This is the second in a series of blog posts examining the possible application of the Congressional Review Act (CRA) to California's waivers under the Clean Air Act allowing the state to issue its own emissions standards for motor vehicles. The first post is here.

The basic legal question at the heart of the dispute over whether California's Clean Air Act waivers are subject to the CRA are whether those waivers are "rules" within the scope of the CRA. The CRA only applies to agency actions that are "rules" that are of "general applicability." In defining a rule, the CRA adopts the definition in the Administrative Procedure Act (APA), which in 5 USC 551 defines a rule as

"an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing"

In contrast, an "order" under the APA is anything that is not a rule. This is not . . . the clearest way to define a rule versus an order under the APA. The confusion in part is that the APA definition or a rule is intended to cover decisions such as approvals of corporate mergers or ratemaking decisions. However, much of this is not relevant to the CRA, which in 5 USC 804 excludes "rules" of "particular applicability" including the ratemaking examples.

Finally, the APA defines an order as including a license, which is in turn defined as "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."

The GAO has twice considered this issue, and in both cases has concluded that California's waivers are not rules. The reasoning is that the waivers are orders because they are case-specific factual determinations that apply to individual actors – in this case, California. In addition, GAO assessed that even if the waivers were rules, they were rules of "particular applicability" and thus did not qualify under the CRA.

What could be the implications if Congress ignored the GAO determination here, and still applied the CRA to these decisions? One possible implication is that, if Congress wants to apply the CRA to licenses and orders, it can do so, regardless of the text of the CRA, if Congress simply determines that a relevant decision qualifies. That has potentially sweeping implications for permitting under environmental (and many other statutes). For

instance, could a Congress decide that an EPA was imposing permit standards that were too strict, or too lax, and use the CRA to void permits for individual facilities around the country? The result could be highly disruptive of permitting programs in ways that may be harmful to the environment, to regulated parties, or both.

One possible counterargument is that the regulatory standards adopted by California can be applied by other states if they choose. This is perhaps the best argument for the waivers being "rules" under the CRA, on the grounds that they are no longer decisions specific to California, and they are of general applicability. The largest problem with this argument is that the waiver analysis is specific to California, such that it looks more like an order or rule of particular applicability (this is the approach taken by GAO). As one of us has previously discussed more extensively, consideration of collateral consequences is an inappropriate way to distinguish between orders and adjudications.

If one were to consider the practical or collateral effects of an agency decision to determine whether it is a rule for CRA purposes (such as other states being able to adopt California standards), that still could produce a substantial expansion of the scope of the CRA in ways that may be destabilizing of a range of other regulatory and policy processes. It is not unusual for an order to a specific party to have effects on many others. For instance, new drug approvals by the FDA presumably are orders or rules of specific applicability– but they have practical consequences for other actors, such as eventually allowing the production of generic drugs by other parties. Even the license for a TV or radio station could be considered a rule because of its collateral effect on other would-be broadcasters: it precludes anyone else from using that frequency in the area. Thus, the counterargument relying on collateral effects seems to sweep far too broadly, deviating substantially from the common understanding of the distinction.