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CHARTING A "SUBSTANTIALLY DIFFERENT" APPROACH TO LAND MANAGEMENT PLANNING FOLLOWING A CONGRESSIONAL REVIEW ACT JOINT RESOLUTION OF DISAPPROVAL

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Congress enacted the Congressional Review Act ("CRA")[1] in 1996 as part of the Gingrich Revolution. Among its provisions, the CRA creates an expedited path for Congress to repeal agency rules. This path, which ends in a "joint resolution of disapproval," does not produce a congressional statement of the reasons for disapproval, or direction on how an agency should proceed following disapproval. This lack of direction is a problem if an agency remains under a statutory obligation to issue a rule covering matters addressed in the disapproved rule.

The CRA also prohibits an agency from reissuing a new rule that is "substantially the same" as a disapproved rule unless specifically authorized to do so by Congress—but the CRA fails to define "substantially the same." The lack of definition sharpens the problem for agencies that not only remain subject to an obligation to issue rules, but where a large portion of the content of those rules is prescribed by statute. Such agencies cannot ignore their mandate to promulgate rules, or the substantive provisions required to be included in those rules, yet they have no way to know how, or how much, a new rule must depart from the disapproved rule.

Further complicating matters, resolutions of disapproval are, as a practical matter, available only when one political party controls both houses of Congress and the White House, and following shifts in power between political parties. Single party control over government rarely lasts long, yet the fallout from a joint resolution of disapproval can linger for years, salting the earth for future rulemaking efforts. Indeed, twenty rules have fallen victim to the CRA with only two of those rules being replaced. The chilling effect on agency action may therefore be more significant than disapproval itself.

We argue here that the CRA does more harm than good and should be repealed. Absent repeal, we argue that Congress should provide specific direction for future agency action as part of any joint resolution of disapproval, and for a narrow definition of "substantially the same" that is confined to those portions of a rule that are committed to agency discretion. We use the Bureau of Land

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[1] 5 U.S.C. §§ 801–900.

Management's ("BLM") planning rule as an example of how an agency that must enact a broad regulatory program could proceed following a joint resolution of disapproval, and to demonstrate that changes that make a replacement rule more defensible could frustrate the will of the disapproving Congress.

I. OVERVIEW OF THE CONGRESSIONAL REVIEW ACT

The CRA grew out of Newt Gingrich and Dick Armey's "Contract with America," which was introduced to the public prior to the 1994 congressional midterm elections. Two years after the midterms, Congress passed the CRA and President Clinton signed it into law as part of the 1996 Small Business Regulatory Enforcement Fairness Act.[2] The CRA was a reaction to the expanding administrative state, curtailing what some saw as an abdication of Congress' legislative functions and executive oversight responsibilities.

The CRA contains multiple provisions aimed at increasing congressional oversight of administrative agency action. One provision requires agencies to submit all final rules to Congress and the Government Accountability Office before those rules go into effect.[3] By requiring rule submission, the CRA keeps Congress apprised of administrative actions and allows Congress to supervise agency rulemaking more effectively.

In addition to its review function, the CRA also creates an expedited path to eliminate rules through a joint resolution of disapproval, stripping the rule of legal force and effect.[4] If a resolution is introduced within the sixty session or legislative days following receipt of a rule, expedited parliamentary procedures are available in considering the resolution.[5] For rules that were finalized during the final sixty session days of the Senate or final sixty days of the House of Representatives, the sixty day review window reopens "in the succeeding session of Congress,"[6] and runs from the fifteenth day session or legislative day after the succeeding Congress first convenes.[7]

During that review period the CRA provides the Senate a faster and easier

[2] Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (Mar. 29, 1996) (codified at 5 U.S.C. § 601).

[3] 5 U.S.C. § 801(a)(1)(A).

[4] 5 U.S.C. § 802.

[5] 5 U.S.C. § 802(a).

[6] 5 U.S.C. § 801(d)(1).

[7] 5 U.S.C. § 801(d)(2).

path through committee.[8] Another provision limits floor debate on a resolution to ten hours split evenly between those arguing for and against disapproval, avoiding potential filibusters.[9] Additionally, the joint resolution is not subject to amendments.[10] If Congress does not act on the resolution within sixty session days of receiving a rule from an agency, the CRA's "fast track" procedures are unavailable and normal parliamentary procedures are required to rescind a rule.[11]

The CRA does not contain comparable procedures for fast tracking a joint resolution of disapproval in the House. But each time the House has considered a CRA disapproval resolution, it has done so under special rules prohibiting floor amendments.[12]

If Congress does pass a joint resolution of disapproval and the President signs it into law, the CRA dictates that a disapproved rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the new rule is specifically authorized by a law enacted after the joint resolution disapproving the original rule."[13] Congress did not define "substantially the same" in the CRA, and legislative history sheds little light on the term's intended meaning. Moreover, resolutions of disapproval do not provide substantive guidance in determining what constitutes "substantially the same." Resolutions of disapproval contain only the following boilerplate language following the resolving clause: "'That Congress disapproves the rule submitted by the __ relating to __, and such rule shall have no force or effect.' (The blank

[8] 5 U.S.C. § 802(c).

[9] 5 U.S.C. § 802(d)(2).

[10] 5 U.S.C. §§ 802(d)(1) and (2).

[11] 5 U.S.C. § 802(e).

[12] MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 14 (2020 UPDATE). *See also*, S.J. Res. 13, S.J. Res. 14, and S.J. Res. 15 (117th Cong. 2021) (the three joint resolutions of disapproval enacted after publication of the Carey and Davis report).

[13] 5 U.S.C. § 801(b)(2). Section 801(b)(2) uses the phrases "substantially the same form" and "substantially the same." "Substantially the same form" relates to an attempt at re-issuing the same rule that was disapproved under the CRA, while the subsequent "substantially the same" relates to an entirely new attempt at rulemaking. The difference between the two phrases seems to be based on whether the agency is starting subsequent rulemaking from a clean slate as opposed to simply adjusting portions of the disapproved rule. Thus, for our purposes, "substantially the same form" and "substantially the same" do not hold significantly different meanings. As such, we will only use the phrase "substantially the same" unless quoting directly from a source using the phrase "substantially the same form."

spaces being appropriately filled in)."[14]

Finally, the CRA states that "[n]o determination, finding, action, or omission under [the CRA] shall be subject to judicial review."[15] At first blush seems to provide agencies issuing a replacement regulation some cover from challenge, but the 10th Circuit opined recently 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."[16] The 10th Circuit then noted that because the replacement rule would be issued pursuant to a law other than the CRA, review would remain available under that other statute, independent of the CRA's prohibition on judicial review.[17]

II. USE OF THE CONGRESSIONAL REVIEW ACT

Prior to 2017, the CRA was used only once to disapprove an agency rule.[18] In 2001, Congress and President George W. Bush used the CRA to disapprove of an Occupational Safety and Health Administration ("OSHA") rule pertaining to ergonomics and musculoskeletal workplace injuries ("the Ergonomics Rule").[19] Following disapproval of the Ergonomics Rule, the CRA was not employed again until 2017, when it was used sixteen times by the Republican-controlled Congress and President Trump to disapprove Obama-era rules.[20] Four years later, the CRA was used three times by the Democrat-

[14] 5 U.S.C. § 802(a).

[15] 5 U.S.C. § 805.

[16] Kansas Natural Resource Coalition v. Dep't of Interior, 971 F.3d 1222, 1228 (10th Cir. 2020) (internal quotation and citations omitted).

[17] *Id*. at 1236-37 (10th Cir. 2020). *See also*, Ctr. for Biological Diversity v. Bernhardt, 946 F.3d 553, 561 (9th Cir., 2019) ("the Jurisdiction-Stripping Provision does not include any explicit language barring judicial review of constitutional claims. Therefore, we presume that Congress did not intend to bar such review."); Tugaw Ranches, LLC v. Dep't of Interior, 362 F.Supp.3d 879, 888 (D. Idaho 2019) ("It appears clear that those who promulgated [the CRA] understood that actions taken by certain actors would not be reviewable, but that this non-reviewability did not extend to all CRA actors and that specifically agency action would be reviewable.").

[18] CAREY & DAVIS, CONG. RSCH. SERV., *supra* note 12 at 25.

[19] Dep't of Labor, OSHA, *Ergonomics Program*, 65 Fed. Reg. 68,262 (Nov. 14, 2000); Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001) (disapproving the Ergonomics Rule).

[20] For a list of all disapproved regulations, *see* CAREY & DAVIS, CONG. RSCH. SERV., *supra*

controlled Congress and President Biden.[21]

Resolutions of disapproval are an effective tool only when two factors converge: single-party control over both houses of Congress and the White House; and following a change in political party control of government. The CRA becomes useful only under these narrow circumstances because split political control of Congress would likely prevent enactment of a joint resolution of disapproval, and because a President is unlikely to sign a resolution disapproving of a rule reflecting similar policy priorities. Resolutions of disapproval therefore tend to solidify partisan positions.

Single party control over both houses of Congress and the presidency, however, is rarely lasting. In the thirteen congressional terms since the CRA's enactment in 1996, a single political party has only once controlled government for two consecutive congressional terms.[22]

Evidencing their partisan nature,[23] joint resolutions of disapproval impose a blanket "no." While Congress could provide direction, all twenty joint resolutions of disapproval enacted to date are silent regarding intent or future direction. Agencies know only that a replacement rule must be substantially different from the prior rule, but they know neither how much of a change is required, or what changes Congress intended when it passed the joint resolution. This places agencies in a difficult spot, as some agencies remain statutorily obligated to promulgate rules.[24]

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note 12 at 25–26.

[21] *See* Pub. L. No. 117-22 (Equal Employment Opportunity Commission's rule regarding Conciliation Procedures), Pub. L. No. 117-23 (Environmental Protection Agency's rule regarding Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review), and Pub. L. No. 117-24 (Comptroller of Currency's rule regarding National Banks and Federal Savings Associations as Lenders).

[22] The Republican party held a majority in both the House and the Senate as well as the White House during the 108th (2003-2005) and 109th Congress (2005-2007).

[23] All twenty joint resolutions of disapproval enacted to date passed both houses of Congress almost entirely on party line votes. Notably, even the joint resolution of disapproval with the greatest level of bipartisan support, the very first resolution undoing the OSHA Ergonomics Rule, was passed along party lines. *See* S.J. Res. 6, 107th Cong. (2001) (garnering "Yea" votes from 206 Republicans and 16 Democrats in the House and 51 Republicans and 5 Democrats in the Senate, respectively).

[24] *See, e.g.*, Securities and Exchange Commission, *Disclosure of Payments by Resource Extraction Issuers*, 85 Fed. Reg. 2522, 2526 (Jan. 15, 2020) ("Although the joint resolution vacated the 2016 Rules, the statutory mandate under Section 13(q) of the Exchange Act remains in effect. As a result, the Commission is statutorily obligated to issue a new rule.");

Knowing that they have already displeased Congress once and fearing that further missteps could impact agency funding or authority, agencies may be reluctant to expend their limited resources revising rules struck down under the CRA. Indeed, only twice has an agency issued a new rule addressing the substantive issues covered in a repealed rule.[25]

If agencies do proceed, they will likely seek to demonstrate that they have taken congressional displeasure into account, but doing so requires them to guess at congressional intent. Changes in administration priorities following enactment of a joint resolution of disapproval, and the prospect that priorities may change again with the next election, can further complicate or chill agency action.

With twenty rules having fallen victim to the CRA and only two of those rules undergoing subsequent rulemaking, resolutions of disapproval can continue to shape agency action for years to come, entrenching partisan sentiments to the likely detriment of bipartisan action. In that sense, resolutions of disapproval enshrine the "dead hand of the past,"[26] and are harmful to the effective functioning of government. This chilling effect on agency action, we fear, may be more significant than disapproval itself, especially where agency responsibilities touch on matters like public health.

We turn now to the BLM Planning Rule, to give shape to what has thus far been a largely abstract discussion. In proposing a path forward, we explore some of the legal challenges facing agencies, and identify significant weaknesses with the CRA that justify its repeal.

Dep't of Labor, *Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012*, 84 Fed. Reg. 53,037, 53,038 (Oct. 4, 2019) ("The rule implements the statutory requirement that the Secretary issue regulations determining how to identify "an occupation that regularly conducts drug testing.").

[25] *See* SEC, *Disclosure of Payments by Resource Extraction Issuers*, 86 Fed. Reg. 4662 (Jan. 15, 2021); Dep't of Labor, *Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012*, 84 Fed. Reg. 53,037 (Oct. 4, 2019).

[26] *See* United States v. Jefferson Cty. Bd. of Educ., 372 F.2d 836, 906 (5th Cir. 1966), on reh'g, 380 F.2d 385 (5th Cir. 1967) (Cox, J., dissenting) ("in moving water there is life, in still waters there is stagnation and death.").

III. BACKGROUND ON THE BUREAU OF LAND MANAGEMENT'S PLANNING RULES

Approximately twenty-eight percent of the United States, or 653 million acres of land surface (over 1 million square-miles) is owned by the federal government.[27] Of this, the BLM manages 244 million acres of land surface,[28] more than any other federal agency. The BLM also manages the federal government's 710 million acre onshore mineral estate when the surface estate is controlled by a non-federal entity or by another federal agency.[29] Management of this landscape is prescribed by multiple federal laws, the two primary ones being the Federal Land Policy and Management Act of 1976 ("FLPMA"), and the National Environmental Policy Act of 1969 ("NEPA").

A. The Bureau of Land Management's Statutory Mandate

Congress, when it enacted FLPMA, directed the BLM to inventory "all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values."[30] Based on this inventory, the Secretary of the Interior must develop, maintain, and periodically update plans providing long-term direction for land use management.[31] In developing and revising Resource Management Plans ("RMPs"), the Secretary of the Interior must:

> (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

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[27] *Dept. of the Interior, Public Land Statistics 2019* 7, Table 1-3, Mineral and Surface Acres Administered by the Bureau of Land Management, Fiscal Year 2019 (2020).

[28] *Id.*

[29] George Cameron Coggins & Robert L. Glicksman, 4 *Pub. Nat. Resources L.* § 39.22 (2d ed. 2017); *Public Land Statistics* 2019, *supra* note 26 at 7, Table 1-3.

[30] 43 U.S.C. § 1711(a).

[31] 43 U.S.C. § 1712(a). "Public involvement" means "the opportunity for participation by affected citizens in rule making, decision making, and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance." 43 U.S.C. § 1702(d).

> (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
> (3) give priority to the designation and protection of areas of critical environmental concern;
> (4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;
> (5) consider present and potential uses of the public lands;
> (6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
> (7) weigh long-term benefits to the public against short-term benefits;
> (8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and
> (9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located. . . .[32]

The Secretary must also "take any action necessary to prevent unnecessary or undue degradation of the lands."[33] To implement these requirements, the Secretary "shall" issue rules establishing "procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands."[34]

To the extent consistent with other laws, the Secretary of the Interior must coordinate land use planning and management with similar efforts that are being undertaken by other federal agencies, tribes, and state and local governments.[35]

[32] 43 U.S.C. § 1712(c).

[33] 43 U.S.C. § 1732(b).

[34] 43 U.S.C. § 1712(f).

[35] 43 U.S.C. § 1712(c)(9).

This includes considering carefully the policies of approved state and tribal land resource management programs, and maximizing consistency across plans to the maximum extent possible.[36]

Supplementing FLPMA's substantive mandate, NEPA imposes procedural requirements that apply to RMP development or revision.[37] Under NEPA, developing or revising an RMP is a "major Federal action[] significantly affecting the quality of the human environment,"[38] and such actions require the BLM to prepare an environmental impact statement ("EIS").[39] The BLM combines its planning and NEPA analysis such that the analysis of management alternatives and environmental impact review are combined into a single document.[40]

Procedurally, this means that the BLM begins the planning and environmental review process with a "scoping" period, where the agency seeks public input in identifying the issues to be addressed and the range of alternative management scenarios meriting consideration.[41] Following scoping, the BLM prepares a combined draft RMP and EIS. The draft is made available for public comment for at least 90 days,[42] comments are reviewed by the BLM, and comments are addressed through revisions to the draft or in a separate response to comments.[43] The BLM then issues a proposed RMP and final EIS reflecting these changes and any other new information or analysis.[44] That decision is subject to a 30-day protest period that is open to any member of the public who participated in the planning process and who has an interest that may be adversely affected by the approval.[45] The decision is also subject to review, by the governor of the state

[36] *Id.*

[37] 42 U.S.C. §§ 4321-47. The White House Council on Environmental Quality promulgates NEPA's implementing regulations, which are binding on the BLM. *See* Exec. Order No. 11991 (1977) (modifying Exec. Order No. 11514 (1970)).

[38] 42 U.S.C. § 4332(2)(C); *see also* 43 C.F.R. § 1601.0-6 (declaring that RMP approval "is considered a major Federal action significantly affecting the quality of the human environment" and therefore necessitates EIS preparation).

[39] 42 U.S.C. § 4332(2)(C).

[40] 43 C.F.R. § 1601.0-6.

[41] 40 C.F.R. § 1501.9(a).

[42] 43 C.F.R. § 1610.2(e).

[43] 40 C.F.R. § 1503.4.

[44] 43 C.F.R. § 1610.4-8.

[45] 43 C.F.R. § 1610.5-2(a).

where the plan is being developed, for consistency with state and local plans.[46] If an inconsistency is identified by a governor, then the BLM can either revise the RMP to address the governor's recommendations, or reject the proposed revisions and provide a written explanation for the rejection of the governor's recommendations.[47] Finally, the U.S. Department of the Interior issues a record of decision, which is then subject to judicial review.[48]

Other laws, including but not limited to the Endangered Species Act, the Mineral Leasing Act, and the National Historic Preservation Act provide additional substantive and procedural sideboards on the scope of the BLM's management discretion. The BLM's management discretion is thus heavily prescribed by law.

B. The Bureau of Land Management's Planning Rules

The BLM first issued land use planning rules in 1979,[49] making minor revisions to these rules in 1983,[50] and again in 2005.[51] In 2011, the BLM began a comprehensive review of its planning rules. This effort, known as Planning 2.0, focused on three main goals: First, addressing "the need for land use plans that support effective management when faced with environmental uncertainty, incomplete information, or changing conditions."[52] Second, providing meaningful opportunities for other federal agencies, state and local governments, Indian tribes, and the public to be involved in RMP development.[53] Third, improving the BLM's ability to plan for and manage resources extending beyond traditional

[46] 43 C.F.R. § 1610.3-2(e).

[47] *Id.*

[48] 43 C.F.R. § 1610.5-2(b).

[49] *See* Public Lands and Resources; Planning, Programming, and Budgeting, 44 Fed. Reg. 46,386 (Aug. 7, 1979) (to be codified at 43 C.F.R. pt. 1600).

[50] Planning, Programming, Budgeting; Amendments to the Planning Regulations; Elimination of Unneeded Provisions, 48 Fed. Reg. 20,364, 20,364 (May 5, 1983) (to be codified at 43 C.F.R. pt. 1600).

[51] Land Use Planning, 70 Fed. Reg. 14,561 (Mar. 23, 2005) (to be codified at 43 C.F.R. pt. 1600).

[52] Resource Management Planning, 81 Fed. Reg. 9674, 9679 (proposed Feb. 25, 2016) (to be codified at 43 C.F.R. pt. 1600).

[53] *Id.*

management boundaries.[54] The final Planning 2.0 rule was issued on December 12, 2016.[55]

Some Western Governors' Association ("WGA") members feared that their ability to influence federal land management decisions would decrease under Planning 2.0. The first of their three main complaints was that the rule undermined requirements to consider state and local planning documents.[56] FLPMA requires consistency between BLM plans and state and local plans "to the maximum extent [the Secretary] finds consistent with Federal law and the purposes of this Act."[57] While Planning 2.0 did not (and could not) reduce this requirement, Planning 2.0 was somewhat narrower than the prior rule in applying only to "officially approved and adopted *plans*" while the prior rule required consideration of "officially approved and adopted resource related *policies and programs*."[58]

Second, Planning 2.0 gave the BLM more latitude in defining the planning area to extend beyond field office boundaries in response to landscape-scale concerns.[59] Some within the WGA expressed concern that the "BLM's emphasis on landscape-scale planning may lead to a resulting emphasis on national objectives over state and local objectives."[60] "Given BLM's increased use of landscape-scale planning, Western Governors expect multiple RMPs to cross state boundaries. Western states are concerned that this could shift key responsibilities away from BLM state directors and obscure state and local priorities in favor of national priorities."[61] Increasing the size of the planning area would have also, in the eyes of some WGA members, increased the number of stakeholders providing

[54] *Id.* at 9679–80.

[55] Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600) (hereinafter Planning 2.0).

[56] Letter from Montana Governor Steve Bullock and South Dakota Governor Dennis Daugaard, Chair and Vice-Chair of the Western Governors' Ass'n, to Senate Majority Leader Mitch McConnell, Senate Minority Leader Charles Schumer, Speaker of the House Paul Ryan, and House Minority Leader Nancy Pelosi, at 4-5 (Feb. 10, 2017) (WGA Letter).

[57] 43 U.S.C. § 1712(c)(9).

[58] Planning 2.0, to be codified at 43 C.F.R. § 1610.3-3(a) (emphasis added). *Cf*., § 1610.3-2(b) (emphasis added).

[59] *Compare*, 43 C.F.R. § 1610.1(b), *and* Planning 2.0, to be codified at 43 C.F.R. § 1610.4(a)(1).

[60] WGA Letter at 3.

[61] *Id.*

input on BLM decisions, thereby diminishing the voice of any one state or local government entity.[62]

Third, Planning 2.0 reduced the comment period for most draft RMP amendments from 90- to 60-days.[63] That change applied to all stakeholders, but Planning 2.0's critics contended that reducing the time allowed to review and comment diminished state and local governments' voice in the planning process. Displeased over Planning 2.0, a coalition of counties joined with the Doña Ana Soil and Water Conservation District to challenge Planning 2.0.[64]

C. The Death of Planning 2.0

Less than two months after Planning 2.0's enactment, the House of Representatives, in accordance with the CRA, passed a resolution disapproving of the rule.[65] That resolution was approved by the Senate on March 7, 2017 and signed into law by President Trump on March 27, 2017.[66] The resolution, in its entirety, states that:

> 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 Bureau of Land Management of the Department of the Interior relating to "Resource Management Planning" (published at 81 Fed. Reg. 89580 (December 12, 2016)), and such rule shall have no force or effect.[67]

Congress provided no explanation of Planning 2.0's failings in the joint

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[62] Notably, landscape-scale planning occurred prior to Planning 2.0. *See, e.g.*, Notice of Availability of the ROD and Approved RMP Amendments for the Great Basin Region Greater Sage-Grouse Sub-Regions of Idaho and Southwestern Montana, Nevada and Northeastern California, Oregon, and Utah, 80 Fed. Reg. 57,633 (Sept. 24, 2015).

[63] *Compare* 43 C.F.R. § 1610.2(e), *and* Planning 2.0, to be codified at 43 C.F.R. § 1610.2-2(b).

[64] *See* Petition for Review of Final Agency Action at 2–4, Kane Cnty. v. United States, No. 2:16-cv-01245 (D. Utah Dec. 12, 2016). This suit was dismissed following enactment of the resolution of disapproval that repealed Planning 2.0. *See* Rule 41(a) Notice of Dismissal, Kane Cnty. v. United States, No. 2:16-cv-01245 (D. Utah Mar. 30, 2017).

[65] H.R.J. Res. 44, 115th Cong. (2017).

[66] Pub. L. No. 115-12, 131 Stat. 76 (2017).

[67] *Id.*

resolution of disapproval, though the House debate on the resolution is somewhat enlightening. Representatives favoring disapproval reiterated the same complaints raised by the WGA:[68] (1) narrowing the consistency requirements to "officially approved and adopted resource related policies and programs," (2) emphasizing landscape-scale planning elevated national objectives over state and local concerns, and (3) reducing the time allowed to review and comment diminished state and local governments' voice in the planning process.[69]

D. The Need for a New Planning Rule

Following the joint resolution of disapproval and effective reinstatement of the prior planning rule, the BLM operates under a rule that has received only scant revisions since its original issuance forty-two years ago. Industry and environmentalists alike agree that the BLM's planning rule is overdue for an update. The BLM remains statutorily obligated to promulgate planning rules, and both the substantive and procedural content of these rules is heavily dictated by FLPMA and NEPA. The BLM cannot stray from these obligations, yet the joint resolution of disapproval and prohibition against issuing a substantially similar rule hangs over the BLM like the Sword of Damocles.

Before exploring specific ways in which the BLM could revise Planning 2.0 without violating the CRA's "substantially the same" prohibition, we will first explore the legal quagmire created by this undefined phrase.

IV. THE "SUBSTANTIALLY THE SAME" QUAGMIRE

By failing to define "substantially the same," Congress created a regulatory environment fraught with uncertainty and instability. Agencies that are subject to joint resolutions of disapproval may avoid subsequent rulemaking for fear of violating the CRA, leaving important administrative problems unaddressed. Agencies that are statutorily obligated to promulgate rules but are

[68] Cong. Rec. H1032-41 (Feb. 7, 2017).

[69] In the words of Representative Liz Cheney, the resolution's lead sponsor, Planning 2.0 "takes authority away from people in local communities. . . . It takes authority away from our elected representatives at a local level, and it puts Washington bureaucrats in charge of decisions that influence and impact our lives." *Id*. at H1032. "Planning 2.0 directs the BLM to perform large, landscape-scale planning efforts that stretch across county lines and State lines. This new regulation allows radical, special interest groups from other States to have the same influence as county and local officials in the planning process." Id. at H1036 (statement of Rep. Gossar).

constrained by a joint resolution of disapproval must choose between two perils: risk violating the substantive statute by not regulating fully, or risk violating the CRA by issuing a rule that is "substantially the same" as the disapproved rule.

To date, the most extensive discussion of the "substantially the same" comes from a post-enactment statement by Senators Don Nickels, Harry Reid, and Ted Stevens. According to these Senators, "[i]t will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule."[70] The three suggest that agencies having broad, statutorily granted discretion to regulate may continue to do so; that a joint resolution of disapproval may effectively prohibit agencies from issuing new rules if agency discretion is "narrowly circumscribed" by other laws; and that agencies should look to the debate on any joint resolution to determine congressional intent.[71]

Setting aside the practical challenges involved in divining congressional intent from an abridged floor debate, the Senators' advice on whether and how an agency should proceed is hard to square with normal rules of statutory construction. Courts are reluctant to rely on post-enactment statements by individual lawmakers to divine congressional intent, and the same cautions should apply to agency staff. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. . . . [P]ost-enactment legislative history by definition could have had no effect on the congressional vote."[72] As such, an agency's path forward remains, at best, unclear. Congress should say what it wants rather than make agencies search for hidden meanings. We therefore turn next to secondary sources for interpretive guidance.

A. Interpretive Options for "Substantially the Same"

Determining whether a rule is "substantially the same" as a disapproved rule requires a context specific analysis. According to the Congressional Research Service, "sameness could be determined by scope, penalty level, textual similarity, or administrative policy, among other factors,"[73] all of which require

[70] Joint Explanatory Statement of House and Senate Sponsors, 142 CONG. REC. S.3683 (daily ed. Apr. 18, 1996).

[71] *Id.*

[72] Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) (internal citations and quotation marks omitted).

[73] MAEVE P. CAREY, ALISSA M. DOLAN & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., THE

attention to the details of any given rule. We focus here on two prominent interpretive arguments: First, addressing the reasons for disapproval given by Congress when promulgating a new rule; and second, assessing "substantially the same" based on the rulemaking discretion left to the agency by an underlying statute. We then discuss whether resolutions amend underlying substantive statutes.

1. Address the Reasons for Disapproval

By focusing on congressional concerns, agencies maximize opportunities to affect changes that result in the kinds of substantial differences that Congress intended.[74] Agencies also depend on Congress for their legal authority to regulate, and for adequate and stable budgets. Agencies therefore pay close attention to direction contained in duly enacted laws and are unlikely to disregard the reasons Congress disapproved of a rule in crafting substantially different replacement rules.[75]

Resolutions of disapproval, however, do not identify the reasons for congressional disfavor. All twenty resolutions of disapproval contain identical language, and none include either a statement of the problems with the disapproved rule, or direction for redressing those concerns. Absent such direct statements, the Congressional Record of the House floor debate on a resolution provides the most authoritative source of information. Indeed, according to the explanatory statement provided by the CRA's co-sponsors, "The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval."[76] But statements from individual Representatives provide a poor picture of congressional intent

CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 17 (2016).

[74] Congress may have also intended agencies to revise procedural aspects of the disapproved rule. "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." Finkel & Sullivan, *supra* note 73 at 736. So, in going back to the drawing board, agencies can address the methods used in promulgating a rule as well as the substance of the rule itself.

[75] Adam M. Finkel & 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?*, 63 ADMIN. L. REV. 707, 736 (2011).

[76] Joint Explanatory Statement of House and Senate Sponsors, 142 CONG. REC. S.3683 (daily ed. Apr. 18, 1996).

under normal circumstances,[77] and debate under the CRA is heavily constrained, making a clouded picture even worse. Congress should make its intentions clear and not expect agencies to read tea leaves.

Additionally, the intent of the Congress that enacted the joint resolution of disapproval may have little in common with the priorities of the current Congress or President. This places agencies in the unenviable position of having to choose between fidelity to ambiguous and non-binding direction, and rulemaking based on an assessment of current objectives that may conflict with a joint resolution of disapproval. The legal answer is that the CRA requires only that a replacement rule differ substantially from its predecessor, not that it differ in ways that Congress may have intended but not reduced to law. As the late Justice Antonin Scalia famously said, "We are governed by laws, not by the intentions of legislators,"[78] and the "[t]he text is the law, and it is the text that must be observed."[79] An agency may therefore differentiate a rule by acting in ways that Congress did not intend.

Congress, for example, disapproved of the Office of Surface Mining, Reclamation, and Enforcement's 2016 Stream Protection Rule[80] because that rule was perceived as too burdensome on the coal mining industry.[81] While the Republican majority in the 115th Congress clearly preferred a rule that would be less onerous, Congress did not reduce that goal to a legal requirement. A replacement rule could therefore distinguish itself from its predecessor by being more protective of the streams into which coal waste is discharged, thereby potentially making compliance more burdensome on the coal mining industry. While we tend to believe that increased stream protections would be good policy

[77] SW Gen., Inc. v. N.L.R.B., 796 F.3d 67, 77 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017), *citing* Zuber v. Allen, 396 U.S. 168, 186 (1969) ("Floor debates reflect at best the understanding of individual Congressmen."); Chrysler Corp. v. Brown, 441 U.S. 281, 311, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

[78] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

[79] ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (1997). *See also*, In Re Sinclair, 870 F.2d 1340, 1341 (7th Cir. 1989) (holding that when conflict exists between statute and its legislative history, the statute prevails).

[80] Fed. Reg. 93066 (Dec. 20, 2016) (final rule).

[81] *See e.g.*, CONG. REC. H.841 (daily ed. Feb. 1, 2017) (comments of Rep. Johnson, "make no mistake about it, the stream protection rule is not about protecting streams. It was designed for one purpose—to regulate the coal mining industry out of business. It is the centerpiece of the Obama administration's war on coal.").

and make the new regulation substantially different and therefore more defensible, that outcome conflicts with the intentions of the Congress that passed the resolution. One can easily imagine a scenario where the political tables are turned.

This legally correct approach also ignores political and pragmatic realities. Agencies may decide to focus on other matters rather than wade into a political quagmire. Of the twenty rules disapproved of by Congress, only two have been reissued.[82] The real effect of a joint resolution of disapproval therefore appears to be a chilling of agency action. Assuming agencies do forge ahead, we believe that they should focus on matters within their discretion.

2. Assessment of Agency Discretion in Rulemaking

Professor Cary Coglianese proposed a compelling interpretive approach in response to a 2020 SEC proposed rule. That proposed rule addressed a situation where a resolution disapproves an agency rule, and the agency remains statutorily obligated to promulgate a rule addressing the same substantive issues. Professor Coglianese argues that "the approach that best respects both the statutory prohibition in the CRA and statutory requirement in the substantive law is to look to see whether the agency has exercised its discretion in substantially the same manner."[83]

To illustrate the argument, Professor Coglianese asks us to envision an agency rule containing 100 words. A statute mandates that the agency include 70 specific words in the rule. This leaves the agency with discretion over 30 of the 100 words in the rule. If Congress disapproved the initial rule using the CRA, the agency could only change 30 of those words without violating its statutory mandate under the substantive statute. While 70-percent of a new rule would be identical to the disapproved rule, the new rule should be upheld if the agency made significant substantive changes to the remaining 30-percent. This is because the agency acted in good faith to comply with both the CRA and the underlying statutory mandate. Requiring changes to the statutorily mandated 70 words

[82] *See* SEC, *Disclosure of Payments by Resource Extraction Issuers*, 86 Fed. Reg. 4662 (Jan. 15, 2021); Dep't of Labor, *Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012*, 84 Fed. Reg. 53,037 (Oct. 4, 2019).

[83] Cary Coglianese, *Solving the Congressional Review Act's Conundrum*, U. PENN. L. SCH., SSRN, Pub. L. Rsch. Paper No. 20-15, 1 (Mar. 16, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567230.

"would imply that the CRA has repealed the substantive statute that requires those 70 words,"[84] which Professor Coglianese argues violates various canons of statutory construction.[85] Thus, the agency need only ensure that the discretionary portions of any new rule differ substantially from the discretionary portions of the disapproved rule. We agree with Professor Coglianese that the prohibition against issuing a rule that is "substantially the same" as a previously disapproved rule is best understood in light of agency discretion. But before exploring how this approach could be applied to potential revisions of Planning 2.0, we will first address whether the CRA does indeed amend the underlying statute.

B. Effect of a Joint Resolution and the CRA on Underlying Statutes

While Professor Coglianese and others argue persuasively that a joint resolution of disapproval does not amend an underlying statute, a recent case illustrates that a broad interpretation of "substantially the same" could have the same substantive effect as amending an underlying statute.

In 2019, the Center for Biological Diversity ("CBD") sought to compel the Department of the Interior ("DOI") to re-issue regulations that had been disapproved under the CRA. CBD argued that the CRA and the joint resolution violated separation of powers principles because they interfered with the Executive Branch's duty under the Take Care clause of the Constitution. Specifically, CBD noted that Congress had statutorily directed the executive branch, through the DOI, to manage federal wildlife refuges. CBD then argued that the CRA joint resolution of disapproval prevented the DOI from implementing its constitutional duty to faithfully execute these laws.[86] The Ninth Circuit Court of Appeals rejected this argument, holding that "When Congress enacts legislation that directs an agency to issue a particular rule, 'Congress has amended the law.' "[87]

This holding suggests disapproval could amend substantive provisions of the law under which the agency promulgated the rule. This interpretation might

[84] *Id.* at 6.

[85] *Id.* at 5 (discussing, in the context of the CRA and the Dodd-Frank Act, that repeals of statutes should be expressly stated by Congress, the specific controls over the general, and that later statutes prevail over earlier statutes).

[86] *See* U.S. Const., art II,§ 3 (the President "shall take Care that the Laws be faithfully executed.").

[87] 946 F.3d 553, 562 (9th Cir. 2019).

make sense in circumstances where an agency issued a narrow rule, under a statutory provision with minimal agency discretion, that Congress then rejected through the CRA. For example, imagine that the 115th Congress passed a statute prohibiting the sale of menthol cigarettes in National Parks on Sundays and directed the DOI to issue implementing regulations. Disregarding the obvious problems with such a law, imagine that the DOI issued the regulations at the end of the Trump administration, and that the next Congress issued a joint resolution of disapproval. Because the underlying statute leaves little room for agency discretion, by disapproving of the regulations, Congress effectively amended the underlying statute. In fact, a similar situation occurred in *Alliance for the Rockies v. Salazar*, which the *Bernhardt* court relied heavily upon in its reasoning.

Alliance for the Wild Rockies involved the gray wolf, which is protected under the Endangered Species Act ("ESA"). A 2009 DOI rule eliminated the ESA's protections for a distinct population segment of the gray wolf. Prior litigation struck down the 2009 rule for violating the ESA. Congress subsequently passed a law requiring the DOI to re-issue the 2009 Delisting Rule "without regard to any other provision of statute or regulation that applies to issuance of such rule."[88] In *Alliance for the Wild Rockies*, the court held that Congress, in directing the DOI to disregard applicable provisions of the ESA, substantively amended the ESA with respect to that one specific rule for a distinct population segment of a single species.[89]

Interpreting the joint resolution of disapproval to repeal the underlying law comports with the wishes of at least some of the CRA's sponsors who argued that "if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule."[90] This result also comports with the principle that when two statutes are in irreconcilable conflict, the older of the statutes normally yields to the more recently enacted statute.[91] A joint resolution of disapproval, always enacted later in time than the

[88] Alliance for the Wild Rockies v. Salazar, 672 F.3d 1170, 1172 (9th Cir. 2012).

[89] *Id.* at 1174.

[90] Joint Explanatory Statement of House and Senate Sponsors, 142 CONG. REC. S.3683, 3686 (daily ed. Apr. 18, 1996).

[91] *See* Watt v. Alaska, 451 U.S. 259, 285 (1981) (Stewart, J., dissenting) ("If two inconsistent acts be passed at different times, the last. . . is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way.") (citations omitted) (internal quotation marks omitted); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting) ("Enacted later in time, the NLRA should qualify as an

underlying statutes, would thus control if it is impossible to reconcile the resolution with the underlying statute.

However, the narrow statutory provision at issue in *Alliance for the Rockies* does not justify broader and ill-defined repeals. The holding in *Alliance for the Wild Rockies* also turned on the affirmative statement by Congress disregarding other statutory provisions ("without regard to any other provision of statute.").[92] Where a joint resolution of disapproval contains only boilerplate language rather than affirmative direction, broad repeals should not be implied.[93]

Other canons of statutory construction also counsel against such implied amendments. First, implied statutory repeals are strongly disfavored.[94] It is well settled that unless the two statutes or statutory provisions are entirely irreconcilable, a court should give effect to both.[95] By way of example, in *Morton v. Mancari*,[96] federal employees argued that the Indian Reorganization Act of 1934's preference for hiring Native Americans as employees in the Bureau of Indian Affairs was impliedly repealed by the Equal Employment Opportunity Act of 1972 ("EEOA"), which forbid racial discrimination in federal hiring. The plaintiffs alleged that Congress impliedly repealed the hiring preference by enacting a law forbidding federal hiring discrimination. The U.S. Supreme Court stated "there is nothing in the legislative history . . . that indicates affirmatively any congressional intent to repeal the . . . preference. Indeed . . . there is ample

"implied repeal" of the FAA, to the extent of any genuine conflict.") (citation omitted).

[92] *Id*. ("[W]hen Congress so directs an agency action, with similar language, Congress has amended the law.") (citation omitted).

[93] 5 U.S.C. § 802(a) ("[T]he matter after the resolving clause of which is as follows: "That Congress disapproves the rule submitted by the __ relating to __, and such rule shall have no force or effect." (The blank spaces being appropriately filled in).").

[94] Am. Bank & Trust Co. v. Dallas County, 463 U.S. 855, 868 (1983) ("[R]epeals by implication are not favored. This doctrine flows from the basic principle that courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (citations and internal quotation marks omitted).

[95] *Id., see also*, Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1323 (2020) ("Presented with two statutes, the Court will regard each as effective—unless Congress' intention to repeal is clear and manifest, or the two laws are 'irreconcilable.'") (citations and internal quotation marks omitted).

[96] 417 U.S. 535 (1974).

independent evidence that the legislative intent was to the contrary."[97] Thus, the Court held, there was no implied repeal of the Native American hiring preference. Like the EEOA in *Mancari*, resolutions of disapproval do not contain congressional intent to expressly repeal substantive laws driving agency rules,[98] and courts should hesitate to find a repeal of underlying statutes absent clear congressional intent.

Second, "it is a commonplace of statutory construction that the specific governs the general."[99] Statutes directing agencies to promulgate rules are invariably more detailed than boilerplate resolutions of disapproval. For example, the rulemaking provisions contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[100] the authority under which a 2016 Securities and Exchange Commission ("SEC") rule was promulgated,[101] are detailed and specific. Section 1504 of Dodd-Frank amended the Securities and Exchange Act of 1934 to add detailed provisions directing the SEC to promulgate rules regarding resource extraction issuer payments.[102] In total, Section 1504 adds six technical defined terms and numerous provisions addressing rulemaking consultation, interactive data standards, and international transparency efforts to Section 13 of the Securities Exchange Act.[103] Conversely, the 2017 joint resolution of disapproval says only that the 2016 SEC rule no longer had any

[97] *Id.* at 550. *See id.* at 547–49 (addressing congressional intent to keep the IRA preference fully intact, the Court discussed the Civil Rights Act of 1964's positive treatment of the preference, an additional two laws providing a Native American preference immediately after enactment of the EEOA, and Native American hiring preferences treatment as exception to anti-discriminatory Executive Orders (as the EEOA was essentially a codification of previously issued Executive Orders)).

[98] 5 U.S.C. § 802(a) ("[T]he matter after the resolving clause of which is as follows: "That Congress disapproves the rule submitted by the __ relating to __, and such rule shall have no force or effect." (The blank spaces being appropriately filled in).").

[99] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) (quoting Morales v. TWA, 504 U.S. 374, 384 (1992)); *see also* CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 55 (2018).

[100] Pub. L. No. 111-203, 124 Stat. 1376 (codified at 12 U.S.C. §§ 5301–5641).

[101] SEC, *Disclosure of Payments by Resource Extraction Issuers*, 81 Fed. Reg. 49,360 (July 27, 2016).

[102] Dodd-Frank, Pub. L. No. 111-203, 124 Stat. 1376, at 2220, Title XV § 1504; Securities and Exchange Act of 1934. 15 U.S.C. 78m(q).

[103] *Id.*

force or effect.[104] In this case, the more specific Section 1504 of Dodd-Frank should control over the more general 2017 joint resolution.

Next, while the statute enacted later in time generally controls, such a rule should not apply when the latter statute is vague in its effect and application would foster uncertainty. Rulemaking authorizations are normally far more specific and detailed than the generic, scripted language present in CRA resolutions. With limited and mandatory language contained in resolutions of disapproval speaking only to an agency rule, a court should avoid an interpretation that raises more questions than it resolves.

Finally, Congress exerts a substantial amount of effort and takes considerable amounts of time to draft legislation as lengthy and nuanced as Dodd-Frank or FLPMA.[105] FLPMA, for example, was enacted only after years of study by a bi-partisan Public Land Law Review Commission whose recommendations were fully debated and weighed, over several years, by Congress.[106] Allowing a later Congress to set aside that work, without careful deliberation or careful explanation, is antithetical to sound lawmaking.

In summary, while the Ninth Circuit's holding in *Bernhardt* provides some authority to support statutory amendment through a joint resolution of disapproval, both legal and policy arguments counsel for rejecting a broad interpretation of "substantially the same" that would result in statutory amendments by implication of the CRA.

V. PLANNING 3.0 AND A "SUBSTANTIALLY DIFFERENT" RULE

In this section, we propose several potential changes to Planning 2.0. We use these proposals to explore the application and implications of the interpretive arguments raised above. In the last section, we propose changes to the CRA (including repeal) that would eliminate the problem currently facing the BLM and other agencies.

The test of a new rule under the CRA is whether the rule is substantially different from the prior rule—not whether the new rule differs in ways intended by those who drafted the joint resolution of disapproval. We do, however, think

[104] Pub. L. No. 115-4, 131 Stat. 9 (Feb. 14, 2017).

[105] Pub. L. No. 94-579, 90 Stat. 2743 (Oct. 21, 1976) (codified as amended at 43 U.S.C. §§ 1701-84).

[106] *See generally*, Eleanor Schwartz, *A Capsule Examination of the Legislative History of the Federal Land Policy and Management Act (FLPMA) of 1976*, 21 ARIZ. L. REV. 285 (1979) (recounting the years of effort leading up FLPMA's enactment).

that the BLM should remain mindful of congressional concerns when it issues a new rule. That said, the intent of a Congress that is no longer in power and that did not reduce its intentions to law, even if they can be ascertained accurately, should not trump the policy objectives of the current Congress or presidential administration. Elections, after all, have consequences.

There are ample opportunities to differentiate a new planning rule from Planning 2.0, and we offer several examples of changes to discretionary requirements. At the outset we note a concern that the BLM will act based on policy preferences, and that these preferences may disadvantage longstanding land users, appears to undergird many of the criticisms leveled at Planning 2.0. A revised planning rule could commit the BLM to relying on the best available science, as required by Executive Order 13563 and as noted in the preamble to the final rule.[107] This mandate, however, was not included in Planning 2.0 itself, and incorporating such a requirement, including clarification of what constitutes the best available science and how the BLM should act in the face of scientific uncertainty, would both insulate a new rule from policy based changes and differentiate the new rule from Planning 2.0.

Another simple change from Planning 2.0 would be to increase the time available to review the planning assessment, scoping notice, draft plan or plan amendment, and other planning documents. More time could also be provided for the Governor's consistency review. These changes would address concerns that reduced timelines under Planning 2.0 increased burdens on state and local governments, some of which struggle to provide meaningful input on complex RMP amendments.[108]

Next, Planning 2.0 stated that the deciding official for plans implicating national level policy determinations or crossing state lines shall be determined by either the Secretary of the Interior or the Director of the BLM, and that the State Director will determine the deciding official for plans that are wholly within one state.[109] The perceived shift in power away from local communities was a criticism repeatedly leveled at Planning 2.0 in the House of Representatives.[110] An updated planning rule could define what constitutes a national level policy. An

[107] 81 Fed. Reg. 89580, 89658 (Dec. 12, 2016).

[108] WGA Letter at 3.

[109] *See* Planning 2.0, to be codified at 43 C.F.R. § 1610.0-4.

[110] Cong. Rec. H1032-41 (Feb. 7, 2017) ("Let me be clear: Planning 2.0 takes planning decisions away from local communities and centralizes those decisions with bureaucrats in Washington, D.C." Statement by Rep. Gosar, *id*. at 1036. *See also* statements by Reps. Cheney, McClintock, Tipton, Lamalfa, and Stewart.

updated planning rule could also clarify when the Field Office Supervisor will normally serve as the deciding official. When coupled with more time for state and local governments to review planning materials to identify inconsistencies with local plans, these changes would address concerns that decisionmaking authority may shift away from those BLM officials who live and work closest to the resource under the BLM's care.

Concerns that Planning 2.0 failed to give ample consideration to state and local planning documents were also a common refrain in the debate on the joint resolution of disapproval. While FLPMA requires,[111] and Planning 2.0 retained,[112] requirements to promote consistency across jurisdictions, the BLM could strengthen those requirements. Planning 2.0 stated that the BLM was not required to address plan consistency "if the responsible official has not been notified, in writing, by Federal agencies, State and local governments, or Indian tribes of an apparent inconsistency."[113] A revised rule could clarify that the BLM will request officially approved and adopted state and local plans that are relevant to the planning process. A revised rule could further clarify that the BLM cannot avoid addressing consistency with applicable plans that are within its possession simply because written copies of those plans were not provided by state or local government officials.[114]

As noted earlier, the legal question is whether the next generation of the BLM's planning rule is substantially different from Planning 2.0, not whether it differs in ways the authors of the joint resolution of disapproval may have preferred but never reduced to law. Changes that advance resource protection could therefore differentiate the BLM's next planning rule. For example, Planning 2.0 includes only one mention of climate change, and that mention is as part of a list of factors that need to be considered in developing the planning assessment.[115] The BLM is legally obligated to consider climate change when making planning decisions, and to manage for a changing climate.[116] Numerous recent court cases

[111] 43 U.S.C. § 1712(c)(9).

[112] *See* Planning 2.0, to be codified at 43 C.F.R. § 1610.3-3.

[113] *See* Planning 2.0, to be codified at 43 C.F.R. § 1610.3-3(a)(2).

[114] Ultimate responsibility for providing applicable planning documents should, however, rest with the agencies that authored those plans as those agencies are best able to identify and provide the documents.

[115] *See* Planning 2.0, to be codified at 43 C.F.R. § 1610.4(d)(6).

[116] *See* Jamie Gibbs Pleune, John C. Ruple & Nada Wolff Culver, *The BLM's Duty to Incorporate Climate Science into Permitting Practices and a Proposal for Implementing a Net Zero Requirement into Oil and Gas Permittin*g, 32 COLO. NAT. RES., ENERGY & ENVTL.

hold that the BLM errs when it fails to adequately consider climate change.[117] The BLM could differentiate a revised planning rule from Planning 2.0, and improve both planning and plan implementation, by providing clear direction about how to address climate change.

Planning 2.0 also included only scant mention of mitigation, noting that RMPs should contain objectives that "[i]dentify standards to mitigate undesirable impacts to resource conditions."[118] An updated planning rule could include more direction about when the BLM can and should implement such standards, the authority for and enforceability of requiring mitigation, how to determine the sufficiency of required mitigation, whether mitigation requirements contained in planning documents can be waived, and waiver procedures if waivers are indeed allowed.

Staying with mitigation, a new planning rule could also require earlier consideration of mitigation opportunities. The BLM routinely defers decisions regarding mitigation, at least within the oil and gas development context, until the Application for a Permit to Drill ("APD") phase.[119] The BLM justifies this decision by saying that the availability of more granular information at the APD phase makes it easier to address site-specific concerns, but by then, the

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L. REV. 253 (2021) (see section III and cases cited therein).

[117] *See e.g.*, *California v. Bernhardt*, Case No. 4:18-cv-05712-YGR, 2020 U.S. Dist. LEXIS 128961 (N.D. Cal. July 15, 2020) (BLM erred by disregarding climate change in the methane waste prevention rule); *Citizens for Clean Energy v. United States Dept. of Int.*, 384 F. Supp. 1264 (D. Mont. Apr. 19, 2019) (BLM erred by ignoring climate change impacts in coal leasing requirements); *Citizens for a Healthy Community v. U.S. BLM*, 377 F. Supp. 3d 1223, 1236-37 (D. Colo. 2019) (BLM erred by failing to take a hard look at indirect effects resulting from development of oil and gas developed from federal lands); *San Juan Citizens All. v. U.S. BLM*, 326 F. Supp. 3d 1227, 1242 (D.N.M. 2018) (BLM erred in failing to adequately analyze indirect impact of greenhouse gas emissions in approving oil and gas leases); *WildEarth Guardians v. United States*, CV-18-73-GF-BMM, 2020 U.S. Dist. LEXIS 77409 (D. Mont. May 1, 2020) (BLM erred by failing to consider cumulative effect of multiple oil and gas leasing decisions); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 71 (D.D.C. 2019) (same).

[118] *See* Planning 2.0, 43 C.F.R. §1610.1-2(a)(2(i).

[119] APD issuance is the final phase of development and occurs after the BLM has first determined, through planning, that an area is appropriate for oil and gas leasing and also determined what land use stipulations are appropriate for that landscape. The BLM then, after reviewing expressions of leasing interest, can offer areas for lease. Only after a lease is issued can the BLM consider an APD.

commitment to allow development has already occurred.[120]

A new planning rule could require that, to the maximum extent practicable, the BLM identify programmatic mitigation measures during the planning phase to ensure: (1) uniform application of mitigation requirements across all actors, and (2) to reduce the chance that mitigation opportunities will be missed, thereby minimizing the risk of "unnecessary or undue degradation of the lands."[121] Moving in this direction is consistent with FLMPA as well as NEPA's mandate to fully consider impacts before making an irretrievable commitment of resources.[122]

Finally, FLPMA requires the BLM to "give priority to the designation and protection of areas of critical environmental concern," or ACECs.[123] Planning 2.0 included only meager direction on ACEC designation or management. A revised planning rule could distinguish itself by including robust direction about how "priority" should be given to ACEC designation and protection. Other changes are also possible and could be identified through rulemaking.

VI. RECOMMENDATIONS REGARDING THE CRA

The other method for resolving the BLM's rulemaking quandary is to target the tool creating the difficulty: the CRA. Most of the issues involving the CRA stem from the ambiguity of the phrase "substantially the same," as well as the troubling lack of guidance provided by Congress to agencies subject to joint resolutions of disapproval. We propose four methods to address these issues: (1) A repeal of the CRA; (2) Statutorily defining "substantially the same"; (3) Amending the CRA to require congressional direction to agencies; and (4) Interpreting resolutions of disapproval and "substantially the same" narrowly. Options 2, 3, and 4 may be most effective if undertaken together.

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[120] *See, e.g.*, San Juan Citizens All. v. U.S. BLM, 326 F. Supp. 3d 1227, 1244 (D.N.M. 2018) (where the BLM argued that "it would work with industry at a later date [after leasing] to facilitate the use of the relevant best management practices".). *See also*, Duna Vista Resorts, 187 Interior Dec. 43 (IBLA 2016) (arguing that it was appropriate to issue a FONSI at the leasing stage because the BLM had authority to mitigate all potential environmental effects by imposing COAs at the APD stage).

[121] 43 U.S.C. § 1732(b).

[122] *See* 40 C.F.R. § 1501.2(a) ("Agencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time to ensure that agencies consider environmental impacts in their planning and decisions.").

[123] 43 U.S.C. § 1712((b)(3).

A. Repeal the Congressional Review Act

The most effective way to mitigate the issues the CRA raises is to repeal the Act. Most of the existing literature[124] and prior congressional attempts at amending the CRA[125] adopt this approach.[126] The main argument for repeal is that Congress can already eliminate an agency rule by enacting a statute repealing the rule.[127] Through non-CRA legislation, Congress would have time for robust hearings and longer floor debate in both houses, creating a more transparent, detailed, and enlightening record to guide subsequent agency action.

Confining Congress to its Article I legislative authority would increase the time and effort required to rescind flawed agency rules, and this can be both good and bad. Realistically, there is little impetus for Congress to reduce its own power by repealing the Act, as the fast-track parliamentary procedures can be an attractive tool irrespective of political persuasion.[128] While some members of

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[124] *See* Thomas O. McGarity, Reina Steinzor, James Goodwin & Katherine Tracy, *The Congressional Review Act: The Case for Repeal*, CENTER FOR PROGRESSIVE REFORM (2018), https://cpr-assets.s3.amazonaws.com/documents/CRA_Repeal_Case_050218.pdf; Lisa Gilbert & Amit Narang, *Scrap the Congressional Review Act*, REGULATORY REVIEW (June 7, 2017), https://www.theregreview.org/2017/06/07/gilbert-narang-scrap-congressional-review-act/.

[125] *See* SCRAP Act, S. 1140, 115th Cong. §§ 2(a), 3(b) (2017) (calling for the full repeal of the CRA, and providing federal agencies authority to "reinstate a [CRA disapproved] rule by publishing the [disapproved] rule in the Federal Register during the 1-year period beginning on the date of enactment of this Act.").

[126] Short of a full repeal of the CRA, Congress could amend the CRA to remove the resolution of disapproval and "substantially the same" provisions from the Act while leaving the review provisions fully intact. So, while Congress could not use the CRA to rescind a regulation, the amended CRA would help Congress remain apprised of developments in the administrative state. This in turn could lead to a traditional congressional repeal of unpopular regulations. With normal legislative procedures controlling, Congress could more easily direct agencies that are required to promulgate a rule how to do so. Without the weight of the "substantially the same" provision resting on an agency's shoulders, it is more likely to promulgate a new rule that still addresses administrative and policy issues in an adequate manner.

[127] TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 8–9 (2018).

[128] Sam Batkins, *Issues at the Intersection of the Three Branches: Congress Strikes Back: The Institutionalization of the Congressional Review Act*, 45 MITCHELL HAMLINE L. REV. 351, 383 (2019) ("Progressive groups may not love the use of the CRA at all times, but in this instance—when it is designed to produce a favorable policy outcome—resolutions of

Congress may be appalled by use of the CRA against rules they find necessary and beneficial, those same members may find the CRA more palatable when confronted with rules they, and their constituents, vehemently oppose. Doing away with the CRA would also address the perverse incentive noted above, whereby an administration may choose to differentiate a rule from its disapproved predecessor by moving in the opposite direction from which Congress intended.

We believe the overall increase in procedural transparency, thoughtful deliberation, and clear agency guidance will lead to better regulatory outcomes. We also believe that laws should be structured to make rules more, not less, consistent with congressional intent. In light of these considerations, we believe that the benefits of repealing the CRA outweigh reductions in congressional expediency.

B. Define "Substantially the Same"

Congress should, at a minimum, amend the CRA to define "substantially the same." A statutory definition would allow agencies to move more freely through subsequent rulemaking, knowing where the CRA's boundaries lie. Simply having a definitional benchmark against which to measure the adequacy of subsequent action would greatly aid both agencies and reviewing courts. While this article does not put forth any specific statutory definition, existing literature provides guidance in drafting a statutory definition of "substantially the same."[129] We believe that the definition should be as narrow as possible to avoid impairing an agency's ability to fulfill its underlying statutory mandate.

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disapproval can come in handy. This is one glaring example of why, despite the number of progressives or conservatives in Congress, they will likely never vote to repeal the entire CRA."). But notably, as of the writing of this article, seventeen resolutions of disapproval have been enacted by Republican administrations compared to three by Democratic administrations.

[129] *See* Finkel & Sullivan, *supra* note 73 (providing seven possible interpretive methodologies regarding "substantially the same"); Coglianese, *supra* note 82 at 20-15 (providing an interpretation of "substantially the same" based upon the rulemaking discretion available to an agency under governing statutes); MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R46690, CONGRESSIONAL REVIEW ACT ISSUES FOR THE 117TH CONGRESS: THE LOOKBACK MECHANISM AND EFFECTS OF DISAPPROVAL 9–11 (Feb. 19, 2021), ("In light of [the CRA's] legislative history, agencies considering reissuing rules may look to the reasons Congress gave, if any, for striking down the rule in the first place.").

C. Require Congressional Direction to Administrative Agencies

A recurring critique of the CRA is that Congress provides virtually no guidance regarding a rule's perceived ills or what changes to a disapproved rule would cure those defects when passing resolutions of disapproval. Congress only says "no," and tells the agency that the new rule must differ from the old. While the CRA does not explicitly bar Congress from providing more direction, the CRA does require that all resolutions of disapproval contain the same generic language.[130] Identifying the problems with a rule, and directing an agency towards specific revisions, would ensure that changes contained in a replacement rule result in the kind of substantive changes intended by Congress.[131]

Ironically, the test of a replacement rule is not whether it responds to congressional concerns, which the agency and a reviewing court can only guess at, but whether the replacement rule is substantially different from the original rule. As the Stream Protection Rule example shows, an agency can differentiate a rule from its disapproved predecessor in ways that either frustrate or further congressional intent, and both approaches appear equally defensible. Requiring Congress to include clear direction to agencies ensure that replacement rules advance congressional intent and reduce the potential for administrative mischief, which was what the CRA was supposed to do all along.

D. Interpret the Congressional Review Act Narrowly

Finally, agencies should interpret "substantially the same" narrowly to retain sufficient regulatory flexibility to address the pressing issues that Congress charged to agency care when it passed laws authorizing rulemaking. In hearing CRA cases, courts should also interpret "substantially the same" narrowly to provide agencies ample room to promulgate rules consistent with their statutory mandates. The answer is not to hobble agencies with ambiguous limits, but to encourage Congress to legislate with clarity and specificity.

In most legislation delegating broad rulemaking authority to administrative agencies, Congress spends significant time and energy creating complex statutory schemes that agencies must implement. If, in reviewing an agency rule subject to § 801(b)(2) of the CRA, courts gave a broad construction to the term "substantially the same," thereby preventing whole swaths of regulation,

[130] 5 U.S.C. § 802(a).

[131] For a similar CRA suggestion, see Eric Dude, Note, *The Conflicting Mandate: Agency Paralysis Through the Congressional Review Act's Resubmit Provision*, 30 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 115, 137–40 (2019).

the CRA "cure" could become more worse than the ill. If Congress indeed intends to make wide-ranging changes to a substantive statute, concludes that an agency has strayed from its mandate, or decides that a statutory mandate no longer reflects the objectives of the congressional majority, Congress should clarify that mandate.

The level of deference granted to an agency in interpreting its substantive mandate under statutes other than the CRA, and in promulgating rules following a joint resolution of disapproval, should be inversely proportional to the level of direction provided by Congress when it enacts the resolution. If Congress provides clear direction, discretion should be interpreted narrowly as agencies must abide by that direction. If Congress just says "no," Congress is effectively granting broad discretion to agencies, and reviewing courts should be more deferential when reviewing replacement regulations. This approach would have the added benefit of incentivizing legislative clarity.

VII. CONCLUSION

If an administrative rule displeases Congress, Congress should forego the CRA and repeal that rule using traditional legislative tools, ensuring a full and open debate over the substance of the rule and providing the agency with clear direction regarding both the problems perceived and the changes needed. If allowed to persist, the CRA should be amended to define "substantially the same," and to require Congress to direct future agency action responding to disapprovals.

The CRA should not, however, prevent federal agencies from undertaking tasks within their charge. Statutes directing agencies to act must continue to be given effect, and the CRA should be interpreted to avoid implicitly dismantling complex regulatory programs. This can be accomplished by interpreting "substantially the same" as applying only to those portions of a rule that are charged to agency discretion.

As illustrated by the BLM's planning rule example, changes making a replacement rule substantially different from a rule struck down under the CRA need not move the replacement rule in the direction preferred by the Congress that dismantled the prior rule. Ironically, the CRA may embolden the BLM to issue a revised planning rule that is far greener than the rule disapproved of by congressional Republicans. While that may reflect good environmental policy, a law that incentivizes agencies to act contrary to the will of Congress has no place in our legal system. It is time to repeal the CRA.