

# Warning: This agreement contains language hazardous to democracy.

The New NAFTA: Red Tape for Regulators?  
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Stuart Trew, Canadian Centre for Policy Alternatives

# Main points

1. USMCA tightens the handcuffs on governments attempting to strengthen environmental, health, animal welfare and consumer protections.
2. The USMCA's Good Regulatory Practices chapter and the "Trumped" up Regulatory Cooperation Council (RCC) create new avenues for industry lobbying.
3. The Trump administration, Canadian government and industry groups see USMCA and RCC as tools for deregulation and pre-emptive enforcement of trade disciplines.

WTO – SPS Agreement	CPTPP	USMCA
<ul style="list-style-type: none"> <li>• Sets Codex Alimentarius as relevant international standard-setting body for food safety.</li> <li>• Countries free to pursue different food safety policies as long as they are “based on scientific principles” (Art. 2.2), do not “arbitrarily or unjustifiably” discriminate against imports (Art. 2.3).</li> <li>• Harmonization of standards is voluntary but encouraged (Articles 3, 4).</li> <li>• Mandates risk assessments of new measures, “as appropriate to the circumstances,” that take into account economic impacts.</li> <li>• Significant transparency requirements including input from interested <i>parties</i>.</li> <li>• Subject to WTO dispute settlement.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>WTO+</b></li> <li>• Encourages recognition of equivalence of SPS measures on a “systems-wide basis” (Art. 7.8.1).</li> <li>• More extensive section on science-based SPS measures and risk analysis, with strong preference for least-trade-restrictive risk-management options, or “not taking any measure” at all (Art. 7.9.6.b).</li> <li>• More detailed transparency rules (Art. 7.13), including 60-day notice for “persons” of the other parties to comment (Art. 7.13.4), and encouraging countries to let six months elapse between new SPS measure and their enforcement.</li> <li>• Mostly subject to CPTPP dispute settlement, including Art. 7.9 (Science and Risk Analysis) after two years of the agreement coming into force.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>WTO+ / CPTPP+</b></li> <li>• More extensive risk analysis section re: adopting the least trade restrictive measure or no measure at all (Art. 9.6.9 and 9.6.10).</li> <li>• Countries cannot stop imports of an already tradable good undergoing a risk assessment (Art. 9.6.15) unless as an emergency measure per Art. 9.14.</li> <li>• Strong encouragement to harmonize SPS measures (Art. 9.7) and recognize equivalence of measures, including on a systems-wide basis (Art. 9.9).</li> <li>• Limits import checks to “reasonable and necessary” testing (Art. 9.11.6.a).</li> <li>• Extensive cooperation provisions including establishment of sector-specific technical working groups (Art. 9.18).</li> <li>• Recourse to USMCA dispute settlement only after technical consultations (Art. 9.19.6).</li> </ul>

# Industry praise for SPS chapter

“The revised measures contained in the trade agreement are the **most comprehensive and modern** commitments yet negotiated in a U.S. trade agreement. These rules should assist producers trading across borders as a result of **disciplines and commitments placed on regulators.**”

~ ATAC for Trade in Fruits and Vegetables, Sept. 2018

“[W]e would draw particular attention to the SPS provisions which go well beyond those agreed in the WTO or TPP in promoting **improved adherence to science-based decision making, stronger dispute settlement, and providing a useful consultative mechanism.**”

~ ATAC for Sweeteners and Sweetener Products, Sept. 2018

“[T]he Agreement enhances parties’ **obligations** to: Show that each risk assessment conducted is **appropriate to the circumstances** of the risk and that the risk management measure is **no more trade restrictive than required** to achieve the country’s appropriate level of protection...”

~ ATAC for Processed Foods, Sept. 2018

“While the provisions do not specifically address the issue of adoption of **trade facilitative residue levels and adventitious presence mechanisms**, they do provide additional avenues to address them. We concur that this chapter represents a significant improvement of the WTO SPS Agreement and the TPP and **should serve as foundational language for other free trade agreements.**”

~ ITAC for Grains, Feed, Oilseeds and Planting Seeds, Sept. 2018

WTO – TBT Agreement	CPTPP	USMCA
<ul style="list-style-type: none"> <li>• Non-discrimination (national treatment) for imports of like products (Art. 2.1).</li> <li>• Technical regulations “shall not be more trade-restrictive than necessary to fulfil a legitimate objective” (Art. 2.2).</li> <li>• Legitimate objectives include “national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.”</li> <li>• Preference for international standards and conformity assessment processes; and recognition of foreign standards as equivalent.</li> <li>• Early warning of new technical regulations and opportunity for other <i>parties</i> to comment.</li> <li>• Subject to WTO dispute settlement.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>WTO+</b></li> <li>• Incorporates parts of Articles 2 (technical regulations), 5 (conformity assessments) and Annex 3 (standardizing bodies) of the TBT Agreement.</li> <li>• BUT... requires parties to apply best practices (e.g., Good Regulatory Practices) agreed by the WTO’s TBT committee (Art. 8.5).</li> <li>• National treatment required for conformity assessment bodies of other parties (Art. 8.6.1) and limits on testing to determine conformity.</li> <li>• Extensive, WTO+ transparency rules including requirement that “persons” of other parties be able to “participate in the development of technical regulations” on terms no less favourable than residents (Art. 8.7.1).</li> <li>• Strong emphasis on regulatory alignment and removal of TBTs through dialogue and mutual recognition agreements (Art. 8.9.2).</li> <li>• Includes sectoral annexes (e.g., organics, food additives) where regulation is further constrained.</li> <li>• Partial recourse to CPTPP dispute settlement.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>WTO+ / CPTPP+</b></li> <li>• Incorporates more of the TBT Agreement than CPTPP + TBT Committee Decision on International Standards (e.g., that they “not distort the global market” or “stifle innovation.”)</li> <li>• Wider, enforceable language on recognition of national public or private standardization bodies as relevant international standards (Art. 11.4).</li> <li>• Mandatory use of regulatory impact assessments, with strong emphasis on voluntary alternative measures (Art. 11.5).</li> <li>• Mandatory periodic reviews of regulations and creation of petition process for persons of another party.</li> <li>• Requirement that labels “do not create unnecessary obstacles to trade” (Art. 11.5.8).</li> <li>• New language on stakeholder involvement in developing technical regulations (Art. 11.7.7 and 11.7.8).</li> <li>• Extensive notification and publication process for new standards or rules.</li> <li>• Recourse to USMCA dispute settlement for WTO+ articles.</li> </ul>

# Industry praise for TBT chapter

“Regulatory transparency enables trade-related concerns to be *vetted and addressed before new measures are finalized.*”

~ ATAC for Processed Foods, Sept. 2018

“NAFTA 2018 contains provisions to ensure that standards-setting, conformity assessment procedures, and technical regulations are developed in a fair and transparent manner, with opportunities for ‘*bottom-up*’ participation by *stakeholders*.... The NAFTA 2018 significantly deepens the requirements to more fully implement *acceptance of international standards irrespective of the source.*”

~ ITAC for Chemicals, Pharmaceuticals, Health/Science Products and Services, Sept. 2018

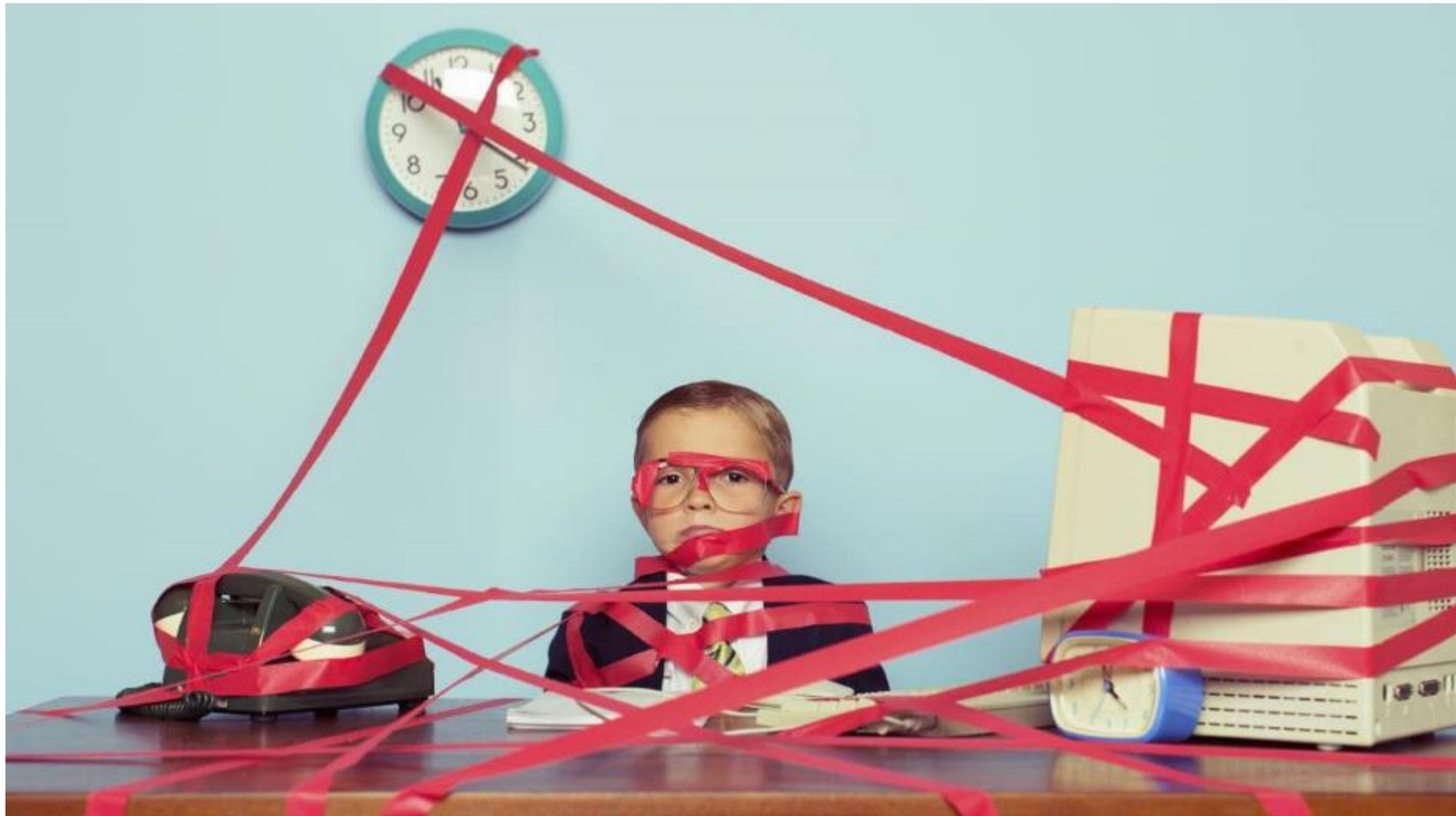
“Transparency and feedback provisions in the TBT ”will help to ensure that the *trade concerns of interested parties* will be substantively reviewed and considered *before a new regulation is finalized.*”

~ ITAC for Consumer Goods, Sept. 2018

“Explicit reference of the WTO TBT Committee Decision [re: Code of Good Practice principles of standards development] underscores that *standards of U.S.-domiciled standards development organizations are international for the purposes of satisfying commitments in The Trade Agreement...*”

~ ITAC for Standards and Technical Trade Barriers, Sept. 2018

# Tying it all together: Good Regulatory Practices



# GRP in a nutshell

- Governments should worry primarily about the **commercial/trade impacts of new regulations**: “least trade-restrictive” option preferred.
- **Transparency of regulatory process** (involvement of foreign governments and domestic and foreign “persons”).
- Use of **regulatory impact assessments** (cost/benefit) and adoption of “one-for-one” rules (or 2-for-1 in U.S.).
- “**Science-based**” or “**risk-based**” regulations must prevail over precautionary or hazard-based rules: evidence of “serious or irreversible harm” needed before acting.
- “[A]dopt **international approaches wherever possible,**” and “limit the number of specific Canadian regulatory requirements.”
- Consider “**alternative instruments** for meeting policy objectives (e.g., **voluntary measures**, information strategies),” or **not doing anything at all** (USMCA – SPS).



# GRP and Regulatory Cooperation

- NAFTA 1994 as a “living agreement” with working groups.
- WTO Agreement (1995) + Technical Barriers to Trade (TBT) Committee (Good Regulatory Practices, GRP).
- Security and Prosperity Partnership (2005-2008).
- Can-U.S. Regulatory Cooperation Council (RCC) (2011).
- OECD study group on International Regulatory Coop (2012-13).
- Executive Order 13609 - Promoting International Regulatory Cooperation (2012)
- Standalone regulatory coop chapter in CETA (2016)
- Regulatory Coherence/GRP in CPTPP (2017)
- Executive Order 13771 (U.S., 2017) + Cabinet Directive on Regulation (Canada, 2018)
- USMCA (2018) with dispute resolution process.

“In short, good regulatory practices are enhanced by regulatory cooperation, but without good regulatory practices, regulatory cooperation is often out of reach.”

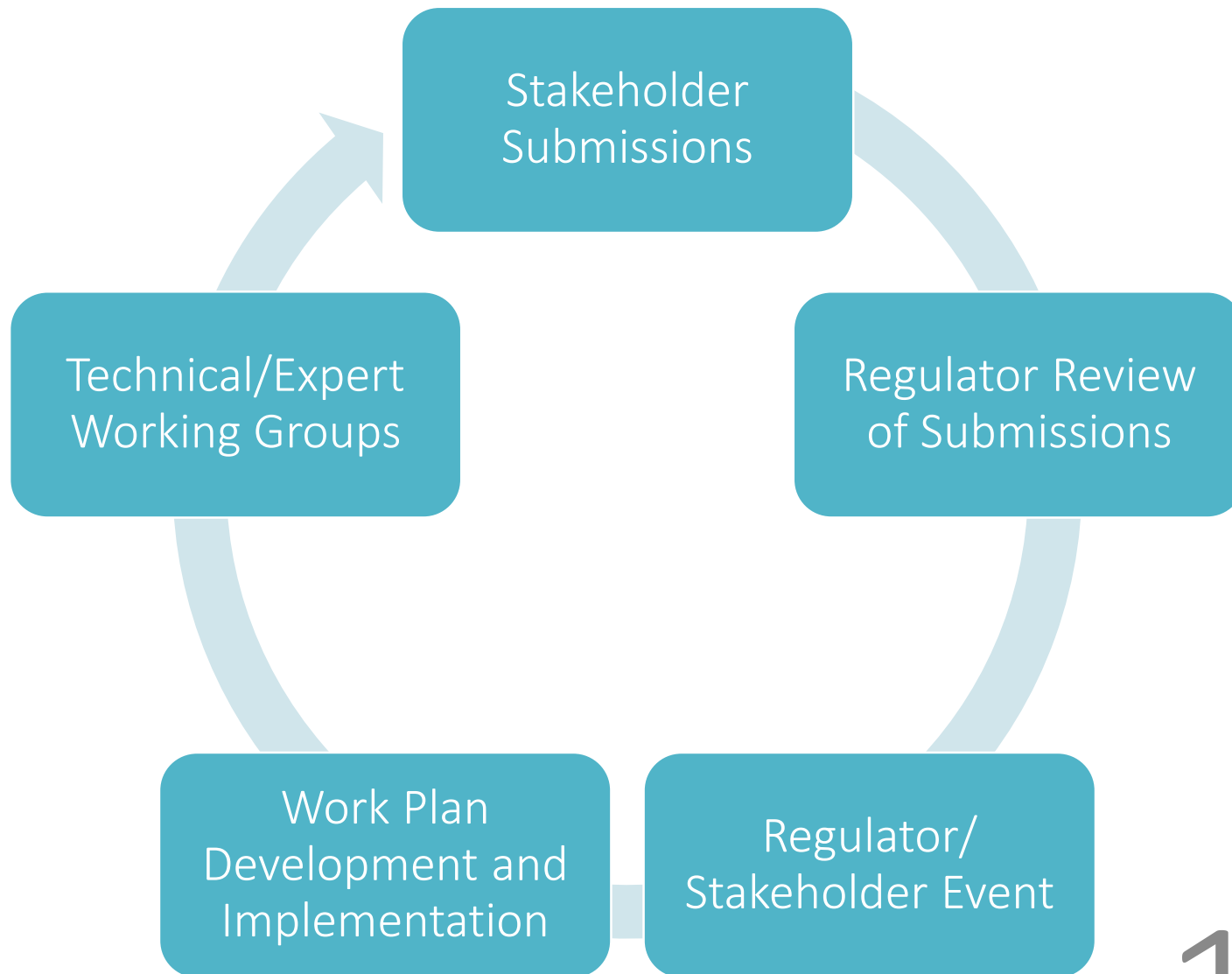
~ U.S. Chamber of Commerce, 2017



# RCC Work Plans - current

Canadian Department	United States Counterpart	Work Plan
<b>Health Canada</b>	Food and Drug Administration	<a href="#">Pharmaceutical and Biological Products</a> <a href="#">Over-the-Counter Products</a> <a href="#">Medical Devices</a> <a href="#">Veterinary Drugs</a>
	Occupational Safety and Health Administration	<a href="#">Workplace Chemicals</a>
<b>Pesticide Management Regulatory Agency</b>	Environmental Protection Agency	<a href="#">Pesticides</a>
<b>Canadian Food Inspection Agency</b>	Food and Drug Administration	<a href="#">Food Safety</a>
	Animal and Plant Health Inspection Service	<a href="#">Plant Health</a> <a href="#">Animal Health</a>
	Food Safety and Inspection Service	<a href="#">Meat Inspections</a>
<b>Transport Canada</b>	Department of Transportation	<a href="#">Connected Vehicles</a> <a href="#">Motor Vehicle Standards</a> <a href="#">Rail Safety</a> <a href="#">Transport of Dangerous Goods</a> <a href="#">Aviation Regulations</a>
	<a href="#">U.S. Coast Guard</a>	<a href="#">Marine Safety and Security (Program)</a> <a href="#">Marine Safety and Security (Operational)</a>
	Environmental Protection Agency	<a href="#">Locomotive Emissions</a>
<b>Environment and Climate Change Canada</b>	Environmental Protection Agency	<a href="#">Chemicals Management</a>
<b>Natural Resources Canada</b>	Department of Energy	<a href="#">Energy Efficiency Standards</a> <a href="#">Alternative Fuel Use in Transportation</a>
	Pipeline and Hazardous Materials Safety Administration	<a href="#">Explosive Classification</a>
<b>Department of Fisheries and Oceans</b>	National Oceanic and Atmospheric Administration	<a href="#">Aquaculture</a>

# Components of RCC Work Plan Process



## RCC SNAC/SNUR TWG

Nancy	Beck	American Chemistry Council	US
Lynn	Bergeson	Bergeson & Campbell PC	US
Pat	<u>Casano</u>	General Electric	US
Marcia	Castellani	Ford	US
Shaun	Clancy	<u>Evonik</u>	US
Robin	Davidson	<u>Freescale Semiconductor</u>	US
Fe	de Leon	Canadian <u>Environmental Law Association (CELA)</u>	CAN
Christina	Franz	American Chemistry Council (ACC)	US
Mark	Greenwood	Greenwood Environmental	US
Jim	Hanna	Dow	CAN
Suzanne	<u>Hartigan</u>	International Fragrance Association	US/NA
Barbara	Lewis	<u>Givaudan</u>	US
Barbara	<u>Losey</u>	<u>Alkylphenols &amp; Ethoxylates Research Council</u>	US
Sandra	<u>Madray</u>	Chemical Sensitivities Manitoba	CAN
Anne	McConnell	Canada Consumer Specialty Products Association	CAN
Beta	Montemayor	Canadian Cosmetic, Toiletry and Fragrance Association	CAN
Greg	Overwater	Global Automakers of Canada	CAN
Schuyler	<u>Pulleyn</u>	<u>Chemours</u>	US
Michele	Richardson	<u>OptumInsight</u>	CAN
Daniel	Rosenberg	NRDC	US
Linda	<u>Santry</u>	Nova Chemicals Corp.	CAN
Jennifer	Sass	NRDC	US
Dave	Saucier	Canadian Association of Chemical Distributors (CACD)	CAN
Carol	Sunman	BASF	US
Yasmin	Tarmohamed	Canadian Vehicle Manufacturers' Association	CAN
<u>Karluss</u>	Thomas	Silicones Environment, Health and Safety Council (SEHSC)	US
Ron	Thomas	<u>Arr Maz Custom Chemicals</u>	US

# Some results of GRP/coop in Canada

- **Meat processing and inspection:** Canadian processed meat considered equivalent to U.S. despite warnings from FDA; Cdn outbreak of listeriosis in 2008 blamed on lack of regulatory oversight (adoption of U.S.-style company self-audits).
- **Pesticides:** Higher maximum residue limits in N.A., more toxic products allowed on market, e.g., 2-4D, Siloxane D5.
- **Neonicotinoids:** Canada, U.S. joint “pollinator risk assessments” have delayed action in either country. Canada finally proposing phase-out of products containing *clothianidin* (currently banned in the EU) and *imidacloprid*, which is proven harmful to aquatic insects and their predators and linked to harmful effects in bees. But Canada will first consider “**alternate risk management proposals**” from industry.
- **Rail safety:** Long phase-out period of poor quality tanker cars in line with U.S. plans.; pressure to allow single-person crews contributed to Lac-Mégantic disaster in July 2013.

# RCC: the Trump/Trudeau version

“We will continue our dialogue on regulatory issues and pursue shared regulatory outcomes that are business-friendly, reduce costs, and increase economic efficiency without compromising health, safety, and environmental standards.”

~ Trump/Trudeau joint statement, Feb. 13, 2017

“In issuing guidance to agencies on the implementation of [Executive Order] 13771, on April 5, 2017, the Office of Management and Budget recognized that international regulatory cooperation may serve deregulatory functions and help agencies achieve [their EO 13771] objectives...”

~ Neomi Rao, Administrator, OIRA, Oct. 9, 2018

# Risk assessment of USMCA

- The new NAFTA / USMCA **shifts the regulatory balance** further in favour of corporations to the detriment of public interest protections.
- **Regulatory chill is internalized** through things like the Cabinet Directive on Regulation (Canada) and Executive Order 13771 (U.S.); **protections are pre-empted** via regulatory cooperation committees.
- Nonetheless, there are openings for **activists and experts to intervene in regulatory cooperation** through the RCC and, potentially/eventually, USMCA working groups.



Thank you!



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