



## Decision

**Matter of:** U.S. Environmental Protection Agency—Applicability of the Congressional Review Act to Findings of Failure To Attain and Reclassification of Areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin as Serious for the 2015 Ozone National Ambient Air Quality Standards

**File:** B-337370

**Date:** August 28, 2025

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### DIGEST

In December 2024, the U.S. Environmental Protection Agency (EPA) determined that eight areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin did not attain the 2015 ozone National Ambient Air Quality Standards by the applicable attainment date (Determination).

The Congressional Review Act (CRA) 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 the Comptroller General. CRA adopts the Administrative Procedure Act's (APA) definition of a rule and therefore does not cover those types of agency action that APA defines separately, including orders. We conclude that EPA's Determination is an order and therefore not a rule subject to CRA's submission requirements. In addition, we note that even if the Determination were to meet the APA definition of a rule, it would fall within CRA's exception for rules of particular applicability, and would similarly not be subject to CRA's submission requirements.

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### DECISION

On December 17, 2024, the U.S. Environmental Protection Agency (EPA) published a final determination titled, *Findings of Failure To Attain and Reclassification of Areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin as Serious for the 2015 Ozone National Ambient Air Quality Standards* (Determination).<sup>1</sup> We received a

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<sup>1</sup> 89 Fed. Reg. 101901 (Dec. 17, 2024).

congressional request for a decision as to whether the Determination is a rule subject to the Congressional Review Act (CRA).<sup>2</sup>

Our practice when issuing decisions is to obtain the legal views of the relevant agency on the subject of the request.<sup>3</sup> Accordingly, we reached out to EPA to obtain the agency's legal views.<sup>4</sup> We received EPA's response on June 27, 2025.<sup>5</sup>

## BACKGROUND

### Clean Air Act

The Clean Air Act requires EPA to set, review, and revise National Ambient Air Quality Standards (NAAQS) for six common air pollutants, including ozone.<sup>6</sup> When EPA sets or revises a NAAQS, it must determine whether areas of the country meet the new standards, and will designate areas of the country as "nonattainment," "attainment," or "unclassifiable."<sup>7</sup> To make this designation, EPA relies on recommendations submitted by states as to whether an area is attaining the NAAQS criteria for pollutants.<sup>8</sup> These recommendations are based off of information collected from air quality monitoring data.<sup>9</sup>

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<sup>2</sup> Letter from Representatives Bryan Steil, Glenn Grothman, Bill Huizenga, John R. Moolenaar, Scott Fitzgerald, Robert E. Latta, Tom Tiffany, Derrick Van Orden, Tony Wied, and Rudy Yakym III, House of Representatives, to Comptroller General (Apr. 7, 2025).

<sup>3</sup> GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 21, 2024), available at <https://www.gao.gov/products/gao-24-107329>.

<sup>4</sup> Letter from Assistant General Counsel, GAO, to Official Performing Delegated Duties as the General Counsel, EPA (Apr. 24, 2025).

<sup>5</sup> Letter from General Counsel, EPA, to Assistant General Counsel, GAO (June 27, 2025) (Response Letter).

<sup>6</sup> See 42 U.S.C. §§ 7408, 7409(a)(1), (b)(1); EPA, *Criteria Air Pollutants*, available at <https://www.epa.gov/criteria-air-pollutants> (last visited Aug. 15, 2025).

<sup>7</sup> See 42 U.S.C. § 7407(d)(1)(A), (d)(1)(B); 89 Fed. Reg. at 101902.

<sup>8</sup> 42 U.S.C. § 7407(d)(1)(A).

<sup>9</sup> EPA, *Process to Determine Whether Areas Meet the NAAQS (Designations Process)*, available at <https://www.epa.gov/criteria-air-pollutants/process-determine-whether-areas-meet-naaqs-designations-process> (last visited Aug. 15, 2025).

Relevant here, areas in nonattainment are those that either do not meet the NAAQS for a pollutant, or contribute to ambient air quality in a nearby area that fails to meet them.<sup>10</sup> With respect to ozone, nonattainment areas are classified by the Clean Air Act as “Marginal,” “Moderate,” “Serious,” “Severe,” or “Extreme” in order of stringency.<sup>11</sup> Where EPA designates an area as an ozone nonattainment area, the Clean Air Act requires EPA to determine whether the nonattainment area achieved the relevant NAAQS by the attainment date associated with the area’s classification.<sup>12</sup> However, in some cases, EPA may grant a 1-year extension to states.<sup>13</sup> Under the Clean Air Act, this assessment is governed solely by area design values as of that date.<sup>14</sup> And the values are calculated based on certified air quality monitoring data under EPA regulations, with no judgment or discretion involved by EPA officials.<sup>15</sup>

If an area fails to attain the ozone NAAQS by the applicable attainment date and is not granted a 1-year attainment date extension, the Clean Air Act requires EPA to make a determination that the nonattainment area failed to attain the ozone standard by the applicable attainment date.<sup>16</sup> Except for Extreme or Severe nonattainment areas, the Clean Air Act also requires such area to be reclassified to the higher of (1) the next higher classification for the area or (2) the classification applicable to the area’s “design value” as of the determination of failure to attain.<sup>17</sup>

Where a nonattainment area fails to attain the ozone standard by the applicable attainment date, EPA must also publish a *Federal Register* notice within six months of the attainment date identifying such area and its reclassification.<sup>18</sup>

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<sup>10</sup> 42 U.S.C. § 7407(d)(1)(A)(i); 89 Fed. Reg. at 101902.

<sup>11</sup> 42 U.S.C. § 7511(a)(1); 89 Fed. Reg. at 101902.

<sup>12</sup> 42 U.S.C. § 7511(a)(1).

<sup>13</sup> *Id.* § 7511(a)(5).

<sup>14</sup> 89 Fed. Reg. at 101905. See 42 U.S.C. § 7511(b)(2)(A).

<sup>15</sup> 89 Fed. Reg. at 101905–06. See *generally* 40 C.F.R. pts. 50 and 58.

<sup>16</sup> 42 U.S.C. § 7511(b)(2)(A); 89 Fed. Reg. at 101902.

<sup>17</sup> 42 U.S.C. § 7511(b)(2)(A); 89 Fed. Reg. at 101902–03. A “design value” is a statistic for comparing data from an ambient air quality monitoring site to the applicable NAAQS to determine compliance with the standard. 89 Fed. Reg. at 101901 n.1.

<sup>18</sup> 42 U.S.C. § 7511(b)(2)(B).

### The Determination

On December 17, 2024, EPA published the Determination. It stated that eight Moderate nonattainment areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin failed to attain the 2015 ozone NAAQS by their August 3, 2024, attainment date.<sup>19</sup> Each area's measured design values for 2021–2023 exceeded the allowable ozone standard of 0.070 parts per million (ppm).<sup>20</sup>

Additionally, the Determination found that these areas did not meet the requirements for granting a 1-year extension of the attainment date.<sup>21</sup> It further stated that these areas would be reclassified by operation of law to Serious nonattainment for the 2015 ozone NAAQS on January 16, 2025, the Determination's effective date.<sup>22</sup> Once reclassified, these areas must attain the standard as expeditiously as practicable but no later than August 3, 2027, which is nine years after the initial nonattainment designation.<sup>23</sup>

### 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.<sup>24</sup> The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date.<sup>25</sup> CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using

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<sup>19</sup> 89 Fed. Reg. at 101901, 101903. The eight areas are "Allegan County, MI; Berrien County, MI; Chicago, IL-IN-WI; Cleveland, OH; Milwaukee, WI; Muskegon County, MI; Sheboygan County, WI; and the Illinois portion of the St. Louis, MO-IL area." *Id.* at 101903.

<sup>20</sup> *Id.* at 101901–03; Response Letter, at 3. See 40 C.F.R. § 50.19.

<sup>21</sup> 89 Fed. Reg. at 101903.

<sup>22</sup> *Id.* at 101901.

<sup>23</sup> *Id.* at 101902, 101905.

<sup>24</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>25</sup> *Id.* § 801(a)(1)(A).

special procedures.<sup>26</sup> If a resolution of disapproval is enacted, then the new rule has no force or effect.<sup>27</sup>

CRA adopts the definition of a rule under the Administrative Procedure Act (APA), 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.”<sup>28</sup> 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.<sup>29</sup>

EPA did not submit a CRA report to Congress or the Comptroller General on the Determination. In its response to us, EPA stated that the Determination is not subject to CRA because it is an order or, alternatively, a rule of particular applicability.<sup>30</sup>

## DISCUSSION

At issue here is whether the Determination meets CRA’s definition of rule, which adopts APA’s definition of a rule, with three exceptions. We conclude that the Determination is an order, and therefore is not subject to CRA’s submission requirements. In addition, we conclude that even were the Determination to meet the APA definition of a rule, it would fall within CRA’s first exception for rules of particular applicability, and would similarly not be subject to CRA’s submission requirements.

### The Determination is an Order

APA provides for two mutually exclusive ways to implement agency actions, either rules or orders.<sup>31</sup> Any agency action meeting the definition of an order cannot be a rule under APA, and thus cannot be a rule for purposes of CRA.<sup>32</sup> APA defines an order as “the whole or a part of a final disposition, whether affirmative, negative,

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<sup>26</sup> See *id.* § 802.

<sup>27</sup> *Id.* § 801(b)(1).

<sup>28</sup> *Id.* §§ 551(4), 804(3).

<sup>29</sup> 5 U.S.C. § 804(3).

<sup>30</sup> Response Letter, at 2–4.

<sup>31</sup> 5 U.S.C. § 551(5)–(6); see B-334995, July 6, 2023.

<sup>32</sup> B-335030, May 8, 2024.

injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.”<sup>33</sup> Orders result from adjudications, which are “case-specific, individual determination[s] of a particular set of facts that ha[ve] immediate effect on the individual(s) involved.”<sup>34</sup> We have explained that adjudications apply existing criteria and processes from an agency’s regulations and the statutes they implement to a given set of facts.<sup>35</sup>

We previously determined that EPA’s denial of petitions for exemptions under the Clean Air Act’s Renewable Fuel Standard Program was an order not subject to CRA.<sup>36</sup> We reached this conclusion because EPA’s action constituted the final disposition of the applicants’ petitions, and the action at issue was EPA’s application of the agency’s interpretation to the facts presented by the petitions.<sup>37</sup>

Similar to the facts in that case, the Determination constitutes a final disposition. It made “final determinations” that the eight nonattainment areas failed to attain the 2015 ozone standards by the August 3, 2024, attainment date.<sup>38</sup> Moreover, the Determination resulted from EPA’s application of the Clean Air Act requirements and EPA regulations to a set of facts.<sup>39</sup> In general, EPA’s determinations of whether areas timely attain the NAAQS are based solely on comparing the certified air quality monitoring data to the relevant NAAQS.<sup>40</sup> Here, EPA stated it was “required” to find failure to attain based on the areas’ design values exceeding 0.070 ppm, the relevant level for attainment for ozone NAAQS.<sup>41</sup> Therefore, because EPA’s Determination was a final disposition applying existing legal standards to the facts presented, and made case-specific, individual determinations with respect to the discrete areas at issue, it constitutes an order under APA and is not subject to CRA’s submission requirements.

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<sup>33</sup> 5 U.S.C. § 551(6).

<sup>34</sup> B-334309, Nov. 30, 2023 (*citing United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245–46 (1973); *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017)).

<sup>35</sup> See B-334995, July 6, 2023.

<sup>36</sup> B-334400, Feb. 9, 2023.

<sup>37</sup> *Id.*

<sup>38</sup> 89 Fed. Reg. at 101906.

<sup>39</sup> See 42 U.S.C. § 7511(b)(2)(A); 40 C.F.R. § 50.19.

<sup>40</sup> Response Letter, at 3.

<sup>41</sup> *Id.*, at 3.

Some historical context also supports our conclusion. EPA previously identified determinations for the active ozone standards—the 2008 and 2015 8-hour ozone NAAQS—as actions meeting the APA definition of a rule because they also addressed EPA’s related statutory obligations.<sup>42</sup> But recently EPA has taken a different approach. It has issued determinations for each area using notices grouped by region and separately codified a standalone rulemaking that established deadlines applicable to all reclassified ozone nonattainment areas.<sup>43</sup> EPA has not submitted these determinations as rules subject to CRA because according to EPA, they are best viewed as orders.<sup>44</sup>

EPA’s decoupling of the determinations for the active ozone standards from addressing related statutory obligations underscores the Determination’s sole focus: applying existing legal standards (the Clean Air Act and its implementing regulations) to a set of facts (the eight areas’ measured values). For these reasons, we conclude that the Determination is an order and therefore not a rule subject to CRA’s submission requirements.

#### Rule of Particular Applicability

We note that even if the Determination were to meet the APA definition of a rule, it would still not be subject to CRA’s submission requirements as it would fall within CRA’s first exception for rules of particular applicability. We have explained that rules of particular applicability are those rules that are addressed to an identified entity and also address actions that entity may or may not take, taking into account facts and circumstances specific to that entity.<sup>45</sup>

We previously concluded that even if EPA’s denial of petitions for exemptions under the Clean Air Act’s Renewable Fuel Standard Program were rules, they would be rules of particular applicability because in denying the petitions, EPA addressed the specific facts those petitions presented and determined the specific petitioners were

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<sup>42</sup> Response Letter, at 3–4 (noting that such actions met the APA definition of a rule because they were of future effect designed to implement, interpret, or prescribe law or policy, but fell under CRA’s first exception for rules of particular applicability). See 5 U.S.C. § 804(3)(A).

<sup>43</sup> Response Letter, at 4. See, e.g., 89 Fed. Reg. 103657 (Dec. 19, 2024); 89 Fed. Reg. 101901 (Dec. 17, 2024); 89 Fed. Reg. 97545 (Dec. 9, 2024); 89 Fed. Reg. 92816 (Nov. 25, 2024).

<sup>44</sup> Response Letter, at 4. Of note here, the Determination itself states that it is a rule of particular applicability. 89 Fed. Reg. at 101906. But in its response to us, EPA clarified that the determinations are more accurately characterized as adjudicatory orders, rather than rules of particular applicability. Response Letter, at 4.

<sup>45</sup> B-330843, Oct. 22, 2019.

not eligible for waivers of the programmatic requirements at issue.<sup>46</sup> Similarly here, the Determination is addressed to specific entities—the eight nonattainment areas—and is a result of EPA analyzing the facts presented against the Clean Air Act and EPA implementing regulations and concluding that the areas failed to attain the ozone standard by the applicable attainment date. Therefore, if the Determination were a rule, it would fall within CRA’s first exception for rules of particular applicability, which are not subject to CRA’s submission requirements.

## CONCLUSION

The Determination is an order, and therefore not a rule subject to CRA’s submission requirements. We note that even were the Determination to meet the APA definition of a rule, it would fall under CRA’s first exception for rules of particular applicability, and would similarly not be subject to CRA’s submission requirements.

A handwritten signature in black ink, reading "Edda Emmanuelli Perez". The signature is written in a cursive, flowing style.

Edda Emmanuelli Perez  
General Counsel

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<sup>46</sup> B-334400, Feb. 9, 2023.