might have been, and might still be, supported by most or nearly all members.

**[\*762]** Interpretation 3 (the agency's task is to significantly improve the cost-benefit balance, nothing more) makes the most sense in light of our analysis and should become the commonly understood default position. The CRA is essentially the ad hoc version of the failed Dole-Johnston regulatory reform bill<sup>225</sup> --rather than requiring agencies to produce cost-beneficial rules, and prescribing how Congress thought they should do so, the CRA simply reserves to Congress the right to reject on a case-by-case basis any rule whose stated costs exceed stated benefits, or, if the votes are there, one for which third-party assertions about costs exceed stated or asserted benefits. The way to reissue something distinctly different is to craft a rule whose benefit-cost balance is much more favorable. Again, this could be effected with a one-word change in a massive document, if that word, for example, halved the stringency as compared to the original, halved the cost, or both. Or, a rule missing one word--thereby exempting an industry-sector that the original rule would have regulated--could be "distinctly different" with far lower costs. If the original objection had merit this change would not drastically diminish total benefits, and it could arouse far less opposition than the previous nearly identical rule.

Interpretation 2 (even an identical rule can be reissued under "substantially different" external conditions), while it may seem to make a mockery of § 801(b)(2), also has merit. Congress clearly did not want agencies to circumvent the CRA by waiting for the vote count to change, or for the White House to change hands and make a simple majority in Congress no longer sufficient, and then reissuing an identical rule. Even that might not be such a bad outcome; after all, a parent's answer to a sixteen-year-old's question, "Can I have the car keys?," might be different if the child waits patiently and asks again in two years. But we accept that the passage of time alone should not be an excuse for trying out an identical rule again. However, time can also change everything, and the CRA needs to be interpreted such that time can make an identical rule into something "substantially different" than what used to be. Indeed, the Nickles-Reid signing statement already acknowledged how important this is, when it cited the following as a good reason for an initial veto: "agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change."<sup>226</sup> In other words, a particular rule Congress might have favored at the time it created the organic statute might not be appropriate anymore when finally promulgated because time can change **[\*763]** both problems and solutions. We fail to see any difference between that idea and the following related assertion: "During the time lapse between *the veto of a rule and its subsequent reissuance*, the nature of the problem addressed, and its proper solution, can change." It may, of course, change such that the original rule seems even less sensible, but what if it changes such that the costs of the original rule have plummeted and the benefits have skyrocketed? In such a circumstance, we believe it would undercut the entire purpose of regulatory oversight and reform to refuse to debate on the merits a reissued rule whose costs and benefits--even if not its regulatory text--were far different than they were when the previous iteration was struck down.

Interpretation 1 (anything goes so long as the agency merely *asserts* that external conditions have changed), on the other hand, would contravene all the plain language and explanatory material in the CRA. Even if the agency believes it now has better explanations for an identical reissued rule, the appearance of asking the same question until you get a different answer is offensive enough to bedrock good government principles that the regulation should be required to have different costs and benefits after a veto, not just new rhetoric about them.<sup>227</sup>

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<sup>225</sup> See *supra* Part I.B.2.

<sup>226</sup> 142 CONG. REC. 8197 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>227</sup> We conclude this notwithstanding the irony that in one sense, the congressional majority did just that in the ergonomics case--it delayed the rule for several years to require the National Academy of Sciences (NAS) to study the problem, and when it did not like the NAS conclusion that ergonomics was a serious public health problem with cost-effective solutions, it forced NAS to

We therefore believe Interpretation 3 is the most reasonable general case, but that Interpretations 2 or 4 may be more appropriate in various particular situations. But there is one additional burden we think agencies should be asked to carry, even though it is nowhere mentioned in the CRA. The process by which a rule is developed can undermine its content, and beneficial changes in that content may not fix a suspect process, even though Congress modified with "substantially the same" the word "form," not the word "process." Indeed, much of the floor debate about ergonomics decried various purported procedural lapses: the OSHA [\*764] leadership allegedly paid expert witnesses for their testimony, edited their submissions, and made closed-minded conclusory statements about the science and economics while the rulemaking record was still open, among other flaws.<sup>228</sup> We think agencies should be expected to fix procedural flaws specifically identified as such by Congress during a veto debate, even if this is not needed to effectuate a "substantially different form."<sup>229</sup>

## VI. PRACTICAL IMPLICATIONS FOR OSHA OF A COST-BENEFIT INTERPRETATION OF THE CRA

We have argued above that the agency's fundamental obligation under the CRA is to craft a reissued rule with substantially greater benefits, substantially lower costs, or both, than the version that Congress vetoed. As a practical matter, we contend it should focus on aspects of the regulation that Congress identified as driving the overall unfavorable cost-benefit balance. When, as is often the case, the regulation hinges on a single quantitative judgment about stringency (How low should the ambient ozone concentration be? How many miles per gallon must each automobile manufacturer's fleet achieve? What trace amount of fat per serving can a product contain and still be labeled fat-free?), a new rule can be made "substantially different" with a single change in the regulatory text to change the stringency, along with, of course, parallel changes to the Regulatory Impact Analysis tracking the new estimates of costs and benefits. The 2000 OSHA ergonomics rule does not fit this pattern, however. Although we think it might be plausible for OSHA to argue that the underlying science, the methods of control, and the political landscape have changed enough after a decade of federal inactivity on ergonomic issues that the 2000 rule could be repropounded verbatim as a solution to a "substantially different" problem, we recognize the political impracticality of such a strategy. But changing the costs and benefits of the 2000 rule will require major thematic and textual revisions, because the original rule had flaws much more to do with regulatory design and philosophy than with [\*765] stringency per se. In this Part, therefore, we offer some broad suggestions for how OSHA could make substantially more favorable the costs and benefits of a new ergonomics regulation.

### A. *Preconditions for a Sensible Discussion About the Stringency of an Ergonomics Rule*

In our opinion, reasonable observers have little room to question the fact of an enormous market failure in which occupational ergonomic stressors cause musculoskeletal disorders (MSDs) in hundreds of thousands of U.S.

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convene a different panel and answer the question again. See, e.g., *Ergonomics in the Workplace; NewsHour with Jim Lehrer* (PBS television broadcast Nov. 22, 1999), [www.pbs.org/newshour/bb/business/july-dec99/ergonomics\\_11-22.html](http://www.pbs.org/newshour/bb/business/july-dec99/ergonomics_11-22.html) ("We've already had one [NAS] study . . . [T]hey brought in experts, they looked at all the evidence in this area and they reached the conclusion that workplace factors cause these injuries and that they can be prevented. The industry didn't like the results of that study so they went to their Republican friends in the Congress and got another study asking the exact same seven questions . . . The study is basically just being used as a way to delay a regulation, to delay protection for workers. We'll get the same answers from the NAS-2 that we got from NAS-1." (Peg Seminario, Director, Occupational Safety and Health for the AFL-CIO)). For the NAS studies, see *infra* note 231.

<sup>228</sup> See 147 CONG. REC. 2823 (2001) (statement of Sen. Enzi) ("Maybe OSHA didn't think it needed to pay attention to these [public] comments because it could get all the information it wanted from its hired guns. . . . OSHA paid some 20 contractors \$ 10,000 each to testify on the proposed rule. They not only testified on it; they had their testimony edited by the Department . . . . Then--and this is the worst part of it all--they paid those witnesses to tear apart the testimony of the other folks who were testifying, at their own expense. . . . Regardless of whether these tactics actually violate any law, it clearly paints OSHA as a zealous advocate, not an impartial decisionmaker.").

<sup>229</sup> See *infra* Part VI.B (urging OSHA to consider, among many possible substantive changes to the 2000 ergonomics rule, specific changes in the process by which it might be analyzed and promulgated).

workers annually.<sup>230</sup> Hundreds of peer-reviewed epidemiologic studies have concluded that prolonged or repeated exposures to risk factors such as lifting heavy objects, undertaking relentless fine-motor actions, and handling tools that vibrate forcefully can cause debilitating MSDs that affect the hands, wrists, neck, arms, legs, back, and other body parts.<sup>231</sup> Most of these studies have also documented dose--response relationships: more intense, frequent, or forceful occupational stress results in greater population incidence, more severe individual morbidity, or both. In this respect, ergonomic risk factors resemble the chemical, radiological, and [\*766] biological exposures OSHA has regulated for decades under the OSH Act and the 1980 Supreme Court decision in the *Benzene Case*--if prevailing exposures are sufficient to cause a "significant risk" of serious impairment of health, OSHA can impose "highly protective"<sup>232</sup> controls to reduce the risk substantially, as long as the controls are technologically feasible and not so expensive that they threaten the fundamental competitive structure<sup>233</sup> of an entire industry.<sup>234</sup>

The fundamental weakness of OSHA's ergonomics regulation was that it did not target ergonomic risk factors specifically or directly, but instead would have required an arguably vague, indirect, and potentially never-ending

<sup>230</sup> According to the Bureau of Labor Statistics, there were more than 560,000 injuries, resulting in one or more lost workdays, from the category of "sprains, strains, tears"; by 2009, that number had declined, for whatever reason(s), to roughly 380,000. See *Nonfatal Cases Involving Days Away from Work: Selected Characteristics (2003)*, U.S. BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/CHU00X021XXX6N100> (last visited Nov. 14, 2011).

<sup>231</sup> For a very comprehensive survey of the epidemiologic literature as it existed at the time OSHA was writing its 1999 ergonomics proposal, see NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEPT OF HEALTH & HUMAN SERVS., *MUSCULOSKELETAL DISORDERS AND WORKPLACE FACTORS: A CRITICAL REVIEW OF EPIDEMIOLOGIC EVIDENCE FOR WORK-RELATED MUSCULOSKELETAL DISORDERS OF THE NECK, UPPER EXTREMITY, AND LOW BACK*, NO. 97B141 (Bruce P. Bernard ed., 1997), <http://www.cdc.gov/niosh/docs/97-141/pdfs/97-141.pdf>. See also PANEL ON MUSCULOSKELETAL DISORDERS & THE WORKPLACE, COMM'N ON BEHAVIORAL & SOC. SCIS. & EDUC., NAT'L RESEARCH COUNCIL & INST. OF MED., *MUSCULOSKELETAL DISORDERS AND THE WORKPLACE: LOW BACK AND UPPER EXTREMITIES* (2001), available at <http://www.nap.edu/catalog/10032.html> (reviewing the complexities of factors that cause or elevate the risk of musculoskeletal injury); STEERING COMM. FOR THE WORKSHOP ON WORK-RELATED MUSCULOSKELETAL INJURIES: THE RESEARCH BASE, NAT'L RESEARCH COUNCIL, *WORK-RELATED MUSCULOSKELETAL DISORDERS: REPORT, WORKSHOP SUMMARY, AND WORKSHOP PAPERS* (1999), available at <http://www.nap.edu/catalog/6431.html> (examining the state of research on work-related musculoskeletal disorders); STEERING COMM. FOR THE WORKSHOP ON WORK-RELATED MUSCULOSKELETAL INJURIES: THE RESEARCH BASE, NAT'L RESEARCH COUNCIL, *WORK-RELATED MUSCULOSKELETAL DISORDERS: A REVIEW OF THE EVIDENCE* (1998), available at <http://www.nap.edu/catalog/6309.html> (reflecting on the role that work procedures, physical features of the employee, and other similar factors have on musculoskeletal disorders).

<sup>232</sup> *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607, 643 n.48 (1980).

<sup>233</sup> See *Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case)*, 452 U.S. 490, 513 (1981).

<sup>234</sup> Ergonomic stressors may appear to be very different from chemical exposures, in that person-to-person variation in fitness obviously affects the MSD risk. Some people cannot lift a seventy-five-pound package even once, whereas others can do so over and over again without injury. However, substantial (though often unacknowledged) inter-individual variability is known to exist in susceptibility to chemical hazards as well. See COMM. ON IMPROVING RISK ANALYSIS APPROACHES USED BY THE U.S. EPA, NAT'L RESEARCH COUNCIL, *SCIENCE AND DECISIONS: ADVANCING RISK ASSESSMENT* ch.5 (2009), available at <http://www.nap.edu/catalog/12209.html> (recommending that the EPA adjust its estimates of risk for carcinogens upwards to account for the above-average susceptibility to carcinogenesis of substantial portions of the general population); COMM. ON RISK ASSESSMENT OF HAZARDOUS AIR POLLUTANTS, NAT'L RESEARCH COUNCIL, *SCIENCE AND JUDGMENT IN RISK ASSESSMENT* ch.10 (1994), available at <http://www.nap.edu/catalog/2125.html>. For both kinds of hazards, each person has his or her own dose-response curve, and regulatory agencies can reduce population morbidity and mortality by reducing exposures (and hence risks) for relatively "resistant," relatively "sensitive" individuals, or both--with or without special regulatory tools to benefit these subgroups differentially. See Adam M. Finkel, *Protecting People in Spite of--or Thanks to--the "Veil of Ignorance,"* in *GENOMICS AND ENVIRONMENTAL REGULATION: SCIENCE, ETHICS, AND LAW* 290, 290-341 (Richard R. Sharp et al. eds., 2008) (arguing that the government should use its technological capacities to estimate individualized assessments of risk and benefit).

series of ill-defined improvements in broader industrial management systems at the firm level, ones that in turn could have reduced stressors and thereby reduced MSDs. The decision to craft a management-based regulation<sup>235</sup> rather than one that directly specified improvements in technological controls (a design standard) or reductions in specific exposures (a performance standard) was perhaps an understandable [\*767] reaction on OSHA Assistant Secretary Charles Jeffress' part to history and contemporary political pressures.

In 1995, OSHA drafted a complete regulatory text and preamble to a proposed ergonomics regulation that would have specified performance targets for the common risk factors in many industrial sectors. Of necessity, these targets in some cases involved slightly more complicated benchmarks than the one-dimensional metrics industry was used to seeing from OSHA (e.g., ppm of some contaminant in workplace air). For example, a "lifting limit" might have prohibited employers from requiring a worker to lift more than X objects per hour, each weighing Y pounds, if the lifting maneuver required rotating the trunk of the body through an angle of more than Z degrees. OSHA circulated this proposed rule widely, and it generated such intense opposition from the regulated community, and such skepticism during informal review by the Office of Information and Regulatory Affairs, that the agency withdrew it and went back to the drawing board. Because the most vehement opposition arose in response to the easily caricatured extent of "micro-management" in the 1995 text,<sup>236</sup> when OSHA began to rework the ergonomics rule in 1998, it acted as if the most important complexion of the new rule would be its reversal of each feature of the old one. Where the 1995 text was proactive and targeted exposures, the 2000 text<sup>237</sup> was reactive, and imposed on an employer no obligation to control exposures until at least one employee in a particular job category had already developed a work-related MSD. Where the 1995 text provided performance goals so an employer could know, but also object to, how much exposure reduction would satisfy an OSHA inspector, the revised text emphasized that inspectors would be looking for evidence of management leadership in creating an ergonomically appropriate workplace and employee participation in decisions about ergonomic design.

OSHA intended this pendulum swing with respect to the earlier version [\*768] in large part to provide the opposition with what it said it wanted--a "user-friendly" rule that allowed each employer to reduce MSDs according to the unique circumstances of his operation and workforce. Instead, these attributes doomed the revised ergonomics rule, but with hindsight they provide a partial blueprint for how OSHA could sensibly craft a "substantially different" regulation in the future. American business interpreted OSHA's attempt to eschew one-size-fits-all requirements not as a concession to the opposition around the 1995 text, but as a declaration of war. The "flexibility" to respond idiosyncratically to the unique ergonomic problems in each workplace was almost universally interpreted by industry trade associations as the worst kind of vagueness. Having beaten back a rule that seemed to tell employers exactly what to do, industry now argued that a rule with too much flexibility was a rule without any clear indication of where

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<sup>235</sup> See, e.g., Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 *LAW & SOC'Y REV.* 691, 726 (2003) ("The challenge for governmental enforcement of management-based regulation may be made more difficult because the same conditions that make it difficult for government to impose technological and performance standards may also tend to make it more difficult for government to determine what constitutes 'good management.'").

<sup>236</sup> n236 For two examples cited by Congressmen of each political party, see *OSHA's Regulatory Activities and Processes Regarding Ergonomics: Hearing Before the Subcomm. on Nat'l Econ. Growth, Natural Res. & Regulatory Affairs of the H. Comm. on Gov't Reform & Oversight*, 104th Cong. (1995). At that hearing, Republican Representative David McIntosh stated:

A questionnaire in the draft proposal asks employers of computer users if their employees are allowed to determine their own pace, and discourages employers from using any incentives to work faster. In other words, employers would not be allowed to encourage productivity. If the Ergonomics rulemaking is truly dead, we have saved more than just the enormous cost involved.

*Id.* at 7 (statement of Rep. McIntosh). Similarly, Democratic Representative Collin Peterson expressed concern about governmental micromanagement of industrial processes: "I have to say that I am skeptical that any bureaucrat can sit around and try to figure out this sort of thing." *Id.* at 9 (statement of Rep. Peterson).

<sup>237</sup> See Ergonomics Program, 64 *Fed. Reg.* 65,768 (proposed Nov. 23, 1999).



the compliance burden would end. Small business in particular characterized the lack of specific marching orders as being "left to their own devices," in the sense of federal abdication of responsibility to state plainly what would suffice.<sup>238</sup> But in light of what had already transpired in 1995, and exacerbated by the publication of the final rule after the votes were cast in the Bush v. Gore election, but before the outcome was known, it turned out that OSHA opened itself up to much worse than charges of insufficient detail—it became dogged by charges that the regulatory text was a Trojan horse, hiding an apparatus that was specific and onerous, but one it was keeping secret.<sup>239</sup> The requirement—not found in the OSH Act or in its interpretations in the *Benzene Case* or *Cotton Dust Case*,<sup>240</sup> but having [\*769] evolved out of OSHA's deference to the instructions issued by OIRA—that OSHA compare the costs and benefits of compliance with each final rule<sup>241</sup> played into this conspiratorial interpretation: because OSHA provided cost information, it was reasonable for industry to infer that OSHA knew what kinds of controls it would be requiring, and that inspectors would be evaluating these controls rather than management leadership and employee participation to gauge the presence of violations and the severity of citations. Both the extreme flexibility of the rule and the detail of the cost-benefit information may have been a road paved with good intentions, but ironically or otherwise these factors combined to fuel the opposition and to provide a compelling narrative of a disingenuous agency, a story that receptive ears in Congress were happy to amplify.

Not only was OSHA's attempt to write a regulation whose crux was "choose your controls" misinterpreted as "choose our controls by reading our minds," but it undermined any tendency of Congress to defer to the agency's conclusion that the rule had a favorable benefit-cost balance. Because the projected extent of compliance expenditures depended crucially on how many firms would have to create or improve their ergonomics management systems, and what those improvements would end up looking like, rather than on the more traditional cost accounting scenario—the price of specified controls multiplied by the number of controls necessary for regulated firms to come into compliance—opponents of the rule did not need to contest OSHA's data or price estimates; they simply needed to assert that the extreme ambiguity of the regulatory target could lead to much greater expenditures than OSHA's rosy scenarios predicted. The ominous pronouncements of ergonomic costs<sup>242</sup> were the single most important factor in justifying the congressional veto, on the grounds that the costs of the regulation swamped benefits it would deliver, and the vagueness of the rule played into the hands of those who could benefit from fancifully large cost estimates. The reactive nature of the rule—most of the new controls would not have to be implemented until one or more MSD injuries occurred in a given job category in a particular workplaces—also made OSHA's benefits estimates precarious. All estimates of reduced health effects as a function

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<sup>238</sup> 147 CONG. REC. 2837 (2001) (statement of Sen. Bond) ("The Clinton OSHA ergonomics regulation . . . will be devastating both to small businesses and their employers because it is incomprehensible and outrageously burdensome. Too many of the requirements are . . . like posting a speed limit on the highway that says, 'Do not drive too fast,' but you never know what 'too fast' is until a State trooper pulls you over and tells you that you were driving too fast.").

<sup>239</sup> n239 One author opined:

The [2000] ergonomics standard . . . is one of the most vague standards OSHA has ever adopted. It leaves the agency with tremendous discretion to shape its actual impact on industry through enforcement strategy. In other words, OSHA's information guidance documents will likely play a large role in the practical meaning of the standard. This will allow the agency to work out details while bypassing the rigors of notice-and-comment rulemaking. However, it will also expose OSHA to more accusations of "back door" rulemaking.

Timothy G. Pepper, *Understanding OSHA: A Look at the Agency's Complex Legal and Political Environment*, 46 PROF. SAFETY, Feb. 2001, at 14, 16, available at <http://www.allbusiness.com/government/government-bodies-offices-legislative/1443343-1.html>.

<sup>240</sup> *Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case)*, 452 U.S. 490, 513 (1981).

<sup>241</sup> See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 745 (2006).

<sup>242</sup> For cost estimates ranging up to \$ 125 billion annually, see *supra* note 101. See also Editorial, *supra* note 90 ("Although the Occupational Safety and Health Administration puts the price tag on its rules at \$ 4.5 billion, the Economic Policy Foundation gauges the cost to business at a staggering \$ 125.6 billion.").

of reduced exposures involve uncertainty in dose-response, whether or not the promulgating agency quantifies that uncertainty, but to make future costs and benefits contingent [\*770] on future cases of harm, not merely on exposures, added another level of (unacknowledged) uncertainty to the exercise.

Whatever the reasons for a veto under the CRA, we argued above that the affected agency's first responsibility, if it wants to avoid being thwarted by the "substantially similar" trap, is to craft a revised rule with a much more favorable balance of benefits to costs. But because the 2000 ergonomics rule had chosen no particular stringency per se, at least not one whose level the agency and its critics could even begin to agree existed, OSHA cannot tweak the benefit-cost balance with any straightforward concessions. In the case of ergonomics, we contend that OSHA probably needs to abandon the strategy of a flexible, management-based standard, since that approach probably guarantees pushback on the grounds that the true cost of complying with a vague set of mandates dwarfs any credible estimates of benefits, in addition to pushing the hot button of the "hidden enforcement manual." In the next section, we list some practical steps OSHA could take to comport with the CRA, motivated by a catalog of the strongest criticisms made during the floor debate on the 2000 rule, as well as our own observations about costs, benefits, and regulatory design.

### *B. Specific Suggestions for Worthwhile Revisions to the Ergonomics Rule*

A "substantially different" ergonomics rule would have benefits that exceeded costs, to a high degree of confidence. We believe OSHA could navigate between the rock of excessive flexibility--leading to easy condemnation that costs would swamp benefits--and the hard place of excessive specificity--leading essentially to condemnation that the unmeasured cost of losing control of one's own industrial process would dwarf any societal benefits--simply by combining the best features of each approach. The basic pitfall of the technology-based approach to setting standards--other than, of course, the complaint from the left wing that it freezes improvements based on what can be achieved technologically, rather than what needs to be achieved from a moral vantage point--is that it precludes clever businesses from achieving or surpassing the desired level of performance using cheaper methods. However, a hybrid rule--one that provides enough specificity about how to comply that small businesses cannot claim they are adrift without guidance, and that also allows innovation so long as it is at least as effective as the recommended controls would be--could perhaps inoculate the issuing agency against claims of too little or too much intrusiveness. From a cost--benefit perspective, such a design would also yield the very useful output of a lower bound on the net benefit estimate because by definition any of the more efficient controls some firms would freely opt to undertake would either lower total costs, [\*771] reap additional benefits, or both. It would also yield a much less controversial, and less easily caricatured, net benefit estimate because the lower-bound estimate would be based not on OSHA's hypotheses of how much management leadership and employee participation would cost and how many MSDs these programs would avert, but on the documented costs of controls and the documented effectiveness of specific workplace interventions on MSD rates. In other words, we urge OSHA to take a fresh look at the 1995 ergonomics proposal, but to recast specific design and exposure-reduction requirements therein as recommended controls--the specifications would become safe harbors that employers could implement and know they are in compliance, but that they could choose to safely ignore in favor of better site-specific, one-size-fits-one solutions to reduce intolerable ergonomic stressors.

The other major philosophical step toward a "substantially different" rule we urge OSHA to consider involves replacing ergonomic "exposure floors" with "exposure ceilings." With the intention of reassuring many employers that they would have no compliance burden if their employees were subjected only to minimal to moderate ergonomic stressors, OSHA created a Basic Screening Tool demarcating exposures above which employers *might* have to implement controls.<sup>243</sup> For example, even if one or more employees developed a work-related MSD, the employer would have no obligation to assess the jobs or tasks for possible exposure controls, unless the affected employees were routinely exposed to stressors at or above the screening levels. These levels are low, as befits a screening tool used to exclude trivial hazards; for example, only a task that involved lifting twenty-five pounds or more with arms fully extended, more than twenty-five times per workday, would exceed the screening level and possibly trigger the obligation to further assess the situation. Unfortunately, it was easy for trade associations and

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<sup>243</sup> See Ergonomics Program, 65 Fed. Reg. 68,262, 68,848-49 (Nov. 14, 2000).

their allies in Congress to misrepresent these floors as ceilings, as if OSHA had set out to eliminate *all* "twenty-five times twenty-five pounds workdays" rather than to treat any lifting injuries caused by occupational duties below this level as the employee's tough luck.<sup>244</sup> Hence the debate degenerated into warnings about "the end of Thanksgiving" under an OSHA rule that "prohibited" grocery checkout workers from lifting twenty-six-pound turkeys off the conveyor belt.<sup>245</sup> In a [\*772] revised rule, approaching the dose-response continuum from above rather than from below might make much more practical and political sense. As with all of its health standards for chemicals, OSHA's goal, as reinforced by the "significant risk" language of the *Benzene* decision, is to eliminate where feasible exposures that are intolerably high; defining instead exposures that are not insignificantly low may help narrow this window, but it obviously backfired in the case of ergonomics. Making the tough science-policy decisions about which levels of ergonomic stressors must be ameliorated wherever feasible, just as OSHA and other agencies do routinely for toxic substances with observed or modeled dose-response relationships, would have four huge advantages: (1) it would clearly transform the ergonomics rule into something "substantially different" than the 2000 version; (2) it would ally OSHA with the science of MSD dose-response--because the 2000 version triggered controls upon the appearance of an MSD, instead of treating certain exposures as intolerably risky regardless of whether they had already been associated with demonstrable harm, it certainly made it at least appear that OSHA regarded MSDs as mysterious events, rather than the logical result of specific conditions;<sup>246</sup> (3) it could insulate OSHA from some of the political wrangling that caused it to exempt some obviously risky major industries (e.g., construction) from the rule entirely, while subjecting less risky industries to the specter of costly controls, because controlling intolerable exposures wherever they are found is a neutral means of delimiting the scope of the rule; and (4) it would shift the rhetorical burden from government having to argue that small exertions might be worthy of attention to industry having to argue that herculean exertions must be permitted. Adjusting the ceiling to focus mandatory controls on the most intolerable conditions is, of course, the quintessential regulatory act and the most direct force that keeps costs down and pushes benefits up--and this is the act that OSHA's management-based ergonomics rule abdicated.

Continuing with recommendations that improve the cost-benefit [\*773] balance and also respond to specific hot buttons from the congressional veto debate, we believe that OSHA should also consider targeting an ergonomics rule more squarely at MSDs that are truly caused or exacerbated by occupational risk factors. The 2000 rule defined a work-related MSD as one that workplace exposure "caused or contributed to,"<sup>247</sup> but the latter part of this definition, intentionally or otherwise, subsumes MSDs that primarily arise from off-the-job activity and that repetitive motion merely *accompanied* (the easily mocked tennis elbow hypothetical). On the other hand, a redefinition that simply required a medical opinion that *the MSD would not have occurred absent the occupational exposure(s)* would cover any exposures that pushed a worker over the edge to a full-blown injury (and, of course, any exposures that alone sufficed to cause the injury), but not those that added marginally to off-work exposures that were already sufficient by themselves to cause the MSD. In this regard, however, it will be important for OSHA to correct an egregious misinterpretation of the science of ergonomics bandied about freely during the congressional veto debate. Various members made much of the fact that one of the NAS panel reports concluded that "[n]one of

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<sup>244</sup> For example, Republican Senator Don Nickles of Oklahoma began the Senate debate on the rule by flatly stating, "Federal bureaucrats are saying you can do this; you can't do that. You can only move 25 pounds 25 times a day . . . Employees would say: I have to stop; it is 8:25 [a.m.], but I have already moved 25 things. Time out. Hire more people." 147 CONG. REC. 2817 (statement of Sen. Nickles).

<sup>245</sup> Republican Representative Ric Keller of Florida said, "It is also true that if a bagger in a grocery store lifts a turkey up and we are in the Thanksgiving season, that is 16 pounds, he is now violating Federal law in the minds of some OSHA bureaucrats because they think you should not be able to lift anything over 15 pounds. We need a little common sense here." 147 CONG. REC. 3059-60 (statement of Rep. Keller). Although the Basic Screening Tool nowhere mentions fifteen pounds (but rather twenty-five), or fewer than twenty-five repetitions per day, this exaggeration is over and above the basic misinterpretation of the function of the screening level.

<sup>246</sup> The decision to make the ergonomics rule reactive rather than proactive arguably played right into the hands of opponents, who essentially argued that OSHA had come to agree with them that science did not support any dose-response conclusions about MSD origins.

<sup>247</sup> Ergonomics Program, 65 Fed. Reg. at 68,854 (defining work-related).

the common MSDs is uniquely caused by work exposures." <sup>248</sup> Senator Kit Bond and others took this literally true statement about the totality of all cases of one single kind of MSD--for example, all the cases of carpal tunnel syndrome, all the cases of Raynaud's phenomenon--and made it sound as if it referred to every individual MSD case, which is of course ridiculous. "Crashing your car into a telephone pole is not uniquely caused by drunk driving," to be sure--of the thousands of such cases each year, some are certainly unrelated to alcohol, but this in no way means that we cannot be quite sure that what was to blame in a *particular* case in which the victim was found with a blood alcohol concentration of, say, 0.25 percent by volume, enough to cause stupor. Many individual MSDs are caused solely by occupational exposure, and any regulation worth anything must effect reductions in those exposures that make a resulting MSD inevitable or nearly so.

The other hot-button issue specifically mentioned repeatedly in the veto debate was OSHA's supposed attempt to create a separate workers' compensation system for injured employees. Paragraph (r) of the final ergonomics rule <sup>249</sup> would have required employers who had to remove an employee from her job due to a work-related MSD to pay her at least ninety percent of her salary for a maximum of ninety days, or until a health care professional determined that her injury would prevent her from ever [\*774] resuming that job, whichever came first. OSHA deemed such a "work restriction protection" program necessary so that employees would not be deterred from admitting they were injured and risk losing their jobs immediately. But various members of Congress decried this provision of the rule as "completely overrid[ing] the State's rights to make an independent determination about what constitutes a work-related injury and what level of compensation injured workers should receive." <sup>250</sup> Worse yet, because § 4(b)(4) of the OSH Act states that "[n]othing in this [Act] shall be construed to supersede or in any manner affect any workmen's compensation law," <sup>251</sup> various members argued that OSHA "exceeded [its] constitutional authority" by legislating a new workers' compensation system rather than regulating. <sup>252</sup> Other members disputed these allegations, noting that providing temporary and partial restoration of salary that would otherwise be lost during a period of incapacity is very different from compensating someone for an injury. As Senator Edward Kennedy said, "It has virtually nothing to do with workers compensation, other than what has been done traditionally with other kinds of OSHA rules and regulations such as for cadmium and lead." <sup>253</sup> Indeed, the Court of Appeals for the District of Columbia Circuit settled this issue years ago in upholding the much more generous eighteen-month protection program in the OSHA lead standard. In *United Steelworkers of America v. Marshall*, <sup>254</sup> that court held that § 4(b)(4) of the OSH Act bars workers from using an OSHA standard to assert a private cause of action against their employers and from obtaining state compensation for a noncompensable injury just because OSHA may protect a worker against such an injury. <sup>255</sup> But more generally, the circuit court concluded that "the statute and the legislative history both demonstrate unmistakably that OSHA's statutory mandate is, as a general matter, broad enough to include such a regulation as [medical removal protection (MRP)]." <sup>256</sup>

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<sup>248</sup> 147 CONG. REC. 2838 (statement of Sen. Bond).

<sup>249</sup> Ergonomics Program, 65 Fed. Reg. at 68,851.

<sup>250</sup> 147 CONG. REC. 2824 (statement of Sen. Enzi)

<sup>251</sup> OSH Act § 4(b)(4), 29 U.S.C. § 653 (2006).

<sup>252</sup> 147 CONG. REC. 2817 (2001) (statement of Sen. Nickles); see also *supra* Part II.A.

<sup>253</sup> 147 CONG. REC. 2818 (2001) (statement of Sen. Kennedy).

<sup>254</sup> 647 F.2d 1189 (D.C. Cir. 1980).

<sup>255</sup> Id. at 1235-36.

<sup>256</sup> Id. at 1230. Medical removal protection (MRP) is the provision of salary while an employee with a high blood lead level (or a similar biomarker of exposure to cadmium, methylene chloride, etc.) is removed from ongoing exposure until his level declines. See *id.* at 1206. The court's decision stated in relevant part: "We conclude that though MRP may indeed have a great practical effect on workmen's compensation claims, it leaves the state schemes wholly intact as a *legal* matter, and so does not violate Section 4(b)(4)." Id. at 1236.

It is ironic, therefore, that the only mention of workers' compensation in the vetoed ergonomics rule was a provision that allowed the employer to [\*775] reduce the work restriction reimbursement dollar for dollar by any amount that the employee receives under her state's compensation program!<sup>257</sup> If OSHA had not explicitly sought to prohibit double dipping, the ergonomics rule would never have even trespassed semantically on the workers' compensation system. It is tempting, then, to suggest that OSHA could make the work restriction program "substantially different" by removing the reference to workers' compensation and making it a more expensive program for employers to implement. However, both the spirit of responding to specific congressional objections and of improving the cost-benefit balance would argue against such a tactic, as would the practical danger of arousing congressional ire by turning its objections against the interests of its favored constituents. It is possible that an exposure-based ergonomics rule that does not rely on the discovery of an MSD to trigger possible controls would reduce the disincentive for workers to self-report injuries, but the problem remains that without some form of insurance against job loss, workers will find it tempting to hide injuries until they become debilitating and possibly irreversible. Perhaps the Administration could approach Congress before OSHA issued a new ergonomics proposal, and suggest it consider creating a trust fund for temporary benefits for the victims of MSD injuries, as has been done for black lung disease and vaccine-related injuries.<sup>258</sup> Employers might find work-restriction payments from a general fund less offensive than they apparently found the notion of using company funds alone to help their own injured workers.

OSHA could obviously consider a wide variety of other revisions to make a new ergonomics rule "substantially different" and more likely to survive a second round of congressional review. Some of the other changes that would accede to specific congressional concerns from 2001--such as making sure that businesses could obtain all the necessary guidance materials to implement an ergonomics program free of charge, rather than having to purchase them from private vendors at a possible cost of several hundred dollars<sup>259</sup>--are presumably no-brainers; this one being even easier to accommodate now than it would have been before the boom in online [\*776] access to published reports. Other redesigns are up to OSHA to choose among based on its appraisal of the scientific and economic information with, we would recommend, an eye toward changes that would most substantially increase total benefits, reduce total costs, or both.

There is one other category of change that we recommend even though it calls for more work for the agency than any literal reading of "substantially the same form" would require. The CRA is concerned with rules that reappear in the same "form," but it is also true that the process leading up to the words on the page matters to proponents and opponents of every regulation. The ergonomics rule faced withering criticism for several purported deficiencies in how it was produced.<sup>260</sup> We think the CRA imposes no legal obligation upon OSHA to develop a "substantially different" process the second time around--after all, "form" is essentially perpendicular to "process," and had Congress wanted to force an agency to change how it arrived at an offensive form, it surely could have said "reissued in substantially the same form or via substantially the same process" in § 801(b)(2). Nevertheless, well-founded complaints about flawed process should, we believe, be addressed at the same time an agency is attempting to improve the rule's form in the cost-benefit sense. Although courts have traditionally been very reluctant to rescind rules signed by an agency head who has telegraphed his personal views on the subject at

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<sup>257</sup> See Ergonomics Program, 65 Fed. Reg. 68,262, 68,851 (Nov. 14, 2000) ("Your obligation to provide [work restriction protection] benefits . . . is reduced to the extent that the employee receives compensation for earnings lost during the work restriction period from either a publicly or an employer-funded compensation or insurance program . . .").

<sup>258</sup> See 26 U.S.C. § 9501 (2006) (creating the Black Lung Disability Trust Fund with the purpose of providing benefits to those who were injured from the Black Lung); *id.* § 9510 (forming the Vaccine Injury Compensation Trust Fund for the purpose of providing benefits to those who were injured by certain vaccinations).

<sup>259</sup> See 147 CONG. REC. 2825-26 (2001) (statement of Sen. Enzi).

<sup>260</sup> See *supra* note 228 and accompanying text.

issue,<sup>261</sup> we assume the Obama Administration or a future Executive would be more careful to avoid the appearance of a general bias for regulation as a "thrill" (or, for that matter, against it as a "menace") by the career official leading the regulatory effort.<sup>262</sup> We, however, do not expect OSHA to overreact to ten-year-old complaints about the zeal with which it may have sought to regulate then. Other complaints about the rulemaking process in ergonomics may motivate a "substantially different" process, if OSHA seeks to re-promulgate. For example, Senator Tim Hutchinson accused OSHA of orchestrating a process with "witnesses who were paid, instructed, coached, practiced, to arrive at a preordained outcome,"<sup>263</sup> and although an agency need not confine itself to outside experts who will testify pro bono, we suggest it would be politically unwise for OSHA to edit again the testimony of the experts it enlists. Similarly, a different ergonomics rule that still had the cloud of improper and undisclosed conflict of interest in [\*777] the choice of specific outside contractors to do the bulk of the regulatory impact analysis work<sup>264</sup> would, we believe, fail to comport with the spirit of § 801(b)(2), in that it would have circumvented the instructions of at least some in Congress to "clean up" the process.

On the other hand, we think some objections to the process by which a rule is developed ought more properly to be the subject of judicial review rather than congressional interference. Some members of Congress accused OSHA of not having enough time to read, let alone digest and thoughtfully respond to, the more than 7000 public comments received as late as August 10, 2000, before the final rule was issued barely three months later.<sup>265</sup> Senator Enzi also said that OSHA "took the comments they got, and they opposed everything and incorporated things in this that were worse than in the law that was passed."<sup>266</sup> But although a reviewing court could not punish OSHA per se for crafting a rule with costs exceeding benefits, or for engaging in conduct with expert witnesses that Congress might find unseemly, the courts are empowered and required to judge whether OSHA arbitrarily ignored evidence in the record, or twisted its meaning.<sup>267</sup> The CRA, therefore, should emphasize those substantive--and procedural--concerns for which aggrieved parties have no other remedy.

## VII. RECOMMENDATIONS TO AMEND THE CRA

Congress has voted on just one attempt to amend the CRA in the fourteen years since its passage: the inconsequential Congressional Review Act Improvement Act, which unanimously passed the House in June 2009, and that would have eliminated the requirement that an agency transmit each final rule to each house of Congress, leaving the Comptroller General as the only recipient.<sup>268</sup> Here we suggest several more substantive changes

<sup>261</sup> See, e.g., *United Steelworkers of Am. v Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (finding that the head of OSHA "served her agency poorly by making statements so susceptible to an inference of bias," but also finding that she was not "so biased as to be incapable of finding facts and setting policy on the basis of the objective record before her").

<sup>262</sup> See *supra* note 100.

<sup>263</sup> 147 CONG. REC. 2832 (statement of Sen. Hutchinson).

<sup>264</sup> See Letter from Rep. David M. McIntosh, Chairman, Subcomm. on Nat'l Econ. Growth, to Alexis M. Herman, Sec'y of Labor, U.S. Dep't of Labor (Oct. 30, 2000), available at <http://insidehealthpolicy.com/Inside-OSHA/Inside-OSHA-11/13/2000/mcintosh-letter-to-herman/menu-id-219.html>. McIntosh alleged that the career OSHA official who led the ergonomics rulemaking did (with OSHA's approval) assign task orders to a consulting firm that she had been an owner of before coming to government (and after signing a Conflict of Interest Disqualification requiring her to recuse herself from any such contractual decisions involving her former firm).

<sup>265</sup> See, e.g., 147 CONG. REC. 2823 (statement of Sen. Enzi).

<sup>266</sup> *Id.* at 2821.

<sup>267</sup> See **5 U.S.C. § 706(2)(A)** (2006) (mandating that the reviewing court shall set aside arbitrary and capricious agency actions, findings, and conclusions).

<sup>268</sup> See Congressional Review Act Improvement Act, H.R. 2247, 111th Cong. (2009) (as passed by House of Representatives, June 16, 2009); 155 CONG. REC. H6849 (daily ed. June 16, 2009) (recording the House roll call vote). The Senate did not take

[\*779] Congress should consider to improve the CRA, emphasizing the reissued-rules problem but including broader suggestions as well. We make these suggestions in part to contrast with several of the pending proposals to change the CRA that have been criticized as mischievous and possibly unconstitutional.<sup>269</sup>

**Improvement 1: Codification of the Cost-Benefit-Based Standard.** First, Congress should explicitly clarify within the CRA text the meaning of "substantially the same" along the lines we suggest: any rule with a substantially more favorable balance between benefits and costs should be considered "substantially different" and not vulnerable to a preemptory veto. In the rare cases where a prior congressional mandate to produce a narrowly tailored rule collides head-on with the veto of the rule [\*780] as promulgated, Congress has already admitted that it owes it to the agency to "make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval."<sup>270</sup> But there is currently no legal obligation for Congress to do so. In a hypothetical case where Congress has effectively said, "Promulgate this particular rule," and then vetoed a good-faith attempt to do just that, it seems particularly inappropriate for Congress not to bind itself to resolve the paradox. But we believe it is also inappropriate for Congress to perpetuate the ambiguity of "substantially the same" for the much more common cases in which the agency is not obligated to try again, but for good reasons wishes to.

**Improvement 2A: Severability.** The CRA veto process might also be improved by permitting a resolution of disapproval to strike merely the offending portion(s) of a proposed rule, leaving the rest intact. If, as a clearly hypothetical example, the only thing that Congress disliked about the ergonomics regulation was the additional entitlement to benefits different from those provided by state workers' compensation laws, it could have simply struck that provision. Charles Tiefer has made the interesting observation that one would not want to close military bases this way (but rather craft a take-it-or-leave-it approach for the proposed list as a whole) to avoid horse-trading,<sup>271</sup> but a set of regulatory provisions can be different: it is not zero-sum in the same way. The allowance for severability would pinpoint the offending portion(s) of a proposed regulation and therefore give the agency clearer guidance as to what sort of provisions are and are not approved.

Severability would have the added benefit of lowering the chances of there being a null set of reasons for veto. In other words, a generic joint resolution may be passed and overturn a regulation even though no single substantive reason has majority support in Congress. Suppose, for example, that the FAA proposed an updated comprehensive passenger safety regulation that included two unrelated provisions. First, due to passengers' disobeying the limitations on in-flight use of personal electronic devices and mobile phones, the rule banned possession of personal electronics as carry-on items. Second, in order to ensure the dexterity and mobility of those assisting with an emergency evacuation, the rule increased the minimum age for exit-row seating from fifteen to eighteen. If thirty

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significant action on the bill. See *H.R. 2247: Congressional Review Act Improvement Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2247> (last visited Nov. 14, 2011).

Various legislators have drafted other bills that have not made it to a vote. Recently, Republican Senator Mike Johanns of Nebraska introduced a bill that would bring administrative "guidance documents" within the purview of the CRA, making them subject to the expedited veto if they meet the same economic impact guidelines that subject rules to congressional scrutiny under the CRA in its current form. See *Closing Regulatory Loopholes Act of 2011*, S. 1530, 112th Cong. (2011) (as referred to committee, Sept. 8, 2011); cf. *supra* note 69 (describing the economic criteria currently used to determine whether a rule is subject to congressional review). Importantly, the bill would make vetoed guidance documents subject to the CRA's "substantially the same" provision. See S. 1530 § 2(b)(1)(B). Supporters of the bill have argued that agencies have used such guidance documents to craft enforceable policies while sidestepping congressional review, while opponents take issue with the potential new costs the bill would impose on agencies. See Stephen Lee, *Agency Guidance Would Be Subject To Congressional Review Under House Bill*, 41 OCCUPATIONAL SAFETY & HEALTH REP. 788, 788-89 (Sept. 15, 2011). At the time this Article went to press, the bill had only been introduced and referred to committee. See *S. 1530: Closing Regulatory Loopholes Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-1530> (last visited Nov. 14, 2011).

<sup>269</sup> See *supra* note 268.

<sup>270</sup> 142 CONG. REC. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

<sup>271</sup> Tiefer, *supra* note 136, at 479 & n.311 (relying on the Supreme Court's reasoning in *Dalton v. Spector*, 511 U.S. 462 (1994)).

senators disliked solely the electronics ban, but thirty different senators disliked only the exit row seating restriction, then under the current law the [\*781] entire regulation is at risk of veto even though a majority of Senators approved of all of the rule's provisions. An ability to strike just the offending portion of a regulation decreases the potential<sup>272</sup> for this sort of null set veto.

**Improvement 2B: Codified Rationale.** On the other hand, some might well consider a scalpel to be a dangerous tool when placed into the hands of Congress. Although Congress may understand what it means to send an agency back to square one with a rule under the current procedure, the availability of a partial veto might lead to overuse of the CRA, turning it into a forum for tinkering with specific words in complicated regulations produced with fidelity to the science and to public comment, perhaps in ways that a court would consider arbitrary and capricious if done by the issuing agency.

Alternatively, Congress could also go much further than the limited resolution template<sup>273</sup> and take on more responsibility by living up to the literal promise embodied in the signing statement. The drafters of the CRA stated: "The authors intend the debate on *any* resolution of disapproval to focus on the law that authorized the rule . . . ." <sup>274</sup> This goal would be served (though admittedly at the expense of some speed) by requiring the joint resolution of disapproval to include a statement of the reason(s) for the veto. That is to say, whenever Congress disapproves of a rule, it should surround what Cohen and Strauss called the "Delphic 'No!'" <sup>275</sup> with some attempt to explain the "why 'No'?" question the agency will rightly be preoccupied with as it regroups or retreats. From the agency's point of view, it is bad enough that Congress can undo in ten hours what it took OSHA ten years to craft, but to do so without a single word of explanation, beyond the ping-pong balls of opposing rhetoric during a floor debate, smacks more of Congress flexing its muscle than truly teaching the agency a lesson. Indeed, it is quite possible that the act of articulating an explanatory statement to be voted on might reveal that there

"That Congress disapproves the rule submitted by the \_\_\_ relating to \_\_\_, and such rule shall have no force or effect"). [\*782] might be fifty or more unhappy Senators, but no majority for any particular view of whether and why the rule should be scrapped.

**Improvement 3: Early Veto.** We hasten to add, however, that this bow to transparency and logic should be a two-way street; we also enthusiastically endorse the proposal Professor Strauss made in 1997 that the CRA should be "amended to provide that an agency adopting the same or 'substantially the same' rule to one that has been disapproved must fully explain in its statement of basis and purpose how any issues ventilated during the initial disapproval process have been met." <sup>276</sup> We would go further, however, and suggest that the overwhelmingly logical time to have the discussion about whether a reissued rule runs afoul of the "substantially the same" provision is when the new rule is *proposed*, not after it is later issued as a final rule. Surely, needless costs will be incurred by the agency and the interested public, needless uncertainty will plague the regulated industries, and other benefits will be needlessly foregone in the bargain, if Congress silently watches a regulatory proposal go through notice and comment that it believes may be invalid on "substantially the same" grounds, only to veto it at

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<sup>272</sup> Admittedly, severability would not entirely eliminate this possibility- the risk would still remain where dueling minorities of legislators opposed the *same* provision but for different reasons. For example, if the Environmental Protection Agency were to propose an ozone standard of 60 parts per billion (ppb), the regulation is at risk of being vetoed if thirty senators think the standard should be 25 ppb while another thirty Senators think it should be 200 ppb.

<sup>273</sup> See 5 U.S.C. § 802 (2006) (requiring that a joint resolution of disapproval read:

<sup>274</sup> 142 CONG. REG. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

<sup>275</sup> Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 105(1997).

<sup>276</sup> *Hearing on CRA, supra* note 83, at 135 (statement of Peter L. Strauss, Betts Professor of Law, Columbia University). Assuming that our proposal immediately above was adopted, we would interpret Strauss' amendment as then applying only to issues specifically called out in the list of particulars contained in the expanded text of the actual resolution of disapproval--not necessarily to every issue raised by any individual member of Congress during the floor debate.



the finish line. We suggest that whenever an agency is attempting to reissue a vetoed rule on the grounds that it is not "substantially the same," it should be obligated to transmit the notice of proposed rulemaking (NPRM) to both houses, and then that Congress should have a window of time--we suggest sixty legislative days--to decide whether the proposal should not be allowed to go forward on "substantially the same" grounds, with silence denoting assent. Under this process, failure to halt the NPRM would preclude Congress from raising a "substantially the same" objection at the time of final promulgation, but it would of course not preclude a second veto on any substantive grounds.<sup>277</sup> The [\*783] agency would still be vulnerable to charges that it had found a second way to issue a rule that did more harm than good. With this major improvement in place, a vague prohibition against reissuing a similar rule would at worst cause an agency to waste half of its rulemaking resources in an area.

**Improvement 4: Agency Confrontation.** Currently, the CRA does not afford the agency issuing a rule the opportunity that a defendant would have under the Confrontation Clause<sup>278</sup> to face his accusers about the conduct at issue. Even within the confines of an expedited procedure, and recognizing that the floor of Congress is a place for internecine debate as opposed to a hearing, the CRA could still be amended to allow some limited dialogue between the agency whose work is being undone and the members. Perhaps in conjunction with a requirement that Congress specify the reasons for a resolution of disapproval, the agency should be allowed to enter a response into the official record indicating any concerns about misinterpretation of the rule or the accompanying risk and cost analyses. This could, of course, become somewhat farcical in a case (like the ergonomics standard) where the leadership of the agency had changed hands between the time of promulgation and the time of the vote on the disapproval--presumably, Secretary Chao would have declined the opportunity to defend the previous administration's ergonomics standard on factual grounds. However, each agency's Regulatory Policy Officer could be empowered to craft such a statement.<sup>279</sup>

## CONCLUSION

The CRA can be a helpful hurdle to check excesses and spur more favorable actions from a CBA standpoint, but it makes no sense to foreclose the agency from doing what Congress wants under the guise of the substantial similarity provision. OSHA should not reissue the ergonomics rule in anything like its past form--not because of "substantial similarity," but because it was such a flawed rule in the first place. But a different rule with a more favorable cost-benefit ratio has been needed for decades, and [\*784] "substantial similarity" should not be raised again lightly, especially since at least ten years will have passed and times will have changed.

The history and structure of the CRA, and its role in the larger system of administrative law, indicate that the substantial similarity provision should be interpreted narrowly. More specifically, it seems that if, following disapproval of a rule, the agency changes its provisions enough that it alters the cost-benefit ratio in a significant and favorable way, and at least tries in good faith to fix substantive and procedural flaws, then the new rule should

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<sup>277</sup> Enforcement of a limit on tardy congressional "substantial similarity" vetoes would require additional amendments to the CRA. First, the section governing judicial review would need to be amended so that a court can review and invalidate a CRA veto on the basis that Congress was making an after-the-fact "substantial similarity" objection. Cf. 5 U.S.C. § 805 ("No determination, finding, action, or omission under this chapter shall be subject to judicial review."). Second, Congress would need to insert its substantive basis for the veto into the text of the joint resolution, which is currently not allowed (but which we recommend as Improvement 2B above). Absent a textual explanation of the substantive basis for a veto, the ban on a tardy congressional "substantial similarity" veto would be an empty prohibition; members of Congress could vote in favor of a blanket veto without any substantive reason, and courts would likely decline to review the veto under the political question doctrine.

<sup>278</sup> See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

<sup>279</sup> Note that these officers usually were career appointees, who would therefore generally hold over when administrations changed. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 745 (2006). President Bush issued an executive order that redefined these officers as being political appointees, but President Obama rescinded that order in January 2009, redefining these officials as careerists who might be better able to fulfill this function objectively. See Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *invalidating* Exec. Order No. 13,422, 3 C.F.R. 191 (2007).

not be barred under the CRA. The rule can still be vetoed a second time, but for substantive reasons rather than for a technicality. The framers of the CRA were concerned with federal agencies creating costly regulatory burdens with few benefits, and this consideration arose again in the debates over the OSHA ergonomics rule. The disapproval procedure--with its expedited debates, narrow timeframe, and failure to provide for severability of rule provisions--suggests that the substantial similarity provision is not intended to have broad effects on an agency's power to issue rules under its organic statute, especially in a system in which we generally defer to agencies in interpreting their own delegated authority. Instead, the history and structure of the procedure suggest that the CRA is intended to give agencies a second chance to "get it right." In an ideal world, Congress would monitor major regulations and weigh in at the proposal stage, but sending them back to the drawing board, even though regrettably not until after the eleventh hour, is what the CRA most fundamentally does, and therefore it is fundamentally important that such a drawing board not be destroyed. If one believes, as we do, that well-designed regulations are among "those wise restraints that make us free," then Congress should not preclude wise regulations as it seeks to detect and rework regulations it deems deficient.

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Administrative Law Review

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**Montanans for Multiple Use v. Barbouletos**, 568 F.3d 225, 229 (D.C. Cir. 2009): when confronted with a claim that an agency action should be invalidated based on the agency's failure to comply with the submission requirements of the CRA, found that "the language in § 805 is unequivocal and precludes review of this claim...."

**Via Christi Reg'l Med. Ctr. V. Leavitt**, 509 F.3d 1259, 1271 n. 11 (10<sup>th</sup> Cir. 2007): "[t]he Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms."

The 5th Circuit affirmed, without discussion of the CRA, a district court opinion that concluded "the language could not be plainer" and that the alleged failure to comply with the CRA "is not subject to review by this [c]ourt." **Tex. Savings and Cmty Bankers Assoc. v. Fed. Hous. Fin. Bd.**, 1998 U.S. Dist. LEXIS 13470, 27 (W.D. Tex. 1998), *aff'd* **Tex. Savings & Cmty Bankers Assoc. v. Fed. Hous. Fin. Bd.**, 201 F.3d 551 (5th Cir. 2000); *see also* **United States v. Calson**, 2013 U.S. Dist. LEXIS 130893 (D. Minn. 2013); **United States v. Ameren Mo.**, 2012 U.S. Dist. LEXIS 95065 (E.D. Mo. 2012); **Forsyth Mem'l Hosp. v. Sebelius**, 667 F.Supp. 2d 143, 150 (D.D.C. 2009); **New York v. Am. Elec. Power Serv. Corp.**, 2006 U.S. Dist. LEXIS 32829 (S.D. Ohio 2006).

*But see* **United States v. S. Ind. Gas & Elec. Comp.**, 2002 U.S. Dist. LEXIS 20936 (S.D. Ind. 2002).

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**From:** Memmott, Justin (EPW)  
**Sent:** 2017-03-30T09:11:55-04:00  
**Importance:** Normal  
**Subject:** BLM methane rule  
**Received:** 2017-03-30T09:12:04-04:00

Take a look at the Earthjustice attorney's quote. Highlighted below.

## METHANE

### What Trump's order means for CRA, litigation on BLM rule

[Pamela King](#) and [Ellen M. Gilmer](#), E&E News reporters

Published: Thursday, March 30, 2017

Efforts to repeal the Bureau of Land Management's methane rule under the **Congressional Review Act** are not dead following President Trump's "energy independence" executive order, the American Council for Capital Formation said yesterday.

As the CRA resolution stalled in the Senate, ACCF this month launched a campaign to strike from the books BLM's regulation curbing natural gas venting, flaring and leakage from production sites on public lands. If the upper chamber were to vote in support of the CRA resolution, the Methane and Waste Prevention Rule would quickly disappear, along with any possibility that BLM would reintroduce a substantially similar regulation.

Trump's direction to the Interior Department to suspend, revise or rescind four rules, including the methane rule, is a much lengthier process, ACCF said.

"Unraveling the methane rule at the agency level would require months of staff work and would undoubtedly face vigorous legal challenges from environmental groups, which could delay its repeal for up to two years," ACCF wrote in a statement yesterday. "On the other hand, Senate passage of a disapproval resolution under the CRA — something the House has already accomplished — would be quick and efficient, saving the agency both time and resources."

In a legal sense, rescinding a rule under the CRA is a far cleaner process, said Mark Barron, a partner at the law firm BakerHostetler.

"If they get 51 votes to repeal the regulation, then the regulation goes away, and that's the end of it," he said.

The order did little to move the needle, particularly with respect to the methane rule's future, Barron said.

"It was already widely known that the Trump Administration did not support the venting and flaring rule and I think most folks anticipated that, if the CRA did not pass, BLM would move to rescind the rule through the regulatory process," he wrote in an email to E&E News. "The debate since the election has never been whether the rule would be discarded, but whether it would be discarded quickly and easily in Congress or through the time consuming and expensive process of administrative rulemaking (and subsequent litigation). The Executive Order doesn't do anything to change that analysis."

Hogan Lovells attorney Hilary Tompkins, the former solicitor for President Obama's Interior, read the executive order as a change in strategy.

"It does provide an alternative approach, and I think they were reading the tea leaves in Congress and the Senate on that CRA, and they've kicked it back to the executive branch to find an alternative approach," she said.

A revised rule could keep the elements of the regulation that strengthen BLM's royalty collection process, said Ryan Alexander, president of Taxpayers for Common Sense.

"That's much more productive than CRA," she said.

Environmental lawyers saw a silver lining in the White House's direction. Groups that opposed CRA repeal have asked BLM to tweak the rule, rather than allowing Congress to eliminate it.

"The fact that this executive order shows that President Trump himself wants the Bureau of Land Management to use a scalpel to change the methane waste prevention rule is yet another sign that the oil and gas lobbyists who are asking Congress to use a sledgehammer to get rid of the rule using the Congressional Review Act are just too extreme," said Joel Minor, an Earthjustice attorney representing environmental intervenors in litigation over the methane rule.

The regulation went through years of comment and technical review and is therefore deserving of a more thorough examination before it is killed, said Erik Schlenker-Goodrich, executive director of the Western Environmental Law Center.

"The current administration might not like it, but it does have the authority to go through a new rulemaking process," he said.

A window of opportunity to pass the CRA resolution through the Senate could open up after the chamber votes on Supreme Court justice nominee Neil Gorsuch, ACCF said.

The Senate has until the week of May 8 to nullify the rule with a simple majority vote, the group said.

## **In the courtroom**

This week's executive order creates a wave of uncertainty for litigation over the methane rule.

Industry groups and states challenged the regulation immediately after BLM finalized it last year. The U.S. District Court for the District of Wyoming declined their request to freeze the rule, and it took effect in January, gradually phasing in compliance requirements.

Environmental defenders of the rule are now monitoring the court docket to see if the Justice Department seeks to pause the case. DOJ lawyers have already asked courts to pause proceedings in litigation over U.S. EPA's Clean Power Plan and BLM's hydraulic fracturing rule, which were also targeted by the executive order. As in those cases, environmental lawyers have vowed to oppose any attempt to halt the methane litigation.

"We don't see any reason to put the litigation on hold until there is a firm and final decision revoking the rule from the Bureau of Land Management, and that will require notice-and-comment rulemaking, and that's a process that is likely to take far longer than resolving the litigation in court," Minor said.

Earthjustice and other environmental groups will argue that the issues in the litigation must be resolved to inform Interior's reconsideration of the rule, as challengers contend that the methane rule is essentially an air quality regulation that falls on EPA's and states' turf. Minor noted that

BLM "at least in theory needs to know what it has legal authority to do before it takes action."

Tompkins, the former Interior solicitor, said it's "a big question mark" whether the district court would agree with environmental groups and allow litigation to move forward in either the methane case or the fracking case.

"I think the court will want to know: Is this an issue that could likely be capable of repetition and recur?" she said. "Or are we truly mooted out all the issues in these cases? It's really going to depend on the vantage point of those judges."

Courts have previously allowed environmental intervenors to continue pressing litigation after the federal government has retreated in some cases, including litigation over the Clinton administration's "roadless rule" and an enforcement case against Duke Energy Corp. initiated by the Clinton administration just before George W. Bush took office.

Another wrinkle from Trump's executive order is its erasure of the Obama administration's metric for weighing the "social cost" of greenhouse gases. The social cost of methane was incorporated into the cost-benefit analysis for the methane rule and faced deep skepticism from the federal judge handling the case (*Energywire*, Jan. 17).

Minor said the new administration's rejection of the metric should not affect legal arguments surrounding the rule.

"The fact that the executive order effectively rescinds the use of the social cost of methane in the future doesn't retroactively change the use of the social cost of methane in the past," he said. "An agency's regulation has to stand based on the record and the decision that the agency made when it issued the rule, not post hoc developments that perhaps the agency changed its mind about something."

Legal briefs in the case are due in April and May.

And as Interior moves forward with a rulemaking process to reconsider the rule, supporters of increased regulation are also preparing for new opportunities to hold the agency accountable along the way and challenge a final decision if needed. Minor noted that any attempt to weaken the Obama administration's effort to prevent methane waste "could well be grounds for litigation over that choice."

"They are going to have to provide a robust rebuttal of all the vast administrative record that exists for [the methane and fracking rules]," Tompkins said. "There was extensive public comment, analysis and research, and if the new administration is going to rescind or significantly change those Interior regulations and policies, they're going to have to provide a counterpoint to why and address all those issues in the records that support the prior administration's actions."

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**To:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
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**Importance:** Normal  
**Subject:** BLM V/F Docs  
**Received:** 2017-04-06T16:38:17-04:00  
[4-6-17 VF CRA Briefing.pdf](#)

Pat. Here it is. Expanded bullet points from the attached document are below.

- Encouraging beneficial use of oil or gas on lease
  - Under the Mineral Leasing Act, oil or gas that is used on lease for production purposes is not subject to royalties. NTL-4A provided guidance as to the particular uses of oil or gas termed “beneficial purposes” that would not be subject to royalties. NTL-4A’s “beneficial purposes” included heating oil or gas to condition it for market, compressing gas to place in marketable condition, and fueling drilling rig engines.
  - A non-controversial part of the Venting & Flaring Rule (43 C.F.R. subpart 3178) replaced NTL-4A’s “beneficial purposes” with an expanded and clarified list of “royalty-free uses.” Following a repeal of the Rule, the BLM would consider how the beneficial-use policies of NTL-4A could be strengthened, either through internal guidance or additional rulemaking, in order to encourage conservation through beneficial use of oil or gas on lease.
- Regulating flaring of unmarketable gas from oil wells
  - Oftentimes, especially in tight oil formations like the Bakken, oil production is accompanied by a extensive amounts of gas production, termed “associated gas.” Depending on the value of the associated gas and the availability of gas pipelines, it may not be economical for an oil-well operator to capture the gas, leading the operator to dispose of the gas through flaring.
  - NTL-4A required BLM approval for the routine flaring of associated gas. Such approval could be obtained upon a showing that capture of the gas is not economically justified and that conservation of the gas would lead to a premature abandonment of recoverable oil reserves and ultimately to a greater loss of energy than if the gas were flared. Following a repeal of the Rule, the BLM could consider how NTL-4A’s restrictions on routine flaring could be strengthened, either through internal guidance or through additional rulemaking.

- Conserving unsold gas by injection
  - Operators may find the subsurface injection of gas to be an attractive means of disposing of gas that cannot be economically captured for market. Gas may be injected into the reservoir to enhance oil recovery, or it could be injected with the intent to recover it later. The viability of injecting unsold gas is dependent on the local geology as to whether it is suitable for accepting gas for reinjection to conserve it for future needs.
  
- Improving ROW timelines and removing obstacles to timely approval for pipeline infrastructure.
  - An important factor driving the flaring of associated gas is the lack of access to gas pipelines. Operators complain that pipeline construction is being delayed by the BLM's failure to approve rights-of-way (ROW) in a timely manner. ROW approvals are impacted by coordination with other surface managing agencies (BIA/USFS/FWS/BOR/ArmyCOE).
  
- Recognizing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana
  - Many states with Federal oil and gas production already have regulations addressing flaring. North Dakota, for example, requires operators to submit waste minimization plans with their APDs and requires operators to capture a certain percentage of the gas they produce. Wyoming and Utah place volumetric limits on flaring, and Colorado has detailed LDAR requirements. The BLM could consider avoiding a duplicative, one-size-fits-all rule that ignores effective regulations already imposed by the states.

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior



## BLM Venting & Flaring Rule

### Summary of the Final Rule:

The “Venting & Flaring Rule” (the Rule) is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). Currently, only 12 percent of operators have reported flared gas from oil well production. The Rule is codified in 43 CFR subparts 3178 and 3179 and became effective on January 17, 2017.

### Statutory Authority and Regulatory History:

The Mineral Leasing Act of 1920 (MLA) (30 U.S.C. §§ 188–287) subjects federal oil and gas leases to the condition that lessees will “use all reasonable precautions to prevent waste of oil and gas developed in the land . . . .” 30 U.S.C. § 225. Further, the MLA requires lessees to exercise “reasonable diligence, skill, and care” in their operations and requires lessees to observe “such rules for the health and safety of the miners and for the prevention of undue waste as may be prescribed by [the] Secretary [of the Interior].” 30 U.S.C. § 187. The Federal Oil and Gas Royalty Management Act (FOGRMA) makes lessees liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence or the failure to comply with applicable rules or regulations. 30 U.S.C. § 1756. Both the MLA and FOGRMA authorize the Secretary of the Interior to prescribe rules and regulations necessary to carry out the purposes of those statutes. 30 U.S.C. § 189; 30 U.S.C. § 1751.

Before promulgation of the Venting and Flaring Rule, the Bureau of Land Management (BLM) regulated the venting, flaring, and beneficial use of gas pursuant to NTL-4A, which placed limits on the venting and flaring of gas and defined when gas was “unavoidably lost” and therefore not subject to royalties. The BLM’s Venting & Flaring Rule included many regulatory changes, including emissions-focused requirements that did not appear in NTL-4A. Multiple states and industry groups believe that these new requirements are actually within the jurisdiction of the Clean Air Act (CAA) and therefore outside the Department’s authority to regulate.

### If the Rule is Not Repealed under the Congressional Review Act (CRA):

Although the Venting & Flaring Rule went into effect in January 2017, many of the Rule’s more onerous requirements are not yet operative. Although operators are not yet obligated to comply with these requirements, they will need to expend time and resources to prepare for compliance dates. Presently, the Rule requires operators to submit a waste minimization plan with their applications for permits to drill (APDs), imposes restrictions on venting, and clarifies that when gas is “avoidably lost” and it is therefore subject to royalties. Operators must comply with the Rule’s flaring (or “gas capture”) requirements, equipment upgrade/replacement requirements, and leak detection and repair (LDAR) requirements beginning on January 17, 2018.

The BLM expects industry’s annual compliance costs from 2017 to 2026 to be between \$114 and \$279 million, with first year compliance costs estimated to be \$113 million (\$84 million for LDAR alone).

The Rule will continue in effect unless the BLM rescinds or replaces the Rule through the rulemaking process outlined below, or the Rule is overturned in pending litigation. Any new rule that the BLM promulgates would likely be challenged in court with a minimum litigation cost of \$500,000. If the new rulemaking is overturned in litigation, the Venting and Flaring Rule would come back into effect.

If the Rule is Repealed under the CRA:

If the Rule is repealed under the CRA, NTL-4A would come back into effect immediately. The BLM retains its existing authority under the MLA and FOGRMA to make effective updates to NTL-4A while ceding some of the more duplicative regulatory provisions to states/EPA under the CAA.

The BLM could consider policy actions to curb waste and focus on revisions to NTL-4A to address the following:

- Encouraging beneficial use of oil or gas on lease
- Regulating flaring of unmarketable gas from oil wells
- Conserving unsold gas by reinjection
- Improving ROW timelines and removing obstacles to timely approval for pipeline infrastructure
- Recognizing existing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana

If a court overturns any replacement or revision of NTL-4A, NTL-4A would come back into effect.

**Table: Rulemaking Schedule**

Activity	Description	Timing
Advanced Notice of Proposed Rulemaking (ANPR)	OPTIONAL. The BLM would solicit input from the public on whether, and how, NTL-4A should be revised.	1 month to publish 2 months for public comment
Notice of Proposed Rulemaking (NPR)	The BLM would develop a NPR based on previous rule experiences or comments received from ANPR process. The Office of Management and Budget (OMB) needs to review and clear the proposal.	3 months to draft NPR 3 months for OMB review
NPR comment period	The NPR is published in the Federal Register for notice-and-comment period.	2 months
Comment review/ Drafting final rule	The BLM reviews the comments and revises the rule in light of those comments. The BLM sends the revised/final rule to OMB for review.	2 months review/drafting 3 months OMB review
Final rule is published	The BLM publishes the final rule in the Federal Register	After publishing, 2 months until effective
Total time to publish		13 months (for NPR) 16 months (including ANPR)
Total cost		\$1.2 2.1 million

**To:** Sterne, Kate (Cornyn)[Kate\_Sterne@cornyn.senate.gov];  
neil\_chatterjee@mccconnell.senate.gov[neil\_chatterjee@mccconnell.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-06T16:59:34-04:00  
**Importance:** Normal  
**Subject:** Venting/Flaring Docs  
**Received:** 2017-04-06T17:00:22-04:00  
[4-6-17 VF CRA Briefing.pdf](#)  
[4-6-17 VF CRA VF Expanded Bullet List.docx](#)

Neil and Kate. Thank you both for chatting. I've attached the docs that have been sent to Portman's office for your reference. I will also be sending to Heller's. Both Senators will be doing a call with the Secretary tomorrow. Glad to talk about either if needed.

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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The BLM expects industry’s annual compliance costs from 2017 to 2026 to be between \$114 and \$279 million, with first year compliance costs estimated to be \$113 million (\$84 million for LDAR alone).

The Rule will continue in effect unless the BLM rescinds or replaces the Rule through the rulemaking process outlined below, or the Rule is overturned in pending litigation. Any new rule that the BLM promulgates would likely be challenged in court with a minimum litigation cost of \$500,000. If the new rulemaking is overturned in litigation, the Venting and Flaring Rule would come back into effect.

If the Rule is Repealed under the CRA:

If the Rule is repealed under the CRA, NTL-4A would come back into effect immediately. The BLM retains its existing authority under the MLA and FOGRMA to make effective updates to NTL-4A while ceding some of the more duplicative regulatory provisions to states/EPA under the CAA.

The BLM could consider policy actions to curb waste and focus on revisions to NTL-4A to address the following:

- Encouraging beneficial use of oil or gas on lease
- Regulating flaring of unmarketable gas from oil wells
- Conserving unsold gas by reinjection
- Improving ROW timelines and removing obstacles to timely approval for pipeline infrastructure
- Recognizing existing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana

If a court overturns any replacement or revision of NTL-4A, NTL-4A would come back into effect.

**Table: Rulemaking Schedule**

Activity	Description	Timing
Advanced Notice of Proposed Rulemaking (ANPR)	OPTIONAL. The BLM would solicit input from the public on whether, and how, NTL-4A should be revised.	1 month to publish 2 months for public comment
Notice of Proposed Rulemaking (NPR)	The BLM would develop a NPR based on previous rule experiences or comments received from ANPR process. The Office of Management and Budget (OMB) needs to review and clear the proposal.	3 months to draft NPR 3 months for OMB review
NPR comment period	The NPR is published in the Federal Register for notice-and-comment period.	2 months
Comment review/ Drafting final rule	The BLM reviews the comments and revises the rule in light of those comments. The BLM sends the revised/final rule to OMB for review.	2 months review/drafting 3 months OMB review
Final rule is published	The BLM publishes the final rule in the Federal Register	After publishing, 2 months until effective
Total time to publish		13 months (for NPR) 16 months (including ANPR)
Total cost		\$1.2 2.1 million

**To:** Harrell, Jeremy (Heller)[Jeremy\_harrell@heller.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-06T17:00:43-04:00  
**Importance:** Normal  
**Subject:** Fwd: BLM V/F Docs  
**Received:** 2017-04-06T17:01:33-04:00  
[4-6-17 VF CRA Briefing.pdf](#)

Jeremy. Thanks for chatting and appreciate the quick response today for the call. The doc is attached and expanded bullet points from the attached document are below.

- Encouraging beneficial use of oil or gas on lease
  - Under the Mineral Leasing Act, oil or gas that is used on lease for production purposes is not subject to royalties. NTL-4A provided guidance as to the particular uses of oil or gas termed “beneficial purposes” that would not be subject to royalties. NTL-4A’s “beneficial purposes” included heating oil or gas to condition it for market, compressing gas to place in marketable condition, and fueling drilling rig engines.
  - A non-controversial part of the Venting & Flaring Rule (43 C.F.R. subpart 3178) replaced NTL-4A’s “beneficial purposes” with an expanded and clarified list of “royalty-free uses.” Following a repeal of the Rule, the BLM would consider how the beneficial-use policies of NTL-4A could be strengthened, either through internal guidance or additional rulemaking, in order to encourage conservation through beneficial use of oil or gas on lease.
- Regulating flaring of unmarketable gas from oil wells
  - Oftentimes, especially in tight oil formations like the Bakken, oil production is accompanied by a extensive amounts of gas production, termed “associated gas.” Depending on the value of the associated gas and the availability of gas pipelines, it may not be economical for an oil-well operator to capture the gas, leading the operator to dispose of the gas through flaring.
  - NTL-4A required BLM approval for the routine flaring of associated gas. Such approval could be obtained upon a showing that capture of the gas is not economically justified and that conservation of the gas would lead to a premature abandonment of recoverable oil reserves and ultimately to a greater loss of energy than if the gas were flared. Following a repeal of the Rule, the BLM could consider how NTL-4A’s restrictions on routine flaring could be strengthened, either through internal guidance or through additional rulemaking.

- Conserving unsold gas by injection
  - Operators may find the subsurface injection of gas to be an attractive means of disposing of gas that cannot be economically captured for market. Gas may be injected into the reservoir to enhance oil recovery, or it could be injected with the intent to recover it later. The viability of injecting unsold gas is dependent on the local geology as to whether it is suitable for accepting gas for reinjection to conserve it for future needs.
  
- Improving ROW timelines and removing obstacles to timely approval for pipeline infrastructure.
  - An important factor driving the flaring of associated gas is the lack of access to gas pipelines. Operators complain that pipeline construction is being delayed by the BLM's failure to approve rights-of-way (ROW) in a timely manner. ROW approvals are impacted by coordination with other surface managing agencies (BIA/USFS/FWS/BOR/ArmyCOE).
  
- Recognizing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana
  - Many states with Federal oil and gas production already have regulations addressing flaring. North Dakota, for example, requires operators to submit waste minimization plans with their APDs and requires operators to capture a certain percentage of the gas they produce. Wyoming and Utah place volumetric limits on flaring, and Colorado has detailed LDAR requirements. The BLM could consider avoiding a duplicative, one-size-fits-all rule that ignores effective regulations already imposed by the states.

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs



Office of the Secretary of the Interior

## BLM Venting & Flaring Rule

### Summary of the Final Rule:

The “Venting & Flaring Rule” (the Rule) is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). Currently, only 12 percent of operators have reported flared gas from oil well production. The Rule is codified in 43 CFR subparts 3178 and 3179 and became effective on January 17, 2017.

### Statutory Authority and Regulatory History:

The Mineral Leasing Act of 1920 (MLA) (30 U.S.C. §§ 188–287) subjects federal oil and gas leases to the condition that lessees will “use all reasonable precautions to prevent waste of oil and gas developed in the land . . . .” 30 U.S.C. § 225. Further, the MLA requires lessees to exercise “reasonable diligence, skill, and care” in their operations and requires lessees to observe “such rules for the health and safety of the miners and for the prevention of undue waste as may be prescribed by [the] Secretary [of the Interior].” 30 U.S.C. § 187. The Federal Oil and Gas Royalty Management Act (FOGRMA) makes lessees liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence or the failure to comply with applicable rules or regulations. 30 U.S.C. § 1756. Both the MLA and FOGRMA authorize the Secretary of the Interior to prescribe rules and regulations necessary to carry out the purposes of those statutes. 30 U.S.C. § 189; 30 U.S.C. § 1751.

Before promulgation of the Venting and Flaring Rule, the Bureau of Land Management (BLM) regulated the venting, flaring, and beneficial use of gas pursuant to NTL-4A, which placed limits on the venting and flaring of gas and defined when gas was “unavoidably lost” and therefore not subject to royalties. The BLM’s Venting & Flaring Rule included many regulatory changes, including emissions-focused requirements that did not appear in NTL-4A. Multiple states and industry groups believe that these new requirements are actually within the jurisdiction of the Clean Air Act (CAA) and therefore outside the Department’s authority to regulate.

### If the Rule is Not Repealed under the Congressional Review Act (CRA):

Although the Venting & Flaring Rule went into effect in January 2017, many of the Rule’s more onerous requirements are not yet operative. Although operators are not yet obligated to comply with these requirements, they will need to expend time and resources to prepare for compliance dates. Presently, the Rule requires operators to submit a waste minimization plan with their applications for permits to drill (APDs), imposes restrictions on venting, and clarifies that when gas is “avoidably lost” and it is therefore subject to royalties. Operators must comply with the Rule’s flaring (or “gas capture”) requirements, equipment upgrade/replacement requirements, and leak detection and repair (LDAR) requirements beginning on January 17, 2018.

The BLM expects industry’s annual compliance costs from 2017 to 2026 to be between \$114 and \$279 million, with first year compliance costs estimated to be \$113 million (\$84 million for LDAR alone).

The Rule will continue in effect unless the BLM rescinds or replaces the Rule through the rulemaking process outlined below, or the Rule is overturned in pending litigation. Any new rule that the BLM promulgates would likely be challenged in court with a minimum litigation cost of \$500,000. If the new rulemaking is overturned in litigation, the Venting and Flaring Rule would come back into effect.

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If the Rule is repealed under the CRA, NTL-4A would come back into effect immediately. The BLM retains its existing authority under the MLA and FOGRMA to make effective updates to NTL-4A while ceding some of the more duplicative regulatory provisions to states/EPA under the CAA.

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If a court overturns any replacement or revision of NTL-4A, NTL-4A would come back into effect.

**Table: Rulemaking Schedule**

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Final rule is published	The BLM publishes the final rule in the Federal Register	After publishing, 2 months until effective
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Total cost		\$1.2 2.1 million

**To:** Memmott, Justin (EPW)[justin\_memmott@epw.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-07T13:22:14-04:00  
**Importance:** Normal  
**Subject:** V/F Docs  
**Received:** 2017-04-07T13:22:57-04:00  
[4-6-17 VF CRA Briefing.pdf](#)  
[4-6-17 VF CRA VF Expanded Bullet List.docx](#)

These were delivered to Portman yesterday.

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

## BLM Venting & Flaring Rule

### Summary of the Final Rule:

The “Venting & Flaring Rule” (the Rule) is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). Currently, only 12 percent of operators have reported flared gas from oil well production. The Rule is codified in 43 CFR subparts 3178 and 3179 and became effective on January 17, 2017.

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The Mineral Leasing Act of 1920 (MLA) (30 U.S.C. §§ 188–287) subjects federal oil and gas leases to the condition that lessees will “use all reasonable precautions to prevent waste of oil and gas developed in the land . . . .” 30 U.S.C. § 225. Further, the MLA requires lessees to exercise “reasonable diligence, skill, and care” in their operations and requires lessees to observe “such rules for the health and safety of the miners and for the prevention of undue waste as may be prescribed by [the] Secretary [of the Interior].” 30 U.S.C. § 187. The Federal Oil and Gas Royalty Management Act (FOGRMA) makes lessees liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence or the failure to comply with applicable rules or regulations. 30 U.S.C. § 1756. Both the MLA and FOGRMA authorize the Secretary of the Interior to prescribe rules and regulations necessary to carry out the purposes of those statutes. 30 U.S.C. § 189; 30 U.S.C. § 1751.

Before promulgation of the Venting and Flaring Rule, the Bureau of Land Management (BLM) regulated the venting, flaring, and beneficial use of gas pursuant to NTL-4A, which placed limits on the venting and flaring of gas and defined when gas was “unavoidably lost” and therefore not subject to royalties. The BLM’s Venting & Flaring Rule included many regulatory changes, including emissions-focused requirements that did not appear in NTL-4A. Multiple states and industry groups believe that these new requirements are actually within the jurisdiction of the Clean Air Act (CAA) and therefore outside the Department’s authority to regulate.

### If the Rule is Not Repealed under the Congressional Review Act (CRA):

Although the Venting & Flaring Rule went into effect in January 2017, many of the Rule’s more onerous requirements are not yet operative. Although operators are not yet obligated to comply with these requirements, they will need to expend time and resources to prepare for compliance dates. Presently, the Rule requires operators to submit a waste minimization plan with their applications for permits to drill (APDs), imposes restrictions on venting, and clarifies that when gas is “avoidably lost” and it is therefore subject to royalties. Operators must comply with the Rule’s flaring (or “gas capture”) requirements, equipment upgrade/replacement requirements, and leak detection and repair (LDAR) requirements beginning on January 17, 2018.

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**Table: Rulemaking Schedule**

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  - Under the Mineral Leasing Act, oil or gas that is used on lease for production purposes is not subject to royalties. NTL 4A provided guidance as to the particular uses of oil or gas—termed “beneficial purposes”—that would not be subject to royalties. NTL 4A’s “beneficial purposes” included heating oil or gas to condition it for market, compressing gas to place in marketable condition, and fueling drilling rig engines.
  - A non controversial part of the Venting & Flaring Rule (43 C.F.R. subpart 3178) replaced NTL 4A’s “beneficial purposes” with an expanded and clarified list of “royalty free uses.” Following a repeal of the Rule, the BLM would consider how the beneficial use policies of NTL 4A could be strengthened, either through internal guidance or additional rulemaking, in order to encourage conservation through beneficial use of oil or gas on lease.
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  - NTL 4A required BLM approval for the routine flaring of associated gas. Such approval could be obtained upon a showing that capture of the gas is not economically justified and that conservation of the gas would lead to a premature abandonment of recoverable oil reserves and ultimately to a greater loss of energy than if the gas were flared. Following a repeal of the Rule, the BLM could consider how NTL 4A’s restrictions on routine flaring could be strengthened, either through internal guidance or through additional rulemaking.
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  - An important factor driving the flaring of associated gas is the lack of access to gas pipelines. Operators complain that pipeline construction is being delayed by the BLM’s failure to approve rights of way (ROW) in a timely manner. ROW approvals are impacted by coordination with other surface managing agencies (BIA/USFS/FWS/BOR/ArmyCOE).
- Recognizing State/tribal policy/rules, such as those in North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana
  - Many states with Federal oil and gas production already have regulations addressing flaring. North Dakota, for example, requires operators to submit waste minimization plans with their APDs and requires operators to capture a certain percentage of the gas they produce. Wyoming and Utah place volumetric limits on flaring, and Colorado has detailed LDAR requirements. The BLM could consider avoiding a duplicative, one size fits all rule that ignores effective regulations already imposed by the states.

Deleted: not insignificant

Deleted: would

Deleted: .

Deleted: wishes to

**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Orth, Patrick (Portman)  
**Sent:** 2017-04-11T14:19:41-04:00  
**Importance:** Normal  
**Subject:** Draft letter  
**Received:** 2017-04-11T14:19:49-04:00

Dear Secretary Zinke,

Over the last decade, advancement in technology and engineering has enabled an unprecedented opportunity for the production of oil and natural gas from underground shale formations. As a result of this increased production, the United States has become more energy secure and states like Ohio have seen an increase in direct and indirect oil and gas investments.

The Department of the Interior, through the Bureau of Land Management (BLM), plays an integral role in the responsible development of the vast energy resources owned and managed by the federal government. The BLM, through the Mineral Leasing Act, is responsible for preventing the waste of methane emitted during the oil and natural gas production process. It is important that the Department minimize the waste of methane through a pragmatic approach that prevents waste but does not discourage investment. I have been encouraged by your comments during your confirmation process and in your time as Secretary that you have made public comments about your desire to reduce methane waste in a similar approach.

As you know, a Congressional Review Act (CRA) resolution currently sits before the Senate that would repeal the previous Administration's Methane and Waste Prevention Rule. I have concerns with the rule as it was written but also believe that there are actions that you can take to reduce methane waste than the previous status quo. As I consider whether or not I will vote for the CRA resolution it would be helpful to know what actions you can commit to taking should the CRA pass.

I look forward to working with you to reduce the waste of our natural resources.

Sincerely,  
RP

Patrick Orth  
Legislative Assistant  
Office of Senator Rob Portman  
Phone: 202-224-3353  
Email: [Patrick\\_orth@portman.senate.gov](mailto:Patrick_orth@portman.senate.gov)



**To:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-11T16:09:43-04:00  
**Importance:** Normal  
**Subject:** Re: Draft letter  
**Received:** 2017-04-11T16:10:29-04:00

THanks Pat. looks good and we'll chat later.

On Tue, Apr 11, 2017 at 2:19 PM, Orth, Patrick (Portman) <[patrick\\_orth@portman.senate.gov](mailto:patrick_orth@portman.senate.gov)> wrote:

Dear Secretary Zinke,

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Patrick Orth

Legislative Assistant

Office of Senator Rob Portman

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Email: [Patrick\\_orth@portman.senate.gov](mailto:Patrick_orth@portman.senate.gov)

--

Micah Chambers

Special Assistant / Acting Director

Office of Congressional & Legislative Affairs

Office of the Secretary of the Interior

**To:** Paul, Sarah (Heller)[sarah\_paul@heller.senate.gov];  
Andrew\_Williams@heller.senate.gov[Andrew\_Williams@heller.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-18T15:42:51-04:00  
**Importance:** Normal  
**Subject:** Call w/ Senator Heller & Sec. Zinke  
**Received:** 2017-04-18T15:43:38-04:00  
[4-6-17 VF CRA Briefing.docx](#)

Sarah and Andrew. Thank you for calling. Appreciate you taking the time and sorry this has been such a mess. The memo I referenced is attached. Would welcome your boss' input on SNPLMA issue as well. Just googled a few articles and got a general gist of his position. Thank you for flagging that as well. As I mentioned, Sen. Portman has been working with us to understand the actions we could take should the Senate pass the CRA. We are committed to replacing it with appropriate actions with DOI's jurisdiction.

If there's any chance a quick call can happen tomorrow morning at 9 am PST, it'd be greatly appreciated.

Thank you

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

## BLM Venting & Flaring Rule

### Summary of the Final Rule:

The “Venting & Flaring Rule” (the Rule) is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). Currently, only 12 percent of operators have reported flared gas from oil well production. The Rule is codified in 43 CFR subparts 3178 and 3179 and became effective on January 17, 2017.

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**To:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-18T16:32:10-04:00  
**Importance:** Normal  
**Subject:** Minor Edits  
**Received:** 2017-04-18T16:32:57-04:00  
[4-11-17 - DRAFT Response.docx](#)

Pat as mentioned. There are a couple edits from our end. Mostly minor. We removed one of the bullet points which I can explain over the phone if needed. It ended up being duplicative of another point. Call my cell if needed 202.706.9093

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

The Honorable Rob Portman  
United States Senator  
448 Russell Senate Office Building  
Washington, D.C. 20510

April xx, 2017

Dear Senator Portman:

Thank you for your letter regarding the Department of the Interior's (DOI) Venting and Flaring rule. I, too, believe DOI has an integral role to play in this issue, which is why I intend to act within my authority as Secretary to craft solutions that incentivize responsible development.

I share your concerns regarding methane waste and I agree that we must manage our public lands in a pragmatic way. Should you and your Senate colleagues choose to rescind the rule through the Congressional Review Act (CRA), the Bureau of Land Management (BLM) will continue to have the ability to act under its existing authorities to meaningfully update its policies to reduce waste. The BLM will continue to regulate venting, flaring, and beneficial use of gas pursuant to the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL 4A). The world has certainly changed since these regulations were last updated, and we need revisions to reflect the world we live in today. Whether the BLM pursues new rulemaking or revisions to existing processes, the following options will serve as our guide posts:

- Strengthening policies to encourage conservation through beneficial use of oil or gas on leases;
- Conserving unsold gas by reinjection for enhanced oil recovery or for later recovery;
- Improving rights of way (ROW) timelines and removing obstacles to timely approval for pipeline and gathering infrastructure;
- Recognizing existing flaring restrictions and policies in states like North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana to avoid duplication and redundancy.

**Deleted:** on lease of oil or gas

**Deleted:** ¶  
Addressing flaring restrictions of unmarketable gas from oil wells;

**Formatted:** Font: (Default) Times New Roman, 12 pt

I have been tasked to lead and plan for the Department's future over the next 100 years. As an admirer of President Teddy Roosevelt, you can rest assured that the policies I propose will reflect the promise I made to you and your colleagues during my confirmation hearing: we will work together to ensure the use of our public lands reflects higher purpose so that our children's children can look back and say, "We did it right."

Sincerely,

Secretary Ryan Zinke

**To:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]; Neely, Amanda (HSGAC)[Amanda\_Neely@hsgac.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-19T17:49:11-04:00  
**Importance:** Normal  
**Subject:** Revised  
**Received:** 2017-04-19T17:49:58-04:00

Please let me know what you think here. As I mentioned earlier, there are concerns with boxing us into only a certain set of options, particularly if there are other options we haven't explored or haven't seen yet. Let me know what your boss thinks. Thank you and enjoy California. Hope you get to catch a breath soon.

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**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]; Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Neely, Amanda (HSGAC)  
**Sent:** 2017-04-19T18:33:29-04:00  
**Importance:** Normal  
**Subject:** Re: Revised  
**Received:** 2017-04-19T18:33:42-04:00

Thanks, Micah. How about "we commit to pursuing, among other options, the following strategies..."?

---

**From:** Chambers, Micah  
**Sent:** Wednesday, April 19, 2017 2:50 PM  
**To:** Orth, Patrick (Portman); Neely, Amanda (HSGAC)  
**Subject:** Revised

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**To:** Neely, Amanda (HSGAC)[Amanda\_Neely@hsgac.senate.gov]  
**Cc:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-20T13:41:42-04:00  
**Importance:** Normal  
**Subject:** Re: Revised  
**Received:** 2017-04-20T13:42:29-04:00

Thanks for the quick reply Amanda. I plugged in the line you sent and it read a little weird, but I think I word smithed it with same message. Pls let me know if this works:

Whether the BLM pursues new rulemaking or revisions to existing processes, the Department remains committed to reducing methane waste by pursuing, among other options, the following strategies:

On Wed, Apr 19, 2017 at 6:33 PM, Neely, Amanda (HSGAC)  
<Amanda\_Neely@hsgac.senate.gov> wrote:

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**Subject:** Revised

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**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**Cc:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Neely, Amanda (HSGAC)  
**Sent:** 2017-04-20T13:48:51-04:00  
**Importance:** Normal  
**Subject:** Re: Revised  
**Received:** 2017-04-20T13:49:09-04:00

I think that works. I'm a little concerned about the suggestion that BLM might pursue revisions to existing processes by that, do you mean the reg we would void via CRA? If so, I think that raises the specter of the substantially the same as problem, and it would be helpful if the letter clarifies that any new rule will not be substantially the same as the current rule. I know the department doesn't think that issue is judicially reviewable, but the judicial review bar only applies to actions/omissions "under this subchapter" and I do not think the writing of a new rule is an action taken under the CRA. So we do want to be sure that the letter to be clear that future action will be different from the current rule [Thanks, Amanda

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**Sent:** Thursday, April 20, 2017 10:43 AM  
**To:** Neely, Amanda (HSGAC)  
**Cc:** Orth, Patrick (Portman)  
**Subject:** Re: Revised

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**To:** Neely, Amanda (HSGAC)[Amanda\_Neely@hsgac.senate.gov]  
**Cc:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-20T13:55:11-04:00  
**Importance:** Normal  
**Subject:** Re: Revised  
**Received:** 2017-04-20T13:55:59-04:00

No. If it is CRA'd (new word) BLM reverts back to the NTL4A. We would look at taking the principles we mentioned and updating the NTL4A with the options listed. However, if we find that some of these options are more complex for the Federal Register system, then we might have to look into a new rulemaking process. But the options in the letter are very different than the current rule while achieving the same objective. Feel free to call if none of that made sense. 202.706.9093

On Thu, Apr 20, 2017 at 1:48 PM, Neely, Amanda (HSGAC)  
<[Amanda\\_Neely@hsgac.senate.gov](mailto:Amanda_Neely@hsgac.senate.gov)> wrote:

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**To:** Orth, Patrick (Portman); Neely, Amanda (HSGAC)  
**Subject:** Revised

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**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**Cc:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Neely, Amanda (HSGAC)  
**Sent:** 2017-04-20T13:59:34-04:00  
**Importance:** Normal  
**Subject:** Re: Revised  
**Received:** 2017-04-20T13:59:52-04:00

Got it, thanks. If the letter could make that a little more clear, that would be great. "Existing processes established by" or "under"...

But the phrasing you use below addresses our other concern thanks.

---

**From:** Chambers, Micah  
**Sent:** Thursday, April 20, 2017 10:56 AM  
**To:** Neely, Amanda (HSGAC)  
**Cc:** Orth, Patrick (Portman)  
**Subject:** Re: Revised

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**Subject:** Revised

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**To:** Neely, Amanda (HSGAC)[Amanda\_Neely@hsgac.senate.gov]  
**Cc:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-04-20T14:09:03-04:00  
**Importance:** Normal  
**Subject:** Re: Revised  
**Received:** 2017-04-20T14:09:51-04:00

This read any clearer?

If a CRA is passed, the BLM will continue to regulate venting, flaring, and beneficial use of gas pursuant to the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). The world has changed since these regulations were first implemented so any revisions should reflect today's realities.

Whether the BLM proposes new rulemaking or revisions to the NTL-4A process, the Department remains committed to reducing methane waste by pursuing, among other options, the following strategies:

On Thu, Apr 20, 2017 at 1:59 PM, Neely, Amanda (HSGAC)

<[Amanda\\_Neely@hsgac.senate.gov](mailto:Amanda_Neely@hsgac.senate.gov)> wrote:

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<[Amanda\\_Neely@hsgac.senate.gov](mailto:Amanda_Neely@hsgac.senate.gov)> wrote:

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think the writing of a new rule is an action taken under the CRA. So we do want to be sure that the letter to be clear that future action will be different from the current rule. Thanks,  
Amanda

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**From:** Chambers, Micah  
**Sent:** Thursday, April 20, 2017 10:43 AM  
**To:** Neely, Amanda (HSGAC)  
**Cc:** Orth, Patrick (Portman)  
**Subject:** Re: Revised

Thanks for the quick reply Amanda. I plugged in the line you sent and it read a little weird, but I think I word smithed it with same message. Pls let me know if this works:  
Whether the BLM pursues new rulemaking or revisions to existing processes, the Department remains committed to reducing methane waste by pursuing, among other options, the following strategies:

On Wed, Apr 19, 2017 at 6:33 PM, Neely, Amanda (HSGAC)  
<[Amanda\\_Neely@hsgac.senate.gov](mailto:Amanda_Neely@hsgac.senate.gov)> wrote:

Thanks, Micah. How about "we commit to pursuing, among other options, the following strategies..."?

---

**From:** Chambers, Micah  
**Sent:** Wednesday, April 19, 2017 2:50 PM  
**To:** Orth, Patrick (Portman); Neely, Amanda (HSGAC)  
**Subject:** Revised

Please let me know what you think here. As I mentioned earlier, there are concerns with boxing us into only a certain set of options, particularly if there are other options we haven't explored or haven't seen yet. Let me know what your boss thinks. Thank you and enjoy california. Hope you get to catch a breath soon.  
Micah

The Honorable Rob Portman  
United States Senator  
448 Russell Senate Office Building  
Washington, D.C. 20510

April xx, 2017

Dear Senator Portman:

Thank you for your letter regarding the Department of the Interior's (DOI) Venting and Flaring rule. I, too, believe DOI has an integral role to play in this issue, which is why I intend to act within my authority as Secretary to craft solutions that incentivize responsible development.



I share your concerns regarding methane waste and I agree that we must manage our public lands in a pragmatic way. Should you and your Senate colleagues choose to rescind the rule through the Congressional Review Act (CRA), the Bureau of Land Management (BLM) will continue to have the ability to act under its existing authorities to meaningfully update its policies to reduce waste. The BLM will continue to regulate venting, flaring, and beneficial use of gas pursuant to the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). The world has certainly changed since these regulations were last updated, and we need revisions to reflect the world we live in today. Whether the BLM pursues new rulemaking or revisions to existing processes, the Department intends to address the following venting and flaring issues:

- Strengthening policies to encourage conservation through beneficial use of oil or gas on leases;
- Conserving unsold gas by reinjection for enhanced oil recovery or for later recovery;
- Improving rights-of-way (ROW) timelines and removing obstacles to timely approval for pipeline and gathering infrastructure;
- Recognizing existing flaring restrictions and policies in states like North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana to avoid duplication and redundancy.

I have been tasked to lead and plan for the Department's future over the next 100 years. As an admirer of President Teddy Roosevelt, you can rest assured that the policies I propose will reflect the promise I made to you and your colleagues during my confirmation hearing: we will work together to ensure the use of our public lands reflects higher purpose so that our children's children can look back and say, "We did it right."

Sincerely,

Secretary Ryan Zinke

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**Cc:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Neely, Amanda (HSGAC)  
**Sent:** 2017-04-20T14:38:31-04:00  
**Importance:** Normal  
**Subject:** Re: Revised  
**Received:** 2017-04-20T14:38:50-04:00

Looks good. Thanks, Micah.

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**From:** Chambers, Micah  
**Sent:** Thursday, April 20, 2017 11:09 AM  
**To:** Neely, Amanda (HSGAC)  
**Cc:** Orth, Patrick (Portman)  
**Subject:** Re: Revised

This read any clearer?

If a CRA is passed, the BLM will continue to regulate venting, flaring, and beneficial use of gas pursuant to the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). The world has changed since these regulations were first implemented so any revisions should reflect today's realities.

Whether the BLM proposes new rulemaking or revisions to the NTL-4A process, the Department remains committed to reducing methane waste by pursuing, among other options, the following strategies:

On Thu, Apr 20, 2017 at 1:59 PM, Neely, Amanda (HSGAC)

<[Amanda\\_Neely@hsgac.senate.gov](mailto:Amanda_Neely@hsgac.senate.gov)> wrote:

Got it, thanks. If the letter could make that a little more clear, that would be great. "Existing processes established by" or "under"...

But the phrasing you use below addresses our other concern thanks.

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**From:** Chambers, Micah  
**Sent:** Thursday, April 20, 2017 10:56 AM  
**To:** Neely, Amanda (HSGAC)  
**Cc:** Orth, Patrick (Portman)  
**Subject:** Re: Revised

No. If it is CRA'd (new word) BLM reverts back to the NTL4A. We would look at taking the principles we mentioned and updating the NTL4A with the options listed. However, if we find that some of these options are more complex for the Federal Register system, then we might have to look into a new rulemaking process. But the options in the letter are very different than the current rule while achieving the same objective. Feel free to call if none of that made sense. 202.706.9093

On Thu, Apr 20, 2017 at 1:48 PM, Neely, Amanda (HSGAC)

<Amanda\_Neely@hsgac.senate.gov> wrote:

I think that works. I'm a little concerned about the suggestion that BLM might pursue revisions to existing processes by that, do you mean the reg we would void via CRA? If so, I think that raises the specter of the substantially the same as problem, and it would be helpful if the letter clarifies that any new rule will not be substantially the same as the current rule. I know the department doesn't think that issue is judicially reviewable, but the judicial review bar only applies to actions/omissions "under this subchapter" and I do not think the writing of a new rule is an action taken under the CRA. So we do want to be sure that the letter to be clear that future action will be different from the current rule. Thanks,  
Amanda

---

**From:** Chambers, Micah  
**Sent:** Thursday, April 20, 2017 10:43 AM  
**To:** Neely, Amanda (HSGAC)  
**Cc:** Orth, Patrick (Portman)  
**Subject:** Re: Revised

Thanks for the quick reply Amanda. I plugged in the line you sent and it read a little weird, but I think I word smithed it with same message. Pls let me know if this works:

Whether the BLM pursues new rulemaking or revisions to existing processes, the Department remains committed to reducing methane waste by pursuing, among other options, the following strategies:

On Wed, Apr 19, 2017 at 6:33 PM, Neely, Amanda (HSGAC)  
<Amanda\_Neely@hsgac.senate.gov> wrote:

Thanks, Micah. How about "we commit to pursuing, among other options, the following strategies..."?

---

**From:** Chambers, Micah  
**Sent:** Wednesday, April 19, 2017 2:50 PM  
**To:** Orth, Patrick (Portman); Neely, Amanda (HSGAC)  
**Subject:** Revised

Please let me know what you think here. As I mentioned earlier, there are concerns with boxing us into only a certain set of options, particularly if there are other options we haven't explored or haven't seen yet. Let me know what your boss thinks. Thank you and enjoy California. Hope you get to catch a breath soon.

Micah

The Honorable Rob Portman  
United States Senator  
448 Russell Senate Office Building  
Washington, D.C. 20510

April xx, 2017

Dear Senator Portman:

Thank you for your letter regarding the Department of the Interior's (DOI) Venting and Flaring rule. I, too, believe DOI has an integral role to play in this issue, which is why I intend to act within my authority as Secretary to craft solutions that incentivize responsible development.

I share your concerns regarding methane waste and I agree that we must manage our public lands in a pragmatic way. Should you and your Senate colleagues choose to rescind the rule through the Congressional Review Act (CRA), the Bureau of Land Management (BLM) will continue to have the ability to act under its existing authorities to meaningfully update its policies to reduce waste. The BLM will continue to regulate venting, flaring, and beneficial use of gas pursuant to the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). The world has certainly changed since these regulations were last updated, and we need revisions to reflect the world we live in today. Whether the BLM pursues new rulemaking or revisions to existing processes, the Department intends to address the following venting and flaring issues:

- Strengthening policies to encourage conservation through beneficial use of oil or gas on leases;
- Conserving unsold gas by reinjection for enhanced oil recovery or for later recovery;
- Improving rights-of-way (ROW) timelines and removing obstacles to timely approval for pipeline and gathering infrastructure;
- Recognizing existing flaring restrictions and policies in states like North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana to avoid duplication and redundancy.

I have been tasked to lead and plan for the Department's future over the next 100 years. As an admirer of President Teddy Roosevelt, you can rest assured that the policies I propose will reflect the promise I made to you and your colleagues during my confirmation hearing: we will work together to ensure the use of our public lands reflects higher purpose so that our children's children can look back and say, "We did it right."

Sincerely,

Secretary Ryan Zinke

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Micah Chambers  
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Office of Congressional & Legislative Affairs  
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Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Micah Chambers[micah\_chambers@ios.doi.gov]  
**Cc:** Neely, Amanda (HSGAC)[Amanda\_Neely@hsgac.senate.gov]  
**From:** Orth, Patrick (Portman)  
**Sent:** 2017-04-26T20:17:31-04:00  
**Importance:** Normal  
**Subject:** Edits to letter  
**Received:** 2017-04-26T20:17:45-04:00

Micah -

See below for the additional edits Senator Portman needs in addition to the specific polices on beneficial use. Let us know if you have any questions.

Thanks,

Pat

April xx, 2017

Dear Senator Portman:

Thank you for your letter regarding the Department of the Interior's (DOI) Methane and Waste Prevention Rule. I, too, believe DOI has an integral role to play in this issue, which is why I intend to act within my authority as Secretary to craft solutions that incentivize responsible development.

I share your concerns regarding methane waste and I agree that we must manage our public lands in a pragmatic way. Should you and your Senate colleagues choose to rescind the rule through the Congressional Review Act (CRA), the Bureau of Land Management (BLM) will continue to have the authority to meaningfully update its policies to reduce methane waste. If a CRA is passed, the BLM will continue to regulate venting, flaring, and beneficial use of gas pursuant to the DOI Order known as NTL-4A[1]. The world has changed a lot since these regulations were first implemented. I will update and revise the NTL-4A process or initiate a new rulemaking process, the Department is and will remain committed to reducing methane waste.

You asked me in your letter about specific concrete actions that the Department would take in the absence of the current Methane and Waste Prevention Rule. The Department would pursue, among other options, the following strategies:

- Strengthening policies to encourage companies to capture methane to be used for other purposes. Such policy changes will include:

- [additional policy] Currently companies do not have to pay royalties to the government on methane used for a specific list of purposes. The Department will expand this list which would encourage companies to capture and use more methane;
- [additional policy];
- [additional policy];
- Tightening restrictions on the flaring of unmarketable methane from oil wells;
- Conserving unsold methane by reinjection into the existing well for enhanced oil recovery or for later recovery;
- Expediting approval for methane pipeline and gathering infrastructure;
- Eliminating BLM policies that conflict with or duplicate flaring restrictions in states like North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana.

I have been tasked to lead and plan for the Department's future over the next 100 years. As an admirer of President Teddy Roosevelt, you can rest assured that the policies I propose will reflect the promises I made to you and your colleagues during my confirmation hearing: we will work together to ensure the use of our public lands reflects higher purpose so that our children's children can look back and say, "We did it right." Under my leadership, the Department will take important steps to reduce methane waste, and we will do that without hurting job creation and economic growth. Thank you for your interest in this issue, and thank you for your letter.

Sincerely,

Secretary Ryan Zinke

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[1] *The 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A)*

Sent from my iPhone



**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Orth, Patrick (Portman)  
**Sent:** 2017-05-01T09:03:16-04:00  
**Importance:** Normal  
**Subject:** updated letter  
**Received:** 2017-05-01T09:03:24-04:00

Micah hope you had a nice weekend. See below for a few further edits. I believe NTL -4A is a guidance so I switched that from order. Let me know if you have any questions.

April xx, 2017

Dear Senator Portman:

Thank you for your letter regarding the Department of the Interior's (DOI) Methane and Waste Prevention Rule. I, too, believe DOI has an integral role to play in this issue, which is why I intend to act within my authority as Secretary to craft solutions that incentivize responsible development. I share your concerns regarding methane waste and I agree that we must manage our public lands in a pragmatic way. Should you and your Senate colleagues choose to rescind the rule through the Congressional Review Act (CRA), the Bureau of Land Management (BLM) will continue to have the authority to meaningfully update its policies to reduce methane waste. If a CRA is passed, the BLM will continue to regulate venting, flaring, and beneficial use of gas pursuant to the DOI guidance known as NTL-4A[1]. The world has changed a lot since these regulations were first implemented. I will update and revise the NTL-4A guidance or initiate a new rulemaking process, because the Department is and will remain committed to reducing methane waste.

You asked me in your letter about specific concrete actions that the Department would take in the absence of the current Methane and Waste Prevention Rule. The Department would pursue, among other options, the following strategies:

- Engaging in a robust assessment of all venting and flaring requirements to ensure the industry conserves resources and prevents waste, and so the taxpayer is assured the fair value of royalties. This includes, and is not limited to:
  - Criteria for approving venting and flaring
  - Venting and flaring thresholds
  - Venting and flaring time limits
  - Beneficial use
  - Royalty requirements

• Strengthening policies to encourage companies to capture methane to be used for other purposes, such as the beneficial use of methane on lease for generating power, powering equipment, and compressing or treating methane.

• Tightening restrictions on the flaring of unmarketable methane from oil wells;

• Conserving unsold methane by reinjection into the existing well for enhanced oil recovery or for later recovery;

• Expediting approval for methane pipeline and gathering infrastructure;

• Eliminating BLM policies that conflict with or duplicate flaring restrictions in states like North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana.

I have been tasked to lead and plan for the Department's future over the next 100 years. As an admirer of President Teddy Roosevelt, you can rest assured that the policies I propose will reflect the promises I made to you and your colleagues during my confirmation hearing: we will work together to ensure the use of our public lands reflects higher purpose so that our children's children can look back and say, "We did it right." Under my leadership, the Department will take important steps to

reduce methane waste, and we will do that without hurting job creation and economic growth. Thank you for your interest in this issue, and thank you for your letter.

Sincerely,

Secretary Ryan Zinke

Patrick Orth  
Legislative Assistant  
Office of Senator Rob Portman  
Phone: 202-224-3353  
Email: [Patrick\\_orth@portman.senate.gov](mailto:Patrick_orth@portman.senate.gov)

**To:** Loraine, Jennifer (Gardner)[Jennifer\_Loraine@gardner.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-05-09T14:03:22-04:00  
**Importance:** Normal  
**Subject:** Re: Do you have time for a call?  
**Received:** 2017-05-09T14:04:09-04:00

thoughts

The Honorable Cory Gardner  
United States Senator  
354 Russell Senate Office Building  
Washington, D.C. 20510

Dear Senator Gardner:

Thank you for taking the time to talk with me regarding the Department of the Interior's (DOI) Methane and Waste Prevention Rule. Both you and Sen. Portman reiterated the same concerns as the Congressional Review Act process has moved forward. Per our conversation, I wanted to formally respond to your inquiries.

I, too, believe DOI has an integral role to play in this issue, which is why I intend to act within my authority as Secretary to craft solutions that incentivize responsible development. Should you and your Senate colleagues choose to rescind the rule through the Congressional Review Act (CRA), the Bureau of Land Management (BLM) will continue to have the authority to meaningfully update its policies to reduce methane waste. If a CRA is passed, the BLM will continue to regulate venting, flaring, and beneficial use of gas pursuant to the DOI guidance known as NTL-4A[1]. NTL-4A was first implemented a few decades ago, so it should be revised to reflect the realities of today. Whether the BLM proposes new rulemaking or revisions to the existing NTL-4A process, we will take concrete action to reduce methane waste. Throughout our conversation, you asked me what actions the Department would take in the absence of the current Methane and Waste Prevention Rule. In response, the Department would pursue, among other options, the following strategies:

- Engaging in a robust assessment of all venting and flaring requirements to ensure the industry conserves resources and prevents waste, and so the taxpayer is assured the fair value of royalties. This includes, and is not limited to:
  - Criteria for approving venting and flaring
  - Venting and flaring thresholds and time limits
  - Beneficial use
  - Royalty requirements
- Strengthening policies to encourage companies to capture methane to be used for other purposes, such as the beneficial use of methane on lease for generating power, powering equipment, and compressing or treating methane;
- Revising existing BLM restrictions on the flaring of unmarketable methane from oil wells;

- Conserving unsold methane by reinjection into the existing well for enhanced oil recovery or for later recovery;
- Expediting rights-of-way (ROW) approvals and removing obstacles so pipeline and gathering infrastructure can be built quickly;
- Eliminating BLM policies that conflict with or duplicate flaring restrictions in states like North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana.

I have been tasked to lead and plan for the Department's future over the next 100 years. As an admirer of President Teddy Roosevelt, the policies I propose will reflect the promise I made to you and your colleagues during my confirmation hearing: we will work together to ensure the use of our public lands reflects higher purpose so that our children's children can look back and say, "We did it right." As Congress weighs its options, rest assured that the Department is committed to reducing methane waste and under my leadership, we will take the important steps to accomplish that goal. Responsible energy development and proper conservation are not mutually exclusive goals and we will utilize reasonable regulations without hurting job creation and economic growth. Thank you for your interest in this issue, and thank you for taking the time to share your perspective.

Sincerely,

Secretary Ryan Zinke

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[1] The 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A)  
On Tue, May 9, 2017 at 10:37 AM, Chambers, Micah <[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)> wrote:

Just called. My work cell is 202.706.9093

On Tue, May 9, 2017 at 9:01 AM, Loraine, Jennifer (Gardner)  
<[Jennifer\\_Loraine@gardner.senate.gov](mailto:Jennifer_Loraine@gardner.senate.gov)> wrote:

About the letter from Zinke to Portman? The earlier the better, if possible. I briefly mentioned to Amanda while she was in with Mr. Bernhardt.

202-224-6249 is my direct.

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Loraine, Jennifer (Gardner)[Jennifer\_Loraine@gardner.senate.gov]  
**From:** Chambers, Micah  
**Sent:** 2017-05-10T17:45:24-04:00  
**Importance:** Normal  
**Subject:** Fwd: as requested  
**Received:** 2017-05-10T17:46:11-04:00  
[Gardner signed.pdf](#)

Despite today. Here's the signed letter.

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior



THE SECRETARY OF THE INTERIOR  
WASHINGTON

MAY 10 2017

The Honorable Cory Gardner  
United States Senate  
Washington, DC 20510

Dear Senator Gardner:

Thank you for taking the time to speak with me regarding the Department of the Interior's (Department) Methane and Waste Prevention Rule. I am formally responding to your inquiries.

Should you and your Senate colleagues choose to rescind the rule through the Congressional Review Act (CRA), the Bureau of Land Management (BLM) will continue to have the authority to meaningfully update its policies to reduce methane waste. If a CRA is passed, BLM will continue to regulate venting, flaring, and beneficial use of gas pursuant to the DOI guidance known as NTL-4A<sup>1</sup>. NTL-4A was first implemented a few decades ago, so it should be revised to reflect the realities of today. Whether BLM proposes new rulemaking or revisions to the existing NTL-4A process, we will take concrete action to reduce methane waste. Throughout our conversation, you asked me what actions the Department would take in the absence of the current Methane and Waste Prevention Rule. In response, the Department would pursue, among other options, the following strategies:

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  - Criteria for approving venting and flaring
  - Venting and flaring thresholds and time limits
  - Beneficial use
  - Royalty requirements;
- Strengthening policies to encourage companies to capture methane to be used for other purposes, such as the beneficial use of methane on lease for generating power, powering equipment, and compressing or treating methane;
- Revising existing BLM restrictions on the flaring of unmarketable methane from oil wells;
- Conserving unsold methane by reinjection into the existing well for enhanced oil recovery or for later recovery;
- Expediting rights-of-way (ROW) approvals and removing obstacles so pipeline and gathering infrastructure can be built quickly;
- Eliminating BLM policies that conflict with or duplicate flaring restrictions in states such as North Dakota, Wyoming, Utah, New Mexico, Colorado, and Montana.

I have been tasked to lead and plan for the Department's future over the next 100 years. As an admirer of President Teddy Roosevelt, the policies I propose will reflect the promise I made to you

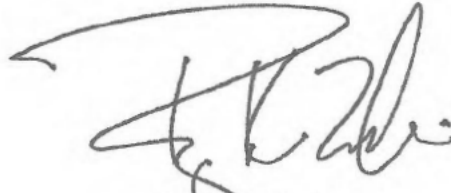
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<sup>1</sup> The 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A)

and your colleagues during my confirmation hearing: we will work together to ensure the use of our public lands reflects higher purpose so that our children's children can look back and say we did it right. As Congress weighs its options, rest assured that the Department is committed to reducing methane waste; under my leadership, we will take the important steps to accomplish that goal. Responsible energy development and proper conservation are not mutually exclusive goals, and we will utilize reasonable regulations without hurting job creation and economic growth.

Thank you for your interest in this issue, and thank you for taking the time to share your perspective.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Zinke", with a large, sweeping flourish above the name.

Ryan R. Zinke  
Secretary of the Interior