

# PRACTICAL IMPLICATIONS OF REGULATORY REFORM IN THE TRUMP ERA & IMPACTS ON TRUSTEE RELATIONS

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# Trump Administration Environmental Priorities



# Major Initiatives

- Budget Priorities
- Deregulatory Emphasis & Actions
- “1-in-2-out” Executive Order
- REINS Act
- Regulatory Accountability Act

# Trump Administration Priorities

- **FY2018 Proposed Budget, A New Foundation for American Greatness**
  - Would cut EPA funding by -32% (\$2.6 billion) and 3,000+ jobs
  - Eliminates Geographic Programs: e.g., Great Lakes (-\$300M), Chesapeake Bay (-\$73M), Puget Sound (-\$28M)
  - EPA Superfund program -30% (-\$330M), state, tribal assistance grants -43% (-\$48.3M)
  - Agency funding reductions impacting Natural Resource Damages: NOAA -17% (-\$1B), Interior -12% (-\$1.68B)
- **Executive Orders:** EO 13771, Reducing Regulation and Controlling Regulatory Costs; EO 13777, Enforcing the Regulatory Reform Agenda; EO 13778, Restoring The Rule of Law, Federalism, And Economic Growth by Reviewing The “Waters Of The United States” Rule; EO 13783, Promoting Energy Independence and Economic Growth
- **Push Environmental Policy to States:** Resource Constraints

# Programmatic Deregulatory Actions

## **Clean Power Plan (CPP)**

- Rule stayed by Supreme Court in February 2016 pending the resolution of challenges to the Plan. Challenges have been held in abeyance by the D.C. Circuit.
- Rescission rule is currently pending at OMB.
- Withdrawal from Paris Accord

## **Waters of the United States Rule (WOTUS)**

- Rule is currently stayed pending litigation.
- EPA released its proposal to repeal the rule on June 27.

## “1-in-2-out” Executive Order

“Unless prohibited by law, whenever an executive department or agency publicly proposed for notice and comment or otherwise promulgates a new regulation, **it shall identify at least two existing regulations to be repealed.**”

## “1-in-2-out” Executive Order

Federal agencies must repeal at least two existing regulations for each new one

- Offset incremental costs imposed by new regulations
- **No net positive incremental cost of regulations finalized in FY 2017**
- Defines “regulation” to include many guidance documents
- OMB Director issued guidance on April 6

# “1-in-2-out” Executive Order

Establishes regulatory budget

- President determines how much agencies may annually spend promulgating new regulations
- **FY 2017's total incremental cost set at \$0**
- This budget could be set at a negative number, requiring net deregulation based on costs



# “1-in-2-out” Executive Order

## Legal Challenges

- NRDC, Communication Workers of America, and Public Citizen sued in the U.S. District Court for D.C. to block the order on February 8, arguing that it:
  - ◆ **Exceeds the President’s constitutional authority**, overriding authority Congress has delegated to agencies. Agencies cannot comply with the order without acting arbitrarily or failing to fulfill their statutory obligations
  - ◆ **Will block health, safety, and environmental protections without accounting for the benefits of those rules**
- The viability of this challenge is unclear

# “1-in-2-out” Executive Order

## Practical challenges to implementation

- New regulatory impact analysis for rules to be taken down (what if the costs are higher without the rule? Costs of change?)
- Statutory constraints
- Resource competition within declining budget

## Net Result on federal environmental actions

- EPA will fall behind
- Deadlines in suits, court orders, and consent decrees?

# Regulations from the Executive in Need of Scrutiny Act of 2017 (REINS Act)

H.R. 26



# REINS Act

## Background

- House repeatedly passed similar bills over past 6 years nearly along party lines

## Bill history

- Passed in the House of Representatives Jan. 5, 2017; referred to the Senate Committee on Homeland Security & Government Affairs.
- Sent to the full Senate for consideration on May 17, 2017.

# REINS Act

- Revises the Congressional Review Act (CRA)
- CRA allows Congress to **overturn agency regulations** within 60 legislative days via joint resolution
- Agencies cannot reissue “substantially the same” rules without congressional approval
- Requires Congress to act only to *disapprove* rules

# REINS Act

- Now requires Congress to actively *approve* all new “major” rules in order for them to take effect
- Major rules - \$100 million+ economic impact
  - Streamlined congressional approval procedure
  - Process for non-major rules remains the same
  - Congress decides within 70-90 days of Comptroller General issuing agency report

# REINS Act

## Additional requirements

- Offsets: Agencies submit, with every proposed new regulation, an existing rule for repeal/amendment to offset the new rule's economic cost.
- Repeal must take place before new rule can take effect
- All existing regulations reconsidered: All preexisting regulations must be reviewed over a 10-year period
- Rules *repealed by default* if not actively *approved*

# Regulatory Accountability Act

**H.R. 5 & S. 951**





# Regulatory Accountability Act (H.R. 5)

- **Overview**

- House Bill; multiple Acts within one
- Focuses on formalizing the rulemaking process to allow for evidentiary hearings
- Overhauls Notice & Comment rulemaking under Administrative Procedure Act
- Would change judicial deference

- **Current status**

- Passed House of Representatives Jan. 11, 2017
- Related bill pending in Senate

# Regulatory Accountability Act (H.R. 5)

- Establishes extensive **advance notice procedure** for rules with significant economic impacts
- **Overrides Chevron Deference**
  - ◆ Reviewing courts decide questions of law *de novo*
  - ◆ Courts prohibited from interpreting statutory gaps as implicit delegation of legislative authority
  - ◆ Exception when Congress **explicitly** delegates authority to regulate or interpret
- **Requires hearings** for high-impact rules
- Requires agency **reports to Congress** on certain economic impacts of finalized *major, high-impact* and *negative-impact on jobs and wages* rules

# Other Legislative Reform Possibilities

# Other Legislative Reform Possibilities

## **Midnight Rules Relief Act of 2017 (H.R. 21)**

- Amends Congressional Review Act to allow Congress to disapprove regulations *en bloc*, instead of individually

## **Searching for and Cutting Regulations That Are Unnecessarily Burdensome (SCRUB) Act (H.R. 988)**

- Establishes 9-member commission to independently assess regulations which are outdated or unnecessarily burdensome
- May earn bipartisan support from moderate senators

## **Regulatory Integrity Act (H.R. 1004)**

- Requires agencies to disclose actions and public communications about pending rules
- Prevents agencies from using public communications to lobby the public for support of pending rules

# Other Legislative Reform Possibilities

## Financial CHOICE Act (H.R. 10)

- Passed by the House June 8, 2017
- Amends the **Dodd-Frank Wall Street Reform and Consumer Protection Act**
- Key provision (Subtitle B, Sec. 844) revises the holding requirement to introduce shareholder resolutions to **1-percent** of the issuer's securities
- Example: Exxon Mobil
  - ◆ 4.2 billion shares outstanding
  - ◆ 1% holding requirement means an investor must own 42 million shares, worth \$3.4 billion
- Effectively prevents small and medium investors from submitting proposals

# Natural Resource Damages Mitigation



# Natural Resource Damages

- **Endorsed by the Obama Administration**

- ◆ Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, 80 Fed. Reg. 68743 (Nov. 6, 2015)
- ◆ Directed the NRD trustees – Department of the Interior (DOI) and National Oceanic and Atmospheric Administration (NOAA) – to develop guidance identifying:  
*“the conditions for evaluating whether, where, and when **restoration banking** or advance restoration projects would be appropriate as components of a restoration plan”*

- **NOAA and DOI issued guidance**

- ◆ NOAA: December 1, 2016
- ◆ DOI: December 9, 2016

# Natural Resource Damages

- **President Trump's Executive Order revoked the Obama Mitigation Memorandum**
  - ♦ "Promoting Energy Independence and Economic Growth," (E.O. 13783) (addressing the Clean Power Plan and policies and regulations on climate change) (Sec. 3) (Mar. 28, 2017).
  - ♦ Also directed all agencies to identify "Agency Actions" (existing regulations, orders, guidance documents, polices, and other similar agency actions) arising from the Obama Memorandum and "as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules [to do so]..."



# Natural Resource Damages

- **DOI Secretary Zinke Issued Secretarial Order**
  - ◆ Secretarial Order No. 3349, “American Energy Independence”
  - ◆ Ordered a “reexamination of the mitigation policies and practices across [DOI] in order to better balance conservation strategies and policies with equally legitimate need to creating jobs for hard-working American families.”
- Obama Memorandum was designed to make it the policy of federal agencies (BLM, DOI, NOAA) to “avoid and then minimize harmful effects to land, water, wildlife, and other ecological resource (“natural resources”) cause by land- or water-disturbing activities”  
**establish policies to protect federal lands**

# Forecasting New Federal Priorities

- EPA Priorities
  - Budget cuts and personnel costs
  - Retrenchment in regulations and rule making
  - Streamline remediation and Superfund
  - Cuts in State funding and local/regional programs
- Natural Resource Trustees (DOI and NOAA)
  - Downsized programs
  - Emphasis on federalism and states' rights
  - Privatize or downsize federal lands and monuments
- Setting the table for more disputes

# COMPETING VALUES & PRIORITIES BETWEEN FEDERAL, STATE AND TRIBAL NATURAL RESOURCE TRUSTEES

THE MUIR WOODS





# What is the highest trust value of the Muir Woods to the public?

1. Existence and Passive Values
2. Cultural and Human Uses
3. Carbon Sequestration & Resource Services
4. Habitat Values
5. Timber
6. Tax Credits

# So what do you do when the Trustees don't agree?

- A trio of court decisions – ***Cœur d'Alene I***, ***Cœur d'Alene II***, and ***Tyson Foods*** – sparked debate over the scope of a trustee's authority to bring and resolve NRD claims on behalf of the public.
- Inconsistent decisions on how trustees (and which ones may) recover NRD from responsible parties through settlement or litigation raise important questions for parties seeking to resolve NRD claims.
  - Scope of Authority to Bring Claims
  - Power to Recover for and Resolve Claims
  - Primacy of the Resource and Restoration
  - Early Settlements Issues
  - Finality

# CERCLA's Framework for NRD Claims

- CERCLA provides a “make-whole” remedial framework for natural resources damaged or destroyed by releases of hazardous substances.
- Allowing multiple trustees to recover for the same injured resource once – but not twice – promotes CERCLA’s “make-whole” remedy.
- Trustee must have authority over the resource and demonstrate that the injured resource is within the scope of its trusteeship.
- Courts have recognized co-trustees are the **norm** and not the exception (*e.g., Coeur d’Alene I and II*).

# Coordination Among Co-Trustees

- CERCLA's implementing regulations encourage co-trustees to coordinate and cooperate with one another. See 40 C.F.R. 300.615(a).
- Coordination and cooperation is not always possible:
  - Individual trustees may lack resources to fund NRD cases.
  - Political pressure or economic impacts that accompany the pursuit of responsible parties could dissuade trustees from bringing NRD claims.
  - Disagreements as to the scope and extent of contamination
- What happens when co-trustees do not act in unison?
- Can a co-trustee pursue or resolve an NRD claim without the other co-trustees?



## Trustee Coordination (Cont'd)

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- What happens when co-trustees do not act in unison?
- Can a co-trustee pursue or resolve an NRD claim without the other co-trustees?

## *Cœur d'Alene v. ASARCO Inc.*, 280 F. Supp. 2d 1094 (D. Id. 2003) (Cœur d'Alene I)

The court recognized three co-trustees over natural resources in the Cœur d'Alene Basin: the U.S., Idaho, and Cœur d'Alene Tribe.

CERCLA “clearly anticipates [overlapping trusteeship] because natural resources are not static to one area.” 280 F. Supp. 2d at 1116.

The court found that co-trustees may only recover NRD according to their percentage of actual management or control of an injured natural resource. *Id.*

## *United States v. ASARCO Inc.*, 471 F. Supp. 2d 1063 (D. Id. 2005) (*Cœur d'Alene II*)

The court modified its order in *Cœur d'Alene I* and held that co-trustees could recover the full amount of NRD for an injured resource, less any amount already recovered by another co-trustee, and were not required to allocate their trusteeship interest vis-à-vis other co-trustees. 471 F. Supp. 2d at 1067-69.

## Cœur d'Alene II Ctd.

The court noted that this approach is consistent with CERCLA's focus on full restoration of injured natural resources and not on the party (trustee) to whom NRD is awarded. *Id.* at 1067.

The court also addressed situations where co-trustees were in disagreement: "If there is later disagreement between co-trustees, that disagreement would have to be resolved by successive litigation between the trustees...." *Id.* at 1068.

# Oklahoma v. Tyson Foods, 258 F.R.D. 472 (N.D. Okla. 2009) (Tyson Foods)

Relying on *Cœur d'Alene I*, the court dismissed Oklahoma's NRD claim for its failure to join the Cherokee Nation. 258 F.R.D. at 484.

The court refused to recognize an agreement between Oklahoma and the Nation that retroactively assigned the Nation's interests and claims relating to the lawsuit. *Id.* at 475-76.

# Tyson Foods Ctd.

While the court recognized that Oklahoma and the Nation may be co-trustees over the natural resources at issue, it found that without an allocation “one trustee—the State—is [] likely to be unjustly enriched at the expense of the Nation, thereby impairing the [] Nation’s ability to protect its interests.” *Id.* at 479.

The court explained it could not determine “the ratio or percentage of actual management or control” of Oklahoma vis-à-vis the Nation “in the Nation’s absence.” *Id.*

# Case Law Addressing Co-Trustee Recovery After *Tyson Foods*

- Courts have failed to address or reconcile the conflict between the *Cœur d'Alene I* and *Tyson Foods* approach and the *Cœur d'Alene II* approach.
- ***Quapaw Tribe of Oklahoma v. Blue Tee Corp.***, No. 03-CV-0846-CVE-PJC, 2010 WL 3368701 (N.D. Okla. Aug. 20, 2010)
  - Defendants moved to dismiss under Rule 19, relying on *Tyson Foods*.
  - Plaintiff-trustees avoided dismissal by amending their Rule 26 disclosures to clarify that they only sought NRD for natural resources exclusively under their tribal jurisdiction.
- ***Century Indemnification Co. v. Marine Group LLC***, 131 F. Supp. 3d 1018 (D. Or. 2015)
  - Recognized the conflict between *Cœur d'Alene I* and *II* but took no position on which approach is consistent with CERCLA's NRD scheme.

# Case Law Addressing Co-Trustee Recovery After *Tyson Foods Ctd.*

- ***United States v. NCR Corp.*** No. 10-C-910, 2017 WL 25467 (E.D. Wis. Jan. 3, 2017)
  - Defendant proposed to introduce evidence showing that prior settlements had misallocated NRD and what the allocation of NRD should have been to prevent double recovery.
  - The court adopted the *Cœur d'Alene II* approach, whereby a co-trustee can recover the full NRD *less* any amount *already* recovered as a result of a settlement to another trustee.
  - “[A] non-settler’s liability is reduced by the amount of the settlement, not the amount the party *thinks* the settlement should have been.” *Id.* at \*2.



WILL COURTS ADHERE TO  
CONGRESS' INTENT BEHIND  
CERCLA?



# Approach under *Cœur d'Alene I* and *Tyson Foods*

Co-trustees will **bear the burden** & expense of allocating their respective interests.

Settling parties must make an **allocation among trustees** to determine amount of NRD a settling trustee is authorized to recover.

Requires one bifurcated trial where all co-trustees are involved.

May **prevent double recovery** and encourage **coordination and cooperation** among co-trustees.

# Approach under *Cœur d'Alene II*

May lead to a **race to the court house**, leading to a party with **less control** over the natural resource recovering 100% of NRD, followed by **successive lawsuits** among trustees.

May promote **early settlements** & allow responsible parties to evaluate & resolve their risk early.

Makes it unlikely that one **co-trustee could veto**, or by its absence preclude, another co-trustee from resolving an NRD claim.

# Implications

- Pursuit of Early Settlements
- Quantification of Injury and Damages
- Credits and Certainty
- Transaction Costs vs. Litigation Exposure
- Restoration of the Resource
- Finality

# QUESTIONS?

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