To: Katharine MacGregor[katharine_macgregor@ios.doi.gov]; Downey Magallanes[downey_magallanes@ios.doi.gov]; James Schindler[james.schindler@boem.gov]; Hubbel Relat[hubbel_relat@ios.doi.gov]; James Cason[james_cason@ios.doi.gov]; Scott Hommel[scott_hommel@ios.doi.gov]; Douglas Domenech[douglas_domenech@ios.doi.gov]; Micah Chambers[micah_chambers@ios.doi.gov]; Kathleen Benedetto[kbenedetto@blm.gov]; Daniel Jorjani[daniel.jorjani@sol.doi.gov]; Lori Mashburn[lori_mashburn@ios.doi.gov]; Amanda Kaster[amanda_kaster@ios.doi.gov]; Casey Hammond[casey_hammond@ios.doi.gov]
Cc: Mariagrazia Caminiti[marigrace.caminiti@sol.doi.gov]
From: Moore, Angela
Sent: 2019-02-08T12:35:48-05:00
Importance: Normal
Subject: Awareness Review for FOIA Request SOL-2017-00160 (2 Custodians)
Received: 2019-02-08T12:36:37-05:00
Combined Docs SOL-2017-00160_Matthew Ballenger.pdf
Haugrud, Jack Combined_Redacted_edits.pdf

Good afternoon,
For your awareness, attached are 2 pdfs containing 175 pages (Ballenger) and 464 pages (Haugrud) as a partial release for the request mentioned above. The records are related to the Waste Prevention Rule CRA.

Katharine, Downey, James S. and Hubbel, please review both pdfs. Everyone else need only review Jack Haugrud's collection.

Please review by Wednesday, 2/13. Per departmental guidance, non-response within 72 hours will be taken as an affirmation that your review is complete.

Thanks,
Angela

Angela Moore
FOIA Office (Contract Attorney)
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, N.W.
Washington D.C. 20240
Office: (202) 208-5079
angela.moore@sol.doi.gov

From:	Hawbecker, Karen
To:	Jack Haugrud
Cc:	Mariagrazia Caminiti; Richard McNeer; Tom Bovard
Subject:	Fwd: LEGISLATIVE REFERRAL: (DUE 1/30/17 @ 4:45 PM) MISC #6 - OMB Statement of Administration Policyr Re: Five Joint Resolutions that would Overturn Five Final Agency Rules under the Congressional Review Act
Date:	Monday, January 30, 2017 4:01:31 PM
Attachments:	HJRes Combined CRA SAP Circulation.docx

Jack, This is a draft Statement of Administration Policy regarding the CRA action on which the House is scheduled to vote on Wednesday. It includes the Stream Protection Rule and the Waste Prevention Rule. (b)(5) [redacted].

(b)(5) [redacted] --Karen

On Mon, Jan 30, 2017 at 2:32 PM, Caminiti, Mariagrazia <marigrace.caminiti@sol.doi.gov> wrote:

> I think you may be interested. mg
>
> ---------- Forwarded message ----------
> From: **Nevils, Joseph** <joseph_nevils@ios.doi.gov>
> Date: Mon, Jan 30, 2017 at 2:24 PM
> Subject: LEGISLATIVE REFERRAL: (DUE 1/30/17 @ 4:45 PM) MISC #6 - OMB Statement of Administration Policyr Re: Five Joint Resolutions that would Overturn Five Final Agency Rules under the Congressional Review Act
> To: James Cason <james_cason@ios.doi.gov>, Douglas Domenech <douglas_domenech@ios.doi.gov>, Scott Hommel <scott_hommel@ios.doi.gov>, DS <gareth_rees@ios.doi.gov>, OIG <Lori_Vassar@doioig.gov>, OIG <bruce_delaplaine@doioig.gov>, OIG <nancy_dipaolo@doioig.gov>, OCL Office <Pamela_Barkin@ios.doi.gov>, OCL Office <Joshua_Mahan@ios.doi.gov>, OCL Office <Dominic_Maione@ios.doi.gov>, OCL Office <Chris_Salotti@ios.doi.gov>, OCL Office <tracy_goodluck@ios.doi.gov>, OCL Office <micah_chambers@ios.doi.gov>, OCL Office <amanda_kaster@ios.doi.gov>, A/S-PMB <David_Downes@ios.doi.gov>, A/S-PMB <Amy_Holley@ios.doi.gov>, A/S-PMB <Debra_Sonderman@ios.doi.gov>, A/S-PMB <Denise_Flanagan@ios.doi.gov>, A/S-PMB <Abigail_D_Miller@ios.doi.gov>, A/S-PMB <Olivia_Ferriter@ios.doi.gov>, PPA <Catherine_Gulac@ios.doi.gov>, POB <adrianne_moss@ios.doi.gov>, POB <jason_freihage@ios.doi.gov>, POB <tiffany_taylor@ios.doi.gov>, POB <patrick_joos@ios.doi.gov>, ONRR <matt.williams@onrr.gov>, ONRR <anita.gonzales-evans@onrr.gov>, ONRR <onrrcongressionalaffairs@onrr.gov>, ONRR <matthew.mckeown@sol.doi.gov>, ONRR <jerold.gidner@onrr.gov>, A/S-FW <maureen_foster@ios.doi.gov>, FWS <angela_gustavson@fws.gov>, FWS <Martin_Kodis@fws.gov>, FWS <lisa_m_jones@fws.gov>, FWS <alyssa_hausman@fws.gov>, FWS <devin_helfrich@fws.gov>, FWS <taylor_pool@fws.gov>, NPS <Sarah_Gamble@nps.gov>, NPS <Susan_Farinelli@nps.gov>, NPS <Melissa_Kuckro@nps.gov>, A/S-LM <Richard_Cardinale@ios.doi.gov>, A/S-LM <Pam.Royal@boemre.gov>, A/S-LM <pam.royal@bsee.gov>, Katharine Macgregor

<katharine_macgregor@ios.doi.gov>, OSM <msimpson@osmre.gov>, BLM <mareid@blm.gov>, BLM <wholmes@blm.gov>, BLM <jralston@blm.gov>, BLM <begruber@blm.gov>, BLM <kkelleh@blm.gov>, BLM <dblackst@blm.gov>, BLM <ledouglas@blm.gov>, BLM <michelle_reid@blm.gov>, BLM <William_E_Holmes@blm.gov>, Casey Hammond <casey_hammond@ios.doi.gov>, Kathleen Benedetto <kathleen_benedetto@ios.doi.gov>, SOL <Marigrace.Caminiti@sol.doi.gov>, SOL <edward.keable@sol.doi.gov>, SOL <Robert.Johnston@sol.doi.gov>, SOL-GL <rachel.spector@sol.doi.gov>, SOL-GL <timothy.murphy@sol.doi.gov>, SOL-LR <Laura.Brown@sol.doi.gov>, SOL-LR <renee.cooper@sol.doi.gov>, SOL-MR <Thomas.Bovard@sol.doi.gov>, SOL-MR <Faye.Johnson@sol.doi.gov>, SOL-MR <DANIEL.KILDUFF@sol.doi.gov>, SOL-MR <PHYLLIS.LESLIE@sol.doi.gov>, SOL-MR <susan.ely@sol.doi.gov>, SOL-MR <tom.bovard@sol.doi.gov>, SOL-PW <Kathleen.Aiken@sol.doi.gov>, SOL-PW <Barry.Roth@sol.doi.gov>, SOL-PW <Carolyn.Burch@sol.doi.gov>
Cc: Matthew Quinn <matthew_quinn@ios.doi.gov>

URGENT DEADLINE DUE TODAY: MONDAY, JANUARY 30, 2017 @ 4:45 PM
DEPARTMENT OF THE INTERIOR
LEGISLATIVE COUNSEL REFERRAL

Date: **January 30, 2017**
To: **Legislative Liaison**

From: **Pam Barkin (501-2563)**
Contact: **Joe Nevils (208-4580)**
Subject: **MISC #6 - OMB Statement of Administration Policy**
Re: Five Joint Resolutions that would Overturn Five Final Agency Rules under the Congressional Review Act

This week the House will consider five joint resolutions that would overturn five final agency rules under the Congressional Review Act. Attached for review is one draft SAP that strongly supports House action on those five joint resolutions.

Please provide any specific edits or your signoff on the SAP by the deadline above.

Below are links to the text of the five joint resolutions cited in the SAP:

H. J. Res. ____ Disapproving the rule submitted by the Department of the Interior known as the Stream Protection Rule

(Subject to a Rule) *(Sponsored by Rep. Bill Johnson / Natural Resources Committee)*

H. J. Res. ___ Providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Securities and Exchange Commission relating to "Disclosure of Payments by Resource Extraction Issuers" (Subject to a Rule) *(Sponsored by Rep. Bill Huizenga / Financial Services Committee)*

H. J. Res. ____ Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Social Security Administration relating to Implementation of the NICS Improvement Amendments Act of 2007 (Subject to a Rule) *(Sponsored by Rep. Sam Johnson / Judiciary Committee)*

H. J. Res. ____ Disapproving the final rule submitted by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration relating to the Federal Acquisition Regulation (Subject to a Rule) *(Sponsored by Rep. Virginia Foxx / Oversight and Government Reform Committee)*

H. J. Res. ____ Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Bureau of Land Management relating to "Waste Prevention, Production Subject to Royalties, and Resource Conservation" (Subject to a Rule) *(Sponsored by Rep. Rob Bishop / Natural Resources Committee)*

Please send agency comments or respond with a "no comment" to Pamela_Barkin@ios.doi.gov and Joseph_Nevils@ios.doi.gov by the deadline above.

Attachment(s): 1

--

Joseph Nevils
Legislative Assistant

Department of the Interior
1849 C St, NW 20240
(202) 208-4580 (O)
(202) 208-7619 (F)

--
Marigrace Caminiti

Executive Assistant to the Solicitor
US Department of the Interior
1849 C Street, NW, Rm. 6352
Washington, DC 20240
202 208 4423   main number
202 208 3111   direct
202 208 5584   fax
202 528 0486 or 202 359 2949 cell/wcell

^^

--
Karen Hawbecker
Associate Solicitor
Division of Mineral Resources
Office of the Solicitor
U.S. Department of the Interior
1849 C Street N.W. MS 5358
Washington, D.C. 20240

Office: (202) 208-4146
karen.hawbecker@sol.doi.gov

DRAFT -- NOT FOR RELEASE

January xx, 2017
(House)

STATEMENT OF ADMINISTRATION POLICY

H.J. Res. – Disapproving the Rule Submitted by the Department of the Interior Known as the Stream Protection Rule
(Rep. Johnson R-OH and cosponsors)

H.J. Res. – Disapproving the Bureau of Land Management's Final Rule Relating to "Waste Prevention, Production Subject to Royalties, and Resource Conservation"
(Rep. Bishop R-UT and cosponsors)

H.J. Res - Disapproving the Securities and Exchange Commission's Rule on Disclosure of Payments by Resource Extraction Issuers
(Rep. Huizenga, R-MI, and cosponsors)

H.J. Res. – Disapproving the rule submitted by the Social Security Administration relating to Implementation of the NICS Improvement Amendments Act of 2007
(Rep. R- and)

H.J. Res. – Disapproving the rule submitted by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration relating to the Federal Acquisition Regulation
(Rep. R- and)

The Administration strongly supports the actions taken by the House to begin to nullify unnecessary regulations imposed on America's businesses. The regulations that the House is voting to overturn under the Congressional Review Act have established burdensome compliance requirements that force jobs out of our communities and discourage doing business in the United States. The House is also considering overturning a Social Security Administration Rule that would increase scrutiny on some Americans with disabilities if they attempt to purchase firearms.

H.J. Res. XX would nullify the Department of the Interior rule known as the "Stream Protection Rule." The bill disapproves an onerous rule imposing requirements on surface coal mining operations, creating significant compliance costs and a regulatory burden on America's coal production. This rule duplicates existing protections already in place at the Federal and state levels. The Administration is committed to reviving America's coal mining communities, which have been hurting for too long.

H.J. Res. XX would nullify the Department of the Interior's Bureau of Land Management final

rule relating to "Waste Prevention, Production Subject to Royalties, and Resource Conservation." The bill disapproves a rule that requires oil and gas producers to implement costly measures to reduce natural gas waste, but does not address the environmental issues associated with controlling methane emissions. The rule imposes significant compliance costs and a regulatory burden on oil and gas production on Federal lands. The Administration is committed to reducing regulatory burdens on American businesses, supporting energy policies that lower costs for hardworking Americans, maximizing the use of American resources, and freeing us from dependence on foreign oil.

H.J. Res. XX would nullify the Securities and Exchange Commission (SEC) rule that requires resource extraction issuers to report payments made to governments for the commercial development of oil, natural gas or minerals. The rule requires companies to disclose information that the host nation of their project prohibits from disclosure or is commercially sensitive. This rule imposes unreasonable compliance costs on American energy companies that are not justified by quantifiable benefits. Moreover, the rule's disclosure requirements are not applied to their foreign competitors, putting American businesses at a competitive disadvantage.

H.J. Res. XX would nullify the rule submitted by the Social Security Administration relating to Implementation of the NICS Improvement Amendments Act of 2007. The rule would allow the Social Security Administration to provide records on certain individuals who receive Disability Insurance benefits under title II of the Social Security Act or Supplemental Security Income payments under title XVI of the Social Security Act to the Attorney General for inclusion in the National Instant Criminal Background Check System. The rule would increase scrutiny on some Americans with disabilities if they attempt to purchase firearms. Nullifying this rule will protect the Second Amendment rights of law abiding citizens.

H.J. Res. XX would nullify a rule related to the Federal Acquisition Regulation that would require federal contractors to self-certify compliance with labor laws. The rule would bog down Federal procurement with unnecessary and burdensome processes that would result in delays, and decreased competition for Federal government contracts. Rolling back this rule will also help to reduce costs in Federal procurement. The Administration is committed to reducing onerous regulatory burdens on America's businesses and using existing authorities to continue enforcing the Nation's workplace laws.

[If these bills were presented to the President in their current form, his advisors would recommend that he sign them into law.]

From:	Hawbecker, Karen
To:	Jack Haugrud
Cc:	Mariagrazia Caminiti; Richard McNeer; Tom Bovard
Subject:	Re: LEGISLATIVE REFERRAL: (DUE 1/30/17 @ 4:45 PM) MISC #6 - OMB Statement of Administration Policyr Re: Five Joint Resolutions that would Overturn Five Final Agency Rules under the Congressional Review Act
Date:	Monday, January 30, 2017 4:15:13 PM

Jack, I've discussed this with Emily [redacted] --Karen

On Mon, Jan 30, 2017 at 4:01 PM, Hawbecker, Karen <karen.hawbecker@sol.doi.gov> wrote:

> Jack, This is a draft Statement of Administration Policy regarding the CRA action on which the House is scheduled to vote on Wednesday. It includes the Stream Protection Rule and the Waste Prevention Rule. [redacted]
>
> [redacted] Karen
>
> On Mon, Jan 30, 2017 at 2:32 PM, Caminiti, Mariagrazia <marigrace.caminiti@sol.doi.gov> wrote:
>
> > I think you may be interested. mg
> >
> > ---------- Forwarded message ----------
> > From: **Nevils, Joseph** <joseph_nevils@ios.doi.gov>
> > Date: Mon, Jan 30, 2017 at 2:24 PM
> > Subject: LEGISLATIVE REFERRAL: (DUE 1/30/17 @ 4:45 PM) MISC #6 - OMB Statement of Administration Policyr Re: Five Joint Resolutions that would Overturn Five Final Agency Rules under the Congressional Review Act
> > To: James Cason <james_cason@ios.doi.gov>, Douglas Domenech <douglas_domenech@ios.doi.gov>, Scott Hommel <scott_hommel@ios.doi.gov>, DS <gareth_rees@ios.doi.gov>, OIG <Lori_Vassar@doioig.gov>, OIG <bruce_delaplaine@doioig.gov>, OIG <nancy_dipaolo@doioig.gov>, OCL Office <Pamela_Barkin@ios.doi.gov>, OCL Office <Joshua_Mahan@ios.doi.gov>, OCL Office <Dominic_Maione@ios.doi.gov>, OCL Office <Chris_Salotti@ios.doi.gov>, OCL Office <tracy_goodluck@ios.doi.gov>, OCL Office <micah_chambers@ios.doi.gov>, OCL Office <amanda_kaster@ios.doi.gov>, A/S-PMB <David_Downes@ios.doi.gov>, A/S-PMB <Amy_Holley@ios.doi.gov>, A/S-PMB <Debra_Sonderman@ios.doi.gov>, A/S-PMB <Denise_Flanagan@ios.doi.gov>, A/S-PMB <Abigail_D_Miller@ios.doi.gov>, A/S-PMB <Olivia_Ferriter@ios.doi.gov>, PPA <Catherine_Gulac@ios.doi.gov>, POB <adrianne_moss@ios.doi.gov>, POB <jason_freihage@ios.doi.gov>, POB <tiffany_taylor@ios.doi.gov>, POB <patrick_joos@ios.doi.gov>, ONRR <matt.williams@onrr.gov>, ONRR <anita.gonzales-evans@onrr.gov>, ONRR <onrrcongressionalaffairs@onrr.gov>, ONRR <matthew.mckeown@sol.doi.gov>, ONRR <jerold.gidner@onrr.gov>, A/S-FW <maureen_foster@ios.doi.gov>, FWS <angela_gustavson@fws.gov>, FWS <Martin_Kodis@fws.gov>, FWS <lisa_m_jones@fws.gov>, FWS <alyssa_hausman@fws.gov>, FWS

<devin_helfrich@fws.gov>, FWS <taylor_pool@fws.gov>, NPS <Sarah_Gamble@nps.gov>, NPS <Susan_Farinelli@nps.gov>, NPS <Melissa_Kuckro@nps.gov>, A/S-LM <Richard_Cardinale@ios.doi.gov>, A/S-LM <Pam.Royal@boemre.gov>, A/S-LM <pam.royal@bsee.gov>, Katharine Macgregor <katharine_macgregor@ios.doi.gov>, OSM <msimpson@osmre.gov>, BLM <mareid@blm.gov>, BLM <wholmes@blm.gov>, BLM <jralston@blm.gov>, BLM <begruber@blm.gov>, BLM <kkelleh@blm.gov>, BLM <dblackst@blm.gov>, BLM <ledouglas@blm.gov>, BLM <michelle_reid@blm.gov>, BLM <William_E_Holmes@blm.gov>, Casey Hammond <casey_hammond@ios.doi.gov>, Kathleen Benedetto <kathleen_benedetto@ios.doi.gov>, SOL <Marigrace.Caminiti@sol.doi.gov>, SOL <edward.keable@sol.doi.gov>, SOL <Robert.Johnston@sol.doi.gov>, SOL-GL <rachel.spector@sol.doi.gov>, SOL-GL <timothy.murphy@sol.doi.gov>, SOL-LR <Laura.Brown@sol.doi.gov>, SOL-LR <renee.cooper@sol.doi.gov>, SOL-MR <Thomas.Bovard@sol.doi.gov>, SOL-MR <Faye.Johnson@sol.doi.gov>, SOL-MR <DANIEL.KILDUFF@sol.doi.gov>, SOL-MR <PHYLLIS.LESLIE@sol.doi.gov>, SOL-MR <susan.ely@sol.doi.gov>, SOL-MR <tom.bovard@sol.doi.gov>, SOL-PW <Kathleen.Aiken@sol.doi.gov>, SOL-PW <Barry.Roth@sol.doi.gov>, SOL-PW <Carolyn.Burch@sol.doi.gov>
Cc: Matthew Quinn <matthew_quinn@ios.doi.gov>

URGENT DEADLINE DUE TODAY: MONDAY, JANUARY 30, 2017 @ 4:45 PM
DEPARTMENT OF THE INTERIOR
LEGISLATIVE COUNSEL REFERRAL

Date:	**January 30, 2017**
To:	**Legislative Liaison**
From:	**Pam Barkin (501-2563)**
Contact:	**Joe Nevils (208-4580)**
Subject:	**MISC #6 - OMB Statement of Administration Policy Re: Five Joint Resolutions that would Overturn Five Final Agency Rules under the Congressional Review Act**

This week the House will consider five joint resolutions that would overturn five final agency rules under the Congressional Review Act. Attached for review is one draft SAP that strongly supports House action on those five joint resolutions.

Please provide any specific edits or your signoff on the SAP by the deadline above.

Below are links to the text of the five joint resolutions

cited in the SAP:

H. J. Res. ____ Disapproving the rule submitted by the Department of the Interior known as the Stream Protection Rule (Subject to a Rule) *(Sponsored by Rep. Bill Johnson / Natural Resources Committee)*

H. J. Res. ____ Providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Securities and Exchange Commission relating to "Disclosure of Payments by Resource Extraction Issuers" (Subject to a Rule) *(Sponsored by Rep. Bill Huizenga / Financial Services Committee)*

H. J. Res. ____ Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Social Security Administration relating to Implementation of the NICS Improvement Amendments Act of 2007 (Subject to a Rule) *(Sponsored by Rep. Sam Johnson / Judiciary Committee)*

H. J. Res. ____ Disapproving the final rule submitted by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration relating to the Federal Acquisition Regulation (Subject to a Rule) *(Sponsored by Rep. Virginia Foxx / Oversight and Government Reform Committee)*

H. J. Res. ____ Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Bureau of Land Management relating to "Waste Prevention, Production Subject to Royalties, and Resource Conservation" (Subject to a Rule) *(Sponsored by Rep. Rob Bishop / Natural Resources Committee)*

Please send agency comments or respond with a "no comment" to Pamela_Barkin@ios.doi.gov and Joseph_Nevils@ios.doi.gov by the deadline above.

Attachment(s): 1

--

Joseph Nevils
Legislative Assistant

Department of the Interior
1849 C St, NW 20240
(202) 208-4580 (O)

(202) 208-7619 (F)

--

Marigrace Caminiti

Executive Assistant to the Solicitor
US Department of the Interior
1849 C Street, NW, Rm. 6352
Washington, DC 20240
202 208 4423 main number
202 208 3111 direct
202 208 5584 fax
202 528 0486 or 202 359 2949 cell/wcell

^^

--

Karen Hawbecker
Associate Solicitor
Division of Mineral Resources
Office of the Solicitor
U.S. Department of the Interior
1849 C Street N.W. MS 5358
Washington, D.C. 20240

Office: (202) 208-4146
karen.hawbecker@sol.doi.gov

--

Karen Hawbecker
Associate Solicitor
Division of Mineral Resources
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U.S. Department of the Interior
1849 C Street N.W. MS 5358
Washington, D.C. 20240

Office: (202) 208-4146
karen.hawbecker@sol.doi.gov

From: Hawbecker, Karen
To: Haugrud, Kevin
Subject: Re: Draft SPR implications write up for CRA Statement of Admininstration Policy
Date: Monday, January 30, 2017 4:55:54 PM

Okay.

On Mon, Jan 30, 2017 at 4:55 PM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

I would like to see the other one before it goes to OCL, regardless of the deadline.

On Mon, Jan 30, 2017 at 4:35 PM, Hawbecker, Karen <karen.hawbecker@sol.doi.gov> wrote:

Jack, These are the comments we are sending to OCL very shortly. We have a deadline of 4:45 pm. Please let me know if you have any objections. If you do, I'll call Matt Quinn to pull our comments back. We will also have a short paragraph on the Waste Prevention Rule that I will send to you very soon. --Karen

--
Karen Hawbecker
Associate Solicitor
Division of Mineral Resources

Office of the Solicitor
U.S. Department of the Interior
1849 C Street N.W. MS 5358
Washington, D.C. 20240

Office: (202) 208-4146
karen.hawbecker@sol.doi.gov

From: Hawbecker, Karen
To: Jack Haugrud
Cc: Christopher Rhymes
Subject: Draft Waste Prevention Rule implications write up for CRA Statement of Administration Policy
Date: Monday, January 30, 2017 4:57:02 PM

Jack, These are the comments we propose to send regarding the implications of the SAP for BLM's oil and gas program. These are not as serious as for the SPR. Please let me know if you have any objections. Thanks. --Karen

From: Hawbecker, Karen
To: Jack Haugrud; Edward T Keable; James Schindler
Cc: Christopher Rhymes
Subject: BLM Waste Prevention Rule briefing for Kate MacGregor
Date: Tuesday, January 31, 2017 8:00:58 PM

On Monday afternoon, January 30, BLM Senior Advisor Tim Spisak briefed Kate MacGregor, Acting ASLMM Rich Cardinale, Acting BLM Deputy Director Jerry Perez, and two BLM transition officials (Kathy Benedetto and Casey Hammond) on the Waste Prevention Rule. Assistant BLM Director Mike Nedd, as well as Karen Hawbecker and Chris Rhymes of SOL-DMR, also attended the briefing. Tim provided the following briefing materials: (1) a short briefing paper providing a high-level overview of the rule, and (2) a 25-slide PowerPoint presentation providing a more detailed summary of the various aspects of the rule. We sent these materials to you separately.

Tim began the meeting by going through the slides (b) (5) [redacted]

(b) (5) [redacted]

(b) (5) [redacted]


(b) (5)

From:	Karen Hawbecker
To:	Edward T Keable; james_schindler@ios.doi.gov
Cc:	Jack Haugrud; Tom Bovard
Subject:	Fwd: SPR--Summary of 2017-01-30 Meeting with ASLMM representatives
Date:	Wednesday, February 1, 2017 10:51:13 AM
Attachments:	ATT00001.htm SPR--Summary of 2017-01-30 Meeting.docx

Adding Ed and James.

Sent from my iPad

Begin forwarded message:

> **From:** "Bovard, Thomas" <tom.bovard@sol.doi.gov>
> **Date:** February 1, 2017 at 9:35:05 AM EST
> **To:** "Haugrud, Jack" <jack.haugrud@sol.doi.gov>
> **Cc:** "Hawbecker, Karen" <KAREN.HAWBECKER@sol.doi.gov>, Susan Ely <susan.ely@sol.doi.gov>, "Morris, Emily" <Emily.Morris@sol.doi.gov>
> **Subject: SPR--Summary of 2017-01-30 Meeting with ASLMM representatives**
>
> Hi Jack, attached is a memo summarizing the briefing on the SPR that we had on Monday with representatives of the ASLMM.
>
> Thanks.
>
> Tom
>
> **Thomas A. Bovard** | Assistant Solicitor
> Branch of Surface Mining | Division of Mineral Resources
> Office of the Solicitor
> United States Department of the Interior
> 1849 C Street NW | Washington, DC 20240
> Phone: 202.208.5730 | Fax: 202.219.1789
> Tom.Bovard@sol.doi.gov

SPR Meeting Summary

Participants:

ASLMM: Katharine Macgregor, Richard Cardinale
OSMRE: Glenda Owens, Harry Payne, Dennis Rice, Robin Ferguson, Kathleen Sheehan, Khalia Boyd
SOL: Tom Bovard, Emily Morris, Sue Ely

Topic: Briefing on OSMRE's Stream Protection Rule (SPR)

Date/Time: January 30, 2017, 1-2pm

Summary: Glenda Owens led the meeting. She provided an introduction to the SPR team and then a summary of the status of the SPR. ASLMM asked about the status of the rule and outstanding legal challenges and Glenda noted that the rule became effective on 1/19/2017 and that there are currently three lawsuits. Emily provided additional information about the lawsuits, including that NGOs have requested to join the lawsuit. Glenda continued to walk through the briefing memo, addressing questions about whether the rule strike an appropriate balance between environmental protection and coal production; how the SPR differs from the 2008 stream buffer zone rule; and why the rule is so long.

(b) (5)

(b) (5)

From: Navaro, Ann
To: Kevin Haugrud
Subject: Fwd: SPR Paper on Implications if Rule is Not Implemented
Date: Wednesday, February 1, 2017 4:31:42 PM
Attachments: SPR nullifed Memo 01302017.FINAL.docx

---

just FYI

Ann Navaro
Acting Associate Solicitor, Division of Parks & Wildlife
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240
202 208 3125 (desk)
202-510-4271 (cell)

---------- Forwarded message ----------
From: **Brown-Kobil, Nancy** <nancy.brown-kobil@sol.doi.gov>
Date: Wed, Feb 1, 2017 at 3:47 PM
Subject: SPR Paper on Implications if Rule is Not Implemented
To: "Jesup, Benjamin" <benjamin.jesup@sol.doi.gov>, Ann Navaro <ann.navaro@sol.doi.gov>

Ben & Ann,

This afternoon, the House has passed a Resolution to apply the CRA to the SPR. FWS and I, along with Sue Ely of DMR, prepared a paper for Gary to discuss implications of this happening. It is attached in case this comes up in any transition meeting. Thanks.

Nancy Brown-Kobil
Attorney-Advisor, Office of the Solicitor
U.S. Department of the Interior
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MEMORANDUM

To: Gary Frazer, Assistant Director, Ecological Services
From: Craig Aubrey, Chief, Division of Environmental Review
Re: Potential ESA implications if OSMRE's Stream Protection Rule is not implemented

The Office of Surface Mining Reclamation and Enforcement (OSMRE) and the Service recently completed a section 7 consultation on OSMRE's 2016 Stream Protection Rule (SPR). The consultation resulted in a programmatic biological opinion (2016 BiOp) that superseded a 1996 BiOp and concluded that coal mining operations and reclamation, as regulated by Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), are not likely to jeopardize the continued existence of ESA-listed or proposed species, or adversely modify or destroy designated or proposed critical habitat. The 2016 BiOp's conclusions were based on OSMRE's commitments in its description of the action that the Stream Protection Rule would be fully implemented nationwide by 2020 and that a 2016 MOU between OSMRE and the Service will be followed by all State, Tribal, and Federal surface mining regulators attempting to rely on the 2016 BiOp for incidental take coverage. Any change in the action evaluated in the consultation, such as failure to fully implement the SPR by 2020 or a nullification of the SPR (such as by a court or under the Congressional Review Act), would likely leave the 2016 Biological Opinion inoperable and require OSMRE to reinitate consultation.

The 2016 BiOp identified significant concerns with OSMRE's existing regulations and the 1996 BiOp, and noted that at least three reinitiation triggers, found at 50 CFR 402.16, had been met for the 1996 BiOp including: 1) new species had been listed and critical habitat had been designated that were affected by the action, 2) new information revealed effects of the action to listed species and critical habitat in a manner or to an extent not previously considered, and 3) the action had been subsequently modified in a manner that caused effects to the listed species and critical habitat that had not been considered in the biological opinion. Specifically, Service Field Office biologists reported that the technical assistance process under the 1996 BiOp was not implemented consistently, species-specific protective measures were not consistently generated on a permit-specific basis, and some permit applications for proposed surface coal mining and reclamation operations with potential effects to ESA resources were not sent to the Service for review. As such, the Service, in the 2016 BiOp, determined the regulatory environment prior to implementation of the SPR and 2016 MOU is not sufficiently protective of species and their habitats.

(b) (5)

MEMORANDUM

(b) (5)

From: Haugrud, Kevin
To: Barsky, Seth (ENRD)
Subject: Re: CRA and BiOps
Date: Monday, February 6, 2017 5:12:42 PM

It's not urgent at this point - I was reminded when Emily Morris sent a note saying the National Mining Association had just sued us and explicitly included a challenge to the BiOp and MOU.

On Mon, Feb 6, 2017 at 5:03 PM, Barsky, Seth (ENRD) <Seth.Barsky@usdoj.gov> wrote:

> I too have been thinking about that. I need to take a look at the final biop that issued before I can give you an answer. When do you need to have an answer?
>
> **From:** Haugrud, Kevin [mailto:jack.haugrud@sol.doi.gov]
> **Sent:** Monday, February 06, 2017 3:52 PM
> **To:** Barsky, Seth (ENRD) <SBarsky@ENRD.USDOJ.GOV>
> **Subject:** CRA and BiOps
>
> Dear Mr. Barsky: [redacted]

From:	Keable, Edward
To:	Robert Johnston
Cc:	Kevin Haugrud; Harris, Kaprice; Timothy Murphy
Subject:	Fwd: Follow up information on the Congressional Review Act
Date:	Thursday, February 9, 2017 5:56:39 PM
Attachments:	United States v. S. Ind. Gas & Elec. Co. 2002 U.S. Dis (1).pdf ARTICLE A COST-BENEFIT INTERPRETATION OF THE SUBSTANTI (2).pdf

+ Jack

Rob,

Thanks for this additional information.

Ed

---------- Forwarded message ----------
From: **Johnston, Robert** <robert.johnston@sol.doi.gov>
Date: Thu, Feb 9, 2017 at 4:48 PM
Subject: Follow up information on the Congressional Review Act
To: Daniel Jorjani <daniel_jorjani@ios.doi.gov>
Cc: "Keable, Edward" <edward.keable@sol.doi.gov>, "Harris, Kaprice" <kaprice.harris@sol.doi.gov>, "Murphy, Timothy" <timothy.murphy@sol.doi.gov>

Dan,

It was a pleasure meeting you this morning. A few quick follow-up items from our discussion on the Congressional Review Act:

- Attached please find the (b) (5) [redacted]
- Also attached please find the law review article we discussed: Adam M. Finkel and Jason W. Sullivan, “A Cost-Benefit Interpretation of the Substantially Similar Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?”, *Administrative Law Review*, vol. 63, no. 4 (Fall 2011).
- Below is the status of the three CRA Joint Resolutions of Disapproval of DOI Rules:
    - H.J. Res. 38 -- Stream Protection Rule -- Presented to the President on February 6.

H.J. Res. 44 -- BLM Planning 2.0 -- Passed House on February 7.
    - H.J. Res. 36 -- Waste Prevention (Venting & Flaring) -- Passed House on February 3.
- (b) (5) [redacted]
- You requested an estimated end date for the Congressional review period of regulations going back to June 13, 2016: I'm working with OCL on this task, which is complicated by the fact that the 60 day calculation is of *continuous* (i.e. without more than a 3-day break) session days, but starts after the 15th (non-continuous) session day (which was January 30th). I'll let you know when we come up with an estimate.

Please let me know if you have any additional questions.

Thank you,
Rob

--
Robert O. Johnston, Jr.
Office of the Solicitor
U.S. Department of the Interior
Phone: 202 208 6282
Fax: 202 208 5584
robert.johnston@sol.doi.gov

--
Edward T. Keable
Deputy Solicitor-General Law
Office of the Solicitor
U.S. Department of the Interior
Phone: 202-208-4423
Fax: 202-208-5584
edward.keable@sol.doi.gov

User Name: Robert Johnston
Date and Time: Thursday, February 9, 2017 11:45:00 AM EST
Job Number: 43180621

Document (1)

1. *United States v. S. Ind. Gas & Elec. Co., 2002 U.S. Dist. LEXIS 20936*
   Client/Matter: -None-

United States v. S. Ind. Gas & Elec. Co.

United States District Court for the Southern District of Indiana, Indianapolis Division

October 24, 2002, Decided

IP99-1692-C-M/ S

Reporter
2002 U.S. Dist. LEXIS 20936 *; 55 ERC (BNA) 1597

UNITED STATES OF AMERICA, Plaintiff, vs. SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, Defendant.

Disposition: [*1] Defendant's Motion for Summary Judgment regarding the Congressional Review of Agency Rulemaking Act DENIED.

Core Terms

judicial review, modifications, routine maintenance, sources, omission, declarations, exemption, air, summary judgment motion, new source, requirements, new rule, determinations, applicability, pollution, enforcement action, emissions, agency's, provides, subject to judicial review, congressional review, agency rulemaking, summary judgment, promulgated, regulations, legislative history, nonmoving party, physical change, Electric, genuine

Case Summary

Procedural Posture

In plaintiff government's enforcement action alleging that defendant utility company violated the Clean Air Act (CAA), *42 U.S.C.S. § 7401 et seq.*, the utility company moved for summary judgment on whether the government violated the Congressional Review of Agency Rule Making Act (CRA), *5 U.S.C.S. § 801 et seq.*, by establishing a new agency rule without submitting a report to Congress as required by the CRA.

Overview
The government sued the utility company alleging that it had made modifications at three electrical generating units that were subject to but failed the New Source Review (NSR) requirements under the CAA. The utility company claimed that its actions were exempt as routine maintenance and not modifications. The utility company alleged that the Environmental Protection Agency (EPA) had made a major change in its interpretation of how NSR rules applied to existing sources of pollution, and because it had not submitted a report to the Congress, the government violated the CRA. The court determined that the EPA had not changed its interpretation of the law and denied the utility company summary judgment. The CRA only applied to new rules promulgated after 1996, and the court found that both before and after 1996, the EPA applied a fact-intensive, common-sense approach to determine whether an action qualified for the routine maintenance exception to the NSR rules, taking into account the nature, extent, purpose, and cost of the action.

Outcome
The utility company's motion for summary judgment as to whether the government violated the CRA was denied.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] As stated by the United States Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Robert Johnston

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] Motions for summary judgment are governed by *Fed. R. Civ. P. 56(c)*, which provides in part: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. A genuine issue of material fact exists whenever there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which she relies. When the moving party has met the standard of *Fed. R. Civ. P. 56*, summary judgment is mandatory.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN3[] In evaluating a motion for summary judgment, the court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. If the nonmoving party fails to establish the existence of an element essential to her case, one on which she would bear the burden of proof at trial, summary judgment must be granted to the moving party.

Environmental Law > Air Quality > General Overview

Environmental Law > ... > Emission Standards > Stationary Emission Sources > New Stationary Emission Sources

Environmental Law > Air Quality > Prevention of Significant Deterioration

Environmental Law > Air Quality > State Implementation Plans

HN4[] When Congress enacted the Clean Air Act (CAA), *42 U.S.C.S. § 7401 et seq.*, in 1970, and subsequently amended it in 1977, it determined that existing pollution sources would be "grandfathered." In other words, existing sources would not be required to immediately install technology to comply with the CAA limitations on pollution emissions. However, Congress did not grant existing sources permanent immunity from the restrictions of the CAA; subsequent "modifications" of existing sources would be required to comply with the New Source Review programs. *42 U.S.C.S. § 7411(a)(4)*. The CAA defines modification as "any physical change" that increases total emissions. However, the Environmental Protection Agency regulations exempt some activities from the broader definition of modification. The exemption relevant to the present case is the routine maintenance exemption. The regulations provide in part: The following shall not, by themselves, be considered modifications under this part: (1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category. *40 C.F.R. § 52.21(b)(2)(iii)*.

Administrative Law > Agency Rulemaking > General Overview

Environmental Law > Air Quality > General Overview

Environmental Law > ... > Emission Standards > Stationary Emission Sources > New Stationary Emission Sources

Environmental Law > Air Quality > Prevention of Significant Deterioration

HN5[] When the Clean Air Act (CAA), *42 U.S.C.S. § 7401 et seq.*, was enacted in 1970, it included the New Source Performance Standards program (NSPS), which governs emission of air pollutants from new sources. The Prevention of Significant Deterioration program (PSD) was added in the 1977 Amendments to the CAA to ensure that relatively unpolluted areas would not allow a decline of air quality to the minimum level permitted by the CAA. The NSPS and the PSD are collectively referred to as New Source Review (NSR). The NSR programs apply not only to new sources of air emissions, but also to modifications of existing sources.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN6[] The Contract with America Advancement Act (CAAA) requires that before any "rule" promulgated by a federal agency can take effect, a copy of the rule, along with an accompanying report, must be submitted to Congress and the Comptroller General. *5 U.S.C.S. §§ 801(a)(1)(A)*, *801(2)(A)*. The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budgets (OMB) is required to make a finding about whether or not a rule is "major," basing the determination on a number of factors measuring the rule's effect on the economy. *5 U.S.C.S. § 804(2)*. If the rule is deemed to be "major," then the Comptroller General is required to submit a report about it to committees from both the House of Representatives and the Senate. *5 U.S.C.S. § 801(2)(A)*. Congress can then issue a "joint resolution" disapproving the proposed rule. *5 U.S.C.S. § 802*. Rules that are not major shall take effect as otherwise provided by law after submission to Congress. *5 U.S.C.S. § 801(a)(1)(4)*.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN7[] The Contract with America Advancement Act adopts the Administrative Procedure Act's (APA) definition of "rule," with certain limited exceptions. *5 U.S.C.S. § 804*. *5 U.S.C.S. § 551(4)* of the APA provides: "Rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription of or the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing. *5 U.S.C.S. § 551(4)*.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN8[] The Contract with America Advancement Act contains one, brief provision on judicial review. *5 U.S.C.S. § 805* provides: No determination, finding, action, or omission under this chapter shall be subject to judicial review.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

HN9[] The Congressional Review of Agency Rule Making Act, *5 U.S.C.S. § 801 et seq.*, provides: No determination, finding, action, or omission under this chapter shall be subject to judicial review. *5 U.S.C.S. § 805*.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Formal Rulemaking

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN10[] The purpose of the Congressional Review of

Agency Rule Making Act (CRA), 5 U.S.C.S. § 801 et seq., is to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Environmental Law > Air Quality > General Overview

Environmental Law > Air Quality > Enforcement > General Overview

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN11[] Under the Clean Air Act, 42 U.S.C.S. § 7401 et seq., agency actions that could have been reviewed in courts of appeal shall not be subject to judicial review in civil or criminal proceedings for enforcement. 42 U.S.C.S. § 7607(b)(2).

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Environmental Law > Air Quality > General Overview

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN12[] 42 U.S.C.S. § 7607(b) deals with judicial review of various air quality rules and standards that are formally promulgated, published, or otherwise officially noticed by the Administrator.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN13[] The Congressional Review of Agency Rule Making Act (CRA), 5 U.S.C.S. § 801 et seq., only applies to new policies or rules promulgated after its March 1996 effective date; thus, the CRA is only applicable if a new Environmental Protection Agency rule came into effect after that date.

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN14[] The Daubert reliability inquiry is a flexible one. The objective of a district court's "gatekeeping" function is to ensure the reliability and relevancy of expert testimony.

Governments > Legislation > Interpretation

HN15[] The meaning of federal regulations is not a question of fact, to be resolved by the jury after a battle of experts. It is a question of law, to be resolved by the court.

Environmental Law > Air Quality > General Overview

Environmental Law > ... > Emission Standards > Stationary Emission Sources > New Stationary Emission Sources

HN16[] It is clear from the language of the Clean Air Act (CAA), 42 U.S.C.S. § 7401 et seq., that it was, in fact, meant to treat existing sources differently from new sources. However, the plain language of the CAA does not give the utility industry a permanent exemption from the New Source Review (NSR) rules. The NSR requirements apply not only to new sources constructed after the enactment of the CAA, but also to modifications of sources existing at the time of the enactment. Indeed, 42 U.S.C.S. § 7411(a)(2) provides that NSR applies to any stationary source, the

construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source. Congress defines modification as any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source of which results in the emission of any air pollutant not previously emitted. *42 U.S.C.S. § 7411(a)(4)*. The plain language of the statute makes the NSR rules applicable to existing sources, which include utility stations, if they are modified. If the CAA was never meant to apply to existing sources of pollution, Congress would not have included modifications of existing sources within the ambit of the NSR coverage.

Counsel: For United States of America, PLAINTIFF: Steven D Ellis, U S Dept of Justice, Washington, DC USA.

For United States of America, PLAINTIFF: Thomas E Kieper, United States Attorney's Office, Indianapolis, IN USA.

For Southern Indiana Gas, DEFENDANT: Angila M Retherford, Vectren Corporation, Evansville, IN USA.

For Southern Indiana Gas, DEFENDANT: Kevin A Gaynor, Vison & Elkins L L P, Washington, DC USA.

For Southern Indiana Gas, DEFENDANT: John R Maley, Barnes & Thornburg, Indianapolis, IN USA.

Judges: LARRY J. MCKINNEY, CHIEF JUDGE, United States District Court, Southern District of Indiana.

Opinion by: LARRY J. MCKINNEY

Opinion

ORDER ON MOTION FOR SUMMARY JUDGMENT ON CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

This matter is before the Court on Defendant Southern Indiana Gas and Electric Company's ("SIGECO") Motion for Summary Judgment on the United States' ("the Government") claims that it violated the Clean Air Act ("CAA"), *42 U.S.C. § 7401, et seq.* The issue presented in SIGECO's motion is whether or not the Government violated the **[*2]** Congressional Review of Agency Rule Making Act, *5 U.S.C. § 801, et seq.* ("CRA"), by establishing a new agency rule without submitting a report to Congress about the rule as required by the CRA. The parties have fully briefed their arguments, and the motion is now ripe for ruling.

I. FACTUAL BACKGROUND

A brief summary of the facts is necessary to give background for the current motion. In support of its position that the Environmental Protection Agency ("EPA") has recently changed its policy regarding the applicability of the CAA's "New Source Review" ("NSR") rules to existing utility sources, SIGECO offers declarations made by former government officials and consultants. The following former highly-placed government officials have made declarations: James Schlesinger, former Secretary of Energy; Walter Barber, former director of EPA's Office of Air Quality Planning and Standards; Joseph Cannon, former EPA Administrator for the Office of Air and Radiation; and Kenneth Schweers, a former consultant at ICF Kaiser, a firm EPA used for technical support during the development of the Title IV program. [1] The declarants testify about what the NSR rules **[*3]** were intended to cover, and how the EPA interpreted the NSR provisions after they were initially enacted. SIGECO provides these declarations as evidence that the EPA had a different policy regarding the NSR rules prior to this enforcement action, and maintains that the EPA has recently changed its NSR policies, which should have been reported to Congress pursuant to the CRA. Because the Court ultimately agrees with the Government that the declarations are not relevant or admissible, it is not necessary to elaborate further on the details of the former officials' recollections.

II. STANDARDS

A. SUMMARY JUDGMENT

HN1[] As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *See Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. **[*4]** *See also United Ass'n of Black Landscapers v. City of Milwaukee, 916 F.2d 1261,*

[1] See SIGECO's Exhibits in Support of Motion for Summary Judgment Regarding the Congressional Review of Agency Rulemaking Act.

1267-68 (7th Cir. 1990), cert. denied, 499 U.S. 923, 111 S. Ct. 1317, 113 L. Ed. 2d 250 (1991). HN2[] Motions for summary judgment are governed by Rule 56(c)) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). **[*5]** The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 997 (7th Cir. 1996), cert. denied, 520 U.S. 1116, 137 L. Ed. 2d 328, 117 S. Ct. 1246 (1997). It is not the duty of the Court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which she relies. See Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. See Celotex, 477 U.S. at 322-23; Shields Enters., Inc. v. First Chi. Corp., 975 F.2d 1290, 1294 (7th Cir. 1992).

HN3[] In evaluating a motion for summary judgment, the Court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. **[*6]** See Estate of Cole v. Fromm, 94 F.3d 254, 257 (7th Cir. 1996), cert. denied, 519 U.S. 1109, 136 L. Ed. 2d 834, 117 S. Ct. 945 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. See Anderson, 477 U.S. at 248; JPM Inc. v. John Deere Indus. Equip. Co., 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. See Clifton v. Schafer, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to [her] case, one on which [she] would bear the burden of proof at trial, summary judgment must be granted to the moving party." Ortiz v. John O. Butler Co., 94 F.3d 1121, 1124 (7th Cir. 1996), cert. denied, 519 U.S. 1115, 136 L. Ed. 2d 843, 117 S. Ct. 957 (1997).

B. CAA'S NEW SOURCE REVIEW RULES

[2]

[*7] HN4[] When Congress enacted the Clean Air Act in 1970, and subsequently amended it in 1977, it determined that existing pollution sources would be "grandfathered." In other words, existing sources would not be required to immediately install technology to comply with the CAA limitations on pollution emissions. However, Congress did not grant existing sources permanent immunity from the restrictions of the CAA; subsequent "modifications" of existing sources would be required to comply with the New Source Review programs. 42 U.S.C. § 7411(a)(4). The CAA defines modification as "any physical change" that increases total emissions. *Id.* However, the EPA regulations exempt some activities from the broader definition of modification. The exemption relevant to the present case is the routine maintenance exemption. The regulations provide in relevant part:

> The following shall not, by themselves, be considered modifications under this part:
> (1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category …

40 C.F.R. § 52.21(b)(2)(iii).

In this enforcement action, the Government **[*8]** alleges that SIGECO made CAA "modifications" during the 1990s at three electrical generating units at Culley Station. SIGECO claims its actions were exempt as routine maintenance, and consequently, not modifications subject to the NSR requirements. Thus, a central issue in this case is the scope of the routine maintenance exception.

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[2] Although the Government alleges violations of the federally approved Indiana State Implementation Plan in addition to the PSD and NSPS violations, those claims are not relevant to this motion.

HN5[] When the CAA was enacted in 1970, it included the New Source Performance Standards program ("NSPS"), which governs emission of air pollutants from new sources. The Prevention of Significant Deterioration program ("PSD") was added in the 1977 Amendments to the CAA to ensure that relatively unpolluted areas, like Warrick County, would not allow a decline of air quality to the minimum level permitted by the CAA. The NSPS and the PSD are collectively referred to as New Source Review. As stated earlier, the NSR programs apply not only to new sources of air emissions, but also to modifications of existing sources. In this motion, SIGECO argues that the EPA has made a major change in its interpretation of how NSR rules apply to existing sources of pollution.

C. CONGRESSIONAL REVIEW OF AGENCY RULEMAKING ACT

The CRA was enacted on March 29, 1996, as part **[*9]** of the Contract with America Advancement Act ("CAAA") to provide a legislative check on administrative agency actions. HN6[] The CAAA requires that before any "rule" promulgated by a federal agency can take effect, a copy of the rule, along with an accompanying report, must be submitted to Congress and the Comptroller General. 5 U.S.C. § 801(a)(1)(A); 5 U.S.C. § 801(a)(2)(A). The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budgets ("OMB") is required to make a finding about whether or not a rule is "major," basing the determination on a number of factors measuring the rule's effect on the economy. *Id.* § 804(2). If the rule is deemed to be "major," then the Comptroller General is required to submit a report about it to committees from both the House of Representatives and the Senate. *Id.* § 801(a)(2)(A). Congress can then issue a "joint resolution" disapproving the proposed rule. *Id.* § 802. Rules that are not major "shall take effect as otherwise provided by law after submission to Congress." *Id.* § 801(a)(3)(C)(4).

HN7[] The CAAA adopts the Administrative Procedure Act's ("APA") definition **[*10]** of "rule," with certain limited exceptions. *Id.* § 804. ("The term 'rule' has the meaning given such term in section 551 …"). Section 551(4) of the APA provides:

> "Rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription of or the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing …

5 U.S.C. § 551(4).

HN8[] The CAAA contains one, brief provision on judicial review. § 805 provides: "No determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805.

III. DISCUSSION

A. JUDICIAL REVIEW OF EPA'S FAILURE TO SUBMIT RULE TO CONGRESS UNDER 5 U.S.C. § 805

Before responding to the substance of SIGECO's motion, the Government argues **[*11]** that this Court lacks jurisdiction to review any actions or omissions by the EPA for the purpose of assessing compliance with the CRA. HN9[] The CRA provides: "No determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. In the Government's view, this language precludes any court not only from reviewing Congressional findings about an agency rule after it was submitted pursuant to the CRA, but also prevents judicial scrutiny of an agency's failure to report a rule to Congress in the first place. SIGECO, on the other hand, asserts that Congress intended a narrower construction of 5 U.S.C. § 805. According to SIGECO, the judicial review provision of the CRA bars a court's review of Congressional findings required under the CRA, but does not preclude a court from determining whether an agency rule is in effect that should have been reported to Congress pursuant to the CRA.

The Government points the Court to one district court case that has considered this precise issue. In Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd., 1998 U.S. Dist. LEXIS 13470, 1998 WL 842181, (W.D. Tex.), *aff'd,* 201 F.3d 551 (5th Cir. 2000), **[*12]** the plaintiffs argued that the defendant violated the CRA by failing to submit a report of a new rule to Congress. *See id.* at *8. The district court, however, concluded that the statute barred judicial review of the defendant's alleged "omission" to submit a report pursuant to the CRA. *See id.* ("The plaintiffs argue § 805 only forecloses review of any 'determination, finding, action, or omission' by Congress. But the statute provides for no judicial review of any 'determination, finding, action, or omission under

this chapter,' not 'by Congress under this chapter.' The Court must follow the plain English. Apparently, Congress seeks to enforce the [CRA] without the able assistance of the courts."). *Id.* n.15.

The Court's own research revealed only one other case that has considered this issue, which was decided after the parties submitted their briefs on the current motion. The District Court for the Southern District of Ohio, in a recent EPA enforcement action similar to the instant action, also concluded that the plain language of the statute left the court without jurisdiction to review an agency's purported failure to report a new rule to Congress. Although the court **[*13]** cited *Texas Savings* approvingly, the court also based its decision to strike the defendant's CRA claim on its doubt that the enforcement action constituted rulemaking covered by the CRA. *See* *United States v. Am. Elec. Power Serv. Corp., 218 F. Supp. 2d 931, 2002 WL 1900067*, at *14 (S.D. Ohio).

This Court respectfully disagrees with *Texas Savings* and *American Electric* and finds the language of the CRA judicial review provision to be ambiguous. As this Court reads *5 U.S.C. § 805*, ("No determination, finding, action, or omission under this chapter shall be subject to judicial review"), it is susceptible to two plausible meanings: (1) as *Texas Savings* and *American Electric* concluded, Congress did not intend for courts to have any judicial review of an agency's compliance with the CRA; or (2) Congress only intended to preclude judicial review of Congress' own determinations, findings, actions, or omissions made under the CRA after a rule has been submitted to it for review. Under the first interpretation, which *Texas Savings* and *American Electric* adopted, agencies could evade the strictures of the CRA by simply not reporting new rules, and **[*14]** courts would be barred from reviewing their lack of compliance. This result would be at odds with ***HN10***[⬆] the purpose of the CRA, which was to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism, and to read it to preclude a court from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual.

Moreover, the language of the statute precludes judicial review of a "determination, finding, action, or omission under this chapter …" Agencies do not make findings and determinations under this chapter; Congress, on the other hand, is required to make a number of findings and determinations under the CRA. Therefore, it is logical to interpret the judicial preclusion language as barring review of the determinations, findings, actions, or omissions made by Congress after a rule is submitted by an agency, but not extending the bar of judicial scrutiny to questions of whether or not an agency rule is in effect that should have been reported to Congress in the first place.

Because there is a "genuine ambiguity in the statute," *Bd. of Trade of the City of Chi. v. Sec. and Exch. Comm'n, 187 F.3d 713, 720 (7th Cir. 1999)*, **[*15]** the Court will consider the legislative record. [3] The legislative history of the CRA confirms the limited reach of the preclusion of judicial review. The sponsers of the CRA commented:

> *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 Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures under this chapter.

Thus, the legislative record buttresses the "limited scope" interpretation of the CRA's judicial review provision; the comments focus of the preclusion of review of determinations made by the OMB and Congress under the CRA, not whether or not an agency's decision not to submit a rule in the first place is reviewable. The sponsers of the CRA also explained, "the limitation on judicial review in no way prohibits a court from determining whether a rule is in effect." No other mention of the judicial review provision is made in the legislative history. **[*16]**

The Government also contends that the plain meaning of *5 U.S.C. § 805* is particularly evident when compared to the judicial review provision from the Regulatory

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[3] The Court acknowledges that the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome. However, Representative Hyde explicitly stated that the joint statement "will serve as the equivalent of a statement of managers." 142 Cong. Rec.H2987. 3000 (daily ed. Mar. 28, 1996). In any event, this Court reached its conclusion about the limited scope of the judicial review provision of the CRA based on the text of the statute and overall purpose of the Act. The legislative history only serves to further reinforce the Court's conclusion.

Flexibility Act ("RFA"). Prior to its amendment in 1996 as part of the CAAA, section 611(a)-(b) of the RFA provided:

> (a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions **[*17]** of this chapter to any action of the agency shall not be subject to judicial review.
> (b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review.

When the CAAA was enacted in 1996, it included both the CRA and an amendment to 5 U.S.C. § 611 of the RFA. Reversing the previous version quoted above that precluded judicial review, the amendment to the RFA specifically provided for judicial review of agency compliance with the RFA.

According to the Government, the RFA amendment to provide for judicial review shows that Congress knew how to provide for judicial review of agency actions if that is what it intended. The Court draws the opposite conclusion by viewing the language of the RFA amendment together with the provision it replaced. The prior version of § 611(a), quoted above, is the precise issue this Court is deciding with regard to the CRA. If Congress wanted to bar judicial review of an agency's determination concerning the applicability of any of the provisions of the CRA, it would have clearly **[*18]** done so, as it had with the prior version of the RFA. Instead, Congress limited its judicial review preclusion by referring to determinations, findings, actions and omissions made under the CRA. Immediately preceding § 805, Congress enumerated a number of determinations, findings, and actions that the OMB and Congressional committees would be required to make under the CRA, and this Court concludes that Congress was referring back to those duties when it enacted the CRA judicial review provision. Thus, this Court concludes that it has jurisdiction to review whether an agency rule is in effect that should have been reported to Congress pursuant to the CRA.

B. EFFECT OF CAA'S JUDICIAL REVIEW PROVISION

The Government also argues that if the Court accepts SIGECO's argument that the EPA's interpretation was a new rule, this Court does not have jurisdiction over this motion because the CAA expressly reserves jurisdiction over final agency action to Courts of Appeal. 42 U.S.C. § 7607(b). ***HN11***[↑] Under the CAA, agency actions that could have been reviewed in Courts of Appeal "shall not be subject to judicial review in civil or criminal proceedings for enforcement. **[*19]** " 42 U.S.C. § 7607(b)(2).

SIGECO responds that because it could not have obtained prior judicial review under § 7607(b)(1), it is not barred from alleging improper agency rulemaking now. The Court agrees with SIGECO. In this motion, SIGECO alleges that on November 3, 1999, the date of the filing of this enforcement action, a major shift in EPA policy occurred that constituted improper rulemaking. To support its contention that the EPA has advanced a new policy, SIGECO cites an EPA expert report prepared for this litigation, and an applicability determination letter sent to another utility company by the EPA after the filing date of this enforcement action. SIGECO could not have challenged these in the Seventh Circuit. To the extent that these documents constitute a new EPA law, the position was never officially promulgated by the Administrator, nor was it published in the Federal Register, and the Court concludes that they do not constitute final agency action under section 7607 of Title 42. *See* United States v. Zimmer Paper Prod., Inc., 733 F. Supp. 1265, 1269-70 (S.D. Ind. 1989) ***HN12***[↑] ("[Section 7607(b)] deals with judicial review of various **[*20]** air quality rules and standards that are formally promulgated, published, or otherwise officially noticed by the Administrator.").

C. IS EPA'S INTERPRETATION A NEW RULE PROMULGATED AFTER MARCH 1996?

Because the Court has determined it has jurisdiction to consider this alleged CRA violation, it must decide if the EPA has promulgated a new rule or policy as defined by the CRA. [4] However, ***HN13***[↑] the CRA only applies to new policies or rules promulgated after its March 1996 effective date; thus, the CRA is only applicable if a new EPA rule came into effect after that date. In this motion, SIGECO asserts that EPA's "new" interpretation of the routine maintenance exemption, illustrated by the filing of this action in November 1999, is a new rule or policy promulgated after March 1996 that should have been reported to Congress. According to SIGECO, EPA's new view of this exemption would impose NSR requirements that "would require significant and expensive pollution control retrofits to virtually all coal-

[4] The CRA incorporates the APA's definition of rule with some limited exceptions.

fired generating units." SIGECO Memo in Support of Motion for Summary Judgment on CRA at 11. The Government claims that the EPA has never changed its interpretation of the routine maintenance **[*21]** exception and, therefore, was under no duty to report a new rule or policy under the CRA.

1. EPA's Pre-1996 Interpretation of Routine Maintenance and NSR

SIGECO offers the testimony of four highly-placed government officials and consultants to establish EPA's long-standing policy with respect to the applicability of NSR to existing sources. The Government contends that these declarations are inadmissible for a number of reasons, and claims that they do not assist the Court in ruling on the motion. The Court agrees with the Government, and excludes the testimony by these four experts under *Rule 702 of the Federal Rules of Evidence.*

As the Supreme Court noted in *Kumho Tire Co., Ltd. v. Carmichael,* ***HN14***[⬆] the *Daubert* reliability inquiry is "a flexible one." *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* (quoting *Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*). **[*22]** The objective of a district court's "gatekeeping" function "is to ensure the reliability and relevancy of expert testimony." *Kumho Tire, 526 U.S. at 152*. This is a case where the *Daubert* factors are not particularly helpful to the Court in determining the admissibility of these experience-based experts. *See id. at 150*. However, the Court still must perform its "gatekeeping" function, and will determine whether the declarations are relevant and reliable based on the nature of the issue before the Court. *See id.*

The bulk of the testimony offered by these experts is not relevant to the Court's consideration of this motion. They explain the political and policy background that existed when Congress initially passed the Clean Air Act, and the conditions and compromises that surrounded it. *See generally* Dec. of James Schlesinger. They also assert that they never heard about the types of NSR issues raised in this enforcement action while they worked with or for the EPA, and are surprised by the current enforcement action. *See, e.g.,* Cannon Dec. at 8. However, none of this information establishes what the law was with respect to the NSR rules, **[*23]** and does not aid this Court in determining the EPA's pre-1996 interpretation of the routine maintenance exception. Many portions of the declarations are akin to legislative history, and the Court will not resort to legislative history when it has the benefit of unambiguous statutory language and case law that establish the law with respect to the NSR rules. The Court is hesitant to consider the politics and compromises that went into a statute, especially when the testimony comes ten or twenty years after the fact from paid declarants.

Moreover, the declarations are essentially being offered to explain the law to the Court. SIGECO contests this, but the declarants clearly opine on the applicability of the NSR rules to existing sources, and this is a question of legal interpretation of the CAA and its accompanying regulations. As the Seventh Circuit held in *Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898*, (7th Cir. 1994), ***HN15***[⬆] "the meaning of federal regulations is not a question of fact, to be resolved by the jury after a battle of experts. It is a question of law, to be resolved by the court." *Bammerlin, 30 F.3d at 900-01* (citing *Harbor Ins. Co. v. Cont'l Bank, 922 F.2d 357, 366 (7th Cir.1990)*; **[*24]** *Specht v. Jensen, 853 F.2d 805 (10th Cir.1988)* (en banc); *United States v. Baskes, 649 F.2d 471, 478-79 (7th Cir.1980)*. But *cf. United States v. Bilzerian, 926 F.2d 1285, 1294-95 (2nd Cir.1991)*. Although there may be instances when former government employees' testimony will assist a court in determining the scope of a regulation, this is not one of those instances, and the Court will rely instead upon the statutory and regulatory language of the CAA, and the Seventh Circuit's decision in *Wis. Elec. Power Co. v. Reilly, 893 F.2d 901*, (7th Cir. 1990) ("WEPCO").

HN16[⬆] It is clear from the language of the CAA that it was, in fact, meant to treat existing sources differently from new sources. However, the plain language of the CAA did not give the utility industry a permanent exemption from the NSR rules. The NSR requirements apply not only to new sources constructed after the enactment of the CAA, but also to modifications of sources existing at the time of the enactment. Indeed, *section 7411(a)(2)* provided that NSR would apply to:

> any stationary source, the construction *or modification* of which is commenced after **[*25]** the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

42 U.S.C. § 7411(a)(2) (emphasis added). Congress then defined modification as:

> any physical change in, or change in the method of operation of, a stationary source which increases

> the amount of any air pollutant emitted by such source of which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4). The plain language of the statute makes the NSR rules applicable to existing sources, which include utility stations like Culley Station, if they are modified. If the CAA was never meant to apply to existing sources of pollution, Congress would not have included modifications of existing sources within the ambit of the NSR coverage.

In this motion and other pending motions, the parties contest vigorously how to interpret the Seventh Circuit's decision in WEPCO. The Court will discuss WEPCO in more detail in subsequent motions. However, for purposes of this motion, it is relevant to note a point in WEPCO about which **[*26]** both parties agree -- the Seventh Circuit clearly applied the EPA's fact-intensive test, considering the nature, extent, cost, and frequency of an action, to determine if a modification fit the contours of the routine maintenance exemption. Moreover, WEPCO provides a pre-1996 example of the EPA enforcing NSR requirements on an existing utility source for proposed modifications.

Summary

In sum, the statutory language makes it clear that the NSR requirements apply not only to new sources of pollution, but to existing sources upon modification. The routine maintenance exception exempts certain actions from the CAA definition of modification, effectively shielding those actions from the NSR requirements. The EPA and Seventh Circuit have applied a fact-intensive, common-sense approach to determine whether an action qualifies for the routine maintenance exception, taking into account the nature, extent, purpose, and cost of the action.

2. EPA's Post-1996 Interpretation of Routine Maintenance and NSR

SIGECO suggests that an expert report prepared for this litigation by an EPA expert witness, Alan Michael Hekking ("Hekking Report"), and an NSR applicability letter written **[*27]** by an EPA office to Detroit Edison ("Detroit Edison letter") in 2000 illustrate EPA's radical change in policy. Gov't Exs. 75, 4. The Government responds that it has never changed its interpretation of the routine maintenance exception over the years, and to the extent the Hekking Report evidences a departure from their policies, his views as an engineering expert are not necessarily the legal views of the EPA. Moreover, the Government asserts that the Detroit Edison letter is consistent with their long-held interpretation of the routine maintenance exemption -- an interpretation that was validated by the Seventh Circuit in WEPCO.

The Hekking Report is a technical, factual analysis of the challenged projects at Culley Station by an engineer hired by the Government. Gov't Ex. 75. It is not appropriate or necessary for the Court to analyze every aspect of the Hekking Report and determine if it agrees with its conclusions. The current motion only requires the Court to decide if it represents a shift in policy that constitutes a new rule for purposes of the CRA. The Hekking Report generally applies the same EPA test used by the EPA in WEPCO, considering the cost, frequency, nature and **[*28]** extent of the modifications to arrive at a finding of whether or not they qualify for the routine maintenance exception. To the extent that there are any differences between the Hekking Report and the EPA's pre-1996 interpretation of the NSR, he is a private citizen hired by the Government to prepare a report for litigation, and his report cannot be considered a new EPA rule.

The Detroit Edison letter was the EPA response to a request by Detroit Edison for an NSR applicability determination regarding proposed replacement projects at the company's power plant. EPA concluded that Detroit Edison's changes would not be a "modification" for purposes of the CAA, and, consequently, that Detroit Edison could proceed with the project without first obtaining a PSD permit. However, the EPA based this determination on Detroit Edison's assurance that the projects would not increase emissions, rejecting the company's claim that the construction was exempt as routine maintenance. [5]

[*29] SIGECO cites the Detroit Edison letter for the proposition that EPA's current view is "that any project that maintains a unit's generating capacity, results in fewer breakdowns, or results in more efficient or reliable operations is presumptively subject to PSD and NSPS [i.e., NSR]." SIGECO Memo in Support at 11. However, the Court's review of the Detroit Edison letter, and the

[5] As observed earlier, NSR only applies where there is both a physical change and increased emissions due to the change. In the Detroit Edison letter, the EPA concluded that the proposed work would constitute a nonroutine physical change, but the NSR permitting requirements would not apply because EPA could not conclude, based on Detroit Edison's submissions, that emissions would increase.

accompanying analysis, reveals no such categorical conclusions. Instead, the EPA applied the WEPCO test to the facts of the Detroit Edison project:

> Detroit Edison claims that the Dense Pack project is eligible for the exclusion for routine maintenance, repair, and replacement. The determination of whether a proposed physical change is "routine" is a case-specific determination which takes into consideration the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors.

Gov't Ex. 4 at 2. EPA then considered the facts of the case in light of nature, extent, frequency and cost of the work, and concluded that the proposed change was a nonroutine physical change. The Court concludes that the Detroit Edison letter does not represent the kind of departure from WEPCO **[*30]** and the language of the CAA that SIGECO ascribes to it, and it does not constitute a new, post-1996 rule under the CRA. Thus, the Court **DENIES** SIGECO'S Motion for Summary Judgment on Congressional Review of Agency Rulemaking.

IV. CONCLUSION

For the reasons discussed herein, the Court finds that SIGECO has failed to demonstrate that EPA has changed its interpretation of the law. Accordingly, the Court **DENIES** SIGECO's Motion for Summary Judgment regarding the Congressional Review of Agency Rulemaking Act.

IT IS SO ORDERED this 24th day of October, 2002.

LARRY J. MCKINNEY, CHIEF JUDGE

United States District Court

Southern District of Indiana

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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?

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Text

[*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), [1] and can now veto a regulation by passing a joint resolution rather than by passing a law. [2] 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. [3] 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, [4] matters most generally as a verdict on the precise

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[1] 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)).

[2] *See* ***5 U.S.C. §§ 801***-802 (2006).

[3] *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).

[4] ***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 [5] 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. [6]

[*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." [7] 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. [8] 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.* [9]

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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[5] David Michaels was confirmed December 3, 2009.*See* 155 CONG. REC. S12,351 (daily ed. Dec. 3, 2009).

[6] *See infra* notes 122-125 and accompanying text.

[7] Kristina Sherry,*'Substantially the Same' Restriction Poses Legal Question Mark for Ergonomics,* INSIDE OSHA, Nov. 9, 2009, at 1, 1, 8.

[8] *See infra* Part III.A.

[9] 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. [10] 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. [11] Similarly, in the Senate, Republicans turned **[*712]** their minority into a four-seat advantage. [12]

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. [13] 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. [14] Of course, it was not only business owners who

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[10] 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)).

[11] *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* (reporting the results of the 1994 U.S. House elections, in which the Republicans won a majority of 230-204).

[12] *See id.* (reporting the results of the 1994 U.S. Senate elections, after which the Republicans held a majority of 52-48).

[13] 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 . . . . ").

[14] *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. [15]

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. [16]

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. [17] 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." [18]

[*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. [19] 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). [20] 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,* [21] which decried the purported insistence on inflexible and draconian strictures on business, and *Breaking the Vicious Circle.* [22] 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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[15] *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.").

[16] *Id.* at 70 (reporting the annual costs of federal regulation in 1991 dollars).

[17] *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").

[18] Stan Crock et al.,*A GOP Jihad Against Red Tape,* Bus. WK., NOV. 28, 1994, at 48 (quoting Senator Nickles).

[19] 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.

[20] *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).

[21] PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: How LAW IS SUFFOCATING AMERICA (1995).

[22] STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1994).

conservative interpretations of science to exaggerate the risks that remained uncontrolled. [23] 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, [24] 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. [25]

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 [26] --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, [27] 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. [28]

The stage was thus set for congressional intervention to rationalize (or, perhaps, to undermine) the federal regulatory system.

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[23] *See id.* at 9-13.

[24] *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).

[25] *Special Report: Are We Scaring Ourselves to Death? The People Respond* (ABC television broadcast Apr. 21, 1994).

[26] *See* Alon Tal, *A Failure to Engage,* 14 ENVTL. F., Jan.-Feb. 1997, at 13.

[27] *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.

[28] 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. [29] When he **[*716]** declined to do so, [30] House Republicans called for a legislative solution--they intended to enact a statute that would put a moratorium on new regulations [31] 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. [32] 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. [33] 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. [34]

The proposed moratorium, despite passing in the House, [35] met strong opposition in the Senate. Although Senate committees recommended enactment of the moratorium for largely the same reasons as the House leadership, [36] a

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[29] *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).

[30] *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).

[31] *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 . . . . ").

[32] *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).

[33] *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).

[34] H.R. 450, 104th Cong. §§ 3(a), 6(2) (1995) (as passed by House of Representatives, Feb. 24, 1995).

[35] 141 CONG. REC. 5880 (1995) (recording the House roll call vote of 276-146,**with** 13 Representatives not voting).

[36] *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. [37] 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." [38] 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." [39] The Republicans, with only a slim majority in the Senate, [40] 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. [41] 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. [42] Senate Democrats saw the more nuanced review process as a significant improvement over the moratorium's prophylactic approach, [43] and the Nickles-Reid Amendment (Senate Bill 219) passed the chamber by a roll call vote of 100-0. [44]

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. [45] Pro-environment House Republicans eventually convinced House leaders that their antiregulatory plans were too far-reaching, [46] and over the following year, members of Congress attempted to include the review provision in several bills. [47] 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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[37] *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).

[38] S. REP. No. 104-15, at 25.

[39] *Id.* at 26.

[40] *See supra* note 12 and accompanying text.

[41] S. 348, 104th Cong. (as introduced in Senate, Feb. 2, 1995).

[42] *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).

[43] *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.").

[44] *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).

[45] *See* 142 CONG. REC. 6926-27 (1996) (statement of Rep. Hyde) (summarizing the procedural history of the Congressional Review Act (CRA)).

[46] *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.").

[47] 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. [48] The congressional review provision was ultimately enacted without debate, as more controversial parts of the Contract with America occupied Congress's attention. [49] On March 28, 1996, the CWAA passed both houses of Congress. [50] 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. [51]

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. [52] 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. [53] It also would have required agencies to certify that each rule produced benefits to human health or the environment that justified the costs incurred. [54] 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, [55] 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. [56] 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. [57]

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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[48] *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)).

[49] *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).

[50] *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).

[51] Presidential Statement on Signing the Contract with America Advancement Act of 1996, 32 WEEKLY COMP. PRES. DOC. 593 (Apr. 29, 1996).

[52] *See* H.R. 9, 104th Cong. §§ 411-24 (1995) (as passed by House, Mar. 3, 1995).

[53] *See, e.g., id.* § 414(b)(2) (setting forth specific requirements for the conduct of risk assessments).

[54] *Id.* § 422(a)(2).

[55] *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).*

[56] S. 343, 104th Cong. (1995) (as introduced in Senate, Feb. 2, 1995).

[57] 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." [58] 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 [59]), 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. [60] 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." [61]

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. [62] 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), [63] the Regulatory Compliance Simplification Act (which requires **[*721]** agencies to prepare compliance guides directed specifically at small businesses), [64] and a series of

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[58] *See* Landy & Dell, *supra* note 55, at 125.

[59] 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).

[60] *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).

[61] 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."

[62] James T. O'Reilly,*EPA Rulemaking After the 104th Congress: Death from Four Near-Fatal Wounds?,* *3 ENVTL. LAW. 1, 1 (1996).*

[63] 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).

[64] 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). [65] 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). [66] The report is then submitted for review to the chairman and ranking member of each relevant committee in each chamber. [67] Some rules--for example, rules pertaining to internal agency functioning, or any rule promulgated by the Federal Reserve System--are exempted from this procedure. [68]

During this review process, the effective date of any major rule is postponed. [69] 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. [70] 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." [71]

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." [72] 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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[65] *Id.* subtit. D, ***110 Stat. 864-68*** (codified as amended at ***5 U.S.C. §§ 601***-605, 609, 611 (2006)).

[66] ***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).

[67] ***5 U.S.C. § 801***(a)(1)(C).

[68] *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).

[69] *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.*

[70] *Id*. § 801(c).

[71] *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).

[72] 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. [73] 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. [74] The House does not have a similar expedited procedure. [75] When a disapproval resolution passes both houses of Congress, it is presented to the President for signing. [76] 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. [77]

[*723] Upon the enactment of a joint resolution against a federal agency rule, the rule will not take effect. [78] 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 [79] --then it cannot continue in force. [80] 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." [81]

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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[73] ***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).

[74] *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).

[75] *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").

[76] ***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.*

[77] 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).

[78] ***5 U.S.C. § 801***(b)(1).

[79] *See supra* notes 69-70 and accompanying text.

[80] ***5 U.S.C. § 801***(b)(1).

[81] *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. [82]

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." [83] 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. [84] 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. [85] 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, [86] and only one instance in which the congressional veto has actually been carried out, [87] 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. [88] In 2001, when the Bush Administration came into office, Republicans in Congress led an attempt to use the measure to

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[82] ***5 U.S.C. § 801***(b)(2).

[83] *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_0f.htm.

[84] *Id.*

[85] *See infra* Part VI and VII.

[86] *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).

[87] *See infra* Part II.A (discussing Congress's use of the veto in 2001 to disapprove of OSHA's ergonomics rule).

[88] *See*U.S. GOV'T ACCOUNTABILITY OFFICE, CONGRESSIONAL REVIEW ACT (CRA) FAQs, 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. [89] The joint resolution generated much debate, in Washington and nationwide, over whether Congress should use the CRA procedure. [90] 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." [91] 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." [92] 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. [93] 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. [94] Opponents of the OSHA regulation argued that it was the product of a flawed, last-minute rulemaking process in the outgoing Clinton Administration. [95] Although the Department of Labor had been attempting to develop an ergonomics program for at least the previous ten years, [96] 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." [97] 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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[89] *See* Ergonomics Rule Disapproval, Pub. L. No. 107-5, ***115 Stat. 7 (2001),*** *invalidating* Ergonomics Program, ***65 Fed. Reg. 68,262*** (Nov. 14, 2000).

[90] *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).

[91] 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).

[92] Ergonomics Program,65 Fed. Reg. at 68,846; *see also* Ergonomics Program, *64 Fed. Reg. 65,768-66,078* (proposed Nov. 23, 1999).

[93] Ergonomics Program,65 Fed. Reg. at 68,847, 68,850-51.

[94] *See* S.J. Res. 6, 107th Cong. (2001) (enacted).

[95] *See, e.g.,* 147 CONG. REC. 2815-16 (statement of Sen. Jeffords) ("[T]he ergonomics rule certainly qualifies as a 'midnight' regulation . . . .").

[96] *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).

[97] 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." [98] 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. [99]

This allegedly flawed and rushed procedure, OSHA's opponents argued, coupled with an overly aggressive posture toward the regulated industries, [100] 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 S100 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." [101] 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." [102] 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." [103] Critics argued that these benefits were overstated as businesses were naturally becoming more ergonomically friendly on their own. [104] 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. [105] But critics cited reports in their favor, [106] 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. [107]

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. [108] When President Bush signed the joint

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[98] *Id.* at 2823 (statement of Sen. Enzi).

[99] *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]").

[100] *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").

[101] 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.").

[102] 147 CONG. REC. 2818 (statement of Sen. Kennedy).

[103] *Id.* at 2827 (statement of Sen. Wellstone).

[104] *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.

[105] *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").

[106] *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").

[107] *See id. at* 3056 (statement of Rep. Boehner) ("OSHA completed its ergonomics regulation without the benefit of the National Academy study.").

[108] *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." [109]

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 [110] 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. [111] For purposes of comparison, in an average year, federal and state OSHA plans collectively issue more than 210,000 violations of all kinds nationwide. [112]

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. [113]

Some Republican lawmakers argued that the OSHA ergonomics standard circumvented congressional oversight because it was finalized in the closing weeks of the Clinton Administration. [114] 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. [115] 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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[109] Presidential Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 37 WEEKLY COMP. PRES. DOC. 477 (Mar. 20, 2001).

[110] *See* Occupational Safety and Health (OSH) Act of 1970 § 5(a)(1), *29 U.S.C. § 654* (2006).

[111] The OSHA website permits users to word-search the text of all general duty violations.*See*OCCUPATIONAL SAFETY & HFALTH ADMIN., DEP'T 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.

[112] *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_20l0.pdf*.

[113] *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.

[114] *See supra* notes 95-99 and accompanying text.

[115] *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. [116] 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. [117] 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), [118] 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. [119]

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. [120] 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

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[116] *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.").

[117] *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).

[118] *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).

[119] *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).

[120] *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. [121]

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. [122] In other words, while Congress may have successfully insulated its own pronouncements from judicial

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[121] *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 *not*a 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*. For a discussion of similar about-faces in statements by members of Congress immediately before and after the veto, see*infra* Part III.B.

[122] *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. [123] 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. [124] In either of these situations, assuming a justiciable case or controversy under Article III, [125] 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. [126] 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. [127] 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.

[123] *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).

[124] *See, e.g.,* Babbitt v. Sweet Home Chapter of Cmtys. 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).

[125] 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).

[126] *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.").

[127] *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).

Robert Johnston

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. [128] 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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[128] 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. [129]

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." [130] 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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[129] 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).

[130] 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." [131] 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." [132] 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; [133] whereas the "atom bomb" and similarly bleak interpretations of the CRA came from Democrats such as Edward Kennedy of Massachusetts. [134] 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. [135]

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[131] ***5 U.S.C. § 801***(b)(2) (2006).

[132] 147 CONG. REC. 2860 (statement of Sen. Feingold).

[133] *Id.* at 2816 (statement of Sen. Jeffords).

[134] *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).

[135] 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/; *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." [136] 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. [137] 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." [138] 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." [139]

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." [140] 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." [141] 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." [142]

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).

[136] Charles Tiefer,*How to Steal a Trillion: The Uses of Laws About lawmaking in 2001,* 17 J.L.&POL. 409, 476 (2001).

[137] 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).

[138] *Id.*

[139] 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)).

[140] Vernon Mogensen,*The Slow Rise and Sudden Fall of OSHA's Ergonomics Standard,* WORKINGUSA, Fall 2003, at 54, 72.

[141] 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).

[142] 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. [143] 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. [144] 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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[143] *See infra* Parts IV.A. 1, IV.A.4.

[144] *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 subsequendy 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. [145] 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." [146] 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. [147] Although there were some complaints about the number or volume of regulations as opposed to merely their efficiency [148] --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. [149] 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). [150] Moreover, the CRA's application only to major rules--a phrase defined in terms of the rule's economic impact [151] --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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[145] *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).

[146] S. REP. No. 104-15, at 5 (1995).

[147] *See* ***5 U.S.C. § 801***(a)(1)(B) (2006); 141 CONG. REC. 9428-29 (1995) (statement of Sen. Domenici).

[148] *See, e.g.,* S. REP. NO. 104-15, at 5 ("Without significant new controls, the volume of regulations will only grow larger.").

[149] ***5 U.S.C. § 801***(a)(1)(B).

[150] 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).

[151] *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. [152] 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, [153] 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. [154] 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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[152] *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)).

[153] *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.

[154] *See* Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bash (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 [155] serves its intended purpose as "guidance to the agencies, the courts, and other interested parties when interpreting the act's terms." [156] 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. [157] 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" [158]). 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, [159] 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." [160] 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. [161] 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" [162] 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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[155] 142 CONG. REC. 8196-8201 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

[156] *Id.* at 8197.

[157] *Id.*

[158] *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."

[159] *See supra* Part III.A.

[160] 142 CONG. REC. 8197 (joint statement of Sens. Nickles, Reid, and Stevens).

[161] *See infra* Part V.

[162] 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." [163] 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." [164] 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." [165] *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. [166] 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." [167] 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." [168] 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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[163] *See id.* at 8199.

[164] 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords).

[165] 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens).

[166] *See, e.g., supra* note 153.

[167] 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

[168] *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, [169] 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. [170] 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." [171]

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. [172] 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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[169] *See infra* Part IV.A.5.

[170] 147 CONG. REC. 3074-75 (2001) (statement of Rep. Sweeney);*see also infra* Part VLB.

[171] *Id.* at 3056 (statement of Rep. Norwood)

[172] *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 [173] 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. [174] 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. [175]

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. [176] Furthermore, there is "no language anywhere [in the CRA that] expressly refers in any manner to a part of any rule under review." [177] 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." [178]

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. [179] 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" [180] --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, [181] 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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[173] *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.").

[174] *See id.* § 1(a).

[175] *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).

[176] *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").

[177] Rosenberg,*supra* note 75, at 1065.

[178] *Id.* at 1066.

[179] *See, e.g.,* 147 CONG. REC. 2843-44 (2001) (statement of Sen. Nickles) (expressing support for a "more cost effective" ergonomics rule).

[180] Rosenberg,*supra* note 75, at 1066.

[181] *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. [182] 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. [183] Where Congress delegates rulemaking authority to an administrative agency, it is inevitable that the delegation will include some ambiguities or gaps. [184] 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." [185] 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." [186] 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." [187] If so, both the court and the agency "must give effect to the unambiguously expressed intent of Congress." [188] 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. [189]

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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[182] *467 U.S. 837(1984).*

[183] *Id. at 866.*

[184] *See* *Morton v. Ruiz, 415 U.S. 199, 231 (1974)* (noting that such a "gap" may be explicit or implicit).

[185] *Chevron, 467 U.S. at 843-44.*

[186] *Id. at 866.*

[187] *Id. at 842.*

[188] *Id. at 842-43.*

[189] *Id. at 843.*

has "directly spoken to the precise question at issue" [190] --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. [191] 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. [192]

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. [193] 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). [194] 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. [195] 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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[190] *Id. at 842.*

[191] *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).

[192] *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").

[193] *Chevron, 467 U.S. at 866.*

[194] *529 U.S. 120(2000).*

[195] *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. [196] 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." [197] 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. [198]

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, [199] 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.* [200] 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. [201] 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. [202] 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." [203] This argument that an administrative agency has exercised legislative power has

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[196] *Id. at 137-39.*

[197] *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.").

[198] *Id. at 167-81* (Breyer, J., dissenting) (arguing for a "literal" interpretation of the FDCA).

[199] 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.

[200] *See supra* note 196 and accompanying text.

[201] *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. REG. 2817 (statement of Sen. Nickles). We argue below that this interpretation may have been incorrect on its face. *See infra* Part VLB.

[202] 147 CONG. REC. 2817 (statement of Sen. Nickles).

[203] *Id.*

constitutional implications. Article I of the Constitution provides that the Senate and House of Representatives have the sole legislative power. [204] 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. [205] 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." [206]

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. [207] 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. [208] 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." [209] 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. [210]

[*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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[204] 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.").

[205] *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).

[206] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[207] *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").

[208] Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case), 448 U.S. 607 (1980).

[209] Id. at 613 (quoting Am. Petroleum Inst. v. OSHA, 581 F.2d 493, 502 (1978)).

[210] *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 [211] 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. [212] 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. [213]

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. [214] 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. [215]

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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[211] 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).*

[212] 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.

[213] *See supra* Part IV.C.2.

[214] *See id.*

[215] *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. [216] With the exception of one aspect of the ergonomics rule, [217] congressional Republicans admitted that OSHA's broad authority did in fact include the power to promulgate the regulation as issued. [218] 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. [219] Second, **[*760]** it seems especially doubtful that Congress would intend to allow modification of an organic statute via an expedited legislative process. [220] Significant changes, such as major changes to a federal agency's

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[216] *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.").

[217] *See supra* note 201 and accompanying text.

[218] *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 . . . .").

[219] *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).***

[220] *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. [221] 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. [222] 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. [223] 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. [224] 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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[221] *See supra* Part I.B.3 (describing the CRA procedure).

[222] 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.

[223] *See infra* Part VII.

[224] 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 [225] --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" then 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." [226] 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. [227]

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[225] *See supra* Part I.B.2.

[226] 142 CONG. REC. 8197 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

[227] 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. [228] 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." [229]

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 reproposed 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 ("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.

[228] *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.").

[229] *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. [230] 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. [231] 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" [232] 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 [233] of an entire industry. [234]

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

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[230] 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).

[231] 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. DEP'T 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).

[232] *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case), 448 U.S. 607, 643 n.48 (1980).*

[233] *See* *Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case), 452 U.S. 490, 513 (1981).*

[234] 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 [235] 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, [236] 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 [237] 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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[235] *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.'").

[236] 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).

[237] *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. [238] 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. [239] The requirement--not found in the OSH Act or in its interpretations in the *Benzene Case* or *Cotton Dust Case,* [240] 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 [241] 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 [242] 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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[238] 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.").

[239] 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 PoliticalEnvironment,* 46 PROF. SAFETY, Feb. 2001, at 14, 16, *available at*http://www.allbusiness.com/government/government-bodies-offices-legislative/l 1443343-1.html.

[240] *Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case), 452 U.S. 490, 513 (1981).*

[241] *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).

[242] 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. [243] 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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[243] *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. [244] 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. [245] 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; [246] (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," [247] 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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[244] 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).

[245] 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.

[246] 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.

[247] Ergonomics Program,65 Fed. Reg. at 68,854 (defining work-related).

the common MSDs is uniquely caused by work exposures." [248] 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 [249] 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." [250] 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," [251] various members argued that OSHA "exceeded [its] constitutional authority" by legislating a new workers' compensation system rather than regulating. [252] 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." [253] 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,* [254] 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. [255] 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)]." [256]

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[248] 147 CONG. REC. 2838 (statement of Sen. Bond).

[249] Ergonomics Program,65 Fed. Reg. at 68,851.

[250] 147 CONG. REC. 2824 (statement of Sen. Enzi)

[251] OSH Act § 4(b)(4),*29 U.S.C. § 653* (2006).

[252] 147 CONG. REC. 2817 (2001) (statement of Sen. Nickles);*see also supra* Part II.A.

[253] 147 CONG. REC. 2818 (2001) (statement of Sen. Kennedy).

[254] *647 F.2d 1189 (D.C. Cir. 1980).*

[255] *Id. at 1235-36.*

[256] *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! [257] 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. [258] 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 [259] --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. [260] 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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[257] *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 . . . . ").

[258] *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).

[259] *See* 147 CONG. REC. 2825-26 (2001) (statement of Sen. Enzi).

[260] *See supra* note 228 and accompanying text.

issue, [261] 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. [262] 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," [263] 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 [264] 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. [265] 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." [266] 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. [267] 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. [268] Here we suggest several more substantive changes

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[261] *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").

[262] *See supra* note 100.

[263] 147 CONG. REC. 2832 (statement of Sen. Hutchinson).

[264] *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).

[265] *See, e.g.,* 147 CONG. REC. 2823 (statement of Sen. Enzi).

[266] *Id.* at 2821.

[267] *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).

[268] *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. [269]

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." [270] 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, [271] 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).

[269] *See supra* note 268.

[270] 142 CONG. REC. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

[271] 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 [272] 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 [273] 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 . . . . " [274] 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!'" [275] 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." [276] 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 silendy 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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[272] 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.

[273] *See* ***5 U.S.C. § 802*** (2006) (requiring that a joint resolution of disapproval read:

[274] 142 CONG. REG. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

[275] Daniel Cohen & Peter L. Strauss,*Congressional Review of Agency Regulations,* 49 ADMIN. L. REV. 95, 105(1997).

[276] *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. [277] 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 [278] 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. [279]

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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[277] 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.

[278] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . ").

[279] 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.

End of Document

From:	Keable, Edward
To:	Robert Johnston
Cc:	Kevin Haugrud; Harris, Kaprice; Timothy Murphy
Subject:	Fwd: Follow up information on the Congressional Review Act
Date:	Thursday, February 9, 2017 5:56:39 PM
Attachments:	United States v. S. Ind. Gas & Elec. Co. 2002 U.S. Dis (1).pdf ARTICLE A COST-BENEFIT INTERPRETATION OF THE SUBSTANTI (2).pdf

+ Jack

Rob,

Thanks for this additional information.

Ed

---------- Forwarded message ----------
From: **Johnston, Robert** <robert.johnston@sol.doi.gov>
Date: Thu, Feb 9, 2017 at 4:48 PM
Subject: Follow up information on the Congressional Review Act
To: Daniel Jorjani <daniel_jorjani@ios.doi.gov>
Cc: "Keable, Edward" <edward.keable@sol.doi.gov>, "Harris, Kaprice" <kaprice.harris@sol.doi.gov>, "Murphy, Timothy" <timothy.murphy@sol.doi.gov>

Dan,

It was a pleasure meeting you this morning. A few quick follow-up items from our discussion on the Congressional Review Act:

- Attached please find the (b) (5) [redacted]
- Also attached please find the law review article we discussed: Adam M. Finkel and Jason W. Sullivan, “A Cost-Benefit Interpretation of the Substantially Similar Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?”, *Administrative Law Review*, vol. 63, no. 4 (Fall 2011).
- Below is the status of the three CRA Joint Resolutions of Disapproval of DOI Rules:
    - H.J. Res. 38 -- Stream Protection Rule -- Presented to the President on February 6.

H.J. Res. 44 -- BLM Planning 2.0 -- Passed House on February 7.
    - H.J. Res. 36 -- Waste Prevention (Venting & Flaring) -- Passed House on February 3.
- (b) (5) [redacted]
- You requested an estimated end date for the Congressional review period of regulations going back to June 13, 2016: I'm working with OCL on this task, which is complicated by the fact that the 60 day calculation is of *continuous* (i.e. without more than a 3-day break) session days, but starts after the 15th (non-continuous) session day (which was January 30th). I'll let you know when we come up with an estimate.

Please let me know if you have any additional questions.

Thank you,
Rob

--
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--
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User Name: Robert Johnston
Date and Time: Thursday, February 9, 2017 11:45:00 AM EST
Job Number: 43180621

Document (1)

1. *United States v. S. Ind. Gas & Elec. Co., 2002 U.S. Dist. LEXIS 20936*
   Client/Matter: -None-

United States v. S. Ind. Gas & Elec. Co.

United States District Court for the Southern District of Indiana, Indianapolis Division

October 24, 2002, Decided

IP99-1692-C-M/ S

Reporter
2002 U.S. Dist. LEXIS 20936 *; 55 ERC (BNA) 1597

UNITED STATES OF AMERICA, Plaintiff, vs. SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, Defendant.

Disposition: [*1] Defendant's Motion for Summary Judgment regarding the Congressional Review of Agency Rulemaking Act DENIED.

Core Terms

judicial review, modifications, routine maintenance, sources, omission, declarations, exemption, air, summary judgment motion, new source, requirements, new rule, determinations, applicability, pollution, enforcement action, emissions, agency's, provides, subject to judicial review, congressional review, agency rulemaking, summary judgment, promulgated, regulations, legislative history, nonmoving party, physical change, Electric, genuine

Case Summary

Procedural Posture

In plaintiff government's enforcement action alleging that defendant utility company violated the Clean Air Act (CAA), *42 U.S.C.S. § 7401 et seq.*, the utility company moved for summary judgment on whether the government violated the Congressional Review of Agency Rule Making Act (CRA), *5 U.S.C.S. § 801 et seq.*, by establishing a new agency rule without submitting a report to Congress as required by the CRA.

Overview
The government sued the utility company alleging that it had made modifications at three electrical generating units that were subject to but failed the New Source Review (NSR) requirements under the CAA. The utility company claimed that its actions were exempt as routine maintenance and not modifications. The utility company alleged that the Environmental Protection Agency (EPA) had made a major change in its interpretation of how NSR rules applied to existing sources of pollution, and because it had not submitted a report to the Congress, the government violated the CRA. The court determined that the EPA had not changed its interpretation of the law and denied the utility company summary judgment. The CRA only applied to new rules promulgated after 1996, and the court found that both before and after 1996, the EPA applied a fact-intensive, common-sense approach to determine whether an action qualified for the routine maintenance exception to the NSR rules, taking into account the nature, extent, purpose, and cost of the action.

Outcome
The utility company's motion for summary judgment as to whether the government violated the CRA was denied.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] As stated by the United States Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Robert Johnston

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] Motions for summary judgment are governed by *Fed. R. Civ. P. 56(c)*, which provides in part: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. A genuine issue of material fact exists whenever there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which she relies. When the moving party has met the standard of *Fed. R. Civ. P. 56*, summary judgment is mandatory.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN3[] In evaluating a motion for summary judgment, the court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. If the nonmoving party fails to establish the existence of an element essential to her case, one on which she would bear the burden of proof at trial, summary judgment must be granted to the moving party.

Environmental Law > Air Quality > General Overview

Environmental Law > ... > Emission Standards > Stationary Emission Sources > New Stationary Emission Sources

Environmental Law > Air Quality > Prevention of Significant Deterioration

Environmental Law > Air Quality > State Implementation Plans

HN4[] When Congress enacted the Clean Air Act (CAA), *42 U.S.C.S. § 7401 et seq.*, in 1970, and subsequently amended it in 1977, it determined that existing pollution sources would be "grandfathered." In other words, existing sources would not be required to immediately install technology to comply with the CAA limitations on pollution emissions. However, Congress did not grant existing sources permanent immunity from the restrictions of the CAA; subsequent "modifications" of existing sources would be required to comply with the New Source Review programs. *42 U.S.C.S. § 7411(a)(4)*. The CAA defines modification as "any physical change" that increases total emissions. However, the Environmental Protection Agency regulations exempt some activities from the broader definition of modification. The exemption relevant to the present case is the routine maintenance exemption. The regulations provide in part: The following shall not, by themselves, be considered modifications under this part: (1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category. *40 C.F.R. § 52.21(b)(2)(iii)*.

Administrative Law > Agency Rulemaking > General Overview

Environmental Law > Air Quality > General Overview

Environmental Law > ... > Emission Standards > Stationary Emission Sources > New Stationary Emission Sources

Environmental Law > Air Quality > Prevention of Significant Deterioration

HN5[] When the Clean Air Act (CAA), *42 U.S.C.S. § 7401 et seq.*, was enacted in 1970, it included the New Source Performance Standards program (NSPS), which governs emission of air pollutants from new sources. The Prevention of Significant Deterioration program (PSD) was added in the 1977 Amendments to the CAA to ensure that relatively unpolluted areas would not allow a decline of air quality to the minimum level permitted by the CAA. The NSPS and the PSD are collectively referred to as New Source Review (NSR). The NSR programs apply not only to new sources of air emissions, but also to modifications of existing sources.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN6[] The Contract with America Advancement Act (CAAA) requires that before any "rule" promulgated by a federal agency can take effect, a copy of the rule, along with an accompanying report, must be submitted to Congress and the Comptroller General. *5 U.S.C.S. §§ 801(a)(1)(A)*, *801(2)(A)*. The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budgets (OMB) is required to make a finding about whether or not a rule is "major," basing the determination on a number of factors measuring the rule's effect on the economy. *5 U.S.C.S. § 804(2)*. If the rule is deemed to be "major," then the Comptroller General is required to submit a report about it to committees from both the House of Representatives and the Senate. *5 U.S.C.S. § 801(2)(A)*. Congress can then issue a "joint resolution" disapproving the proposed rule. *5 U.S.C.S. § 802*. Rules that are not major shall take effect as otherwise provided by law after submission to Congress. *5 U.S.C.S. § 801(a)(1)(4)*.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN7[] The Contract with America Advancement Act adopts the Administrative Procedure Act's (APA) definition of "rule," with certain limited exceptions. *5 U.S.C.S. § 804*. *5 U.S.C.S. § 551(4)* of the APA provides: "Rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription of or the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing. *5 U.S.C.S. § 551(4)*.

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN8[] The Contract with America Advancement Act contains one, brief provision on judicial review. *5 U.S.C.S. § 805* provides: No determination, finding, action, or omission under this chapter shall be subject to judicial review.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

HN9[] The Congressional Review of Agency Rule Making Act, *5 U.S.C.S. § 801 et seq.*, provides: No determination, finding, action, or omission under this chapter shall be subject to judicial review. *5 U.S.C.S. § 805*.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Formal Rulemaking

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN10[] The purpose of the Congressional Review of

Agency Rule Making Act (CRA), 5 U.S.C.S. § 801 et seq., is to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Environmental Law > Air Quality > General Overview

Environmental Law > Air Quality > Enforcement > General Overview

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN11[] Under the Clean Air Act, 42 U.S.C.S. § 7401 et seq., agency actions that could have been reviewed in courts of appeal shall not be subject to judicial review in civil or criminal proceedings for enforcement. 42 U.S.C.S. § 7607(b)(2).

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Environmental Law > Air Quality > General Overview

Environmental Law > Air Quality > Enforcement > Administrative Proceedings

HN12[] 42 U.S.C.S. § 7607(b) deals with judicial review of various air quality rules and standards that are formally promulgated, published, or otherwise officially noticed by the Administrator.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Formal Rulemaking

HN13[] The Congressional Review of Agency Rule Making Act (CRA), 5 U.S.C.S. § 801 et seq., only applies to new policies or rules promulgated after its March 1996 effective date; thus, the CRA is only applicable if a new Environmental Protection Agency rule came into effect after that date.

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN14[] The Daubert reliability inquiry is a flexible one. The objective of a district court's "gatekeeping" function is to ensure the reliability and relevancy of expert testimony.

Governments > Legislation > Interpretation

HN15[] The meaning of federal regulations is not a question of fact, to be resolved by the jury after a battle of experts. It is a question of law, to be resolved by the court.

Environmental Law > Air Quality > General Overview

Environmental Law > ... > Emission Standards > Stationary Emission Sources > New Stationary Emission Sources

HN16[] It is clear from the language of the Clean Air Act (CAA), 42 U.S.C.S. § 7401 et seq., that it was, in fact, meant to treat existing sources differently from new sources. However, the plain language of the CAA does not give the utility industry a permanent exemption from the New Source Review (NSR) rules. The NSR requirements apply not only to new sources constructed after the enactment of the CAA, but also to modifications of sources existing at the time of the enactment. Indeed, 42 U.S.C.S. § 7411(a)(2) provides that NSR applies to any stationary source, the

construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source. Congress defines modification as any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source of which results in the emission of any air pollutant not previously emitted. *42 U.S.C.S. § 7411(a)(4)*. The plain language of the statute makes the NSR rules applicable to existing sources, which include utility stations, if they are modified. If the CAA was never meant to apply to existing sources of pollution, Congress would not have included modifications of existing sources within the ambit of the NSR coverage.

Counsel: For United States of America, PLAINTIFF: Steven D Ellis, U S Dept of Justice, Washington, DC USA.

For United States of America, PLAINTIFF: Thomas E Kieper, United States Attorney's Office, Indianapolis, IN USA.

For Southern Indiana Gas, DEFENDANT: Angila M Retherford, Vectren Corporation, Evansville, IN USA.

For Southern Indiana Gas, DEFENDANT: Kevin A Gaynor, Vison & Elkins L L P, Washington, DC USA.

For Southern Indiana Gas, DEFENDANT: John R Maley, Barnes & Thornburg, Indianapolis, IN USA.

Judges: LARRY J. MCKINNEY, CHIEF JUDGE, United States District Court, Southern District of Indiana.

Opinion by: LARRY J. MCKINNEY

Opinion

ORDER ON MOTION FOR SUMMARY JUDGMENT ON CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

This matter is before the Court on Defendant Southern Indiana Gas and Electric Company's ("SIGECO") Motion for Summary Judgment on the United States' ("the Government") claims that it violated the Clean Air Act ("CAA"), *42 U.S.C. § 7401, et seq.* The issue presented in SIGECO's motion is whether or not the Government violated the **[*2]** Congressional Review of Agency Rule Making Act, *5 U.S.C. § 801, et seq.* ("CRA"), by establishing a new agency rule without submitting a report to Congress about the rule as required by the CRA. The parties have fully briefed their arguments, and the motion is now ripe for ruling.

I. FACTUAL BACKGROUND

A brief summary of the facts is necessary to give background for the current motion. In support of its position that the Environmental Protection Agency ("EPA") has recently changed its policy regarding the applicability of the CAA's "New Source Review" ("NSR") rules to existing utility sources, SIGECO offers declarations made by former government officials and consultants. The following former highly-placed government officials have made declarations: James Schlesinger, former Secretary of Energy; Walter Barber, former director of EPA's Office of Air Quality Planning and Standards; Joseph Cannon, former EPA Administrator for the Office of Air and Radiation; and Kenneth Schweers, a former consultant at ICF Kaiser, a firm EPA used for technical support during the development of the Title IV program. [1] The declarants testify about what the NSR rules **[*3]** were intended to cover, and how the EPA interpreted the NSR provisions after they were initially enacted. SIGECO provides these declarations as evidence that the EPA had a different policy regarding the NSR rules prior to this enforcement action, and maintains that the EPA has recently changed its NSR policies, which should have been reported to Congress pursuant to the CRA. Because the Court ultimately agrees with the Government that the declarations are not relevant or admissible, it is not necessary to elaborate further on the details of the former officials' recollections.

II. STANDARDS

A. SUMMARY JUDGMENT

HN1[] As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *See Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. **[*4]** *See also United Ass'n of Black Landscapers v. City of Milwaukee, 916 F.2d 1261,*

[1] See SIGECO's Exhibits in Support of Motion for Summary Judgment Regarding the Congressional Review of Agency Rulemaking Act.

1267-68 (7th Cir. 1990), cert. denied, 499 U.S. 923, 111 S. Ct. 1317, 113 L. Ed. 2d 250 (1991). HN2[] Motions for summary judgment are governed by Rule 56(c)) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). **[*5]** The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 997 (7th Cir. 1996), cert. denied, 520 U.S. 1116, 137 L. Ed. 2d 328, 117 S. Ct. 1246 (1997). It is not the duty of the Court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which she relies. See Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. See Celotex, 477 U.S. at 322-23; Shields Enters., Inc. v. First Chi. Corp., 975 F.2d 1290, 1294 (7th Cir. 1992).

HN3[] In evaluating a motion for summary judgment, the Court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. **[*6]** See Estate of Cole v. Fromm, 94 F.3d 254, 257 (7th Cir. 1996), cert. denied, 519 U.S. 1109, 136 L. Ed. 2d 834, 117 S. Ct. 945 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. See Anderson, 477 U.S. at 248; JPM Inc. v. John Deere Indus. Equip. Co., 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. See Clifton v. Schafer, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to [her] case, one on which [she] would bear the burden of proof at trial, summary judgment must be granted to the moving party." Ortiz v. John O. Butler Co., 94 F.3d 1121, 1124 (7th Cir. 1996), cert. denied, 519 U.S. 1115, 136 L. Ed. 2d 843, 117 S. Ct. 957 (1997).

B. CAA'S NEW SOURCE REVIEW RULES

[2]

[*7] HN4[] When Congress enacted the Clean Air Act in 1970, and subsequently amended it in 1977, it determined that existing pollution sources would be "grandfathered." In other words, existing sources would not be required to immediately install technology to comply with the CAA limitations on pollution emissions. However, Congress did not grant existing sources permanent immunity from the restrictions of the CAA; subsequent "modifications" of existing sources would be required to comply with the New Source Review programs. 42 U.S.C. § 7411(a)(4). The CAA defines modification as "any physical change" that increases total emissions. *Id.* However, the EPA regulations exempt some activities from the broader definition of modification. The exemption relevant to the present case is the routine maintenance exemption. The regulations provide in relevant part:

> The following shall not, by themselves, be considered modifications under this part:
> (1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category …

40 C.F.R. § 52.21(b)(2)(iii).

In this enforcement action, the Government **[*8]** alleges that SIGECO made CAA "modifications" during the 1990s at three electrical generating units at Culley Station. SIGECO claims its actions were exempt as routine maintenance, and consequently, not modifications subject to the NSR requirements. Thus, a central issue in this case is the scope of the routine maintenance exception.

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[2] Although the Government alleges violations of the federally approved Indiana State Implementation Plan in addition to the PSD and NSPS violations, those claims are not relevant to this motion.

HN5[] When the CAA was enacted in 1970, it included the New Source Performance Standards program ("NSPS"), which governs emission of air pollutants from new sources. The Prevention of Significant Deterioration program ("PSD") was added in the 1977 Amendments to the CAA to ensure that relatively unpolluted areas, like Warrick County, would not allow a decline of air quality to the minimum level permitted by the CAA. The NSPS and the PSD are collectively referred to as New Source Review. As stated earlier, the NSR programs apply not only to new sources of air emissions, but also to modifications of existing sources. In this motion, SIGECO argues that the EPA has made a major change in its interpretation of how NSR rules apply to existing sources of pollution.

C. CONGRESSIONAL REVIEW OF AGENCY RULEMAKING ACT

The CRA was enacted on March 29, 1996, as part **[*9]** of the Contract with America Advancement Act ("CAAA") to provide a legislative check on administrative agency actions. HN6[] The CAAA requires that before any "rule" promulgated by a federal agency can take effect, a copy of the rule, along with an accompanying report, must be submitted to Congress and the Comptroller General. 5 U.S.C. § 801(a)(1)(A); 5 U.S.C. § 801(a)(2)(A). The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budgets ("OMB") is required to make a finding about whether or not a rule is "major," basing the determination on a number of factors measuring the rule's effect on the economy. *Id.* § 804(2). If the rule is deemed to be "major," then the Comptroller General is required to submit a report about it to committees from both the House of Representatives and the Senate. *Id.* § 801(a)(2)(A). Congress can then issue a "joint resolution" disapproving the proposed rule. *Id.* § 802. Rules that are not major "shall take effect as otherwise provided by law after submission to Congress." *Id.* § 801(a)(3)(C)(4).

HN7[] The CAAA adopts the Administrative Procedure Act's ("APA") definition **[*10]** of "rule," with certain limited exceptions. *Id.* § 804. ("The term 'rule' has the meaning given such term in section 551 …"). Section 551(4) of the APA provides:

> "Rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription of or the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing on any of the foregoing …

5 U.S.C. § 551(4).

HN8[] The CAAA contains one, brief provision on judicial review. § 805 provides: "No determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805.

III. DISCUSSION

A. JUDICIAL REVIEW OF EPA'S FAILURE TO SUBMIT RULE TO CONGRESS UNDER 5 U.S.C. § 805

Before responding to the substance of SIGECO's motion, the Government argues **[*11]** that this Court lacks jurisdiction to review any actions or omissions by the EPA for the purpose of assessing compliance with the CRA. HN9[] The CRA provides: "No determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. In the Government's view, this language precludes any court not only from reviewing Congressional findings about an agency rule after it was submitted pursuant to the CRA, but also prevents judicial scrutiny of an agency's failure to report a rule to Congress in the first place. SIGECO, on the other hand, asserts that Congress intended a narrower construction of 5 U.S.C. § 805. According to SIGECO, the judicial review provision of the CRA bars a court's review of Congressional findings required under the CRA, but does not preclude a court from determining whether an agency rule is in effect that should have been reported to Congress pursuant to the CRA.

The Government points the Court to one district court case that has considered this precise issue. In Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd., 1998 U.S. Dist. LEXIS 13470, 1998 WL 842181, (W.D. Tex.), *aff'd,* 201 F.3d 551 (5th Cir. 2000), **[*12]** the plaintiffs argued that the defendant violated the CRA by failing to submit a report of a new rule to Congress. *See id.* at *8. The district court, however, concluded that the statute barred judicial review of the defendant's alleged "omission" to submit a report pursuant to the CRA. *See id.* ("The plaintiffs argue § 805 only forecloses review of any 'determination, finding, action, or omission' by Congress. But the statute provides for no judicial review of any 'determination, finding, action, or omission under

this chapter,' not 'by Congress under this chapter.' The Court must follow the plain English. Apparently, Congress seeks to enforce the [CRA] without the able assistance of the courts."). *Id.* n.15.

The Court's own research revealed only one other case that has considered this issue, which was decided after the parties submitted their briefs on the current motion. The District Court for the Southern District of Ohio, in a recent EPA enforcement action similar to the instant action, also concluded that the plain language of the statute left the court without jurisdiction to review an agency's purported failure to report a new rule to Congress. Although the court **[*13]** cited *Texas Savings* approvingly, the court also based its decision to strike the defendant's CRA claim on its doubt that the enforcement action constituted rulemaking covered by the CRA. *See* *United States v. Am. Elec. Power Serv. Corp., 218 F. Supp. 2d 931, 2002 WL 1900067*, at *14 (S.D. Ohio).

This Court respectfully disagrees with *Texas Savings* and *American Electric* and finds the language of the CRA judicial review provision to be ambiguous. As this Court reads *5 U.S.C. § 805*, ("No determination, finding, action, or omission under this chapter shall be subject to judicial review"), it is susceptible to two plausible meanings: (1) as *Texas Savings* and *American Electric* concluded, Congress did not intend for courts to have any judicial review of an agency's compliance with the CRA; or (2) Congress only intended to preclude judicial review of Congress' own determinations, findings, actions, or omissions made under the CRA after a rule has been submitted to it for review. Under the first interpretation, which *Texas Savings* and *American Electric* adopted, agencies could evade the strictures of the CRA by simply not reporting new rules, and **[*14]** courts would be barred from reviewing their lack of compliance. This result would be at odds with ***HN10***[⬆] the purpose of the CRA, which was to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism, and to read it to preclude a court from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual.

Moreover, the language of the statute precludes judicial review of a "determination, finding, action, or omission under this chapter …" Agencies do not make findings and determinations under this chapter; Congress, on the other hand, is required to make a number of findings and determinations under the CRA. Therefore, it is logical to interpret the judicial preclusion language as barring review of the determinations, findings, actions, or omissions made by Congress after a rule is submitted by an agency, but not extending the bar of judicial scrutiny to questions of whether or not an agency rule is in effect that should have been reported to Congress in the first place.

Because there is a "genuine ambiguity in the statute," *Bd. of Trade of the City of Chi. v. Sec. and Exch. Comm'n, 187 F.3d 713, 720 (7th Cir. 1999)*, **[*15]** the Court will consider the legislative record. [3] The legislative history of the CRA confirms the limited reach of the preclusion of judicial review. The sponsers of the CRA commented:

> *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 Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures under this chapter.

Thus, the legislative record buttresses the "limited scope" interpretation of the CRA's judicial review provision; the comments focus of the preclusion of review of determinations made by the OMB and Congress under the CRA, not whether or not an agency's decision not to submit a rule in the first place is reviewable. The sponsers of the CRA also explained, "the limitation on judicial review in no way prohibits a court from determining whether a rule is in effect." No other mention of the judicial review provision is made in the legislative history. **[*16]**

The Government also contends that the plain meaning of *5 U.S.C. § 805* is particularly evident when compared to the judicial review provision from the Regulatory

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[3] The Court acknowledges that the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome. However, Representative Hyde explicitly stated that the joint statement "will serve as the equivalent of a statement of managers." 142 Cong. Rec.H2987. 3000 (daily ed. Mar. 28, 1996). In any event, this Court reached its conclusion about the limited scope of the judicial review provision of the CRA based on the text of the statute and overall purpose of the Act. The legislative history only serves to further reinforce the Court's conclusion.

Flexibility Act ("RFA"). Prior to its amendment in 1996 as part of the CAAA, section 611(a)-(b) of the RFA provided:

> (a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions **[*17]** of this chapter to any action of the agency shall not be subject to judicial review.
> (b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review.

When the CAAA was enacted in 1996, it included both the CRA and an amendment to 5 U.S.C. § 611 of the RFA. Reversing the previous version quoted above that precluded judicial review, the amendment to the RFA specifically provided for judicial review of agency compliance with the RFA.

According to the Government, the RFA amendment to provide for judicial review shows that Congress knew how to provide for judicial review of agency actions if that is what it intended. The Court draws the opposite conclusion by viewing the language of the RFA amendment together with the provision it replaced. The prior version of § 611(a), quoted above, is the precise issue this Court is deciding with regard to the CRA. If Congress wanted to bar judicial review of an agency's determination concerning the applicability of any of the provisions of the CRA, it would have clearly **[*18]** done so, as it had with the prior version of the RFA. Instead, Congress limited its judicial review preclusion by referring to determinations, findings, actions and omissions made under the CRA. Immediately preceding § 805, Congress enumerated a number of determinations, findings, and actions that the OMB and Congressional committees would be required to make under the CRA, and this Court concludes that Congress was referring back to those duties when it enacted the CRA judicial review provision. Thus, this Court concludes that it has jurisdiction to review whether an agency rule is in effect that should have been reported to Congress pursuant to the CRA.

B. EFFECT OF CAA'S JUDICIAL REVIEW PROVISION

The Government also argues that if the Court accepts SIGECO's argument that the EPA's interpretation was a new rule, this Court does not have jurisdiction over this motion because the CAA expressly reserves jurisdiction over final agency action to Courts of Appeal. 42 U.S.C. § 7607(b). ***HN11***[↑] Under the CAA, agency actions that could have been reviewed in Courts of Appeal "shall not be subject to judicial review in civil or criminal proceedings for enforcement. **[*19]** " 42 U.S.C. § 7607(b)(2).

SIGECO responds that because it could not have obtained prior judicial review under § 7607(b)(1), it is not barred from alleging improper agency rulemaking now. The Court agrees with SIGECO. In this motion, SIGECO alleges that on November 3, 1999, the date of the filing of this enforcement action, a major shift in EPA policy occurred that constituted improper rulemaking. To support its contention that the EPA has advanced a new policy, SIGECO cites an EPA expert report prepared for this litigation, and an applicability determination letter sent to another utility company by the EPA after the filing date of this enforcement action. SIGECO could not have challenged these in the Seventh Circuit. To the extent that these documents constitute a new EPA law, the position was never officially promulgated by the Administrator, nor was it published in the Federal Register, and the Court concludes that they do not constitute final agency action under section 7607 of Title 42. *See* United States v. Zimmer Paper Prod., Inc., 733 F. Supp. 1265, 1269-70 (S.D. Ind. 1989) ***HN12***[↑] ("[Section 7607(b)] deals with judicial review of various **[*20]** air quality rules and standards that are formally promulgated, published, or otherwise officially noticed by the Administrator.").

C. IS EPA'S INTERPRETATION A NEW RULE PROMULGATED AFTER MARCH 1996?

Because the Court has determined it has jurisdiction to consider this alleged CRA violation, it must decide if the EPA has promulgated a new rule or policy as defined by the CRA. [4] However, ***HN13***[↑] the CRA only applies to new policies or rules promulgated after its March 1996 effective date; thus, the CRA is only applicable if a new EPA rule came into effect after that date. In this motion, SIGECO asserts that EPA's "new" interpretation of the routine maintenance exemption, illustrated by the filing of this action in November 1999, is a new rule or policy promulgated after March 1996 that should have been reported to Congress. According to SIGECO, EPA's new view of this exemption would impose NSR requirements that "would require significant and expensive pollution control retrofits to virtually all coal-

[4] The CRA incorporates the APA's definition of rule with some limited exceptions.

fired generating units." SIGECO Memo in Support of Motion for Summary Judgment on CRA at 11. The Government claims that the EPA has never changed its interpretation of the routine maintenance **[*21]** exception and, therefore, was under no duty to report a new rule or policy under the CRA.

1. EPA's Pre-1996 Interpretation of Routine Maintenance and NSR

SIGECO offers the testimony of four highly-placed government officials and consultants to establish EPA's long-standing policy with respect to the applicability of NSR to existing sources. The Government contends that these declarations are inadmissible for a number of reasons, and claims that they do not assist the Court in ruling on the motion. The Court agrees with the Government, and excludes the testimony by these four experts under *Rule 702 of the Federal Rules of Evidence.*

As the Supreme Court noted in *Kumho Tire Co., Ltd. v. Carmichael,* ***HN14***[⬆] the *Daubert* reliability inquiry is "a flexible one." *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* (quoting *Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*). **[*22]** The objective of a district court's "gatekeeping" function "is to ensure the reliability and relevancy of expert testimony." *Kumho Tire, 526 U.S. at 152*. This is a case where the *Daubert* factors are not particularly helpful to the Court in determining the admissibility of these experience-based experts. *See id. at 150*. However, the Court still must perform its "gatekeeping" function, and will determine whether the declarations are relevant and reliable based on the nature of the issue before the Court. *See id.*

The bulk of the testimony offered by these experts is not relevant to the Court's consideration of this motion. They explain the political and policy background that existed when Congress initially passed the Clean Air Act, and the conditions and compromises that surrounded it. *See generally* Dec. of James Schlesinger. They also assert that they never heard about the types of NSR issues raised in this enforcement action while they worked with or for the EPA, and are surprised by the current enforcement action. *See, e.g.,* Cannon Dec. at 8. However, none of this information establishes what the law was with respect to the NSR rules, **[*23]** and does not aid this Court in determining the EPA's pre-1996 interpretation of the routine maintenance exception. Many portions of the declarations are akin to legislative history, and the Court will not resort to legislative history when it has the benefit of unambiguous statutory language and case law that establish the law with respect to the NSR rules. The Court is hesitant to consider the politics and compromises that went into a statute, especially when the testimony comes ten or twenty years after the fact from paid declarants.

Moreover, the declarations are essentially being offered to explain the law to the Court. SIGECO contests this, but the declarants clearly opine on the applicability of the NSR rules to existing sources, and this is a question of legal interpretation of the CAA and its accompanying regulations. As the Seventh Circuit held in *Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898*, (7th Cir. 1994), ***HN15***[⬆] "the meaning of federal regulations is not a question of fact, to be resolved by the jury after a battle of experts. It is a question of law, to be resolved by the court." *Bammerlin, 30 F.3d at 900-01* (citing *Harbor Ins. Co. v. Cont'l Bank, 922 F.2d 357, 366 (7th Cir.1990)*; **[*24]** *Specht v. Jensen, 853 F.2d 805 (10th Cir.1988)* (en banc); *United States v. Baskes, 649 F.2d 471, 478-79 (7th Cir.1980)*. But *cf. United States v. Bilzerian, 926 F.2d 1285, 1294-95 (2nd Cir.1991)*. Although there may be instances when former government employees' testimony will assist a court in determining the scope of a regulation, this is not one of those instances, and the Court will rely instead upon the statutory and regulatory language of the CAA, and the Seventh Circuit's decision in *Wis. Elec. Power Co. v. Reilly, 893 F.2d 901*, (7th Cir. 1990) ("WEPCO").

HN16[⬆] It is clear from the language of the CAA that it was, in fact, meant to treat existing sources differently from new sources. However, the plain language of the CAA did not give the utility industry a permanent exemption from the NSR rules. The NSR requirements apply not only to new sources constructed after the enactment of the CAA, but also to modifications of sources existing at the time of the enactment. Indeed, *section 7411(a)(2)* provided that NSR would apply to:

> any stationary source, the construction *or modification* of which is commenced after **[*25]** the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

42 U.S.C. § 7411(a)(2) (emphasis added). Congress then defined modification as:

> any physical change in, or change in the method of operation of, a stationary source which increases

> the amount of any air pollutant emitted by such source of which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4). The plain language of the statute makes the NSR rules applicable to existing sources, which include utility stations like Culley Station, if they are modified. If the CAA was never meant to apply to existing sources of pollution, Congress would not have included modifications of existing sources within the ambit of the NSR coverage.

In this motion and other pending motions, the parties contest vigorously how to interpret the Seventh Circuit's decision in WEPCO. The Court will discuss WEPCO in more detail in subsequent motions. However, for purposes of this motion, it is relevant to note a point in WEPCO about which **[*26]** both parties agree -- the Seventh Circuit clearly applied the EPA's fact-intensive test, considering the nature, extent, cost, and frequency of an action, to determine if a modification fit the contours of the routine maintenance exemption. Moreover, WEPCO provides a pre-1996 example of the EPA enforcing NSR requirements on an existing utility source for proposed modifications.

Summary

In sum, the statutory language makes it clear that the NSR requirements apply not only to new sources of pollution, but to existing sources upon modification. The routine maintenance exception exempts certain actions from the CAA definition of modification, effectively shielding those actions from the NSR requirements. The EPA and Seventh Circuit have applied a fact-intensive, common-sense approach to determine whether an action qualifies for the routine maintenance exception, taking into account the nature, extent, purpose, and cost of the action.

2. EPA's Post-1996 Interpretation of Routine Maintenance and NSR

SIGECO suggests that an expert report prepared for this litigation by an EPA expert witness, Alan Michael Hekking ("Hekking Report"), and an NSR applicability letter written **[*27]** by an EPA office to Detroit Edison ("Detroit Edison letter") in 2000 illustrate EPA's radical change in policy. Gov't Exs. 75, 4. The Government responds that it has never changed its interpretation of the routine maintenance exception over the years, and to the extent the Hekking Report evidences a departure from their policies, his views as an engineering expert are not necessarily the legal views of the EPA. Moreover, the Government asserts that the Detroit Edison letter is consistent with their long-held interpretation of the routine maintenance exemption -- an interpretation that was validated by the Seventh Circuit in WEPCO.

The Hekking Report is a technical, factual analysis of the challenged projects at Culley Station by an engineer hired by the Government. Gov't Ex. 75. It is not appropriate or necessary for the Court to analyze every aspect of the Hekking Report and determine if it agrees with its conclusions. The current motion only requires the Court to decide if it represents a shift in policy that constitutes a new rule for purposes of the CRA. The Hekking Report generally applies the same EPA test used by the EPA in WEPCO, considering the cost, frequency, nature and **[*28]** extent of the modifications to arrive at a finding of whether or not they qualify for the routine maintenance exception. To the extent that there are any differences between the Hekking Report and the EPA's pre-1996 interpretation of the NSR, he is a private citizen hired by the Government to prepare a report for litigation, and his report cannot be considered a new EPA rule.

The Detroit Edison letter was the EPA response to a request by Detroit Edison for an NSR applicability determination regarding proposed replacement projects at the company's power plant. EPA concluded that Detroit Edison's changes would not be a "modification" for purposes of the CAA, and, consequently, that Detroit Edison could proceed with the project without first obtaining a PSD permit. However, the EPA based this determination on Detroit Edison's assurance that the projects would not increase emissions, rejecting the company's claim that the construction was exempt as routine maintenance. [5]

[*29] SIGECO cites the Detroit Edison letter for the proposition that EPA's current view is "that any project that maintains a unit's generating capacity, results in fewer breakdowns, or results in more efficient or reliable operations is presumptively subject to PSD and NSPS [i.e., NSR]." SIGECO Memo in Support at 11. However, the Court's review of the Detroit Edison letter, and the

[5] As observed earlier, NSR only applies where there is both a physical change and increased emissions due to the change. In the Detroit Edison letter, the EPA concluded that the proposed work would constitute a nonroutine physical change, but the NSR permitting requirements would not apply because EPA could not conclude, based on Detroit Edison's submissions, that emissions would increase.

accompanying analysis, reveals no such categorical conclusions. Instead, the EPA applied the WEPCO test to the facts of the Detroit Edison project:

> Detroit Edison claims that the Dense Pack project is eligible for the exclusion for routine maintenance, repair, and replacement. The determination of whether a proposed physical change is "routine" is a case-specific determination which takes into consideration the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors.

Gov't Ex. 4 at 2. EPA then considered the facts of the case in light of nature, extent, frequency and cost of the work, and concluded that the proposed change was a nonroutine physical change. The Court concludes that the Detroit Edison letter does not represent the kind of departure from WEPCO **[*30]** and the language of the CAA that SIGECO ascribes to it, and it does not constitute a new, post-1996 rule under the CRA. Thus, the Court **DENIES** SIGECO'S Motion for Summary Judgment on Congressional Review of Agency Rulemaking.

IV. CONCLUSION

For the reasons discussed herein, the Court finds that SIGECO has failed to demonstrate that EPA has changed its interpretation of the law. Accordingly, the Court **DENIES** SIGECO's Motion for Summary Judgment regarding the Congressional Review of Agency Rulemaking Act.

IT IS SO ORDERED this 24th day of October, 2002.

LARRY J. MCKINNEY, CHIEF JUDGE

United States District Court

Southern District of Indiana

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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?

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Text

[*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), [1] and can now veto a regulation by passing a joint resolution rather than by passing a law. [2] 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. [3] 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, [4] matters most generally as a verdict on the precise

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[1] 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)).

[2] *See* ***5 U.S.C. §§ 801***-802 (2006).

[3] *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).

[4] ***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 [5] 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. [6]

[*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." [7] 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. [8] 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.* [9]

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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[5] David Michaels was confirmed December 3, 2009.*See* 155 CONG. REC. S12,351 (daily ed. Dec. 3, 2009).

[6] *See infra* notes 122-125 and accompanying text.

[7] Kristina Sherry,*'Substantially the Same' Restriction Poses Legal Question Mark for Ergonomics,* INSIDE OSHA, Nov. 9, 2009, at 1, 1, 8.

[8] *See infra* Part III.A.

[9] 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. [10] 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. [11] Similarly, in the Senate, Republicans turned **[*712]** their minority into a four-seat advantage. [12]

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. [13] 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. [14] Of course, it was not only business owners who

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[10] 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)).

[11] *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* (reporting the results of the 1994 U.S. House elections, in which the Republicans won a majority of 230-204).

[12] *See id.* (reporting the results of the 1994 U.S. Senate elections, after which the Republicans held a majority of 52-48).

[13] 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 . . . . ").

[14] *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. [15]

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. [16]

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. [17] 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." [18]

[*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. [19] 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). [20] 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,* [21] which decried the purported insistence on inflexible and draconian strictures on business, and *Breaking the Vicious Circle.* [22] 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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[15] *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.").

[16] *Id.* at 70 (reporting the annual costs of federal regulation in 1991 dollars).

[17] *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").

[18] Stan Crock et al.,*A GOP Jihad Against Red Tape,* Bus. WK., NOV. 28, 1994, at 48 (quoting Senator Nickles).

[19] 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.

[20] *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).

[21] PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: How LAW IS SUFFOCATING AMERICA (1995).

[22] STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1994).

conservative interpretations of science to exaggerate the risks that remained uncontrolled. [23] 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, [24] 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. [25]

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 [26] --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, [27] 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. [28]

The stage was thus set for congressional intervention to rationalize (or, perhaps, to undermine) the federal regulatory system.

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[23] *See id.* at 9-13.

[24] *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).

[25] *Special Report: Are We Scaring Ourselves to Death? The People Respond* (ABC television broadcast Apr. 21, 1994).

[26] *See* Alon Tal, *A Failure to Engage,* 14 ENVTL. F., Jan.-Feb. 1997, at 13.

[27] *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.

[28] 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. [29] When he **[*716]** declined to do so, [30] House Republicans called for a legislative solution--they intended to enact a statute that would put a moratorium on new regulations [31] 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. [32] 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. [33] 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. [34]

The proposed moratorium, despite passing in the House, [35] met strong opposition in the Senate. Although Senate committees recommended enactment of the moratorium for largely the same reasons as the House leadership, [36] a

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[29] *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).

[30] *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).

[31] *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 . . . . ").

[32] *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).

[33] *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).

[34] H.R. 450, 104th Cong. §§ 3(a), 6(2) (1995) (as passed by House of Representatives, Feb. 24, 1995).

[35] 141 CONG. REC. 5880 (1995) (recording the House roll call vote of 276-146,**with** 13 Representatives not voting).

[36] *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. [37] 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." [38] 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." [39] The Republicans, with only a slim majority in the Senate, [40] 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. [41] 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. [42] Senate Democrats saw the more nuanced review process as a significant improvement over the moratorium's prophylactic approach, [43] and the Nickles-Reid Amendment (Senate Bill 219) passed the chamber by a roll call vote of 100-0. [44]

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. [45] Pro-environment House Republicans eventually convinced House leaders that their antiregulatory plans were too far-reaching, [46] and over the following year, members of Congress attempted to include the review provision in several bills. [47] 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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[37] *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).

[38] S. REP. No. 104-15, at 25.

[39] *Id.* at 26.

[40] *See supra* note 12 and accompanying text.

[41] S. 348, 104th Cong. (as introduced in Senate, Feb. 2, 1995).

[42] *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).

[43] *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.").

[44] *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).

[45] *See* 142 CONG. REC. 6926-27 (1996) (statement of Rep. Hyde) (summarizing the procedural history of the Congressional Review Act (CRA)).

[46] *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.").

[47] 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. [48] The congressional review provision was ultimately enacted without debate, as more controversial parts of the Contract with America occupied Congress's attention. [49] On March 28, 1996, the CWAA passed both houses of Congress. [50] 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. [51]

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. [52] 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. [53] It also would have required agencies to certify that each rule produced benefits to human health or the environment that justified the costs incurred. [54] 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, [55] 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. [56] 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. [57]

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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[48] *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)).

[49] *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).

[50] *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).

[51] Presidential Statement on Signing the Contract with America Advancement Act of 1996, 32 WEEKLY COMP. PRES. DOC. 593 (Apr. 29, 1996).

[52] *See* H.R. 9, 104th Cong. §§ 411-24 (1995) (as passed by House, Mar. 3, 1995).

[53] *See, e.g., id.* § 414(b)(2) (setting forth specific requirements for the conduct of risk assessments).

[54] *Id.* § 422(a)(2).

[55] *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).*

[56] S. 343, 104th Cong. (1995) (as introduced in Senate, Feb. 2, 1995).

[57] 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." [58] 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 [59]), 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. [60] 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." [61]

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. [62] 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), [63] the Regulatory Compliance Simplification Act (which requires **[*721]** agencies to prepare compliance guides directed specifically at small businesses), [64] and a series of

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[58] *See* Landy & Dell, *supra* note 55, at 125.

[59] 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).

[60] *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).

[61] 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."

[62] James T. O'Reilly,*EPA Rulemaking After the 104th Congress: Death from Four Near-Fatal Wounds?,* *3 ENVTL. LAW. 1, 1 (1996).*

[63] 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).

[64] 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). [65] 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). [66] The report is then submitted for review to the chairman and ranking member of each relevant committee in each chamber. [67] Some rules--for example, rules pertaining to internal agency functioning, or any rule promulgated by the Federal Reserve System--are exempted from this procedure. [68]

During this review process, the effective date of any major rule is postponed. [69] 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. [70] 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." [71]

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." [72] 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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[65] *Id.* subtit. D, ***110 Stat. 864-68*** (codified as amended at ***5 U.S.C. §§ 601***-605, 609, 611 (2006)).

[66] ***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).

[67] ***5 U.S.C. § 801***(a)(1)(C).

[68] *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).

[69] *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.*

[70] *Id*. § 801(c).

[71] *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).

[72] 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. [73] 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. [74] The House does not have a similar expedited procedure. [75] When a disapproval resolution passes both houses of Congress, it is presented to the President for signing. [76] 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. [77]

[*723] Upon the enactment of a joint resolution against a federal agency rule, the rule will not take effect. [78] 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 [79] --then it cannot continue in force. [80] 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." [81]

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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[73] ***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).

[74] *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).

[75] *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").

[76] ***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.*

[77] 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).

[78] ***5 U.S.C. § 801***(b)(1).

[79] *See supra* notes 69-70 and accompanying text.

[80] ***5 U.S.C. § 801***(b)(1).

[81] *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. [82]

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." [83] 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. [84] 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. [85] 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, [86] and only one instance in which the congressional veto has actually been carried out, [87] 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. [88] In 2001, when the Bush Administration came into office, Republicans in Congress led an attempt to use the measure to

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[82] ***5 U.S.C. § 801***(b)(2).

[83] *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_0f.htm.

[84] *Id.*

[85] *See infra* Part VI and VII.

[86] *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).

[87] *See infra* Part II.A (discussing Congress's use of the veto in 2001 to disapprove of OSHA's ergonomics rule).

[88] *See*U.S. GOV'T ACCOUNTABILITY OFFICE, CONGRESSIONAL REVIEW ACT (CRA) FAQs, 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. [89] The joint resolution generated much debate, in Washington and nationwide, over whether Congress should use the CRA procedure. [90] 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." [91] 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." [92] 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. [93] 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. [94] Opponents of the OSHA regulation argued that it was the product of a flawed, last-minute rulemaking process in the outgoing Clinton Administration. [95] Although the Department of Labor had been attempting to develop an ergonomics program for at least the previous ten years, [96] 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." [97] 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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[89] *See* Ergonomics Rule Disapproval, Pub. L. No. 107-5, ***115 Stat. 7 (2001),*** *invalidating* Ergonomics Program, ***65 Fed. Reg. 68,262*** (Nov. 14, 2000).

[90] *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).

[91] 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).

[92] Ergonomics Program,65 Fed. Reg. at 68,846; *see also* Ergonomics Program, *64 Fed. Reg. 65,768-66,078* (proposed Nov. 23, 1999).

[93] Ergonomics Program,65 Fed. Reg. at 68,847, 68,850-51.

[94] *See* S.J. Res. 6, 107th Cong. (2001) (enacted).

[95] *See, e.g.,* 147 CONG. REC. 2815-16 (statement of Sen. Jeffords) ("[T]he ergonomics rule certainly qualifies as a 'midnight' regulation . . . .").

[96] *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).

[97] 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." [98] 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. [99]

This allegedly flawed and rushed procedure, OSHA's opponents argued, coupled with an overly aggressive posture toward the regulated industries, [100] 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 S100 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." [101] 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." [102] 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." [103] Critics argued that these benefits were overstated as businesses were naturally becoming more ergonomically friendly on their own. [104] 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. [105] But critics cited reports in their favor, [106] 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. [107]

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. [108] When President Bush signed the joint

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[98] *Id.* at 2823 (statement of Sen. Enzi).

[99] *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]").

[100] *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").

[101] 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.").

[102] 147 CONG. REC. 2818 (statement of Sen. Kennedy).

[103] *Id.* at 2827 (statement of Sen. Wellstone).

[104] *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.

[105] *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").

[106] *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").

[107] *See id. at* 3056 (statement of Rep. Boehner) ("OSHA completed its ergonomics regulation without the benefit of the National Academy study.").

[108] *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." [109]

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 [110] 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. [111] For purposes of comparison, in an average year, federal and state OSHA plans collectively issue more than 210,000 violations of all kinds nationwide. [112]

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. [113]

Some Republican lawmakers argued that the OSHA ergonomics standard circumvented congressional oversight because it was finalized in the closing weeks of the Clinton Administration. [114] 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. [115] 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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[109] Presidential Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 37 WEEKLY COMP. PRES. DOC. 477 (Mar. 20, 2001).

[110] *See* Occupational Safety and Health (OSH) Act of 1970 § 5(a)(1), *29 U.S.C. § 654* (2006).

[111] The OSHA website permits users to word-search the text of all general duty violations.*See*OCCUPATIONAL SAFETY & HFALTH ADMIN., DEP'T 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.

[112] *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_20l0.pdf*.

[113] *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.

[114] *See supra* notes 95-99 and accompanying text.

[115] *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. [116] 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. [117] 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), [118] 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. [119]

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. [120] 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

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[116] *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.").

[117] *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).

[118] *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).

[119] *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).

[120] *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. [121]

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. [122] In other words, while Congress may have successfully insulated its own pronouncements from judicial

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[121] *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 *not*a 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*. For a discussion of similar about-faces in statements by members of Congress immediately before and after the veto, see*infra* Part III.B.

[122] *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. [123] 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. [124] In either of these situations, assuming a justiciable case or controversy under Article III, [125] 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. [126] 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. [127] 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.

[123] *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).

[124] *See, e.g.,* Babbitt v. Sweet Home Chapter of Cmtys. 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).

[125] 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).

[126] *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.").

[127] *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).

Robert Johnston

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. [128] 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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[128] 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. [129]

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." [130] 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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[129] 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).

[130] 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." [131] 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." [132] 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; [133] whereas the "atom bomb" and similarly bleak interpretations of the CRA came from Democrats such as Edward Kennedy of Massachusetts. [134] 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. [135]

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[131] ***5 U.S.C. § 801***(b)(2) (2006).

[132] 147 CONG. REC. 2860 (statement of Sen. Feingold).

[133] *Id.* at 2816 (statement of Sen. Jeffords).

[134] *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).

[135] 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/; *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." [136] 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. [137] 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." [138] 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." [139]

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." [140] 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." [141] 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." [142]

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).

[136] Charles Tiefer,*How to Steal a Trillion: The Uses of Laws About lawmaking in 2001,* 17 J.L.&POL. 409, 476 (2001).

[137] 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).

[138] *Id.*

[139] 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)).

[140] Vernon Mogensen,*The Slow Rise and Sudden Fall of OSHA's Ergonomics Standard,* WORKINGUSA, Fall 2003, at 54, 72.

[141] 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).

[142] 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. [143] 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. [144] 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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[143] *See infra* Parts IV.A. 1, IV.A.4.

[144] *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 subsequendy 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. [145] 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." [146] 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. [147] Although there were some complaints about the number or volume of regulations as opposed to merely their efficiency [148] --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. [149] 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). [150] Moreover, the CRA's application only to major rules--a phrase defined in terms of the rule's economic impact [151] --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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[145] *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).

[146] S. REP. No. 104-15, at 5 (1995).

[147] *See* ***5 U.S.C. § 801***(a)(1)(B) (2006); 141 CONG. REC. 9428-29 (1995) (statement of Sen. Domenici).

[148] *See, e.g.,* S. REP. NO. 104-15, at 5 ("Without significant new controls, the volume of regulations will only grow larger.").

[149] ***5 U.S.C. § 801***(a)(1)(B).

[150] 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).

[151] *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. [152] 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, [153] 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. [154] 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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[152] *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)).

[153] *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.

[154] *See* Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bash (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 [155] serves its intended purpose as "guidance to the agencies, the courts, and other interested parties when interpreting the act's terms." [156] 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. [157] 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" [158]). 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, [159] 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." [160] 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. [161] 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" [162] 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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[155] 142 CONG. REC. 8196-8201 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

[156] *Id.* at 8197.

[157] *Id.*

[158] *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."

[159] *See supra* Part III.A.

[160] 142 CONG. REC. 8197 (joint statement of Sens. Nickles, Reid, and Stevens).

[161] *See infra* Part V.

[162] 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." [163] 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." [164] 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." [165] *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. [166] 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." [167] 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." [168] 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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[163] *See id.* at 8199.

[164] 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords).

[165] 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens).

[166] *See, e.g., supra* note 153.

[167] 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

[168] *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, [169] 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. [170] 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." [171]

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. [172] 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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[169] *See infra* Part IV.A.5.

[170] 147 CONG. REC. 3074-75 (2001) (statement of Rep. Sweeney);*see also infra* Part VLB.

[171] *Id.* at 3056 (statement of Rep. Norwood)

[172] *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 [173] 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. [174] 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. [175]

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. [176] Furthermore, there is "no language anywhere [in the CRA that] expressly refers in any manner to a part of any rule under review." [177] 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." [178]

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. [179] 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" [180] --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, [181] 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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[173] *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.").

[174] *See id.* § 1(a).

[175] *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).

[176] *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").

[177] Rosenberg,*supra* note 75, at 1065.

[178] *Id.* at 1066.

[179] *See, e.g.,* 147 CONG. REC. 2843-44 (2001) (statement of Sen. Nickles) (expressing support for a "more cost effective" ergonomics rule).

[180] Rosenberg,*supra* note 75, at 1066.

[181] *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. [182] 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. [183] Where Congress delegates rulemaking authority to an administrative agency, it is inevitable that the delegation will include some ambiguities or gaps. [184] 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." [185] 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." [186] 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." [187] If so, both the court and the agency "must give effect to the unambiguously expressed intent of Congress." [188] 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. [189]

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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[182] *467 U.S. 837(1984).*

[183] *Id. at 866.*

[184] *See* *Morton v. Ruiz, 415 U.S. 199, 231 (1974)* (noting that such a "gap" may be explicit or implicit).

[185] *Chevron, 467 U.S. at 843-44.*

[186] *Id. at 866.*

[187] *Id. at 842.*

[188] *Id. at 842-43.*

[189] *Id. at 843.*

has "directly spoken to the precise question at issue" [190] --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. [191] 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. [192]

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. [193] 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). [194] 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. [195] 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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[190] *Id. at 842.*

[191] *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).

[192] *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").

[193] *Chevron, 467 U.S. at 866.*

[194] *529 U.S. 120(2000).*

[195] *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. [196] 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." [197] 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. [198]

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, [199] 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.* [200] 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. [201] 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. [202] 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." [203] This argument that an administrative agency has exercised legislative power has

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[196] *Id. at 137-39.*

[197] *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.").

[198] *Id. at 167-81* (Breyer, J., dissenting) (arguing for a "literal" interpretation of the FDCA).

[199] 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.

[200] *See supra* note 196 and accompanying text.

[201] *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. REG. 2817 (statement of Sen. Nickles). We argue below that this interpretation may have been incorrect on its face. *See infra* Part VLB.

[202] 147 CONG. REC. 2817 (statement of Sen. Nickles).

[203] *Id.*

constitutional implications. Article I of the Constitution provides that the Senate and House of Representatives have the sole legislative power. [204] 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. [205] 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." [206]

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. [207] 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. [208] 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." [209] 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. [210]

[*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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[204] 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.").

[205] *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).

[206] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[207] *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").

[208] Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case), 448 U.S. 607 (1980).

[209] Id. at 613 (quoting Am. Petroleum Inst. v. OSHA, 581 F.2d 493, 502 (1978)).

[210] *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 [211] 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. [212] 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. [213]

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. [214] 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. [215]

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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[211] 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).*

[212] 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.

[213] *See supra* Part IV.C.2.

[214] *See id.*

[215] *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. [216] With the exception of one aspect of the ergonomics rule, [217] congressional Republicans admitted that OSHA's broad authority did in fact include the power to promulgate the regulation as issued. [218] 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. [219] Second, **[*760]** it seems especially doubtful that Congress would intend to allow modification of an organic statute via an expedited legislative process. [220] Significant changes, such as major changes to a federal agency's

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[216] *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.").

[217] *See supra* note 201 and accompanying text.

[218] *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 . . . .").

[219] *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).***

[220] *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. [221] 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. [222] 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. [223] 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. [224] 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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[221] *See supra* Part I.B.3 (describing the CRA procedure).

[222] 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.

[223] *See infra* Part VII.

[224] 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 [225] --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" then 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." [226] 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. [227]

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[225] *See supra* Part I.B.2.

[226] 142 CONG. REC. 8197 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

[227] 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. [228] 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." [229]

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 reproposed 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 ("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.

[228] *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.").

[229] *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. [230] 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. [231] 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" [232] 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 [233] of an entire industry. [234]

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

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[230] 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).

[231] 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. DEP'T 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).

[232] *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case), 448 U.S. 607, 643 n.48 (1980).*

[233] *See* *Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case), 452 U.S. 490, 513 (1981).*

[234] 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 [235] 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, [236] 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 [237] 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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[235] *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.'").

[236] 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).

[237] *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. [238] 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. [239] The requirement--not found in the OSH Act or in its interpretations in the *Benzene Case* or *Cotton Dust Case,* [240] 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 [241] 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 [242] 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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[238] 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.").

[239] 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 PoliticalEnvironment,* 46 PROF. SAFETY, Feb. 2001, at 14, 16, *available at*http://www.allbusiness.com/government/government-bodies-offices-legislative/l 1443343-1.html.

[240] *Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case), 452 U.S. 490, 513 (1981).*

[241] *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).

[242] 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. [243] 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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[243] *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. [244] 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. [245] 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; [246] (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," [247] 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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[244] 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).

[245] 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.

[246] 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.

[247] Ergonomics Program,65 Fed. Reg. at 68,854 (defining work-related).

the common MSDs is uniquely caused by work exposures." [248] 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 [249] 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." [250] 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," [251] various members argued that OSHA "exceeded [its] constitutional authority" by legislating a new workers' compensation system rather than regulating. [252] 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." [253] 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,* [254] 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. [255] 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)]." [256]

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[248] 147 CONG. REC. 2838 (statement of Sen. Bond).

[249] Ergonomics Program,65 Fed. Reg. at 68,851.

[250] 147 CONG. REC. 2824 (statement of Sen. Enzi)

[251] OSH Act § 4(b)(4),*29 U.S.C. § 653* (2006).

[252] 147 CONG. REC. 2817 (2001) (statement of Sen. Nickles);*see also supra* Part II.A.

[253] 147 CONG. REC. 2818 (2001) (statement of Sen. Kennedy).

[254] *647 F.2d 1189 (D.C. Cir. 1980).*

[255] *Id. at 1235-36.*

[256] *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! [257] 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. [258] 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 [259] --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. [260] 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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[257] *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 . . . . ").

[258] *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).

[259] *See* 147 CONG. REC. 2825-26 (2001) (statement of Sen. Enzi).

[260] *See supra* note 228 and accompanying text.

issue, [261] 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. [262] 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," [263] 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 [264] 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. [265] 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." [266] 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. [267] 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. [268] Here we suggest several more substantive changes

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[261] *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").

[262] *See supra* note 100.

[263] 147 CONG. REC. 2832 (statement of Sen. Hutchinson).

[264] *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).

[265] *See, e.g.,* 147 CONG. REC. 2823 (statement of Sen. Enzi).

[266] *Id.* at 2821.

[267] *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).

[268] *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. [269]

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." [270] 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, [271] 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).

[269] *See supra* note 268.

[270] 142 CONG. REC. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

[271] 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 [272] 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 [273] 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 . . . . " [274] 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!'" [275] 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." [276] 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 silendy 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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[272] 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.

[273] *See* ***5 U.S.C. § 802*** (2006) (requiring that a joint resolution of disapproval read:

[274] 142 CONG. REG. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

[275] Daniel Cohen & Peter L. Strauss,*Congressional Review of Agency Regulations,* 49 ADMIN. L. REV. 95, 105(1997).

[276] *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. [277] 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 [278] 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. [279]

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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[277] 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.

[278] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . ").

[279] 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.

End of Document

From:	Karen Hawbecker
To:	Jack Haugrud; james_schindler@ios.doi.gov; downey_magallanes@ios.doi.gov; Edward T Keable
Subject:	Fwd: SPR CRA Resolution
Date:	Thursday, February 16, 2017 8:19:39 AM
Attachments:	ATT0 i526ijbovriypwq83i8poj1lu5q737aq.PNG

FYI-We expect the president to sign the resolution nullifying the Stream Protection Rule at 3:15 pm today.

Sent from my iPad

Begin forwarded message:

From: Emily Morris <emily.morris@sol.doi.gov>
Date: February 15, 2017 at 9:08:30 PM EST
To: Tom Bovard <Tom.Bovard@sol.doi.gov>, Karen Hawbecker <karen.hawbecker@sol.doi.gov>
Cc: "susan.ely@sol.doi.gov" <susan.ely@sol.doi.gov>
Subject: SPR CRA Resolution

Looks like it will be signed tomorrow at 3:15.

Trump Schedule II Thursday, February 16, 2017

Posted on February 15, 2017, 8:55 pm by Keith Koffler • 0 Comments

10:30 am II Participates in a congressional listening session

1:25 pm II Speaks with President Beji Caid Essebsi of Tunisia

2:30 pm II Meets with Attorney General

Jeff Sessions

3:15 pm ll Signs HJ Res. 38, which disapparoves of an Obama environmental rule

3:50 pm ll Tapes his weekly address; Cabinet Room

All times Eastern

Trump Schedule ll Thursday, February 16, 2017

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3:50 pm || Tapes his weekly address; Cabinet Room

All times Eastern

From:	Hawbecker, Karen
To:	Jack Haugrud; James Schindler; Downey Magallanes
Cc:	Edward T Keable; Tom Bovard; Emily Morris; Susan Ely
Subject:	Time Sensitive: Draft Notice of Resolution Nullifying SPR for Four SPR Cases
Date:	Thursday, February 16, 2017 12:06:58 PM
Attachments:	WILDLIFE-#294694-v1-MURRAY-notice_of_filing (3).DOCX BILLS-115hjres38enr (2).pdf

DOJ is preparing to file this short notice later today with the court in all of the SPR cases about the resolution nullifying the SPR. Any objections or feedback? It is quite straightforward. Thanks. --Karen

---------- Forwarded message ----------
From: **Bovard, Thomas** <tom.bovard@sol.doi.gov>
Date: Thu, Feb 16, 2017 at 11:43 AM
Subject:
To: "Hawbecker, Karen" <KAREN.HAWBECKER@sol.doi.gov>
Cc: "Morris, Emily" <Emily.Morris@sol.doi.gov>

Hi Karen, as we discussed, DOJ wants to file a notice this afternoon after the signing of H.J. Res. 38 to alert the court of its enactment. The draft notice, which is attached for your review, is for the *Murray* case, but similar ones will be filed in the other three. The caption has now been changed to "Notice of Filing" which DOJ tells us is correct.

Thanks.

tom

Thomas A. Bovard | Assistant Solicitor
Branch of Surface Mining | Division of Mineral Resources
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MURRAY ENERGY CORPORATION, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR *et al.*, Defendants.	Case No. 1:16-cv-2506-RCL The Honorable Royce C. Lamberth

NOTICE OF FILING

Federal Defendants (United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement and United States Department of the Interior, United States Fish and Wildlife Service) are hereby filing a copy of House Joint Resolution ("H.R.J. Res.") 38, 115th Cong., 1st Sess. (2017) (enacted) (filed herewith as Exhibit 1), which was signed by President Trump today. Pursuant to the Congressional Review Act, 5 U.S.C. § 801 *et seq.*, H.R.J. Res. 38 states that "Congress disapproves the rule submitted by the Office of Surface Mining Reclamation and Enforcement of the Department of the Interior relating to the 'Stream Protection Rule' (published at 81 Fed. Reg. 93066 (December 20, 2016)), and such rule shall have no force or effect." Because the enactment of H.R.J. Res. 38 potentially moots some or all of the claims in this case, undersigned counsel will confer with counsel for the other parties and submit a status report to advise the Court as to whether any further litigation is necessary.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division

SETH M. BARSKY, Section Chief
MEREDITH FLAX, Assistant Section Chief

Dated: February 16, 2017

/s/ Mark Arthur Brown
MARK ARTHUR BROWN
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U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ *Mark Arthur Brown*

H. J. Res. 38

One Hundred Fifteenth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the third day of January, two thousand and seventeen

Joint Resolution

Disapproving the rule submitted by the Department of the Interior known as the Stream Protection Rule.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Office of Surface Mining Reclamation and Enforcement of the Department of the Interior relating to the "Stream Protection Rule" (published at 81 Fed. Reg. 93066 (December 20, 2016)), and such rule shall have no force or effect.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

From: Hawbecker, Karen
To: Jack Haugrud; Downey Magallanes; James Schindler; Edward T Keable
Cc: Tom Bovard
Subject: Re: Environmental Groups Seek to Intervene in NMA & Murray SPR Cases
Date: Thursday, February 16, 2017 3:52:33 PM
Attachments: 2017.02.16 Briefing Paper re Motions to Intervene in 2 SPR cases.docx

I've attached a briefing paper to help pave the way toward (b) (5) I'll also add this briefing paper to the Google Drive folder for the SPR litigation.

On Tue, Feb 14, 2017 at 5:08 PM, Hawbecker, Karen <karen.hawbecker@sol.doi.gov> wrote:

(b) (5)

(b) (5)

In both cases, Earthjustice's counsel is representing Appalachian Voices, Center for Coalfield Justice, Coal River Mountain Watch, Cook Inletkeeper, Northern Plains Resource Council, Ohio Valley Environment Coalition, Southern Appalachian Mountain Stewards, Sierra Club, Statewide Organizing for Community eMpowerment, West Virginia Highlands Conservancy, and Waterkeeper Alliance.

Murray Energy Corp. v. Dept. of the Interior **(D.D.C.)** - Position on Motion to Intervene

NLT 2/21/17: On December 22, 2016, Murray Energy filed a complaint against DOI challenging OSMRE's promulgation of the Stream Protection Rule, seeking to have the court set aside the rule. On February 10, 2017, Murray amended its complaint to include APA claims against the 2016 Biological Opinion and memorandum of understanding between OSMRE and FWS. Defenders of Wildlife plans to file a motion to intervene in this case because of the new claims in the amended complaint. (b) (5) . DOJ needs to let Defenders of Wildlife know by Tuesday, February 21. (Emily Morris, 202-208-5236; Sue Ely, 202-208-5959; Nancy Brown-Kobil, 202-208-6479)

National Mining Ass'n v. U.S. DOI **(D.D.C.)** – Position on Motions to Intervene

NLT 2/21//2017: NMA filed this complaint on January 31, 2017, NMA challenging OSMRE's promulgation of the Stream Protection Rule, the 2016 Biological Opinion, and the memorandum of understanding between OSMRE and FWS. Defenders of Wildlife and Earthjustice plan to file a motions to intervene in this case. (b) (5) DOJ needs to let Defenders of Wildlife and Earthjustice know by Tuesday, February 21. (Emily Morris, 202-208-5236; Sue Ely, 202-208-5959)

Office of the Solicitor Briefing Paper

Cases: *Murray Energy Corp. v. U.S. Dep't of the Interior*, No. 1:16-cv-02506-RCL (D.D.C.) (Stream Protection Rule litigation); *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, No. 1:17-cv-00194-RCL (D.D.C.) (Stream Protection Rule litigation)

Issues: What position should the government take regarding Defenders of Wildlife's planned motion to intervene in *Murray Energy*?

What position should the government take regarding Defenders of Wildlife's and Earthjustice's planned motion to intervene in *National Mining Association*?

Background: OSMRE published its final Stream Protection Rule on December 20, 2016. Since that time four lawsuits have been filed challenging that rule. Plaintiffs in these cases are challenging the Stream Protection Rule, including alleged violations of the Administrative Procedure Act, Clean Water Act, and the Surface Mining Control and Reclamation Act. Plaintiffs are also challenging the 2016 Biological Opinion issued by the Fish and Wildlife Service (FWS) and the memorandum of understanding between FWS and the Office of Surface Mining Reclamation and Enforcement (OSM). (b) (5) [redacted]

Environmental groups have previously moved to intervene in three of the cases. In two of the cases, *Murray Energy* and *Nat'l Mining Ass'n*, potential intervenors have discussed their proposed motions to intervene with DOJ to ascertain DOJ's position as required by Local Rule 7(m). (b) (5) [redacted]

1. *North Dakota v. U.S. Dep't of the Interior*, No. 1:16-cv-02478-RCL (D.D.C.) – On January 18, 2017, Earthjustice and Defenders of Wildlife filed a motion to intervene. (b) (5) [redacted]. North Dakota did not respond to Intervenor-Movants' request for a position. North Dakota did not file an objection, and the motion is pending with the court.

2. *Murray Energy Corp. v. U.S. Dep't of the Interior*, No. 1:16-cv-02506-RCL (D.D.C.) – On January 18, 2017, Earthjustice filed a motion to intervene. (b) (5) [redacted]. At that time, the Murray Energy stated it would take a position once it had seen the motion. Murray Energy subsequently decided to oppose the motion and, on February 9, 2017, it filed a brief opposing Earthjustice's motion. Earthjustice's reply brief is due February 24, 2017. On February 9, 2017, Murray Energy also filed an amended complaint, which added claims challenging the 2016 Biological Opinion and memorandum of understanding. (b) (5) [redacted]

3. *Ohio, et al. v. U.S. Dep't of the Interior*, No. 1:17-cv-00108-RCL (D.D.C.) – Earthjustice and Defenders of Wildlife filed a motion to intervene on January 20, 2017. (b) (5) [redacted] The states indicated that they would wait until after the motion was filed to take a position. On February 3, the states filed a statement indicating that they were not taking a position on the motion to intervene. The motion to intervene is pending with the court.

4. *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, No. 1:17-cv-00194-RCL (D.D.C.) – (b) (5) [redacted] Earthjustice and Defenders of Wildlife expect to file their motion to intervene next week. Earthjustice is representing eleven environmental groups (Appalachian Voices, Center for Coalfield Justice, Coal River Mountain Watch, Cook Inletkeeper, Northern Plains Resource Council, Ohio Valley Environment Coalition, Southern Appalachian Mountain Stewards, Sierra Club, Statewide Organizing for Community eMpowerment, West Virginia Highlands Conservancy, and Waterkeeper Alliance). As with Defenders of Wildlife's motion to intervene in *Murray Energy*, it has indicated that it intends to be an Intervenor-Defendant to defend any claims that may survive after H.J. Res. 38 is enacted. Earthjustice has not announced its intent, but it has argued in its previous motions that the rule, the 2016 Biological Opinion, and the memorandum of understanding are all proper and lawful. (b) (5) [redacted]

The local rules of the D.C. District Court state that:

> Before filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is, to narrow the areas of disagreement. . . A party shall include in its motion a statement that the required discussion occurred, and a statement as to whether the motion is opposed.

D.D.C. Loc. R. 7(m).

Recommendation

The Division of Mineral Resources recommends (b) (5) [redacted]

Deadlines: **2/21/2017** – DOJ requests our Position on the Motions to Intervene

Contact: Emily Morris, Attorney-Advisor, Division of Mineral Resources, 202-208-5236; Tom Bovard, Assistant Solicitor, Surface Mining, 202-208-5730

Date: February 16, 2017

From:	Caminiti, Mariagrazia
To:	Jack Haugrud
Subject:	Fwd: Materials for Thursday Valuation Rule Meeting
Date:	Wednesday, February 22, 2017 2:17:01 PM
Attachments:	INFORMATION Memo Evolution of USEITI final.docx InfoBriefing_Secretary_StayRule.docx INFORMATION Briefing RPC Comparison.docx

fyi - added to your calendar for 9am tomorrow - i've printed this material for you.mg
---------- Forwarded message ----------
From: **McKeown, Matthew** <matthew.mckeown@sol.doi.gov>
Date: Wed, Feb 22, 2017 at 2:10 PM
Subject: Fwd: Materials for Thursday Valuation Rule Meeting
To: Mariagrazia Caminiti <marigrace.caminiti@sol.doi.gov>

Here is the material for the meeting we just discussed. Gareth meant Greg Gould, not Gary Frazer.

Matt McKeown
Regional Solicitor
Rocky Mountain Region
Office of the Solicitor
U.S. Department of the Interior
755 Parfet St., Suite 151
Lakewood, CO 80215
New Direct Line: 303-445-0625

---------- Forwarded message ----------
From: **Rees, Gareth** <gareth_rees@ios.doi.gov>
Date: Wed, Feb 22, 2017 at 11:52 AM
Subject: Materials for Thursday Valuation Rule Meeting
To: Daniel Jorjani <daniel_jorjani@ios.doi.gov>, Douglas Domenech <douglas_domenech@ios.doi.gov>, Downey Magallanes <downey_magallanes@ios.doi.gov>, Katharine Macgregor <katharine_macgregor@ios.doi.gov>, Kathleen Benedetto <kathleen_benedetto@ios.doi.gov>, Matthew McKeown <matthew.mckeown@sol.doi.gov>, Megan Bloomgren <megan_bloomgren@ios.doi.gov>, Melissa Simpson <melissa_simpson@ios.doi.gov>, Micah Chambers <micah_chambers@ios.doi.gov>, "Michael D. Nedd" <mnedd@blm.gov>, Nancy Guiden <nancy_guiden@ios.doi.gov>, Ruthie Jefferson <rjefferson@blm.gov>, Scott Hommel <scott_hommel@ios.doi.gov>, Amanda Kaster <amanda_kaster@ios.doi.gov>, Lori Mashburn <lori_mashburn@ios.doi.gov>, Natalie Davis <natalie_davis@ios.doi.gov>

All,

Please find attached materials from Gary Frazer for the Valuation Rule Meeting on Thursday at 9am.

Thanks

Gareth

--

Gareth C. Rees

Office to the Deputy Secretary

U.S. Department of the Interior

Tel: 202 208 6291

Fax: 202 208 1873

Cell: 202 957 8299

--

Marigrace Caminiti

Executive Assistant to the Solicitor
US Department of the Interior
1849 C Street, NW, Rm. 6352
Washington, DC 20240
202 208 4423   main number
202 208 3111   direct
202 208 5584   fax
202 528 0486 or 202 359 2949   cell/wcell

^^^

INFORMATION/ BRIEFING MEMORANDUM

DATE: February 23, 2017

FROM: Gregory J. Gould
Director, Office of Natural Resources Revenue

SUBJECT: ANPR and RPC as Next Steps Following Stay of ONRR's Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Rule

As a next step following its stay of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Rule (Rule), the Office of Natural Resources Revenue (ONRR) proposes to (b) (5) [redacted]

BACKGROUND

The Office of Natural Resources Revenue (ONRR) published the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform Final Rule (2017 Valuation Rule) on July 1, 2016, effective January 1, 2017. On December 29, 2016, industry members and trade organizations filed three lawsuits challenging the Rule. In the near future, (b) (5) [redacted] Further, members of the House of Representatives recently introduced a bill to disapprove the Rule under the Congressional Review Act (CRA).

DISCUSSION

(b) (5) [redacted]

(b) (5)

[redacted]

NEXT STEPS

(b) (5)

[redacted]

From:	Hawbecker, Karen
To:	James Cason; Richard Cardinale; Glenda Owens; Jim Kurth; Maureen Foster
Cc:	Daniel Jorjani; Katharine Macgregor; Downey Magallanes; James Schindler; Davis, Landon; Virginia Johnson; Casey Hammond; Jack Haugrud; Ann Navaro; Tom Bovard; Jesup, Benjamin; Susan Ely; Brown-Kobil, Nancy; Emily Morris
Subject:	Post-Stream Protection Rule ESA Compliance Recommendation
Date:	Monday, March 13, 2017 2:50:08 PM
Attachments:	2017.03.13 OSMRE-FWS ESA Compliance Recommendation Memo FINAL.pdf 2017.03.10 NMA and Murray BiOp Challenges Summary.pdf

Privileged Attorney-Client Communications--Do Not Release

In coordination with the Office of Surface Mining Reclamation and Enforcement (OSMRE) and the U.S. Fish and Wildlife Service (FWS), we have prepared the attached recommendation memorandum that (b) (5) [redacted]

We've also prepared the attached briefing paper that summarizes the plaintiffs' (National Mining Association and Murray Energy Corporation) concerns about the 2016 programmatic biological opinion and the memorandum of understanding between OSMRE and FWS.

After you've had an opportunity to read these documents, we suggest scheduling a meeting to discuss the recommendation.

Karen Hawbecker
Associate Solicitor
Division of Mineral Resources
Office of the Solicitor
U.S. Department of the Interior
1849 C Street N.W. MS 5358
Washington, D.C. 20240

Office: (202) 208-4146
karen.hawbecker@sol.doi.gov

PRIVILEGED ATTORNEY-CLIENT COMMUNICATIONS—ATTORNEY WORK PRODUCT—DO NOT RELEASE

Memorandum

To: K. Jack Haugrud, Acting Solicitor

From: Karen Hawbecker, Associate Solicitor, Division of Mineral Resources
Ann Navaro, Acting Associate Solicitor, Division of Parks and Wildlife

Subject: ESA compliance recommendation after passage of H. R. J. Res. 38

QUESTION PRESENTED

Now that the Stream Protection Rule (SPR) has been nullified, what is the preferred option for the Office of Surface Mining Reclamation and Enforcement (OSMRE) and the U.S. Fish and Wildlife Service (FWS) to comply with the Endangered Species Act (ESA) in a manner that retains a streamlined process for State regulatory authorities and coal companies to obtain incidental take coverage under the ESA for new and existing surface coal mining and reclamation operations?[1]

SHORT ANSWER

We recommend the following actions:

(b) (5)

[redacted]

[2] This recommendation memorandum was developed by the Divisions of Mineral Resources and Parks and Wildlife in the Office of the Solicitor (hereinafter referred to as DMR and DPW), with staff input from OSMRE and FWS.

(b) (5) [redacted]

BACKGROUND

OSMRE published the final SPR on December 20, 2016. *See* 81 Fed. Reg. 93,066 (Dec. 20, 2016). As part of that rulemaking, OSMRE and FWS completed a programmatic consultation under Endangered Species Act (ESA) § 7(a)(2), which resulted in FWS issuing the *Programmatic Biological Opinion and Conference Opinion on the Office of Surface Mining Reclamation and Enforcement's Regulatory Program as Modified by the Issuance and Implementation of the Final Regulation: Stream Protection Rule and as outlined in the Memorandum of Understanding* (2016 BiOp). Up until then, OSMRE and state regulatory authorities had been operating under the *1996 Biological Opinion and Conference Report* (1996 BiOp). The 2016 BiOp superseded the 1996 BiOp and concluded that surface coal mining and reclamation operations, as regulated by Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and modified by the SPR, are not likely to jeopardize the continued existence of ESA-listed or proposed species, or adversely modify or destroy designated or proposed critical habitat. This conclusion was based on OSMRE's commitments in its description of the action that the SPR would be fully implemented nationwide by 2020 and that the 2016 MOU would be followed by all state and tribal surface coal mining regulators wishing to rely on the 2016 BiOp ITS's Terms and Conditions for incidental take coverage.

There have been multiple cases filed challenging the SPR, two of which raise ESA issues pertinent to this discussion.[3] In *National Mining Ass'n v. Dep't of the Interior* (D.D.C.) (*NMA*), plaintiff filed a lawsuit against the Department of the Interior (Department), OSMRE, and FWS that challenges the SPR, the 2016 BiOp, and the 2016 MOU. In *Murray Energy Corp. v. Dep't of the Interior* (D.D.C.) (*Murray*), plaintiff amended its complaint to include Administrative Procedure Act (APA) claims against the 2016 BiOp and 2016 MOU as well as challenges against the SPR itself. These additional claims allege that the 2016 BiOp and MOU exceed OSMRE's and FWS's authority under SMCRA and the ESA. They also claim the 2016 BiOp and MOU are arbitrary and capricious and are in fact "rules" that did not comport with the APA's notice-and-comment provisions. EarthJustice has moved to intervene in *Murray* to defend the 2016 BiOp and has indicated its intent to intervene in *NMA*. Likewise, Defenders of Wildlife has moved to intervene in *Murray* and has indicated its intent to intervene in *NMA* (b) (5) [redacted] Murray's and NMA's concerns about the 2016 BiOp and 2016 MOU, as articulated in their complaints, have been summarized in an

[3] (b)(5) [redacted]

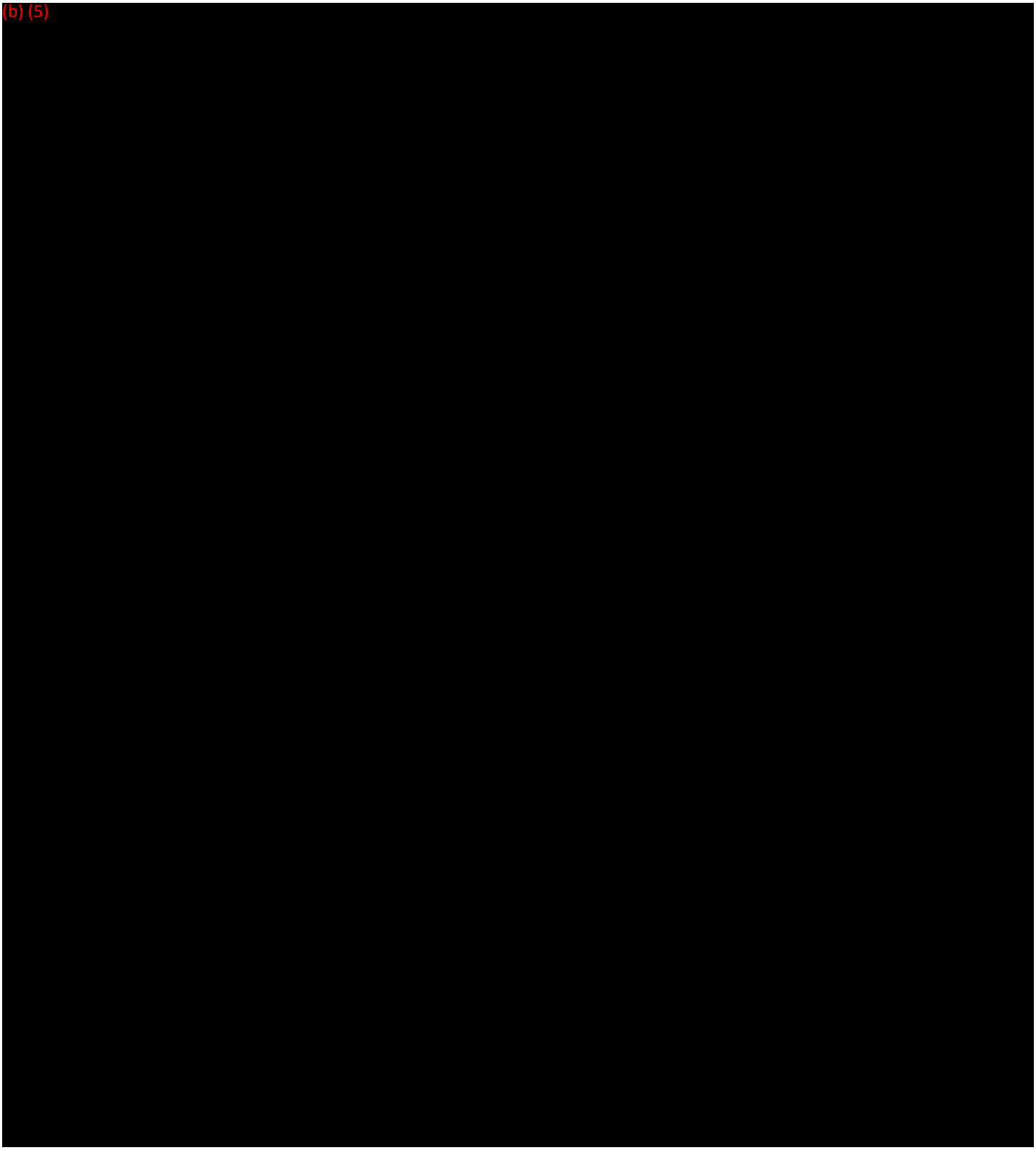
attached memorandum.

On February 2, 2017, Congress passed a joint resolution, H.R. J. Res. 38, nullifying the SPR under the Congressional Review Act (CRA), 5 U.S.C. §§ 801 *et seq*.. The President signed the joint resolution on February 16, 2017. (b) (5) [redacted]

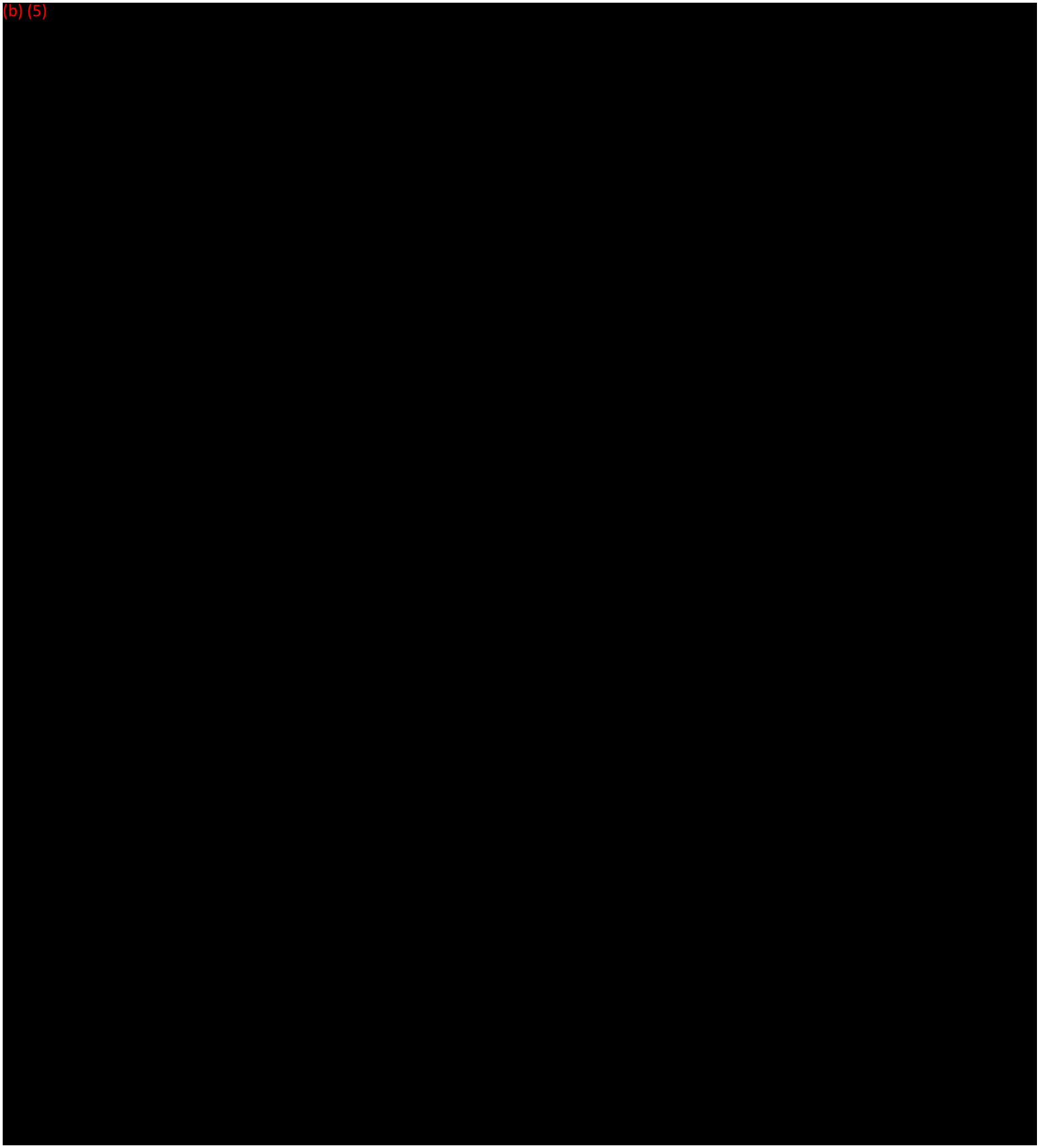
DISCUSSION/ANALYSIS

(b) (5) [redacted]

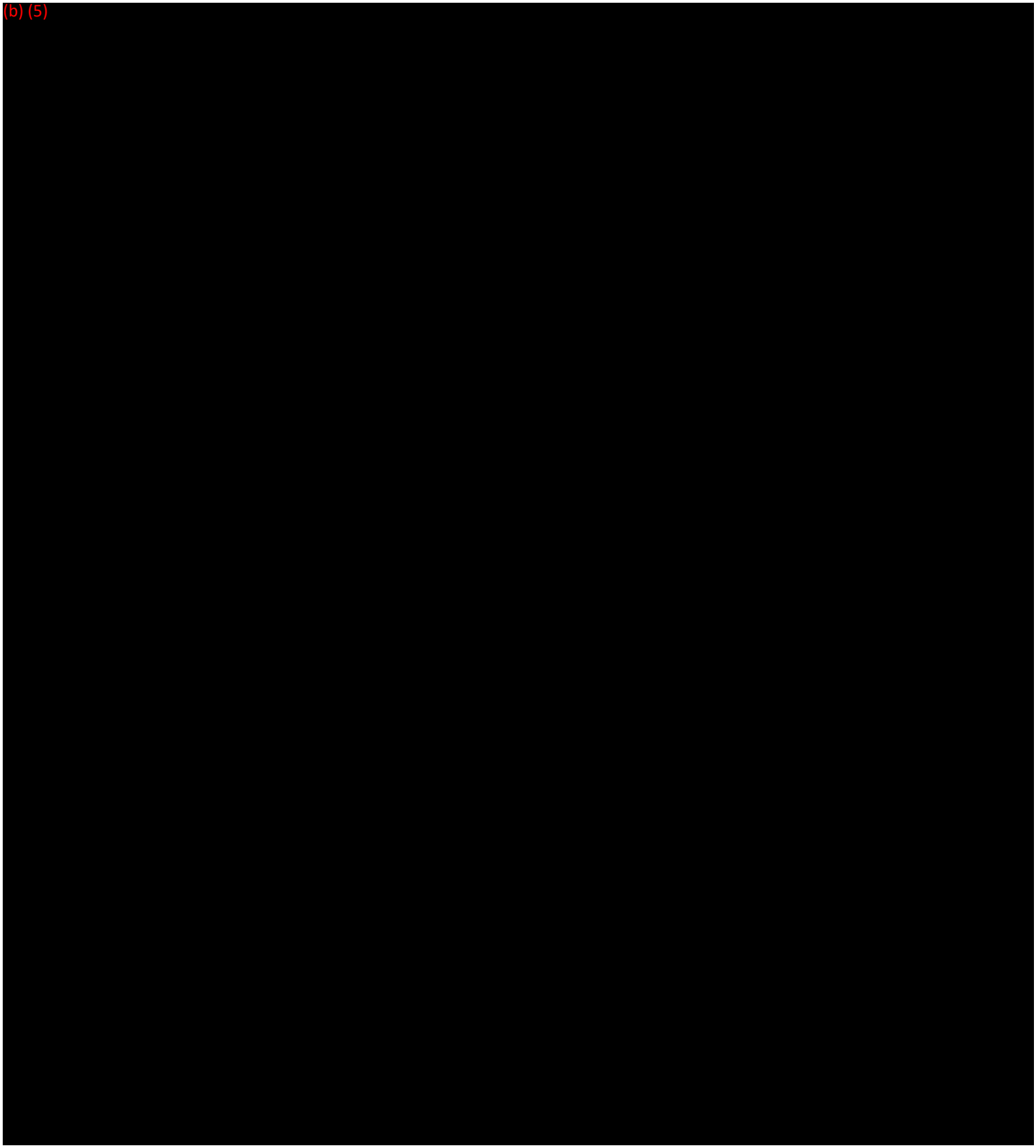
(b) (5)



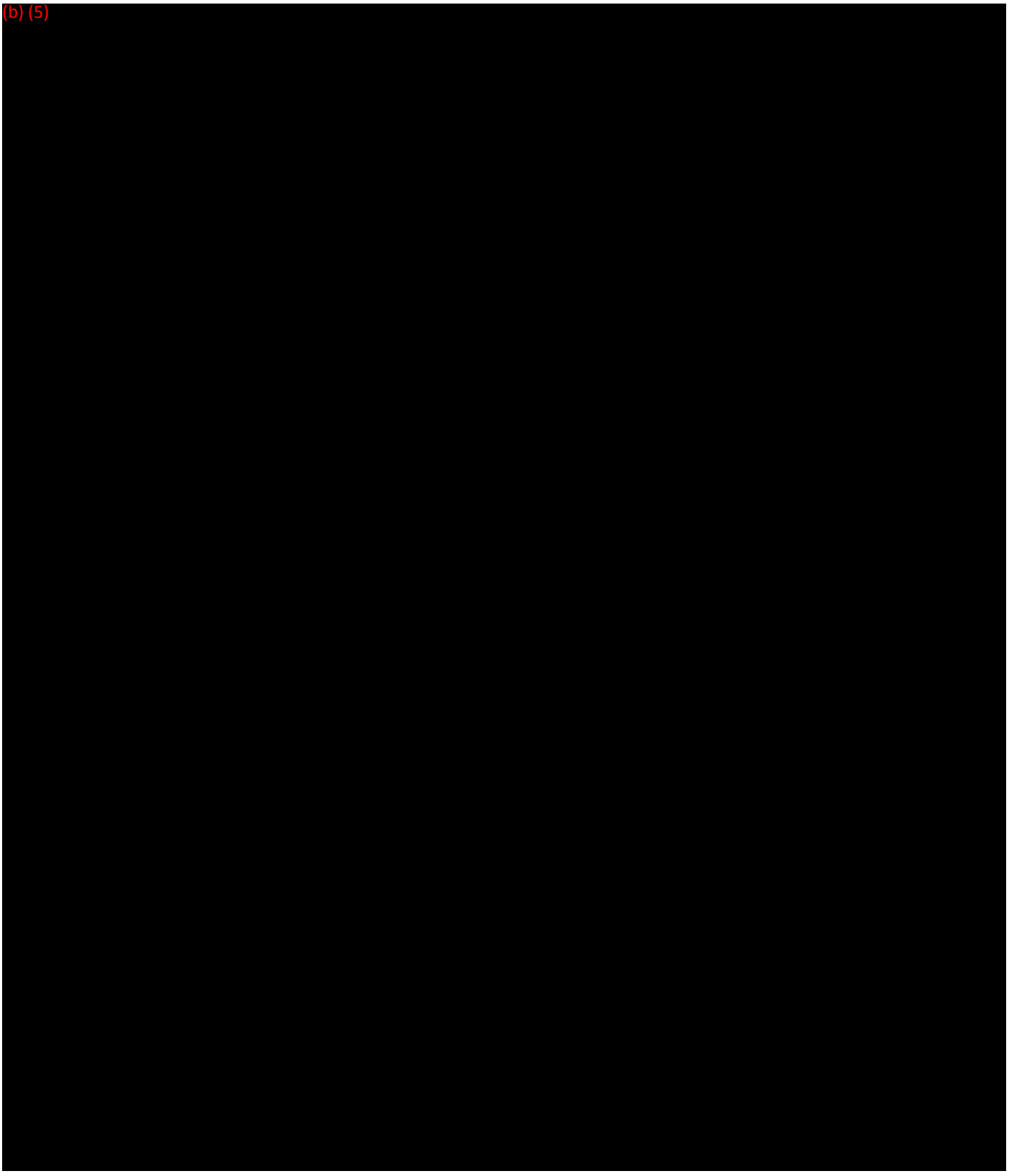
(b) (5)



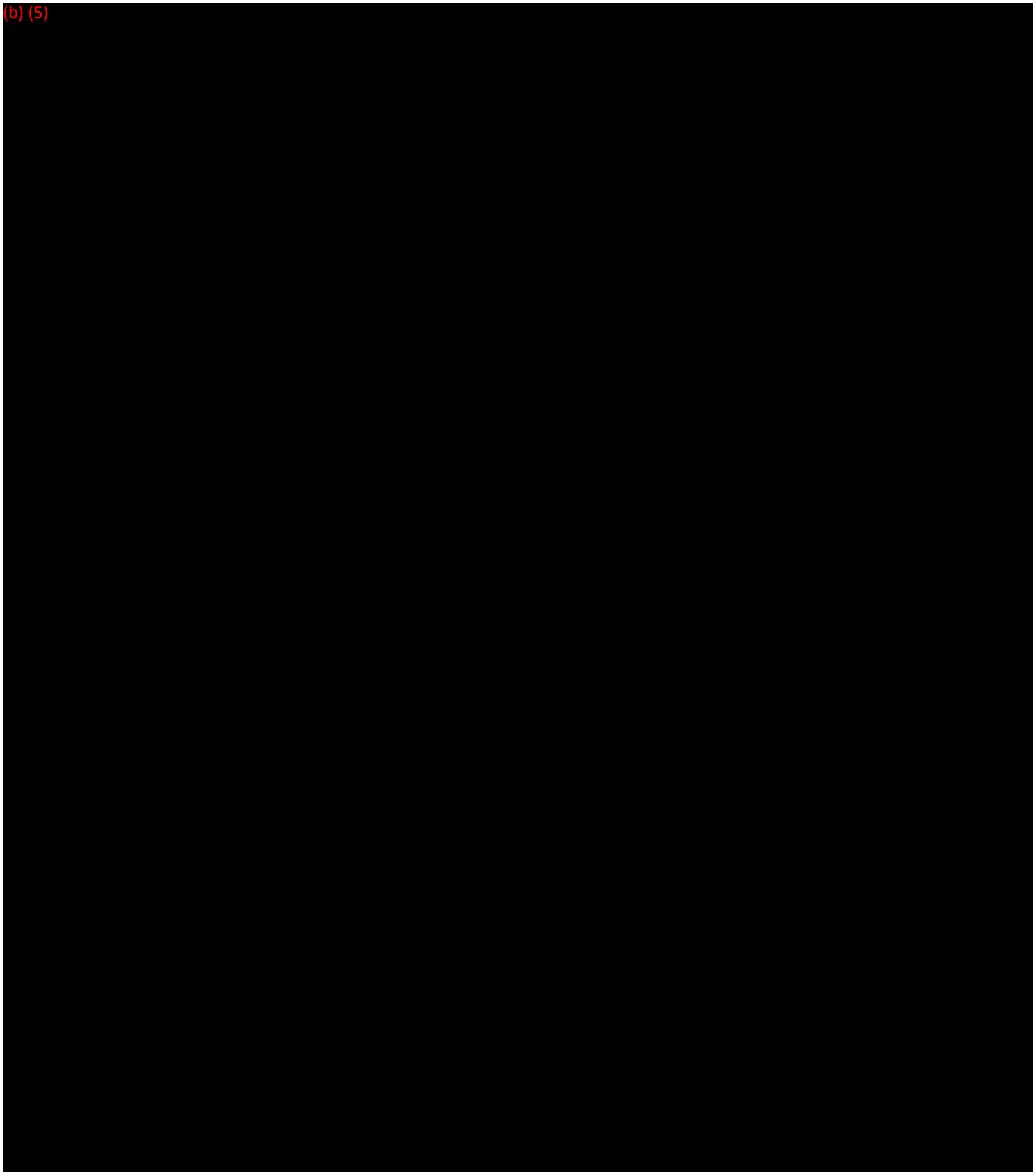
(b) (5)



(b) (5)



(b) (5)



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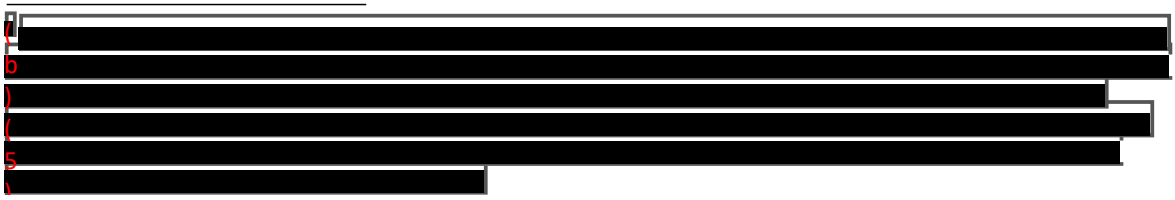

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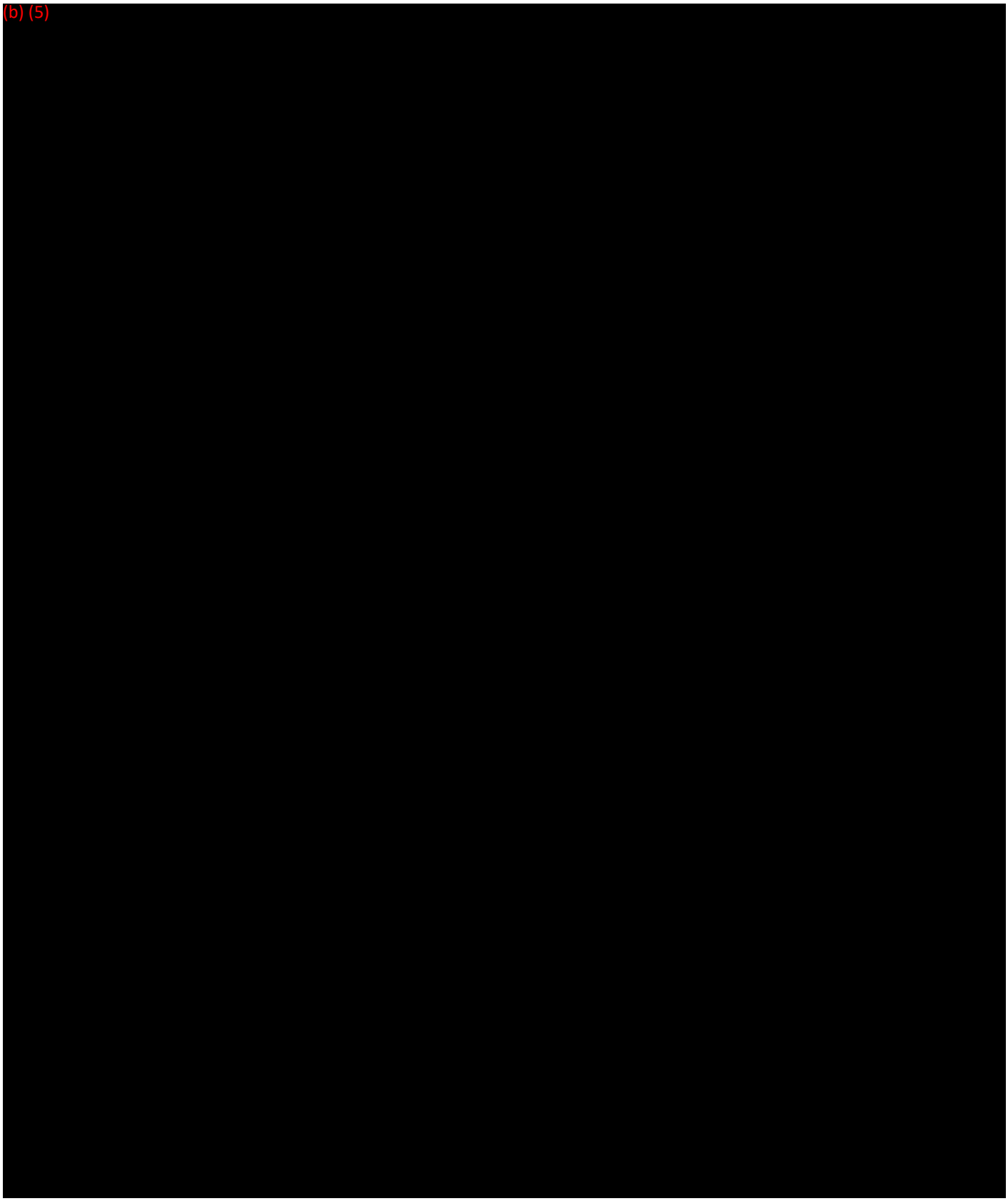


(b) (5)

PRIVILEGED ATTORNEY-CLIENT COMMUNICATIONS – DO NOT RELEASE

Office of the Solicitor Briefing Paper

Cases: *National Mining Ass'n v. Dep't of the Interior* (D.D.C.) (Challenge to Stream Protection Rule, 2016 BiOp, 2016 MOU) (*NMA)*
Murray Energy Corp. v. Dep't of the Interior (D.D.C.) (Amended Complaint) (Challenge to Stream Protection Rule, 2016 BiOp, 2016 MOU) (*Murray)*

Issues: Summary of plaintiffs' concerns about the 2016 BiOP and MOU

Background

In both *NMA* and *Murray,* plaintiffs include claims against the programmatic biological opinion (2016 BiOp) and the memorandum of understanding[1] (MOU) between the Office of Surface Mining Reclamation and Enforcement (OSMRE) and the Fish and Wildlife Service (FWS) in addition to challenges against the Stream Protection Rule (SPR) itself. Each plaintiff seeks a judgment vacating the 2016 BiOp and MOU, arguing that both are contrary to the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the Endangered Species Act of 1973 (ESA) and are arbitrary and capricious in violation of the Administrative Procedure Act (APA).

In general, *NMA* and *Murray* allege three causes of action to the 2016 BiOp and MOU:

(b) (5)

[redacted]

Because of the similarities of the allegations in the two cases, this briefing paper will generally discuss these three main challenges to the 2016 BiOp and MOU contained in both *NMA* and *Murray*.

[1] The 2016 BiOp is entitled, *Programmatic Biological Opinion and Conference Opinion on the Office of Surface Mining Reclamation and Enforcement's Regulatory Program as Modified by the Issuance and Implementation of the Final Regulation: Stream Protection Rule and as outlined in the Memorandum of Understanding.* The 2016 MOU is entitled, *Memorandum of Understanding between FWS and OSMRE Regarding Improved ESA Coordination on Surface Coal Mining and Reclamation Operations.*

(b) (5)

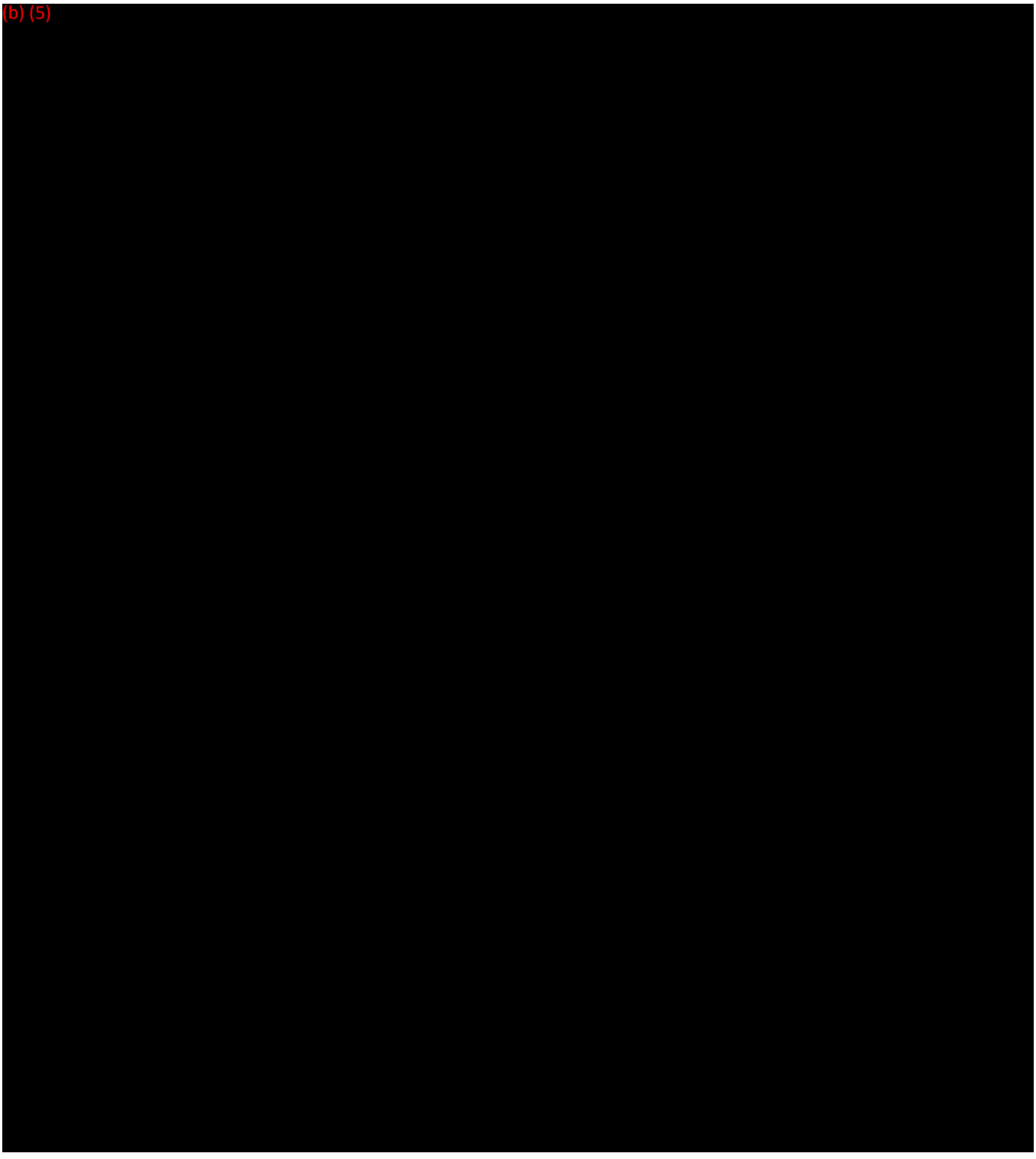
[redacted]

[2] (b) (5)
[redacted]

(b) (5)

[redacted]

(b) (5)



From:	Hawbecker, Karen
To:	Haugrud, Jack; Bovard, Thomas
Cc:	Susan Ely; Morris, Emily
Subject:	Re: Rewrite of OSM"s letter to the ICC
Date:	Thursday, March 30, 2017 11:58:44 AM
Attachments:	2017.03.30 IMCC Letter - SPR nullificaton effect - 3-30 rewrite 02.docx

Thanks, Tom. I suggested taking out the word "however". Here's the latest version. --Karen

Jack, This letter is now a shorter one-page letter. Let us know if you have any additional edits. Thanks. --Karen

On Thu, Mar 30, 2017 at 11:34 AM, Bovard, Thomas <tom.bovard@sol.doi.gov> wrote:

> The attached corrects awkward language in the second sentence so, if you haven't started reviewing please use this version instead.
>
> Thanks.
>
> Tom
>
> **Thomas A. Bovard** | Assistant Solicitor
> Branch of Surface Mining | Division of Mineral Resources
> Office of the Solicitor
> United States Department of the Interior
> 1849 C Street NW | Washington, DC 20240
> Phone: 202.208.5730 | Fax: 202.219.1789
> Tom.Bovard@sol.doi.gov
>
> On Thu, Mar 30, 2017 at 11:26 AM, Bovard, Thomas <tom.bovard@sol.doi.gov> wrote:
>
> > Jack and Karen, attached for your review is my rewrite of OSM's letter to Greg Conrad of the IMCC.
> >
> > Thanks.
> >
> > Tom
> >
> > **Thomas A. Bovard** | Assistant Solicitor
> > Branch of Surface Mining | Division of Mineral Resources
> > Office of the Solicitor
> > United States Department of the Interior
> > 1849 C Street NW | Washington, DC 20240
> > Phone: 202.208.5730 | Fax: 202.219.1789
> > Tom.Bovard@sol.doi.gov

Mr. Greg Conrad, Executive Director
Interstate Mining Compact Commission
445 Carlisle Drive, Suite A
Herndon, VA 20170

RE: Effect of SPR Nullification on ESA Coordination in State Regulatory Programs

Dear Mr. Conrad:

(b) (5)

Sincerely,

Glenda H. Owens

Acting Director

Sincerely,

Glenda H. Owens

Acting Director

From: Brown-Kobil, Nancy
To: Haugrud, Kevin
Cc: Bovard, Thomas; Ann Navaro; Hawbecker, Karen; Jesup, Benjamin; Susan Ely
Subject: Re: Draft 7(d) determination and emails as sent up to Jack
Date: Friday, April 7, 2017 3:03:03 PM

(b) (5) [redacted]

Nancy Brown-Kobil
Attorney-Advisor, Office of the Solicitor
U.S. Department of the Interior
1849 C Street, NW, MS-6327
Washington, D.C. 20240
202.208.6479
202.208-3877 (fax)
Nancy.Brown-Kobil@sol.doi.gov

On Fri, Apr 7, 2017 at 1:49 PM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

(b) (5) [redacted]

> On Fri, Apr 7, 2017 at 1:43 PM, Brown-Kobil, Nancy <nancy.brown-kobil@sol.doi.gov> wrote:
>
> Jack et al.,
>
> (b) (5) [redacted]
>
> I sent him a few sentences and he's mulling them over with his management. Thanks.
>
> Nancy Brown-Kobil
> Attorney-Advisor, Office of the Solicitor
> U.S. Department of the Interior

1849 C Street, NW, MS-6327
Washington, D.C. 20240
202.208.6479
202.208-3877 (fax)
Nancy.Brown-Kobil@sol.doi.gov

On Fri, Apr 7, 2017 at 1:39 PM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

Attorney Client Communication
Attorney Work Product
DO NOT DISCLOSE

(b) (5) [redacted]

On Fri, Apr 7, 2017 at 1:31 PM, Owens, Glenda <gowens@osmre.gov> wrote:

Ok

On Fri, Apr 7, 2017 at 1:30 PM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

Reviewing the 7(d) now.

On Fri, Apr 7, 2017 at 1:16 PM, Owens, Glenda <gowens@osmre.gov> wrote:

Ok thanks Jack, I'll send along with the (b) (5) [redacted] Glenda

On Fri, Apr 7, 2017 at 1:07 PM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

(b) (5) [redacted]

On Fri, Apr 7, 2017 at 12:39 PM, Owens, Glenda <gowens@osmre.gov> wrote:

Thanks Tom. Please let me know when it's ok to send to ASLM for review/approval.
Thanks for everyone's help. Glenda

On Fri, Apr 7, 2017 at 12:04 PM, Bovard, Thomas

<tom.bovard@sol.doi.gov> wrote:

> Hi Glenda, per your request, attached are the draft 7(d) determination and the draft email language that we sent up to Jack for approval.
>
> Thanks.
>
> Tom
>
> **Thomas A. Bovard** | Assistant Solicitor
> Branch of Surface Mining | Division of Mineral Resources
> Office of the Solicitor
> United States Department of the Interior
> 1849 C Street NW | Washington, DC 20240
> Phone: 202.208.5730 | Fax: 202.219.1789
> Tom.Bovard@sol.doi.gov

--
Glenda H. Owens
Deputy Director
U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
(O) 202-208-4006
(F) 202-219-3106
gowens@osmre.gov

--
Glenda H. Owens
Deputy Director
U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
(O) 202-208-4006
(F) 202-219-3106
gowens@osmre.gov

--
Glenda H. Owens
Deputy Director
U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
(O) 202-208-4006
(F) 202-219-3106
gowens@osmre.gov

From:	Brown-Kobil, Nancy
To:	Haugrud, Kevin; Gary Frazer
Cc:	Macgregor, Katharine; Richard Cardinale; Bovard, Tom; Owens, Glenda; Benjamin Jesup; Ann Navaro; Karen Hawbecker; Ely, Susan
Subject:	Re: Revised ESA dcouments
Date:	Monday, April 10, 2017 9:55:52 AM
Attachments:	Draft email messages - from OSMRE and FWS on ESA coordination - fin drft - 04-10-17 kjh.nbk.docx

Including Gary so he is in the loop. Gary, all three documents will be issued at the same time so we edited your email accordingly. Also, just one small edit to Jack's version to reflect his email about (b)(5) [redacted]

Thanks.

Nancy Brown-Kobil
Attorney-Advisor, Office of the Solicitor
U.S. Department of the Interior
1849 C Street, NW, MS-6327
Washington, D.C. 20240
202.208.6479
202.208-3877 (fax)
Nancy.Brown-Kobil@sol.doi.gov

On Sat, Apr 8, 2017 at 12:02 PM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

> Attorney Client Communication
> Attorney Work Product
> DO NOT DISCLOSE
>
> Team: My apologies for the additional edit, but upon further review I think we should (b)(5) [redacted]

On Sat, Apr 8, 2017 at 11:36 AM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

Attorney Client Communication
Attorney Work Product
DO NOt RELEASE (email or attachments)

Kate, Rich - Glenda forwarded to me the latest drafts of the SPR reinitiation documents that she also send to you. (b) (5) [redacted]

On Fri, Apr 7, 2017 at 5:40 PM, Owens, Glenda <gowens@osmre.gov> wrote:

As requested. Glenda

---------- Forwarded message ----------
From: **Owens, Glenda** <gowens@osmre.gov>
Date: Fri, Apr 7, 2017 at 5:22 PM
Subject: Revised ESA dcouments
To: Katharine Macgregor <katharine_macgregor@ios.doi.gov>,
"Richard_Cardinale@ios.doi.gov" <Richard_Cardinale@ios.doi.gov>

Kate and Rich,

Attached are the final revised draft ESA documents that have been reviewed by FWS, SOL, and DOJ. The documents attached here replace the ones I sent you sent earlier: *OSMRE's Reinitiation Letter* to the FWS; the *Interim Procedures for the SMCRA ESA Coordination and Elevation Process*; and the emails to be sent out by OSMRE and the FWS regarding the ESA coordination in state regulatory programs. The changes were minor, and non substantive.

In addition, I am also sending the *7(d) Determination*, which has also been reviewed by all, including DOJ.

Let me know if you have question or comments.

Glenda

--
Glenda H. Owens
Deputy Director

U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
(O) 202-208-4006
(F) 202-219-3106
gowens@osmre.gov

--
Glenda H. Owens
Deputy Director
U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
(O) 202-208-4006
(F) 202-219-3106
gowens@osmre.gov

4/7/2017

Proposed email message from OSMRE to State regulatory authorities, IMCC and OSMRE Regional Offices:

Subject: ESA coordination in State Regulatory Programs

(b) (5)

[redacted]

cc. FWS

(b) (5)

[redacted]

4/7/2017

(b) (5)

[redacted]

If you have any questions, please contact me or Craig Aubrey, chief of the Division of Environmental Review (703/358 2442).

Commented [redacted] (b) (5) [redacted]

From: Brown-Kobil, Nancy
To: Haugrud, Kevin
Cc: Ely, Susan; Ann Navaro; Karen Hawbecker; Bovard, Thomas; Benjamin Jesup
Subject: Re: SPR Reinitiation Letter
Date: Tuesday, April 11, 2017 9:34:39 AM
Attachments: Draft OSM Reinitiation Letter SMB(DOJ) - fin drft - 04-11-17 reinitiation explanation.docx

I think we explain it with the sentence: (b) (5) [redacted]

(b) (5) [redacted]

Nancy Brown-Kobil
Attorney-Advisor, Office of the Solicitor
U.S. Department of the Interior
1849 C Street, NW, MS-6327
Washington, D.C. 20240
202.208.6479
202.208-3877 (fax)
Nancy.Brown-Kobil@sol.doi.gov

On Tue, Apr 11, 2017 at 8:59 AM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

> Nancy, Sue, Tom - (b) (5) [redacted] I've attached the existing draft below.

[OSMRE Letterhead]

April 7, 2017

Gary Frazer, Assistant Director, Ecological Services

U.S. Fish and Wildlife Service

RE: Reinitiation of Consultation on Title V of the Surface Mining Control and Reclamation Act

Dear Mr. Frazer:

(b) (5)

[redacted]

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(b) (5)

[redacted]

Commented [(b) (5)]: [redacted]

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Sincerely,

Glenda H. Owens, Acting Director

From:	Katharine Macgregor
To:	Haugrud, Kevin
Cc:	Richard Cardinale; Bovard, Tom; Owens, Glenda; Nancy Brown-Kobil; Benjamin Jesup; Ann Navaro; Karen Hawbecker; Ely, Susan
Subject:	Re: Revised ESA dcouments
Date:	Tuesday, April 11, 2017 6:05:39 PM

Just did a final look-through on the changes you sent over for the email to change nullify to disapprove -and your latest version deleted the last two sentences from Glenda's email referring to (b) (5) [redacted]. Did you want that also deleted from her email? Similar language was left in Gary's email so I just wanted to make sure that you deleted that on purpose?

Tracking these ever changing documents is proving to be tough :)
- K

On Apr 8, 2017, at 12:02 PM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

> Attorney Client Communication
> Attorney Work Product
> DO NOT DISCLOSE
>
> Team: My apologies for the additional edit. (b) (5) [redacted]
>
> On Sat, Apr 8, 2017 at 11:36 AM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:
>
> > Attorney Client Communication
> > Attorney Work Product
> > DO NOt RELEASE (email or attachments)
> >
> > Kate, Rich - Glenda forwarded to me the latest drafts of the SPR reinitiation documents that she also send to you. (b) (5) [redacted]

(b) (5)

[redacted]

On Fri, Apr 7, 2017 at 5:40 PM, Owens, Glenda <gowens@osmre.gov> wrote:

As requested. Glenda

---------- Forwarded message ----------
From: **Owens, Glenda** <gowens@osmre.gov>
Date: Fri, Apr 7, 2017 at 5:22 PM
Subject: Revised ESA dcouments
To: Katharine Macgregor <katharine_macgregor@ios.doi.gov>, "Richard_Cardinale@ios.doi.gov" <Richard_Cardinale@ios.doi.gov>

Kate and Rich,

Attached are the final revised draft ESA documents that have been reviewed by FWS, SOL, and DOJ. The documents attached here replace the ones I sent you sent earlier: *OSMRE's Reinitiation Letter* to the FWS; the *Interim Procedures for the SMCRA ESA Coordination and Elevation Process*; and the emails to be sent out by OSMRE and the FWS regarding the ESA coordination in state regulatory programs. The changes were minor, and non substantive.

In addition, I am also sending the *7(d) Determination*, which has also been reviewed by all, including DOJ.

Let me know if you have question or comments.

Glenda

--
Glenda H. Owens
Deputy Director
U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
(O) 202-208-4006
(F) 202-219-3106
gowens@osmre.gov

--
Glenda H. Owens
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U.S. Department of the Interior
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<Draft email messages - from OSMRE and FWS on ESA coordination - fin drft - 04-07-17 kjh.docx>

From:	Hawbecker, Karen
To:	Katharine Macgregor
Cc:	Haugrud, Kevin; Richard Cardinale; Bovard, Tom; Owens, Glenda; Nancy Brown-Kobil; Benjamin Jesup; Ann Navaro; Ely, Susan
Subject:	Re: Revised ESA dcouments
Date:	Tuesday, April 11, 2017 6:40:47 PM

Kate, I'll add an (b) (5) sentence like the one in Gary's email to Glenda's email and send the new version with the other documents for final consideration and sharing with Jim. --Karen

On Tue, Apr 11, 2017 at 6:05 PM, Katharine Macgregor <katharine_macgregor@ios.doi.gov> wrote:

> Just did a final look-through on the changes you sent over for the email to change nullify to disapprove -and your latest version deleted the last two sentences from Glenda's email referring to (b) (5). Did you want that also deleted from her email? Similar language was left in Gary's email so I just wanted to make sure that you deleted that on purpose?
>
> Tracking these ever changing documents is proving to be tough :)
> - K
>
> On Apr 8, 2017, at 12:02 PM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:
>
> > Attorney Client Communication
> > Attorney Work Product
> > DO NOT DISCLOSE
> >
> > Team: My apologies for the additional edit. (b) (5)
> >
> > [redacted]
> >
> > On Sat, Apr 8, 2017 at 11:36 AM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:
> >
> > > Attorney Client Communication
> > > Attorney Work Product
> > > DO NOt RELEASE (email or attachments)
> > >
> > > Kate, Rich - Glenda forwarded to me the latest drafts of the SPR reinitiation documents that she also send to you. (b) (5)
> > >
> > > [redacted]

(b) (5)

On Fri, Apr 7, 2017 at 5:40 PM, Owens, Glenda <gowens@osmre.gov> wrote:

> As requested. Glenda
>
> ---------- Forwarded message ----------
> From: **Owens, Glenda** <gowens@osmre.gov>
> Date: Fri, Apr 7, 2017 at 5:22 PM
> Subject: Revised ESA dcouments
> To: Katharine Macgregor <katharine_macgregor@ios.doi.gov>, "Richard_Cardinale@ios.doi.gov" <Richard_Cardinale@ios.doi.gov>
>
> Kate and Rich,
>
> Attached are the final revised draft ESA documents that have been reviewed by FWS, SOL, and DOJ. The documents attached here replace the ones I sent you sent earlier: *OSMRE's Reinitiation Letter* to the FWS; the *Interim Procedures for the SMCRA ESA Coordination and Elevation Process*; and the emails to be sent out by OSMRE and the FWS regarding the ESA coordination in state regulatory programs. The changes were minor, and non substantive.
>
> In addition, I am also sending the *7(d) Determination*, which has also been reviewed by all, including DOJ.
>
> Let me know if you have question or comments.
>
> Glenda

--
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<Draft email messages - from OSMRE and FWS on ESA coordination - fin drft - 04-07-17 kjh.docx>

From: Macgregor, Katharine
To: Haugrud, Kevin
Subject: Re: Revised ESA dcouments
Date: Tuesday, April 11, 2017 6:45:38 PM

Here is the sentence that you had deleted at the very end of Glenda's email: (b)(5) [redacted]

Also - in keeping with what you wanted, (b)(5) [redacted]

On Sat, Apr 8, 2017 at 12:02 PM, Haugrud, Kevin <jack.haugrud@sol.doi.gov> wrote:

> Attorney Client Communication
> Attorney Work Product
> DO NOT DISCLOSE
>
> Team: My apologies for the additional edit, (b)(5) [redacted]
>
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> > DO NOt RELEASE (email or attachments)
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> >
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As requested. Glenda

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Subject: Revised ESA dcouments
To: Katharine Macgregor <katharine_macgregor@ios.doi.gov>,
"Richard_Cardinale@ios.doi.gov" <Richard_Cardinale@ios.doi.gov>

Kate and Rich,

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In addition, I am also sending the *7(d) Determination*, which has also been reviewed by all, including DOJ.

Let me know if you have question or comments.

Glenda

--
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Kate MacGregor
1849 C ST NW
Room 6625
Washington DC 20240

202 208 3671 (Direct)

From:	Frazer, Gary
To:	Haugrud, Kevin; Richard_Cardinale@ios.doi.gov; Bovard, Thomas; Brown-Kobil, Nancy; Susan Ely; Harry Payne; Navaro, Ann; Jesup, Benjamin; Glenda Owens; Macgregor, Katharine; Karen Hawbecker; Maureen Foster; Virginia Johnson; Jim Kurth; Casey Hammond
Subject:	Fwd: ESA coordination in State Regulatory Programs
Date:	Thursday, April 13, 2017 2:32:10 PM
Attachments:	2017.04.13 ESA Coordination Process - Final.docx

Attached is the note I just sent to our regional managers, transmitting Glenda's communication and advising them to re-engage in helping SRAs and OSMRE on ESA compliance using the 1996 BO and the interim coordination procedures. -- GDF

Gary Frazer
Assistant Director -- Ecological Services
U.S. Fish and Wildlife Service
(202) 208-4646

---------- Forwarded message ----------
From: **Frazer, Gary** <gary_frazer@fws.gov>
Date: Thu, Apr 13, 2017 at 7:22 PM
Subject: Fwd: ESA coordination in State Regulatory Programs
To: "White, Rollie" <rollie_white@fws.gov>, Ted Koch <Ted_Koch@fws.gov>, Lori Nordstrom <lori_nordstrom@fws.gov>, "Miranda, Leopoldo" <Leopoldo_Miranda@fws.gov>, Paul Phifer <Paul_Phifer@fws.gov>, Michael Thabault <Michael_Thabault@fws.gov>, "Colligan, Mary" <mary_colligan@fws.gov>, Michael Fris <Michael_Fris@fws.gov>
Cc: Robyn Thorson <Robyn_Thorson@fws.gov>, Theresa Rabot <theresa_rabot@fws.gov>, Benjamin Tuggle <Benjamin_Tuggle@fws.gov>, Joy Nicholopoulos <Joy_Nicholopoulos@fws.gov>, Tom Melius <Tom_Melius@fws.gov>, Deputy Regional Director Charles Wooley <Charles_Wooley@fws.gov>, Cynthia Dohner <Cynthia_Dohner@fws.gov>, Oetker Mike <michael_oetker@fws.gov>, Wendi Weber <Wendi_Weber@fws.gov>, Deborah Rocque <Deborah_Rocque@fws.gov>, Noreen Walsh <Noreen_Walsh@fws.gov>, Matt Hogan <Matt_Hogan@fws.gov>, Gregory Siekaniec <gregory_siekaniec@fws.gov>, Karen Clark <Karen_Clark@fws.gov>, Paul Souza <Paul_Souza@fws.gov>, "Rabin, Larry" <larry_rabin@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Craig Aubrey <craig_aubrey@fws.gov>, Ben Thatcher <ben_thatcher@fws.gov>, John Morse <john_morse@fws.gov>

This follows up on my March 27, 2017, email to you regarding consultation on surface mining operations regulated under SMCRA.

As you can see in the note below, the Office of Surface Mining Reclamation and Enforcement (OSMRE) has determined that, in light of the Congressional Review Act disapproval of the Stream Protection Rule adopted in 2016, they will be reinitiating consultation with Service Headquarters on their surface mining regulatory program as administered through their 1983 regulations and, while that re-initiated consultation is underway, will rely upon our 1996 biological opinion on those 1983 regulations for the purposes of ESA compliance.

Our field offices are now free to re-engage in assisting OSMRE and state regulatory authorities with ESA compliance under the procedures set forth in the 1996 biological opinion and incidental take statement. To facilitate interagency coordination and dispute resolution under the 1996 biological opinion and ITS procedures, the attached interim guidance has been developed for OSMRE, Service, and state regulatory authorities. Please advise your field offices to use the interim procedures to engage with OSMRE and/or the state regulatory authorities on the surface mining permit applications that have been submitted for Service review and comment, and to treat timely action on those applications as a priority of this Administration.

If you have any questions, please contact me or Craig Aubrey, chief of the Division of Environmental Review (703/358-2442).

Gary Frazer
Assistant Director -- Ecological Services
U.S. Fish and Wildlife Service
(202) 208-4646

---------- Forwarded message ----------
From: **Owens, Glenda** <gowens@osmre.gov>
Date: Thu, Apr 13, 2017 at 6:51 PM
Subject: ESA coordination in State Regulatory Programs
To: allen.luttrell@ky.gov, ed.larrimore@maryland.gov, Lanny.Erdos@dnr.state.oh.us, jstefanko@pa.gov, butch.lambert@dmme.virginia.gov, Harold.D.Ward@wv.gov, ed.fogels@alaska.gov, Ginny.brannon@state.co.us, ecoleman@mt.gov, fernando.martinez@state.nm.us, dmoos@nd.gov, johnbaza@utah.gov, todd.parfitt@wyo.gov, johnathan.hall@asmc.alabama.gov, keogh@adeq.state.ar.us, scott.fowler@illinois.gov, sweinzapfel@dnr.gov, Susan Kozak <susan.kozak@iowaagriculture.gov>, Murray Balk <mbalk@kdheks.gov>, stephen.lee@la.gov, James Matheny <james_matheny@deq.state.ms.us>, larry.lehman@dnr.mo.gov, MARYANN.pritchard@mines.ok.gov, denny.kingsley@rrc.texas.gov
Cc: Gary Frazer <gary_frazer@fws.gov>, Greg Conrad <gconrad@imcc.isa.us>, Beth Botsis <bbotsis@imcc.isa.us>

On February 16, 2017, the President signed H.R. J. Res. 38, a joint resolution, under the Congressional Review Act, 5 U.S.C. §§ 801 *et seq.*, which disapproved the Stream Protection Rule (SPR) recently promulgated by the Office of Surface Mining Reclamation and Enforcement's (OSMRE). This disapproval by operation of law means that the SPR has no force or effect and must be treated as though such rule had never taken effect. This nullification of the SPR, in turn, nullified both the December 16, 2016, *Programmatic Biological Opinion and Conference Opinion on the Office of Surface Mining Reclamation and Enforcement's Regulatory Program as Modified by the Issuance and Implementation of the Final Regulation* (2016 BiOp), which analyzed the effects of the SPR, and the related 2016 Memorandum of Understanding (MOU) between OSMRE and the U.S. Fish and Wildlife Service (Service), which addressed implementation of the 2016 BiOp. As a result, OSMRE will be reinitiating formal programmatic consultation with the Service, as provided for under

Section 7(a)(2) of the Endangered Species Act (ESA) and 50 CFR § 402.16, on OSMRE's implementation of Title V of the Surface Mining Control and Reclamation Act. The purpose of this action is to obtain a new programmatic biological opinion based upon the existing regulatory program. Until the formal Section 7 process is completed, State regulatory programs may continue to rely on the 1996 Biological Opinion and Conference Report (1996 BiOp) and the 1996 Incidental Take Statement (ITS) for the exemption of take. In addition, while the reinitiated consultation is underway, OSMRE has developed the attached interim guidance for the state regulatory authorities to ensure that all appropriate regulations, the requirements from the 1996 BiOp, and the Terms and Conditions listed in the Incidental Take Statement associated with the 1996 BiOp are followed. If you have any questions concerning this issue, please contact me or Harry Payne on my staff, at hpayne@osmre.gov or at 202 208 2895.

cc. FWS

Attachment

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1996 Biological Opinion - SMCRA ESA Coordination and Elevation Process

The following outlines the procedures regarding issuance of SMCRA permits by the State Regulatory Authority where the proposed action may affect proposed or listed threatened or endangered species or designated critical habitat under the Endangered Species Act (ESA).

The governing 1983 Title V regulations include several requirements to address potential effects on ESA-listed species. The prohibition against take of a listed species under section 9 of the ESA does not apply when the RA demonstrates that a proposed surface coal mining and reclamation operation will be conducted in compliance with the Terms and Conditions in the Incidental Take Statement (ITS) accompanying the 1996 programmatic Biological Opinion and Conference Report (1996 BiOp). The following procedures are set out to clarify how to comply with the Terms and Conditions of the 1996 BiOp and with our current regulations:

1. The State Regulatory Authority (RA) must provide notice of an administratively complete application for a new permit, significant revision of a permit, or renewal of a permit to the United State Fish and Wildlife Service (Service). *See* 30 C.F.R. § 773.6(a)(3).

   The RA must submit the fish and wildlife resource information in the permit application, as well as the fish and wildlife protection and enhancement plan (PEP) in the permit application, to the Service within 10 days of receipt of request from the Service. *See* 30 C.F.R. §§ 780.16(c) and 784.21(c).

   RAs should approach the Service as early as possible in the permit application development process to provide sufficient time for the coordination and permit review and revision process as it relates to threatened or endangered species or designated critical habitat.

2. The scope and level of detail for fish and wildlife resource information must be determined in coordination with state and federal agencies with responsibilities for fish and wildlife, and must be sufficient to design the PEP. *See* 30 C.F.R. §§ 780.16 and 784.21. To conduct a timely and efficient review of the permit application and to ensure consideration of the best available science including updated species lists for each project location, the Service needs at a minimum the following information:

   a. a detailed description of the action being considered. The detailed description must identify the areas to be disturbed by mining activities, including, but not limited to, vegetation removal, road construction, and surface excavations.
   b. a description of the specific area that may be affected by the action, which would include both the proposed permit area and the adjacent area;
   c. a description of any listed or proposed species or designated critical habitat that may be affected by the action, including the official species lists obtained through the Service's ECOS-IPaC system at: ecos.fws.gov/ipac;

d. a description of the manner in which the action may affect any listed or proposed species or designated critical habitat;
e. a description of how the applicant proposes to avoid or minimize adverse impacts on listed or proposed species and designated critical habitat;
f. a description of how the applicant proposes to enhance fish, wildlife and related environmental values, where practicable (s*ee* 30 CFR 780.16(b));
g. relevant reports, including any environmental impact statements, environmental assessments, biological assessments or other analyses prepared on the proposal; and any other relevant studies or other information available on the action, the affected listed species, or designated critical habitat.

3. Service Review

Upon receipt of the resource information specified above from an RA, the Service will conduct a review of the materials to determine if any of the required information is missing or in need of clarification in order for the Service to evaluate the permit application. The Service will provide the RA with a detailed description of what, if any, additional information is required.

Once the necessary information is submitted to the Service, the Service will determine whether there is a need for additional species specific protective measures (SSPMs), including reporting and monitoring.

If no additional SSPMs are required, the Service will provide the RA with written confirmation that the technical assistance process has been successfully completed.

If the Service suggests additional SSPMs or provides any other comments related to species or critical habitats listed under the ESA, and the RA accepts the Service recommendations, no further coordination in needed.

If the RA does not accept the additional Service measures, the RA must respond to the Service, explaining its rationale for not implementing all the suggested protective measures. After receiving this explanation, the Service will provide a written response to the RA either confirming its agreement with the RA's decision or notifying the RA that the Service does not agree with the RA's decision.

4. The RA must issue a written notification to the Service of its decision to approve or deny an application for a permit if the Service filed comments or objections to the permit application. 30 C.F.R. § 773.19(b)(1). Before approving any permit application that may affect proposed or ESA-listed species or designated critical habitat, the RA must make a finding that "[t]he operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, as determined under the [ESA]. *See* 30 C.F.R. § 773.15(j).

Summary of Interagency Elevation Process

At any point in this process, if it becomes clear that agreement cannot be reached, either party may elect to elevate through the chain of command of the regulatory authority, the Service, and (to the extent appropriate) OSM or the Department for resolution. *See* ITS accompanying 1996 Biological Opinion and Conference Report.