

*TUGAW RANCHES, LLC V. U.S. DEPARTMENT  
OF THE INTERIOR: NEW SCRUTINY OF  
THE CONGRESSIONAL REVIEW ACT IN A  
CHANGING POLITICAL LANDSCAPE*

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INTRODUCTION

The Congressional Review Act (“CRA”)<sup>1</sup> was enacted in 1996 as a means of increasing congressional oversight of agency rulemaking in the face of an expanding administrative state.<sup>2</sup> The Act provides for a streamlined procedure whereby a disfavored new rule promulgated by a federal agency can be overturned.<sup>3</sup> This procedure allows both Houses of Congress to pass a joint resolution of disapproval that, after surviving presidential consideration, overrides the contested rule.<sup>4</sup> To facilitate this review, the Act requires agencies to submit a report of all covered rules to each House of Congress and to the Comptroller General.<sup>5</sup> After a final rule is submitted for review, Congress has sixty legislative days<sup>6</sup> in which to utilize the override procedure.<sup>7</sup>

One challenge posed by this review mechanism is enforcement against agencies. Typically, courts would ensure that agencies complied with statutory requirements through judicial review. However, the Act includes a provision in Section 805 that seemingly precludes judicial review. Section 805 states that “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review.”<sup>8</sup> But this provision does not define *whose* determinations, findings, actions, or omissions are insulated. Was this language intended to apply only to special actors within the CRA, such as Congress, the President, and the Office of Management and Budget (“OMB”)? Or, does the lack of a specified actor mean that *any* actor is immune, including agencies? Some

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1. 5 U.S.C. §§ 801–808 (2018).
  2. See 143 CONG. REC. E571, E575 (daily ed. Apr. 19, 1996) (statement of Rep. Hyde) (“This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority . . . .”); 143 CONG. REC. S3683, S3683 (daily ed. Apr. 18, 1996) (joint statement by Sens. Nickles, Reid, and Stevens) [hereinafter Joint Statement] (explaining that the CRA “establishes a government-wide congressional review mechanism for most new rules” in response to complaints that “Congress has effectively abdicated its constitutional role as the national legislature”).
  3. 5 U.S.C. §§ 801–802; see also Joint Statement, *supra* note 2, at S3683–85 (summarizing the CRA).
  4. 5 U.S.C. §§ 801–802.
  5. *Id.* § 801(a)(1)(A).
  6. This refers to days where Congress is in session, “excluding days either House of Congress is adjourned for more than 3 days during a session of Congress.” *Id.* § 802(a).
  7. *Id.* §§ 801(a)(3), 802(a).
  8. *Id.* § 805.

have argued that the plain meaning supports a total bar to judicial review of CRA compliance,<sup>9</sup> while others have argued for a more limited application, encompassing only particular categories of actors.<sup>10</sup> An expansive reading of Section 805 could eliminate judicial review of agency compliance, meaning that Congress would have to police compliance itself. And enforcement is key, as a significant number of currently implemented rules have reporting deficiencies.<sup>11</sup> These deficiencies suggest that judicial enforcement may be necessary to give effect to the enhanced agency accountability Congress envisioned in enacting the CRA.

However, allowing judicial review of agency compliance after so many years could have a destabilizing effect on regulatory regimes. Normally, Congress is barred from utilizing the CRA after the sixty-day review period has expired, which provides these rules with some insulation from direct oversight.<sup>12</sup> By allowing courts to determine whether agencies have complied with the CRA years after these rules were finalized, the insulation provided by this limited review period would cease to exist. Any rule with reporting deficiencies could be remanded for resubmission to Congress, which would reopen the review period and potentially result in congressional override.<sup>13</sup>

For many years, the question of enforcement was mostly theoretical. The CRA's review mechanism was only successfully utilized once, and the CRA itself was not viewed as particularly impactful.<sup>14</sup> Agency reporting deficiencies were therefore somewhat overlooked. However, the CRA exponentially increased in influence after President Trump's inauguration in 2017, as fourteen agency rules were overturned within the first year of the administration.<sup>15</sup> The sudden revival of the CRA brought issues such as enforcement to the forefront. The District Court of Idaho's decision in *Tugaw Ranches, LLC v. U.S. Depart-*

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9. See, e.g., *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009).
  10. See, e.g., *Tugaw Ranches, LLC v. U.S. Dep't of the Interior*, 362 F. Supp. 3d 879, 889 (D. Idaho 2019) (finding that judicial review of agency actions under the CRA is necessary to effectuate its purpose).
  11. A Congressional Research Service report issued in 2009 noted over one thousand rules that did not meet reporting requirements. CURTIS W. COPELAND, CONG. RESEARCH SERV., R40997, CONGRESSIONAL REVIEW ACT: RULES NOT SUBMITTED TO GAO AND CONGRESS 10 (2009), <https://perma.cc/YGY3-ASRR>.
  12. Cf. Richard Lazarus, *May Courts Review Congressional Review Act Compliance by Agencies?*, 36 ENVTL. F. 13, 13 (2019), <https://perma.cc/GW6Q-P6YV>.
  13. See COPELAND, *supra* note 11, at 21 (noting that agencies have implemented rules that do not satisfy reporting requirements, some for over a decade); Lazarus, *supra* note 12, at 13.
  14. MAEVE P. CAREY, ALISSA M. DOLAN & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 4–6 (2016), <https://perma.cc/X34S-KVQU>.
  15. See *Congressional Review Act*, U.S. GOV'T ACCOUNTABILITY OFFICE [hereinafter GAO, *FAQs*], <https://perma.cc/3HFQ-RAMW> (under "FAQs," click "What Congressional Resolutions of Disapproval Have Occurred under the CRA?").

*ment of the Interior*<sup>16</sup> fits comfortably within this trend of revival. After courts had largely read Section 805 as preventing judicial enforcement of agency compliance,<sup>17</sup> *Tugaw Ranches* unequivocally held that courts had jurisdiction to enforce CRA provisions against agencies.<sup>18</sup> The District Court of Idaho was the first court to directly confront the question of judicial enforcement after the CRA's revival during the Trump Administration. While the District Court of Kansas reached the opposite conclusion just a few months later in a similar case,<sup>19</sup> the decision in *Tugaw Ranches* nevertheless created some concern that the CRA's influence would continue to expand, whether through judicial review or otherwise, at the expense of key regulatory regimes.<sup>20</sup>

This Comment will argue that *Tugaw Ranches* is unlikely to lead to an expansion of judicial review under the CRA, and instead represents a larger trend of increasing scrutiny of the CRA based on its vastly expanded use. Part I provides background on Section 805 of the CRA to set up the tension in *Tugaw Ranches* between the “plain meaning” of the provision and the broad purpose of the CRA. Part II examines the trend of increasing reliance on the CRA during the Trump Administration and considers how this trend has brought key interpretative questions to the forefront, as evident in *Tugaw Ranches*. Given the strong influence of the CRA in the environmental world, this Comment will frame these questions through the lens of environmental rules and regulations. Several congressional overrides under the CRA were used to overturn key environmental rules.<sup>21</sup> Paired with the administration's rollbacks of environmental regulations over the past three years, the expanded use of the CRA has proved to be an obstacle for the environmental community. However, this Comment will argue that the likely failure of *Tugaw Ranches* to expand

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16. 362 F. Supp. 3d 879 (D. Idaho 2019).

17. See, e.g., *Montanans for Multiple Use v. Barboletos*, 568 F.3d 225, 229 (D.C. Cir. 2009).

18. *Tugaw Ranches, LLC v. U.S. Dep't of the Int.*, 362 F. Supp. 3d 879, 889 (D. Idaho 2019) (emphasizing that “[i]n the absence of a clear and unambiguous agency exception in § 805, the Court cannot accept a result that ultimately defeats the purpose of the act itself” in rejecting a total bar to judicial review).

19. *Kan. Nat. Res. Coal. v. U.S. Dep't of the Interior*, 382 F. Supp. 3d 1179, 1184–85 (D. Kan. 2019) (rejecting the reasoning of *Tugaw Ranches* and ruling “§ 805 is unambiguous and precludes judicial review”), *appeal docketed*, No. 19-3108 (10th Cir. May 24, 2019).

20. See *Lazarus, supra* note 12 (noting how the *Tugaw Ranches* decision could make the CRA “a far more potent weapon for challenging the validity of . . . a massive number of federal agency actions”).

21. See GAO, *FAQs, supra* note 15 (providing examples of congressional override under the CRA, including a Department of the Interior rule on stream protection on February 16, 2017 and another Department of the Interior rule on resource management planning on March 27, 2017). For a discussion of the proposed stream protection rule, see Stream Protection Rule, 81 Fed. Reg. 93,066, 93,068 (Dec. 20, 2016) (to be codified in scattered sections of 30 C.F.R.). This rule was anticipated to result in improved water quality downstream from mining sites and improved reforestation efforts in mined land, *id.* at 93,069, and exemplifies the kind of environmental protections being systematically undone.

judicial enforcement represents a key victory for the environmental community not only in insulating previous rules from congressional review, but in preserving agency authority for future rulemaking efforts.

## I. THE STRUCTURE OF THE CONGRESSIONAL REVIEW ACT AND HOW IT OPERATES

The CRA sets up an expedited process for congressional disapproval of agency rules.<sup>22</sup> Despite the brevity of the Act, its provisions are fairly complex, giving rise to questions of interpretation. The sparse legislative history does little to answer these questions. This Part will outline the key provisions of the CRA and how they operate, and will consider the interaction between the provisions of the CRA and agency compliance. This analysis will be grounded in an environmental perspective, given the CRA's connection with the environmental world.

### *A. The CRA in the Environmental World: Why the CRA has Important Implications for Environmental Regulation*

Environmental policy heavily depends on agency rulemaking to function efficiently and effectively. Agencies such as EPA and the Department of the Interior ("DOI") oversee complex, technical regulatory programs via broad statutory authority.<sup>23</sup> Congress depends on these agencies to use their subject matter expertise to promulgate regulations given the intricate science involved in decision-making.<sup>24</sup> But environmental regulations are often costly and can include significant restrictions on economic activities, giving rise to concerns about labor and industry.<sup>25</sup> Especially in recent years, environmental regulation has become an increasingly partisan issue.<sup>26</sup> Therefore, these regulations tend to be a particular target of new administrations that emphasize der-

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22. 5 U.S.C. § 802 (2018).

23. See, e.g., Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1211 (2018) (establishing a nationwide permitting program for surface mining operations and authorizing the Secretary of the Interior to "promulgate such rules and regulations as may be necessary" to oversee this program, 42 U.S.C. § 7651 (2018) (Provision of the Clean Air Act of 1990 establishing the Acid Rain Program, overseen and enforced by EPA, which instituted a cap-and-trade regime for reducing SO<sub>2</sub> and NO<sub>x</sub> emissions).

24. See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 458–59 (3d ed. 2017).

25. See, e.g., ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 813–19 (8th ed. 2018) (discussing conflicts related to land use regulations and tensions stemming from the frequent clash between economic development and environmental protection).

26. See David Karol, *Party Polarization on Environmental Issues: Toward Prospects for Change*, NISKANEN CTR. 1 (2018), <https://perma.cc/Z6MX-G974>.

egulation.<sup>27</sup> The CRA makes it far easier for these administrations to quickly overturn environmental rules before they go into effect, even though these rules may have taken many years to finalize. And, given its substantial reliance on regulations, the environmental world may have a difficult time replacing overturned rules, as the complexity of the regulatory matters involved means that new rules require significant investment.

The CRA has already proven effective in overturning environmental regulations. In 2017, the new Republican congressional majority utilized the review mechanism of the CRA to overturn three regulations promulgated by DOI in late 2016.<sup>28</sup> A common theme among the floor debates regarding the disapproval resolutions was outrage at the substantial power being exhibited by agencies. The first rule, involving national wildlife refuges in Alaska, was challenged in the House on the basis that it encroached on Alaska's right to manage fish and game.<sup>29</sup> Similarly, Alaska Senator Lisa Murkowski portrayed the second rule regarding resource management as "effectively subvert[ing] [the Federal Land Policy and Management Act], shattering the special status arrangement that the West is supposed to have under the Federal law."<sup>30</sup> President Trump played a key role in these overrides, signing disapproval resolutions to give them effect. Trump's strong deregulatory agenda likely facilitated the unprecedented expansion in the use of the CRA's review mechanism.

While overturning these regulations may pose a challenge for future regulatory efforts, the impact could have been significantly more expansive. In a Congressional Research Service report issued in late 2016, ten additional "major" environmental regulations promulgated by EPA, DOI, the Department of Energy, and the Nuclear Regulatory Commission ("NRC") were identified as being potentially susceptible to disapproval resolutions under the CRA.<sup>31</sup> The change in the balance of power in Congress and the Executive Branch after the 2016 election put these regulations at risk of being overturned through the CRA's review mechanism. The early days of the Trump Administration thus

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27. For example, the Trump Administration has emphasized environmental rollbacks as part of its deregulatory scheme. See Nadja Popovich et al., *85 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES (Sept. 12, 2019), <https://perma.cc/3A5Z-U3U6>.
  28. See GAO, *FAQs*, *supra* note 15. For the specific rules overturned, see Energy Conservation Program: Energy Conservation Standards for Uninterruptible Power Supplies, 81 Fed. Reg. 52,196 (Aug. 5, 2016) (to be codified at 10 C.F.R. pt. 430); Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016) (to be codified in scattered sections of 30 C.F.R.); Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600).
  29. See 163 CONG. REC., H1260 (daily ed. Feb. 16, 2017) (statement of Rep. Young).
  30. 163 CONG. REC., S1610 (daily ed. Mar. 7, 2017) (statement of Sen. Murkowski).
  31. See MAEVE P. CAREY, CHRISTOPHER M. DAVIS & CASEY BURGAT, CONG. RESEARCH SERV., "MAJOR" OBAMA ADMINISTRATION RULES POTENTIALLY ELIGIBLE TO BE OVERTURNED UNDER THE CONGRESSIONAL REVIEW ACT IN THE 115TH CONGRESS 4-8 (Nov. 17, 2016), <https://perma.cc/BCK2-TNJJ>.

demonstrated the potentially powerful deregulatory influence the review mechanism could have when utilized during a transitional period.

*B. The CRA in Action: Overturning the DOI's Stream Protection Rule*

Given the complexity of the CRA and its agency review mechanism, it may first be helpful to revisit the overall procedure before delving into the interpretation of specific provisions. Take one of the recently overturned environmental rules as an example: DOI's Stream Protection Rule.<sup>32</sup> This rule was finalized December 19, 2016, after an extensive, multi-year rulemaking process.<sup>33</sup> The rule was intended to "prevent or minimize impacts to surface water and groundwater from coal mining" and would have protected "6,000 miles of streams and 52,000 acres of forests over the next two decades."<sup>34</sup>

For a rule to be overturned using the CRA, a few conditions must be met. First, the agency must determine whether the rule is covered by the CRA and, if so, submit a report on the rule to Congress.<sup>35</sup> The report must contain a copy of the rule, a concise general statement of the rule and whether it should be classified as a "major" rule, and the proposed effective date.<sup>36</sup> Second, Congress must enact a joint resolution of disapproval within sixty legislative days of its receipt of the report.<sup>37</sup> In the Senate, the CRA provides for expedited consideration, limiting debate and precluding amendments.<sup>38</sup> A simple majority in both Houses must vote to enact the disapproval resolution. Third, the President must elect not to veto the resolution, after which the rule will either not go into effect at all or will be treated as though it had never taken effect.<sup>39</sup> If the Presi-

32. Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016) (to be codified in scattered sections of 30 C.F.R.).

33. Press Release, DOI, Interior Department Finalizes Stream Protection Rule to Safeguard Communities from Coal Mining Impacts (Dec. 19, 2016), <https://perma.cc/K62G-Z4A3>.

34. *Id.*

35. 5 U.S.C. §§ 801(a)(1)(A), 804(3) (2018).

36. *Id.* § 801(a)(1)(A). A "major" rule includes any rule that:

has resulted in or is likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*Id.* § 804(2).

37. *Id.* §§ 801, 802(a).

38. *Id.* § 802(d).

39. *Id.* §§ 801(a)(3)(B), 801(f) (discussing when rules go into effect in the event of a joint resolution of disapproval).

dent vetoes the resolution, Congress has the opportunity to override this veto, as with usual legislation.<sup>40</sup>

The Stream Protection Rule was published in the Federal Register on December 20, 2016, during the final days of the Obama Administration.<sup>41</sup> Soon thereafter, President Trump was inaugurated and made clear that deregulation would be an important part of his presidency.<sup>42</sup> With this executive backing, the Republican majority in both Houses of Congress began targeting Obama-era regulations for disapproval under the CRA.<sup>43</sup> A joint resolution of disapproval for the Stream Protection Rule was considered and passed in the House of Representatives on February 1, 2017, and was considered and passed in the Senate the next day.<sup>44</sup> President Trump signed the resolution on February 16, remarking that the Stream Protection Rule was “another terrible job-killing rule” and a “wasteful regulation[] that do[es] nothing.”<sup>45</sup>

The successful overturning of the Stream Protection Rule illustrates a few key points about the CRA. First, the CRA’s expedited consideration provisions allow Congress to quickly act to overturn a disfavored agency rule once it is reported. The Senate received and approved the resolution within just two days.<sup>46</sup> Second, executive regulatory philosophy plays a critical role in successful reliance on the CRA.<sup>47</sup> Overriding a veto is no simple task, and without an immensely unpopular rule, may be effectively impossible in the context of the CRA. The executive therefore likely constitutes a necessary actor. Lastly, changes in administration create a key window of opportunity in which the CRA would be most effective.<sup>48</sup>

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40. *Id.* § 801(a)(3)(B)(i).

41. 81 Fed. Reg. 93,066 (Dec. 20, 2016) (to be codified in scattered sections of 30 C.F.R.).

42. Stephen Santulli, *Use of the Congressional Review Act at the Start of the Trump Administration: A Study of Two Vetoes*, 86 GEO. WASH. L. REV. 1373, 1381 (2018).

43. *See id.*

44. H.R.J. Res. 38, 115th Cong. (2017).

45. Administration of Donald J. Trump, DCPD201700126, Remarks on Signing Legislation Regarding Congressional Disapproval of the Department of the Interior’s Stream Protection Rule 1 (Feb. 16, 2017), <https://perma.cc/36RJ-CDE3>.

46. H.J. Res. 38, 115th Cong. (2017).

47. *See* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL’Y 187, 243 (2018); Santulli, *supra* note 42, at 1381.

48. *See* MORTON ROSENBERG, CONG. RESEARCH SERV., CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 6 (2008).

C. *The CRA's Enactment: Is the Legislative History a Reliable Indicator of Congressional Intent?*

The CRA's legislative history is distinctive in that there is no significant pre-enactment record.<sup>49</sup> Nearly all of the record consists of a single joint statement by the sponsors of the bill, added twenty days after the CRA was enacted.<sup>50</sup> This joint statement was entered into the record and included in the Congressional Record for both the House and the Senate.<sup>51</sup> While this statement was entered into the record after the CRA's enactment, the authors of the statement in fact intended it as a "cure" for the "deficiency" created by the lack of any formal legislative history.<sup>52</sup> Courts have sometimes relied on this limited legislative history to justify a more limited bar to judicial review, allowing courts to retain jurisdiction over questions of agency compliance with the CRA. But the nature of the joint statement makes it a somewhat controversial basis for this interpretation.

Courts that have invoked the joint statement have done so on the premise that despite the timing of its addition to the record, it may nevertheless provide insight into the views of the sponsors regarding the purpose of the CRA and the scope of its requirements. The authors explained that the CRA was intended to act as a "government-wide congressional review mechanism for most new rules."<sup>53</sup> The breadth of this application indicates that the sponsors of the CRA, at least, foresaw widespread participation in the reporting requirements. As to the availability of judicial review under Section 805, the joint statement indicates that the sponsors anticipated a more limited bar to judicial review than the plain language might suggest. The authors note that Section 805 "does not bar a court from giving effect to a resolution of disapproval that was enacted into law" and also does not "prohibit[] a court from determining whether a rule is in effect."<sup>54</sup> The joint statement notes, as an example of this limitation, that "a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3)."<sup>55</sup> Section 801(a)(1)(A) prohibits a rule from going into effect before the reporting requirement is met. This explanation suggests that the sponsors intended for courts to be able to enforce this requirement and that Section 805 should not be read as a total bar to judicial review.

However, as other courts have noted, the joint statement is not necessarily a reliable basis upon which to infer congressional intent. As a primary example,

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49. *Id.* at 23 n.35.

50. *Id.*

51. *Id.*

52. Joint Statement, *supra* note 2, at E574-75.

53. *Id.* at E575.

54. *Id.* at E577.

55. *Id.*

the joint statement was entered into the record twenty days after enactment.<sup>56</sup> Any explanations by the sponsors in this statement therefore did not inform the vote in either House, and there may be good reason to treat the joint statement with some skepticism.<sup>57</sup> Further, the actual language of Section 805 does not include any such limitation to its general bar on judicial review. Several courts have found this plain language a sufficient reason to preclude judicial review of agency actions, particularly because this language is what was voted on and enacted into law.

The inherent tension between allowing a broad bar to judicial review and fulfilling the broad accountability-improving purposes of the CRA has led some courts to supplement their “plain meaning” justification with discussion of parallel and subsequent legislative efforts to limit judicial review. These courts note that Congress had the opportunity to utilize language that would expressly provide for judicial enforcement of the CRA against agencies. The same year the CRA was enacted, Congress amended the Regulatory Flexibility Act (“RFA”) to expressly provide for judicial review of agency compliance.<sup>58</sup> Congress did not include this express language in the CRA. And in the twenty years since its enactment, Congress has not amended the CRA to provide additional clarity. The potentially problematic interpretations of Section 805 became apparent just two years after the CRA’s enactment, where a circuit court noted that the plain language of the provision created a broad bar to judicial review.<sup>59</sup>

Congress has recently attempted to amend the CRA, but was unsuccessful. In 2017, the Regulations from the Executive in Need of Scrutiny (“REINS”) Act was introduced as an amendment to the CRA.<sup>60</sup> The REINS Act proposed several changes to the CRA, one of which was an attempt to expressly provide for judicial review of agency compliance with the Act.<sup>61</sup> This legislation would have added a subsection to Section 805 stating, “[n]otwithstanding subsection (a), a court may determine whether a Federal agency has completed the necessary requirements under this chapter for a rule to take effect.”<sup>62</sup> However, Congress has not passed this legislation since it was

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56. ROSENBERG, *supra* note 48, at 23 n.35.

57. See MANNING & STEPHENSON, *supra* note 24, at 213–16.

58. Pub. L. No. 104-121, § 611, 110 Stat. 847, 865 (1996); see also *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/S, 2002 U.S. Dist. LEXIS 20936, \*16–18 (S.D. Ind. Oct. 24, 2002). The RFA originally included a provision that stated: “[T]he compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review.” *S. Ind. Gas & Elec. Co.*, 2002 U.S. Dist. LEXIS 20936, at \*17.

59. See *Tex. Sav. & Cmty. Bankers Ass’n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551 (5th Cir. 2000).

60. Regulations from the Executive in Need of Scrutiny Act, H.R. 26, 115th Cong. (2017). CAREY, DOLAN & DAVIS, *supra* note 14, at 21.

61. H.R. 26, 115th Cong. § 3.

62. *Id.*

introduced. Such failed revision of the CRA could suggest that the majority of Congress does not feel it necessary to amend the statute, or has acquiesced to a broader interpretation of Section 805.<sup>63</sup>

The legislative history thus does not provide one clear answer to the question of the scope of judicial review under Section 805.

*D. Setting Up the Conflict in Tugaw Ranches: Do Agency Reporting Failures Illustrate the Need for Judicial Enforcement?*

While the legislative history of the CRA may favor a narrower interpretation of Section 805 that would still allow some judicial review, the Department of Justice (“DOJ”) has consistently interpreted Section 805 as a total bar, explicitly extending this protection to agencies. As discussed in the ten-year CRA update, “[the DOJ] has broadly hinted that the language of Section 805 ‘precluding judicial review is unusually sweeping’ so that it would presumably prevent judicial scrutiny and sanction of an agency’s failure to report a covered rule.”<sup>64</sup> The DOJ took this position within one year of the CRA’s enactment and has maintained, in subsequent litigation, that this interpretation of the CRA is correct.<sup>65</sup>

Agencies have frequently failed to meet the CRA’s reporting requirements since its enactment. The Brookings Institution estimated that, at the end of 2016, 348 “significant” rules had apparent reporting deficiencies and would be potentially vulnerable to challenge under a more narrow reading of Section 805’s bar to judicial review.<sup>66</sup> Of the 348 vulnerable rules, thirty-seven implicate environmental regulations or policies.<sup>67</sup> Another study conducted by Curtis Copeland in 2009 suggested similar reporting deficiencies.<sup>68</sup> Copeland’s study concluded that more than 1,000 final rules had not been submitted to the

63. This is the position taken in the most recent case considering this question, *Kansas Natural Resources Coalition v. U.S. Department of the Interior*, 382 F. Supp. 3d 1179 (D. Kan. 2019), appeal docketed, No. 19-3108 (10th Cir. May 24, 2019). The court cited the REINS Act and noted that “[the] proposed additional language reinforces that the current statutory language prohibits judicial review of agency actions. Otherwise, it would not be necessary to add.” *Id.* at 1185 n.43.

64. ROSENBERG, *supra* note 48, at 28 (citing letter from Andrew Fois, Assistant Att’y Gen., Office of Legislative Affairs, Dep’t of Justice, to the Hon. Lamar Smith, Chairman, Subcomm. on Immigration & Claims, Senate Judiciary Comm. (June 11, 1997), and accompanying analysis dated June 10, 1997, at 9–11).

65. *See, e.g.*, *Tugaw Ranches, LLC v. DOI*, 362 F. Supp. 3d 879, 882 (D. Idaho 2019).

66. Philip A. Wallach & Nicholas W. Zeppos, *How Powerful Is the Congressional Review Act?*, BROOKINGS INST. (Apr. 4, 2017), <https://perma.cc/X77T-NQHZ>. This study defines “significant” rules as “having costs or benefits greater than \$100 million, or a few other non-economic criteria according to Executive Order 12866 section 3(f).” This definition appears to parallel the definition of “major” rules in the CRA at 5 U.S.C. § 804(2).

67. COPELAND, *supra* note 11.

68. *Id.* at 21.

GAO, and presumably not to Congress, between 1996 and 2009.<sup>69</sup> Copeland expressed concern that some of these rules had been implemented despite these deficiencies and had been in effect for nearly ten years.<sup>70</sup> Implementing judicial review now could subject these longstanding rules to congressional review and potential disapproval, which could risk destabilizing the regulatory schemes they are part of.<sup>71</sup>

Therefore, while the number of reporting failures suggests that some sort of enforcement mechanism may be needed, there are substantial risks with implementing such a mechanism after so many years.

## II. THE IMPACT OF EXPANDED USE OF THE CRA: BRINGING KEY INTERPRETIVE QUESTIONS TO THE FOREFRONT

Given the broad language of the CRA and its general purpose of increasing agency accountability, some of the specific requirements have given rise to important but somewhat unresolved questions of applicability. What kinds of agency actions are reviewable under the CRA? When are agencies required to report rules? Can courts enforce the provisions of the CRA against agencies?

These questions remained theoretical for many years, as congressional utilization of the CRA's review mechanism was infrequent and almost always unsuccessful.<sup>72</sup> However, after the 2016 election the CRA gained new influence, resulting in an exponential increase in overturned agency rules.<sup>73</sup> With this expansion, the CRA was subjected to additional scrutiny, bringing unresolved questions of applicability to the forefront for the first time.

One key issue that this expansion has highlighted is the ability of courts to review agency compliance with the CRA's reporting requirements. Section 805 states: "No determination, finding, action, or omission under this chapter shall be subject to judicial review."<sup>74</sup> It is unclear whether Congress intended to allow judicial review at all, despite the seemingly expansive preclusive language. The legislative history and judicial determinations on this question do not point to one clear answer. There is a seeming divide between two competing considera-

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69. *Id.*

70. *Id.*

71. See Lazarus, *supra* note 12. Agency rules that are overturned under the CRA are treated as though they had never gone into effect. 5 U.S.C. § 801(f) (2018). Therefore, any memoranda of understanding or policy statements based on that regulation would also be nullified. See *Stream Protection Rule*, OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT (Nov. 17, 2017), <https://perma.cc/6BLR-9JZJ>.

72. See MORTON ROSENBERG, THE CONGRESSIONAL REVIEW ACT AFTER 15 YEARS: BACKGROUND AND CONSIDERATIONS FOR REFORM 11 (drft. Sept. 16, 2011), <https://perma.cc/N4M9-L352>.

73. Cf. GAO, *FAQs*, *supra* note 15.

74. 5 U.S.C. § 805 (2018).

tions: giving effect to the language of the provision as enacted,<sup>75</sup> or giving effect to the purpose of the CRA by facilitating judicial enforcement to ensure agency compliance.<sup>76</sup>

This Part will analyze the trend of increasing reliance on the CRA and its effect on key interpretive questions.

### A. *The Unprecedented Expansion of the CRA During the Trump Administration*

For many years, use of the CRA was infrequent and consistently ineffective. Between 1996 and 2016, only one rule was successfully overturned.<sup>77</sup> And while the introduction of a resolution of disapproval was not a common occurrence, there were still a significant number of opportunities to utilize the CRA's review mechanism that ultimately did not result in enacting a resolution of disapproval.<sup>78</sup> Even for the single joint resolution that proved successful, unique circumstances surrounding its enactment made a repeat success unlikely.<sup>79</sup> The rejected rule involved Occupational Safety and Health Administration's ("OSHA's") ergonomics standards for the workplace.<sup>80</sup> As the ten-year report on the CRA noted,

the veto . . . could be seen as the product of an unusual, confluence of factors and events: control of both Houses of Congress and the presidency by the same party, the longstanding opposition by these political actors, as well as by broad components of the industry to be regulated, to the ergonomics standards, and the willingness and encouragement of a President seeking to undo a contentious, end-of-term rule from a previous Administration.<sup>81</sup>

This "confluence" suggested that repeat success would be unlikely.

However, this assessment changed entirely with the Trump Administration, during which Congress has successfully overturned sixteen agency rules.<sup>82</sup>

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75. See, e.g., *Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, No. A 97 CA 421 SS, 1998 U.S. Dist. LEXIS 13470, at \*27 n.15 (W.D. Tex. June 25, 1998), *aff'd*, 201 F.3d 551 (5th Cir. 2000).

76. See, e.g., *Tugaw Ranches, LLC v. DOI*, 362 F. Supp. 3d 879, 889 (D. Idaho 2019).

77. CAREY ET AL., *supra* note 14, at 5.

78. Seventy-two resolutions of disapproval were introduced between 1996 and 2011. ROSENBERG, *supra* note 72, at 11.

79. *Id.*

80. *Id.*

81. *Id.* at 12.

82. See GAO, *FAQs*, *supra* note 15; see also Santulli, *supra* note 42, at 1382 (discussing the increase in disapproval resolutions at the beginning of the Trump Administration); *The Congressional Review Act: CRA Tracker*, Regulatory Studies Ctr., Geo. Wash. Univ., <https://perma.cc/692E-ZA7L>.

This represented a staggering increase in the success of congressional review under the CRA. It also forces us to reconsider the rarity with which the right confluence of factors may occur. A change in administration coupled with a significant difference in executive philosophy may be sufficient.<sup>83</sup> President Obama “aggressively used the rulemaking process to advance his policies.”<sup>84</sup> President Trump, by contrast, sought to undo the “regulatory overreach” of the prior administration.<sup>85</sup> The contrast between President Obama’s frequent reliance on the administrative state and President Trump’s commitment to mitigating the power of federal agencies opened the door to substantial reliance on the CRA.<sup>86</sup>

*B. Do Courts Have Jurisdiction to Review Agency Compliance with the CRA?*

Courts have had few opportunities to examine the CRA because, prior to 2017, the CRA was only successfully invoked once.<sup>87</sup> Before the District Court of Idaho decided *Tugaw Ranches* in February 2019, no court had definitively and directly answered the question of the availability of judicial review for an agency’s actions. Those decisions did not meaningfully interpret the CRA because they primarily involved questions as to whether the contested agency action was a “rule”—and therefore subject to the CRA—at all.<sup>88</sup> *Tugaw Ranches*, and a few months later, *Kansas Natural Resources Coalition v. DOI*,<sup>89</sup> were the first opinions in which the reviewing court not only reached the question of the scope of Section 805, but made direct determinations with respect to this provision that were a necessary part of the court’s holding. The buildup to these two decisions, and the decisions themselves, exemplify the tension between the broader purpose of the CRA and the language of the provision itself.

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83. See Santulli, *supra* note 42, at 1381–82; see also Larkin, *supra* note 47, at 243. Larkin notes that the “optimal time” for Congress to introduce a resolution of disapproval is “during the early days of a new administration headed by a President who replaces one from the opposing party and who belongs to the same party as the majority of the incoming members of both houses of Congress.” Larkin, *supra* note 47, at 243.

84. Larkin, *supra* note 47, at 244.

85. Santulli, *supra* note 42, at 1381.

86. *Id.*; see also Larkin, *supra* note 47, at 243.

87. See ROSENBERG, *supra* note 72, at 3, 11.

88. See, e.g., *Tex. Sav. & Cmty. Bankers Ass’n v. Fed. Hous. Fin. Bd.*, No. A 97 CA 421 SS, 1998 U.S. Dist. LEXIS 13470, \*28 n.16, \*31–32 (W.D. Tex. June 25, 1998), *aff’d*, 201 F.3d 551 (5th Cir. 2000).

89. 382 F. Supp. 3d 1179, 1185 (D. Kan. 2019), *appeal docketed*, No. 19-3108 (10th Cir. May 24, 2019).

1. *Early Decisions: The Tension Between "Plain Meaning" and the Purpose of the CRA*

One of the first cases to assess the availability of judicial review under the CRA was *Texas Savings & Community Bankers Ass'n v. Federal Housing Finance Board*.<sup>90</sup> This opinion originated the "plain meaning" justification for upholding a broad ban to judicial review, which grew in popularity with subsequent opinions. The court held that Section 805 represented a broad bar to judicial review, stressing that the language of Section 805 was not limited to the actions of Congress alone.<sup>91</sup> Noting that "the statute provides for no judicial review of any 'determination, finding, action, or omission *under this chapter*,' not '*by Congress under this chapter*,'" the district court emphasized that "the language could not be plainer."<sup>92</sup> However, the court did seem to question the efficacy of Congress's apparently total bar to judicial review.<sup>93</sup> Regardless of this apparent hesitancy, the court felt that it was bound by the "plain English" of the provision.<sup>94</sup> Interestingly, the court did not need to take any position as to the meaning of Section 805—the discussion of potential CRA violations was secondary to a broader claim that the agency had failed to comply with the notice-and-comment procedures of the Administrative Procedure Act ("APA").<sup>95</sup> The court concluded that the contested agency actions were not substantive "rules" under 5 U.S.C. § 553(b)(3)(A) and were therefore not subject to either notice-and-comment or CRA requirements.<sup>96</sup>

The court's offhanded remarks about Section 805 had no precedential value, but nevertheless represented the first analysis of the CRA's judicial review provision, two years after its enactment. And the decision did prove influential. Four years later, the Southern District of Ohio issued an opinion with very similar analysis of Section 805 in *United States v. American Electric Power Service Corp.*<sup>97</sup> The court built on and expanded the position in *Texas Savings*, emphasizing the plain language of Section 805 and asserting that plain language must govern except in "rare cases."<sup>98</sup>

90. No. A 97 CA 421 SS, 1998 U.S. Dist. LEXIS 13470 (W.D. Tex. June 25, 1998).

91. *Id.* at \*27.

92. *Id.* at \*27 n.15.

93. *Id.* (citing Peter A. Pfohl, *Congressional Review of Agency Rulemaking: The 104th Congress and the Salvage Timber Directive*, 14 J.L. & POL'Y 1, 29 (1998)) (noting problems with shielding agency actions from judicial challenge).

94. *Id.*

95. *See id.* at \*31–32.

96. *Id.* at \*28–32.

97. 218 F. Supp. 2d 931 (S.D. Ohio 2002).

98. *Id.* at 949 (quoting *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 842 (6th Cir. 1994)).

However, the same year that *American Electric* was decided, the Southern District of Indiana took an opposing stance in *United States v. Southern Indiana Gas & Electric Co.*<sup>99</sup> While this opinion was unpublished, it nevertheless exemplified the opposing view to *Texas Savings*' "plain meaning" argument, emphasizing the policy reasons for enacting the CRA and interpreting Section 805 to better serve these purposes. The court found the language of Section 805 to be ambiguous<sup>100</sup> and held that judicial review was available under Section 805 for an agency's actions.<sup>101</sup> The court considered and rejected the "plain meaning" position in *Texas Savings* and *American Electric*, concluding that Section 805 "is susceptible to two plausible meanings"—a complete bar to judicial review, as the courts found in these prior cases, or a limited bar to judicial review only for "Congress' own determinations, findings, actions, or omissions made under the CRA after a rule ha[d] been submitted."<sup>102</sup> In endorsing the latter interpretation, the court stressed that the former interpretation would "render the statute ineffectual."<sup>103</sup> Without an enforcement mechanism, the court lamented, the CRA reporting requirements would be meaningless.<sup>104</sup>

While the *Southern Indiana* court took a stronger and contradictory position to prior cases, the opinion was somewhat limited in impact. The court's position on the availability of judicial review was tempered by its ultimately more powerful conclusion that EPA had not "changed its interpretation of the law" and that the CRA requirements were therefore inapplicable.<sup>105</sup> As was true in the prior two cases, the question of Section 805's interpretation was not necessary to the larger holding, but the court nevertheless chose to reach the issue. And while a few commentators cited *Southern Indiana* favorably,<sup>106</sup> the decision had no precedential value because it was unpublished.

In 2009, it appeared that the D.C. Circuit had closed off the availability of judicial review with its decision in *Montanans for Multiple Use v. Barbouletos*.<sup>107</sup> This case was the first time a circuit court had explicitly reached this issue,<sup>108</sup> and suggested that the "plain meaning" interpretation of Section 805 would prevail. The D.C. Circuit was asked to invalidate a number of amendments to

99. No. IP99-1692-C-M/S, 2002 U.S. Dist. LEXIS 20936 (S.D. Ind. Oct. 24, 2002).

100. *Id.* at \*13.

101. *Id.* at \*18.

102. *Id.* at \*13.

103. *Id.* at \*14.

104. *Id.* The court also justified its conclusion by looking to the legislative history, but was abundantly cautious in its treatment of the legislative record, likely for the reasons discussed above. *See id.* at \*15 n.3.

105. *Id.* at \*30.

106. *See, e.g.,* ROSENBERG, *supra* note 48, at 30.

107. 568 F.3d 225 (D.C. Cir. 2009).

108. *Texas Savings* was affirmed by the Fifth Circuit, but the court did not consider the issue of judicial enforcement of the CRA. 201 F.3d 551 (5th Cir. 2000).

the land and resource management plan for Flathead National Forest for failure to comply with the CRA.<sup>109</sup> Once again, this claim was somewhat secondary to larger claims that the U.S. Forest Service had failed certain obligations or had acted unlawfully.<sup>110</sup> But the court succinctly and definitively held that Section 805 “denies courts the power to void rules on the basis of agency noncompliance with the Act.”<sup>111</sup> The court further asserted that “the language of § 805 is unequivocal” and that even if the actions at issue constituted “rules,” failure to submit the plans was nonreviewable.<sup>112</sup> This decision was significant for several reasons. First, the D.C. Circuit has a great deal of influence over regulatory issues and APA provisions.<sup>113</sup> Having an influential circuit court issue a decision utilizing such strong, direct language regarding the availability of review sends a powerful message to other courts. Second, the court did not reference any of the preceding opinions, refusing to base its conclusion on either these prior cases or on whether the agency’s action was a “rule” under the CRA.<sup>114</sup> Such an approach differed from the prior cases, which depended in part on the court’s legitimate doubts or outright decisions that the contested action would not even fall under the purview of the CRA. But the D.C. Circuit made clear that the definition of a “rule” bore no influence over its interpretation of the CRA.

Each of these cases addressed the question of reviewability from a more hesitant standpoint, tempering their analysis with discussions of whether the agency action was really a “rule” or including the analysis in an offhanded comment or a footnote. *Tugaw Ranches* reestablished the possibility of allowing judicial review in light of the “absurd results” garnered by the “plain meaning” interpretation espoused in *Montanans* by taking a much more direct, controversial approach.

## 2. *Tugaw Ranches: A New Approach Based on a Changing Political Landscape*

*Tugaw Ranches* was the first case to address the availability of judicial review under the CRA directly as the sole challenge to an agency’s action. This case epitomizes the political impact of the CRA’s expansion and illustrates the

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109. *Montanans for Multiple Use*, 568 F.3d at 227.

110. *See id.*

111. *Id.* at 229.

112. *Id.*

113. *See* Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & POL’Y 131, 142–48, 152–53 (2013) (discussing the influence of the D.C. Circuit based on disproportionate number of administrative law cases it hears relative to other circuits and its special treatment by Congress).

114. *See Montanans for Multiple Use*, 568 F.3d at 229 (finding judicial review to be precluded “even assuming the plan amendments qualify as rules subject to the [CRA] in the first place”).

potential pitfalls of new issues under the CRA reaching the courts. Decided in February 2019, a decade after *Montanans* and two decades after the CRA was enacted, this case dealt with DOI's amendment of federal land use plans to provide increased protections for the Greater Sage Grouse.<sup>115</sup> Neither party disputed that DOI was required to submit these amendments to Congress under the CRA—thus, the district court was left in the unique position of interpreting Section 805 of the CRA on its own merits.<sup>116</sup>

The court considered, and rejected, prior interpretations from various district and circuit courts.<sup>117</sup> The court first distinguished *Texas Savings*. According to the court, *Texas Savings* merely answered the question as to whether Section 805 was limited only to Congress's acts under the CRA, but certainly did not extend to an analysis of Section 805's application to agency actions.<sup>118</sup> However, this analysis is at odds with the actual discussion in *Texas Savings*—while admittedly limited, the court's decision in *Texas Savings* implicitly lamented the perhaps problematic aspects of its interpretation for agency enforcement.<sup>119</sup> The *Texas Savings* court may not have explicitly outlined the bounds of the bar on judicial review, but it certainly suggested that these bounds extended to agency actions as well. But the *Tugaw Ranches* court's summary dismissal of *Texas Savings* is just one aspect of its more general dismissal of preceding cases involving Section 805. The court was similarly dismissive of the "three sentences" the D.C. Circuit used to interpret Section 805 in *Montanans*.<sup>120</sup> The court identified many other cases—both before and after *Montanans*—that considered the question of reviewability under Section 805, only to find them unpersuasive.<sup>121</sup> Ironically, despite being unpublished, the one case the *Tugaw Ranches* court cited favorably was *Southern Indiana*, as the court noted that it contained "the most comprehensive discussion" and found its discussion on ambiguity "insightful."<sup>122</sup>

The court's dismissal of the reasoning in the prior cases was an integral basis for its conclusion that Section 805 is ambiguous. The court used these cases to emphasize that "this matter is far from settled law" and that Section

115. *Tugaw Ranches, LLC v. DOI*, 362 F. Supp. 3d 879, 880 (D. Idaho 2019).

116. *Id.* at 881.

117. *See id.* at 884–85.

118. *Id.* at 882 (emphasizing that the court made "no mention . . . of how far the provision of non-review applies").

119. *See Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, No. A 97 CA 421 SS, 1998 WL 842181, at \*27 n.15 (W.D. Tex. June 25, 1998) (citing Pfohl, *supra* note 93, for the proposition that "preclusion of judicial enforcement may provide an 'out' for agencies"); *id.* ("Apparently, Congress seeks to enforce the [CRA] without the able assistance of the courts.").

120. *Tugaw Ranches*, 362 F. Supp. 3d at 884.

121. *Id.* at 884–85.

122. *Id.* at 885–86.

805 is not clear and unambiguous.<sup>123</sup> The court concluded that “[t]here is no way (by simply looking at the statute itself) for the Court to determine exactly whose actions are subject to judicial review and whose are not.”<sup>124</sup> But this analysis is too quick to reject the possibility that, with no actors specified, the bar was meant to apply to all actors, as first asserted in *Texas Savings*. The court was intentionally cursory in its explanation of ambiguity, rejecting the “plain meaning” interpretation because the court was “concerned with the actual result of such a finding.”<sup>125</sup>

Policy considerations appear to have been the driving force behind the court’s decision.<sup>126</sup> The court dedicated most of its opinion to considering the potentially harmful or counterproductive effects of an expansive ban on judicial review.<sup>127</sup> The court was willing to read ambiguity into Section 805 to combat these effects. However, the court ignored the policy considerations *in favor* of a broader bar on judicial review. As early as 1997, the DOJ made clear its position that Section 805 precluded judicial review of agency acts under the CRA.<sup>128</sup> Agencies subsequently declined to submit particular changes to Congress. Undermining a position consistently taken by the DOJ, and several major courts, for over twenty years could have serious ramifications for the stability of important regulatory schemes, especially where rules have been implemented for over two decades.<sup>129</sup> Under *Tugarw Ranches*’ holding, these longstanding rules could be overturned and treated as though they had never entered into effect, which would nullify any interpretations or policies that arose from these rules. Especially in the environmental world, where numerous and interdepen-

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123. *Id.* at 886.

124. *Id.* at 883.

125. *Id.*

126. The court also relied on legislative history, disputing that it was controversial. The court argued that the delay of the joint statement—filed post-enactment—was “de minimus,” contending that the post-enactment timing was problematic only in that “memories fade or a person’s position may change,” which is not the case for a delay of twenty days. *Id.* at 887.

127. The court noted that, “without review, an agency could continually submit rules and congress could continually reject them, but there would be no adjudicatory function to enforce compliance with the statute itself.” *Id.* at 883 n.2. This relates to the requirements that agencies may not promulgate a “substantially similar” rule after a rejection. The court argued that “Congress does not itself enforce this provision” and that “this provision can only operate if courts enforce it against recalcitrant agencies.” *Id.* at 883. And the court noted that “without review, an agency would frankly have no reason to comply with the CRA—or at least no legal duty.” *Id.* The court is most concerned for a third party’s ability to enforce compliance, because they “need the courts to protect them.” *See id.* at 883–84 (“[T]he political branches can always ‘engage in political wheeling and dealing’ but . . . [p]rivate parties do not sit at the table in that game.” (quoting Larkin, *supra* note 47, at 230)).

128. *See* ROSENBERG, *supra* note 64.

129. *See* COPELAND, *supra* note 11, at 21 (noting that agencies have implemented rules that do not satisfy reporting requirements).

dent regulations go into effect every year, overturning these rules could result in catastrophic upheaval.

Perhaps, however, upheaval *is* the ultimate goal of this suit. Petitioners brought this challenge three years after the DOI had adopted this rule, capitalizing on the CRA's new influence.<sup>130</sup> Ideally, the suit would offer a chance "to have Congress review and reject the sage grouse rules."<sup>131</sup> And Tugaw Ranches is not the only party interested in this outcome—Republican leaders, including the Governor of Idaho, Idaho House Speaker Scott Bedke, and Idaho Senate President Pro Tem Brent Hill moved to intervene in the suit.<sup>132</sup> The political background of this challenge and the inevitable pressure to reach a specific result helps explain the court's decision. The court's emphasis on policy considerations gives effect to this broader effort to undo environmental regulations, although the decision's basis in law is more questionable.

### 3. Kansas Natural Resources: *Halting Tugaw Ranches in Its Tracks?*

Just two months after *Tugaw Ranches* was decided, the District Court of Kansas took an equally strong but opposing view in *Kansas Natural Resources Coalition v. DOI*.<sup>133</sup> Similar to *Tugaw Ranches*, *Kansas Natural Resources* involved the DOI's failure to submit its policy for listing new species as endangered to Congress.<sup>134</sup> And as in *Tugaw Ranches*, the purported violation of the CRA was the only challenge at issue before the court.<sup>135</sup> However, unlike in *Tugaw Ranches*, the court determined that the language of Section 805 was unambiguous and held that the plain meaning of the provision required a broader bar to judicial review encompassing the DOI's failure to submit the "rule."<sup>136</sup>

Much like in *Tugaw Ranches*, the *Kansas Natural Resources* court acknowledged the prior cases involving Section 805, but did not engage with their reasoning, instead using them to summarize the controversy.<sup>137</sup> However, according to the *Kansas Natural Resources* court, that controversy has been largely resolved. The court endorsed the *Montanans* court's view that "§ 805's language was unequivocal."<sup>138</sup> The court then noted the trend of "several district

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130. Kimberlee Kruesi, *Idaho Governor, GOP Leaders Ask to Join Sage Grouse Suit*, AP NEWS (Sept. 3, 2018), <https://perma.cc/BJ8P-EGSZ>.

131. *Id.*

132. *Id.*

133. 382 F. Supp. 3d 1179 (D. Kan. 2019), *appeal docketed*, No. 19-3108 (10th Cir. May 24, 2019).

134. *Id.* at 1180–81.

135. *Id.* at 1181.

136. *Id.* at 1185.

137. *See id.* at 1183–85.

138. *Id.* at 1183.

courts and at least one circuit court” in “adopt[ing] this viewpoint,” pointing to a more recent D.C. Circuit opinion issued the year prior reaffirming the position in *Montanans*.<sup>139</sup> And the court argued that the Tenth Circuit would take a similar position, based on a footnote in a prior Tenth Circuit decision.<sup>140</sup> The court recognized only two instances adopting the opposing position that judicial review could extend to enforcement against agencies—*Southern Indiana* and *Tugaw Ranches*—but dismissed both as unpersuasive.<sup>141</sup>

*Kansas Natural Resources* changed the likelihood that *Tugaw Ranches* would inspire a snowball effect in other courts, radically expanding the traditional perception of the availability of judicial review under the CRA, by taking a direct and opposing stance. Looking to the larger trend in the assessment of Section 805 across all courts that have considered the issue, *Tugaw Ranches* is much more likely to be a small outlier than a turning point in judicial decisions.<sup>142</sup> Nevertheless, *Tugaw Ranches* indicates that determinations of interpretive issues under the CRA may be unpredictable and susceptible to political influence.

### C. *New Dilemma: Can the CRA Limit Future Agency Rulemaking Efforts?*

While the question of courts’ jurisdiction to review agency compliance under the CRA seems to have been tentatively resolved, other interpretive questions remain. One major question is whether the Trump Administration’s success in utilizing the CRA’s review mechanism could pose a significant hurdle to future rulemaking efforts. Section 801(b)(2) of the CRA may substantially limit an agency’s ability to promulgate a new rule to take the place of the overturned rule.<sup>143</sup> This provision mandates that an overturned rule “may not be reissued in substantially the same form.”<sup>144</sup> Therefore, when Congress overturns an agency rule, the agency must not only begin the rulemaking process again, but must do so with new limitations in place. It is unclear, however, just how limiting this provision was intended to be. In debates regarding the recent disapproval resolutions, some members of Congress expressed concerns that over-

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139. *Id.* at 1183–84 (citing *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 892 F.3d 332, 346 (D.C. Cir. 2018)).

140. *Id.* at 1185 (citing *Via Christi Reg’l Med. Ctr. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007)).

141. *See id.* at 1184–85. The court distinguished other cases cited to in *Tugaw Ranches* because they “only peripherally addressed § 805 and did not specifically address the effect of the language in § 805 to its review of the issue in the case before it.” *Id.* at 1184 n.39.

142. *See Lazarus, supra* note 12.

143. *See Santulli, supra* note 42, at 1377–80.

144. 5 U.S.C. § 801(b)(2) (2018).

turning particular rules would significantly burden future agency rulemaking efforts under the “substantially the same form” bar in Section 801(b)(2).<sup>145</sup>

This question has not yet reached the courts, but, as with *Tugaw Ranches* regarding judicial review, the expanded use of the CRA will likely bring this question to the forefront. Such a provision could have catastrophic implications for environmental regulation. Congress has not successfully enacted a major new environmental statute since the Clean Air Act Amendments of 1990, so there is little possibility that any new regulatory restrictions could be introduced by new legislation.<sup>146</sup>

Once again, the scope of Section 805’s bar to judicial enforcement may play a significant role in this analysis. Under the more prominent viewpoint that Section 805 represents a total bar to judicial review, judicial review would likely not be available for this question. If a court does not have jurisdiction to review an agency’s failure to meet reporting requirements, it seems possible that a court would similarly be without jurisdiction to review an agency’s compliance with the “substantially the same form” bar in Section 801(b)(2).<sup>147</sup> The potential lack of reviewability under this provision was one of the concerns the court brought up in *Tugaw Ranches*. The court argued that “Congress does not itself enforce this provision” and that “this provision can only operate if courts enforce it against recalcitrant agencies.”<sup>148</sup> Once again, *Tugaw Ranches* appears to ignore significant countervailing policy considerations, not least of which would be the potential constitutionality problems posed by a provision that could effectively amend an agency’s underlying statute using expedited procedures.

The vast expansion of the CRA over the past two years has illustrated the uncertainties within the broad language of the Act and brought them to the forefront—this was evident in the debate over Section 805’s judicial review bar and will undoubtedly play a major role in any future litigation over Section 801’s “substantially the same form” bar.

## CONCLUSION

The CRA’s broad language leaves us with many unanswered questions. Until 2001, when the CRA was first successfully used to overturn a rule, these questions were largely theoretical.<sup>149</sup> But the Trump Administration’s successful use of the CRA has vastly expanded its influence and has brought these ques-

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145. See Santulli, *supra* note 42, at 1383–84.

146. See PERCIVAL ET AL., *supra* note 25, at 101–02. Congress passed an environmental law in 2016, although it did not rise to the level of a major act. Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016) (codified at 15 U.S.C. §§ 2601–2697 (2018)).

147. See Santulli, *supra* note 42, at 1389–90.

148. *Tugaw Ranches, LLC v. DOI*, 362 F. Supp. 3d 879, 883 (D. Idaho 2019).

149. See Santulli, *supra* note 42, at 1380.

tions to the forefront. *Tugaw Ranches* sits comfortably within this trend of expansion. Faced with the new power of the CRA, the court was required to engage in more than an academic exercise in legislative interpretation—instead, the court faced a question that would have concrete effects on the rulemaking process.

The question of the availability of judicial review is intrinsically tied with the success of the CRA as a means of overseeing agency rulemaking. Rules cannot be reviewed if they are not first reported, and agencies have limited motive to report rules without judicial enforcement.<sup>150</sup> In *Tugaw Ranches*, the court placed significant weight on the policy considerations behind the enactment of the CRA, seeking to protect the efficacy of the Act.<sup>151</sup> While the court justified its decision with the legislative history of the Act,<sup>152</sup> these policy considerations must be the true driving force. At best, the legislative history is sparse, and at worst, it misrepresents the understanding of members of Congress at the time they voted.<sup>153</sup> Courts and commentators have debated the judicial review provision, with each party falling on one of two sides: those who place the plain meaning first, and those who are driven by the purpose of the CRA. Congress's lack of action to clarify this issue over the last twenty years has left this debate unresolved. And expanding judicial review now could be disastrous—longstanding rules could be subject to judicial review nearly twenty years after their enactment.<sup>154</sup> With the contrary holding in *Kansas Natural Resources* following so closely on the heels of *Tugaw Ranches*, judicial review is unlikely to gain traction in other courts, especially given the danger posed by adopting a broader view.

While *Tugaw Ranches* may not have much longevity as a precedent-setting case, it nevertheless illustrates the significance of the CRA in today's world. The Trump Administration's repeated successes in overturning agency rules under the CRA has brought questions about the more long-term effects of the CRA to the forefront. Will agencies be required to be more rigorous in meeting reporting requirements? To what extent does overturning a rule limit an agency's future rulemaking authority? These questions will likely appear before courts in the next few years. And while the CRA has proven harmful to the environmental community through Congress' success in overturning many environmental regulations, a broad bar to judicial review preempts far more significant harms.

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150. See ROSENBERG, *supra* note 48, at 31 (noting that an interpretation avoiding this type of judicial review could defeat the statute's purpose).

151. *Tugaw Ranches*, 362 F. Supp. 3d at 883 n.2.

152. See *id.* at 886–88.

153. See MANNING & STEPHENSON, *supra* note 24, at 213–16 (critiquing use of legislative history by courts to determine congressional understanding).

154. See COPELAND, *supra* note 11, at 21 (estimating number of implemented rules that do not satisfy reporting requirements).