Congressional Review Act (CRA) Disapproval of Clean Air Act Waivers: Analysis and Summary

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Background and Research Summary

In February 2025, EPA Administrator Lee Zeldin submitted waivers granted by the EPA under the Biden-Harris Administration to Congress as final rules for the purpose of congressional review. These three waivers include mandates to increase the number of electric vehicles (EVs) sold in California with the goal that all new vehicles sold in California must be zero emission vehicles by 2035. Because Administrator Zeldin submitted the California waivers to Congress as rules, Congress has the opportunity to remove these requirements by using the congressional review process.

However, after receiving a request from Senators Whitehouse, Padilla, and Schiff, the Government Accountability Office (GAO) issued a decision in March stating that waivers under the Clean Air Act should not be treated as rules for the purposes of the Congressional Review Act. Their decision rests on the distinction between a rule and an adjudication.

The GAO stated in their analysis that an adjudicatory order is "a case-specific, individual determination of a particular set of facts that has immediate effect on the individual(s) involved". In contrast, the GAO defined a rule as "a broad application of general principles that is prospective in nature." They chose to treat the California waivers as adjudications (specifically adjudicatory orders) that function similarly to licenses in their analysis of the California waivers.

Buschbacher and Conde published an article in the *Yale Journal on Regulation* identifying three main problems with the GAO's analysis.

First, the GAO acknowledged in 2018 and again in this analysis that the Office does not need to weigh in on whether a rule submitted by an agency is, in fact, a rule. In footnote 3 of the GAO analysis of the California Waivers states "GAO does not issue formal decisions on actions that agencies have submitted to Congress as rules under CRA because that submission generally obviates the need for a GAO decision on the matter… there is no impediment that a GAO decision might cure". In their 2018 opinion, the GAO stated that the agency submission of an IRS revenue procedure (an adjudication) as a rule "obviates the need for a GAO opinion." The GAO deferred to the IRS' judgement in that case, citing that agencies often submit actions to Congress "out of an abundance of caution", and it is up to Congress to determine if it is a rule and review it or not accordingly.

Additionally, it is necessary to note that the GAO's opinion is not legally binding. Instead, Congress is the final authority on what is taken up under the Congressional Review Act. A GAO advisory decision does not change Congress' ability to take up a rule submitted by an agency. The text of the CRA statue does not mention the GAO and the GAO's General Counsel has testified that the CRA language does not provide the GAO with the power "to decide what a rule is." In this case, the agency already submitted the rule and the GAO's analysis should not be used to protect agency rulings from congressional review.

Finally, the GAO's treatment of California's waiver as an adjudicatory order ignores the nature of waivers under section 177 the Clean Air Act. In the Clean Air Act, Congress granted all 50 states permission to take waivers granted to California and incorporate that standard into their laws rather than the federal standard. This implies the potential for general applicability and in the case of the California waivers, 18 states have signed onto one or more of the electric vehicle mandates.

Historically, courts have treated waivers that carry general applicability as rules (see Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie). In that case, the District Court stated that "once EPA issues a waiver for a California emissions standard" it holds "the same stature as a federal regulation." If the court treats a waiver issued for emissions standards, as having the same impact as a federal regulation, then Congress should be able to treat it as such and review it.

Additional Analysis

The EPA has also submitted state specific regulations as rules to Congress for congressional review in the past and the GAO has offered no opinion on the relevance of these regulations to the CRA. Examples of these sorts of regulations include State Implementation Plans (SIPS), regulations surrounding injection wells, and Resource Conservation and Recovery Act regulations.

State Implementation Plans are a "collection of regulations and documents used by a state, territory, or local air district to implement, maintain, and enforce the National Ambient Air Quality Standards and to fulfill other requirements of the Clean Air Act." SIPS apply on a state-by-state basis and apply only the state that is implementing them. However, out of an abundance of caution, the EPA will often send them to Congress for review even though they technically only apply to one state. The GAO also receives a copy of the submission as standard procedure but has never made a statement that agencies should not submit these Plans as rules.

Similarly, underground injection wells come with regulations in order to avoid potential contamination of drinking water. These regulations have been submitted to Congress for review and to the GAO. Regulations submitted to Congress involved changes and revisions to the reporting requirements for these wells which tend to be state specific given the local nature of well drilling. Again, the GAO has never issued an opinion saying

that an agency should not have submitted a regulation that it deemed a final rule in its internal analysis.

Resource Conservation and Recovery Act (RCRA) regulations create standards for the transportation, treatment storage, disposal, etc. of hazardous waste. Many of these regulations are submitted to the GAO and are state specific (see South Dakota: Final Authorization). Despite this, the GAO has deemed them to have broad enough applicability to raise no analysis of them after their submission to Congress for the purposes of the CRA.

With these examples in mind, Congress should move forward to remove the Clear Air Act waivers granted to California through the CRA process and remove these overly burdensome regulations.