Environmental Protection in the Trump Era

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CHAPTER 3:

How Congress Can Override Environmental Regulation

The Congressional Review Act **(CRA) provides a blunt, powerful tool for Congress to invalidate regulations** recently issued by any federal agency. It is blunt because:

- it allows Congress to wholly invalidate any regulation subject to the CRA, but not to partially disapprove or modify them; and because
- any regulation invalidated by this process is considered never to have taken effect.

It is also powerful because, once a regulation is disapproved, the agency may not reissue it or another regulation "substantially the same" without authorization from Congress. Fifteen CRA resolutions invalidated Obama Administration regulations.

Process.

The CRA allows Congress to use a streamlined procedure to invalidate any final agency rule after it is promulgated, subject to a presidential signature or veto. Generally, Congress can introduce a disapproval resolution within 60 *calendar* days of a rule's issuance (excluding certain days when Congress is adjourned). 5 U.S.C. §802(a). But the CRA adds an additional window for congressional disapproval of regulations that were finalized toward the end of a session of Congress. This window opens approximately 15 days into the next session of Congress, and a CRA resolution can only be introduced within 60 calendar days of that date. *Id.* §801(d)(2). That window, which covered Obama Administration regulations submitted to Congress on or after June 13, 2016, closed on March 31, 2017. **Obama-era regulations can no longer be invalidated via the CRA.**

In addition, to take advantage of expedited Senate procedures discussed below—particularly the inability to filibuster—the Senate must pass a CRA resolution within 60 *session* days from the opening of the review period, which can extend far longer than 60 calendar days because of numerous days the Senate is not in session. *Id*. §802(e). The window for Senate action on Obama Administration regulations opened on January 30, 2017, and ran until May 11, 2017.

This opportunity to invalidate regulations at the beginning of a session of Congress is most relevant when the White House changes parties. When, as now, the current Congress and the current Administration are both opposed to portions of the previous Administration's agenda**,** then **regulations passed at the end of the prior Administration are particularly**

Areas to Watch

Completed Actions. With President Trump's signature, Congress has invalidated 15 Obama Administration regulations, including four environmental or natural resource regulations:

1. the SEC's reporting rule for extractive industries;
2. the Department of the Interior's Stream Protection Rule;
3. the Bureau of Land Management's (BLM's) "Planning 2.0" rule; and
4. a regulation regarding hunting in Alaskan national wildlife refuges.

Another CRA resolution, which would have invalidated a BLM rule regulating methane emissions from oil and gas operations on public lands, passed the House but failed in the Senate by a single vote. As the period for addressing 2016 regulations lapsed on May 11, 2017, no more Obama Administration regulations can be invalidated via the CRA.

vulnerable. Indeed, before 2017, the only time the CRA had been used successfully was in similar circumstances: in 2001, when the George W. Bush Administration succeeded the Clinton Administration, and the Republican-led Congress invalidated an OSHA regulation setting workplace ergonomic standards, with President Bush's assent.

Areas to Watch

Other Potential Actions. Although Obama Administration regulations are immune from the CRA going forward, this Congress may not be finished using the CRA. It remains possible that the CRA may be used to invalidate other regulations issued under Trump appointees—despite the political alignment of Trump's appointees with the Republican majorities in Congress—particularly those produced in response to a statutory command or a court order.

Discussion.

No Filibuster. The CRA's procedural innovations relate particularly to Senate procedure. Most important, the Act eliminates the filibuster for any resolution that fits within its scope; thus, a simple Senate majority is sufficient to pass a resolution of disapproval. The CRA also sets a maximum of 10 hours of Senate floor debate on each resolution, *id.* §802(d)(2), and allows for a nondebatable motion to further limit debate below 10 hours. Even without motions to further limit debate, fewer than 10 hours were ultimately used for many of the resolutions passed in 2017. But **each individual CRA resolution still requires a significant commitment of time and focus.**

One Regulation Per Resolution. The main limitation of the CRA is that each regulation Congress seeks to disapprove requires a *separate* resolution. Given that this Congress has a particularly full agenda, the competition for scarce floor time required trade offs in terms of which regulations were subject to resolutions. This constraint limited the number of disapprovals far below the number of regulations potentially subject to the CRA's reach. (Indeed, this constraint is the motivation for bills like the Midnight Rules Relief Act of 2017 (H.R. 21), which would allow Congress to bundle multiple regulations into a single resolution of disapproval. That bill passed the House in January 2017.)

Lasting Impact. Once a rule is invalidated through a disapproval resolution, it "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 [subsequent] law." *Id.* §801(b)(2). **This long-term effect has potentially far-reaching implications for entire areas of regulation once a disapproval resolution is enacted**. There is a wide possible range of meanings for what "substantially the same form" means in practice—from allowing promulgation of practically the same regulation under changed circumstances, to barring any attempt to regulate within the broad topical areas. Moreover, because the Act bars judicial review, it is unsettled whether courts will have an opportunity to determine the scope of the bar on future regulations. *See* 5 U.S.C. §805.

A challenge to the CRA is pending in federal district court in Alaska. *Center for Biological Diversity v. Zinke*, No. 3:17-cv-00091-JWS (D. Alaska filed Apr. 20, 2017). The suit claims, first, that the CRA's prohibition on future regulations "in substantially the same form" as a disapproved rule is an unconstitutional violation of the separation of powers. The suit also claims that by the Act's own terms, the 2017 resolution disapproving a rule regarding hunting in national wildlife refuges in Alaska exceeded the scope of the CRA. However, a motion to dismiss is now pending, and it remains unclear whether a court will ever reach the merits of these claims.

Opportunities for Public Engagement.

The main opportunity for engagement by members of the public is appealing to members of Congress voting on CRA resolutions. Stakeholder engagement may be most influential in the Senate. If a disapproval resolution passes, there will be future opportunities to:

- engage agencies regarding replacement regulations;
- participate in challenges to new regulations in court, including whether they are substantially similar to an invalidated regulation; and
- reengage Congress if new or clarified authority to regulate is needed.