U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Decision

Matter of: Environmental Protection Agency—Applicability of the Congressional Review Act to June 2022 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Program

File: B-334400

Date: February 9, 2023

DIGEST

The Environmental Protection Agency (EPA), under the Renewable Fuel Standard (RFS) Program, published a document titled *June 2022 Denial of Petitions for RFS Small Refinery Exemptions* (June 2022) (June Denial). GAO received a request for a decision as to whether the June Denial is a rule for purposes of the Congressional Review Act (CRA). CRA incorporates the Administrative Procedure Act's (APA) definition of a rule and requires that before a rule can take effect, an agency must submit the rule to both the House of Representatives and the Senate, as well as to the Comptroller General.

The June Denial announced EPA's denial of 69 small refinery exemption petitions filed with EPA pursuant to the RFS Program. EPA did not submit a CRA report to Congress or the Comptroller General on the June Denial. However, we conclude that the June Denial falls within the APA's definition of an order, not its definition of a rule. Therefore, the June Denial is not subject to CRA's requirement that it be submitted to Congress.

DECISION

On June 3, 2022, the Environmental Protection Agency (EPA) published a document titled *June 2022 Denial of Petitions for RFS Small Refinery Exemptions* (June 2022) (June Denial). EPA, EPA-420-R-22-011 (June 2022), *available at* https://www.epa.gov/renewable-fuel-standard-program/june-2022-denial-petitions-rfs-small-refinery-exemptions (last visited Nov. 14, 2022); EPA, *June 2022 Denial of Petitions for RFS Small Refinery Exemptions*, *Summary*, *available at* https://www.epa.gov/renewable-fuel-standard-*program*/june-2022-denial-petitions-rfs-small-refinery-exemptions (last visited Nov. 14, 2022). We received a request for a decision as to whether the June Denial is a rule for purposes of the Congressional Review Act (CRA). Letter from Senators Hagerty, Moore Capito, and Wicker to the

Comptroller General (June 9, 2022). For the reasons discussed below, we conclude that the June Denial is an order, not a rule.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* https://www.gao.gov/products/gao-06-1064sp. Accordingly, we reached out to EPA to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to General Counsel, EPA (July 7, 2022). We received EPA's response on September 20, 2022. Letter from General Counsel, EPA, to Assistant General Counsel, GAO (Sept. 20, 2022) (Response Letter).

BACKGROUND

Small Refinery Exemptions Under The Renewable Fuel Standard Program

As part of the Clean Air Act (CAA), the Renewable Fuel Standard (RFS) Program generally requires refineries and other regulated entities to ensure that transportation fuel includes a minimum volume of renewable content. 42 U.S.C. § 7545(*o*)(2)(A). However, the RFS Program provides the opportunity for certain "small refineries" to be exempted from this requirement.[1] Upon enactment, the RFS Program exempted all small refineries from compliance duties until 2011. *Id.* § 7545(*o*)(9)(A)(i). After 2011, the CAA directed EPA to extend small refinery exemptions (SREs) where necessary due to "disproportionate economic hardship" (DEH). *Id.* § 7545(*o*)(9)(A), (B).[2]

EPA's process for handling SRE petitions has changed over time. The agency's initial practice was to provide confidential decisions only to the petitioning refinery or refineries. Response Letter at 2; *Advanced Biofuels Ass'n v. EPA*, 792 Fed. Appx. 1, 3 (per curiam) (D.C. Cir. 2019). More recently, EPA began issuing some public decision documents, sometimes grouping multiple petitions into a single consolidated decision. *See Advanced Biofuels,* 792 Fed. Appx. at 4 (describing how EPA publicly released a memorandum addressing 42 small refinery exemptions for compliance year 2018); *see also* EPA, *Denial of Petitions for Small Refinery Exemptions from the Renewable Fuel Standard* (Sept. 2020) (September Denial),

[1] The CAA defines a small refinery as one "for which the average aggregate daily crude oil throughput for a calendar year . . . does not exceed 75,000 barrels." 42 U.S.C. § 7545(*o*)(1)(K).

[2] The CAA provides that a showing of DEH may arise from a CAA-mandated study by the Department of Energy, or from a small refinery's petition for extension. 42 U.S.C. §7545(*o*)(9)(A), (B). EPA must consult with the Department of Energy before deciding on an SRE petition. 42 U.S.C. § 7545(o)(9)(B).

available at https://www.epa.gov/renewable-fuel-standard-program /denial-petitions-small-refinery-exemptions-renewable-fuel-standard (last visited Nov. 9, 2022) (denying petitions filed by 17 small refineries)

EPA's Interpretation of DEH

On December 7, 2021, EPA proposed to "change [its] interpretation" of DEH in light of the Tenth Circuit's decision in *Renewable Fuels Association v. EPA*, 948 F.3d 1206 (2020). *See* EPA, EPA-420-D-21-001, *Proposed RFS Small Refinery Exemption Decision* (Dec. 2021) (Proposed Denial), at 1, *available at*: https://www.epa.gov/ renewable-fuel-standard-program/proposal-deny-petitions-small-refinery-exemptions (last visited Nov. 10, 2022); EPA, *Proposal to Deny Petitions for Small Refinery Exemptions*, *Summary*, *available at* https://www.epa.gov/renewable-fuel-standard-program/proposal-deny-petitions-small-refinery-exemptions (last visited Nov. 14, 2022). In *Renewable Fuels Association*, the Tenth Circuit found that EPA abused its discretion by granting SREs that were "based at least in part on hardships not caused by RFS compliance." *Id.* at 1254. Accordingly, EPA proposed to extend SREs "only to small refineries whose claimed DEH is caused by the cost of complying with the RFS program, and not by other factors." Proposed Denial, at 1, 4. EPA further proposed "to deny all of the pending SRE petitions currently before the Agency," none of which EPA believed had made the requisite DEH showing. *Id.* at 4. EPA characterized its proposed denial as an "adjudication" and "not a rulemaking." *Id.* at 1, 7, 62. EPA further explained that its proposal was "primarily informed by" *Renewable Fuels Association*, which EPA indicated that it "agree[d]" with. *Id.* at 16-17.

On April 7, 2022, EPA issued a decision resolving 36 SREs that the D.C. Circuit had remanded in view of *Renewable Fuels Association*.[3] EPA, EPA-420-R-22-005, *April 2022 Denial of Petitions for RFS Small Refinery Exemptions* (Apr. 2022) (April Denial), at 1, *available at* https://www.epa.gov/renewable-fuel-standard-program/april-2022-denial-petitions-rfs-small-refinery-exemptions (last visited Nov. 14, 2022); 87 Fed. Reg. 24300 (Apr. 25, 2022). In the April Denial, EPA reviewed the background surrounding its Proposed Denial, discussed the comments that EPA had received on that document, and indicated that EPA was "here adopting and applying its proposed SRE statutory interpretations" to deny all 36 of the remanded SRE petitions. April Denial, at 4. EPA described the April Denial as "a single action . . . comprised of the adjudications of 36 SRE petitions." *Id.* at 1. EPA further stated that the April Denial was "not a rulemaking." *Id.* at 72.

[3] *See* C.A. Order, at 3, *Sinclair Wyoming Refining Co. v. EPA* (D.C. Cir. Dec. 8, 2021) (No.19-1196) (on file with GAO) (suggesting that EPA "reconsider its positions in light of" *Renewable Fuels Association* and related decisions).

On June 3, 2022, EPA issued the June Denial. In substance, the June Denial largely mirrored the April Denial by again discussing the Proposed Denial and the comments that EPA received. June Denial, at 1. EPA indicated that the purpose of the June Denial was to provide EPA's "evaluation of the 69 SRE petitions" still pending after the April Denial. *Id.* at 1, 20. On the basis of EPA's revised interpretation of DEH that it had adopted in the April Denial, EPA denied all 69 of these SRE petitions. *Id.* at 4. Once again, EPA characterized its denial as "a single action . . . comprised of the adjudications of 69 SRE petitions." *Id.* at 1. And once again, EPA indicated that its decision was "not a rulemaking." *Id.* at 73.

The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A).[4] The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. *Id*. CRA allows Congress to review and disapprove federal agency rules for a period of 60 days using special procedures. *See* 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is "the whole or a part of 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." *See* 5 U.S.C. § 804(3). However, CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

EPA did not submit a CRA report to Congress or the Comptroller General on the June Denial. In its response to us, EPA stated that the June Denial was not subject to CRA because EPA's resolutions of SRE petitions under the RFS Program are orders, not rules within the meaning of the APA or CRA. Response Letter, at 1.

DISCUSSION

CRA adopts the APA's definition of rule and implicitly excludes from coverage those types of agency action that the APA defines separately. *See*

[4] Alternatively, an agency can find for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, and the rule will then take effect at a time the agency determines. 5 U.S.C. § 808(2).

B-332233, Aug. 13, 2020 (describing rules and orders as "mutually exclusive categories"). A rule, stemming from rulemaking, and an order, stemming from adjudication, are the two primary tools that the APA recognizes for agencies to make and implement policy. *See* 5 U.S.C. § 551(5), (7). For the reasons discussed below, the June Denial falls within the APA's definition of an order. Therefore, the June Denial falls outside the APA's definition of a rule and is not subject to CRA's submission requirement.

The APA defines an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). A "license," as one type of order, is a "form of permission" that may consist of a "statutory exemption." *Id.* § 551(8). Generally speaking, orders are distinguishable from rules "not [by] the extent of their effect," but by their purpose "to clarify and state an agency's interpretation of an existing statute or regulation" without changing the contents of such statutes or regulations. *See British Caledonian Airways Ltd. v. Civil Aeronautics Board*, 584 F.2d 982, 990 (D.C. Cir. 1978).

Assuming sufficient authority to perform either action, "[t]he choice between rulemaking and adjudication lies in the first instance within the [agency]'s discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). This discretion can be "very broad," *Neustar, Inc., v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017) (citation omitted), and courts "accord significant deference to an agency's characterization of its own action" as a rulemaking or an adjudication, *American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788, 797 (5th Cir.), *cert. denied*, 530 U.S. 1274 (2000). It is possible for an agency to abuse its discretion in this regard. *See Bell Aerospace Co.*, 416 U.S. at 294. And as we have said previously, while "an agency's characterization should be considered," it is not "dispositive." B-329272, Oct. 19, 2017, at 2 (finding that a guidance document issued by the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation was a rule, for CRA purposes, notwithstanding those agencies' statements to the contrary). However, the incorporation of some characteristics more typically associated with rulemaking does not automatically convert an adjudication into a rulemaking. *See, e.g.*, *POM Wonderful, LLC v. Federal Trade Commission*, 777 F.3d 478, 497 (D.C. Cir. 2015) ("[the] fact that an order rendered in an adjudication may affect agency policy and have general prospective application does not make it rulemaking") (quoting *Conference Group, LLC v. FCC*, 720 F.3d 957, 966 (D.C. Cir. 2013)), *cert. denied*, 578 U.S. 965 (2016). The reverse is also true. *See Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319 (D.C. Cir. 1995) (rejecting contention that agency must proceed by adjudication if rule would affect terms of existing licenses).

Goodman v. FCC, 182 F.3d 987 (D.C. Cir. 1999) is an instructive case. There, the Federal Communication Commission (FCC) issued an order resolving several outstanding issues related to Specialized Mobile Radio (SMR) licensees. *Id.* at 990. Petitioners before the D.C. Circuit argued that FCC's order was a rule, rather than an order, because FCC had "published [it] in the *Federal Register* under the heading

'Final Rules'" and had "sought public comment." *Id.* at 993. Petitioners also argued that the order was a rule because it "affect[ed] the interests of a broad class of licensees." *Id.* The court rejected these arguments. First, it found "strong reason to conclude the proceeding was not a rulemaking" because the order addressed a request for a "temporary waiver" of existing FCC rules for licenses that had already been issued, whereas a rule would have had "legal consequences 'only for the future.'" *Id.* at 994 (quoting *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring)). The court also found that FCC's publication of the order under a "Final Rules" heading created only the "superficial" appearance of a rule, and explained that agencies "may seek comment in either a rulemaking or an adjudicatory proceeding." *Id.* ("In fact, we have gone so far as to suggest that notice and comment is sometimes required in an adjudication."). With respect to the broad class of licensees implicated by the order, the court explained that "[j]ust as a class action can encompass the claims of a large group of plaintiffs without thereby becoming a legislative proceeding, an adjudication can affect a large group of individuals without becoming a rulemaking." *Id.* Nor did it matter that the order "affected the rights of licensees who were not parties to the [instant] proceeding," because, as the court explained, "the nature of adjudication is that similarly situated non-parties may be affected by the policy or precedent applied . . . to those before the tribunal." *Id.*

Here, EPA's June Denial fits clearly within the APA's definition of an order. The purpose of the June Denial was to provide for the "final disposition" of 69 small refineries' petitions to EPA. 5 U.S.C. § 551(6). Moreover, these small refineries' petitions concerned requests for a "statutory exemption" from the CAA, which the APA recognizes as a type of "license" and therefore an order. *Id.* § 551(8).

Goodman invites direct comparisons. The *Goodman* order involved existing FCC rules related to SMR licensees. *Goodman*, 182 F.3d at 994. Similarly, the June Denial involved existing RFS Program requirements. June Denial, at 1. This emphasis on existing legal requirements, reflected in the text of the June Denial, provides reason to conclude that the June Denial was not a rulemaking. June Denial at 8, 27, 28. The June Denial simply applied the agency's interpretation to the facts presented by 69 SRE petitions, just as the April Denial had applied that interpretation to 36 other SRE petitions. Response Letter, at 2-3. Refineries may submit additional SRE petitions in the future, and the June Denial may permissibly inform those petitions' contents and viability because "[t]he nature of adjudication is that similarly situated non-parties may be affected by the policy or precedent applied." *Goodman,* 182 F.3d at 994.

The counter-arguments from *Goodman* are equally unconvincing here. EPA's denial of multiple SRE petitions in the June Order did not convert that document into a rule because "an adjudication can affect a large group of individuals without becoming a

rulemaking." *Goodman,* 182 F.3d at 994.[5] Likewise, EPA's use of public notice-and-comment procedures did not convert the June Denial into a rule because agencies "may seek comment in either a rulemaking or an adjudicatory proceeding." *Id*.

Courts in prior cases have referred to EPA's resolution of SRE petitions as an adjudicatory function, which lends support to our conclusion. *See Advanced Biofuels*, 792 Fed. Appx. at 5 (referring to a consolidated ruling on 42 SRE petitions as an "informal adjudication"), *Sinclair Wyoming Refining. Co*, 887 F.3d at 992 (finding that EPA had resolved SRE petitions through informal adjudication); *see also Renewable Fuels Ass'n*, 948 F.3d at 1258 (referring to EPA "orders" on SRE petitions), *HollyFrontier Cheyenne Refining*, 141 S. Ct. at 2183 (referring to EPA "orders"). And EPA itself has consistently referred to the June Denial as "adjudicatory" and "not a rulemaking." June Denial, at 1, 73. While this alone is not dispositive, it is a factor that GAO has recognized as being relevant and that courts would likely afford some deference. *See* B-329272, at 2; *American Airlines*, 202 F.3d at 797.[6]

Finally, even if the June Denial fell within the APA definition of a rule, it still would not be subject to CRA because of the exception for rules of particular applicability. In B-332233, Aug. 13, 2020, we determined that an order addressed to a specific licensee and authorizing an amendment to specific licenses had particular applicability such that the CRA could not apply. *See also* B-330843, Oct. 22, 2019 (a rule of particular applicability is one addressing actions that an identified entity may or may not take based on facts and circumstances particular to the entity). Here, the June Denial addressed 69 SRE petitions and found, based on the facts those petitions presented, that the petitioners could not receive waivers of RFS Program requirements. Thus, the June Denial would be a rule of particular applicability and also excepted from CRA requirements on that basis.

CONCLUSION

The June Denial falls within the APA's definition of an order, not the APA's definition of a rule, because its purpose was to provide the final disposition of particular SRE

[5] Several of EPA's prior SRE decisions also adjudicated multiple petitions. See April Denial; September Denial; *Advanced Biofuels,* 792 Fed. Appx. at 4 (describing an EPA decision addressing forty-two SRE petitions).

[6] In this regard, EPA appears to have been more consistent than the agency in *Goodman*, which received deference to its characterization of an action as an "order" despite publishing it under a "Final Rules" heading. *Goodman*, 182 F.3d at 994. EPA published notice of the June Denial and the April Denial in the "Notices" section of the *Federal Register*. 87 Fed. Reg. 34873; 87 Fed. Reg. 24300.

petitions. Therefore, the June Denial is not a rule for purposes of CRA.

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