

values.”<sup>12</sup> Nevertheless, the statute directs EPA to consider that subject.

In its decision to grant the Class I redesignation request for the Yavapai-Apache reservation, EPA examined whether it would be difficult to perform a PSD air quality modeling analysis that assessed the impacts of a proposed source in such a situation. The EPA concluded that, based on the modeling tools available at that time, it would be relatively simple and practicable for a proposed source to project its impact on the Class I area parcels and evaluate the analysis. See 61 FR at 56457–56458. Moreover, current air quality planning and management tools have become increasingly sophisticated and refined and apply to a variety of area sizes and configurations, ranging from a single facility to large metropolitan areas. For example, EPA, in coordination with states has established nonattainment areas in states for the purpose of implementing nonattainment planning requirements for the lead National Ambient Air Quality Standards (NAAQS) that encompass areas of only a few square kilometers. See e.g., 40 CFR 81.310 and 40 CFR 81.311. Conversely, there is an ozone transport region under the CAA for the purpose of ozone nonattainment planning that spans from Maine to northern Virginia. See section 184(a) of the CAA. Thus, EPA is reluctant to establish rigid criteria regarding the geographic size, geographic orientation, or population size of a Class I area that would automatically disqualify certain Tribes (or states) from exercising the authority conferred under section 164(c) to redesignate lands within Reservations. *Arizona v. EPA*.

EPA believes it can evaluate the size of the lands in the proposed redesignation area based upon the Agency's experience in the Yavapai-Apache redesignation and other air quality planning requirements. EPA also notes that it is expected to use caution in reversing redesignation requests in resolving disputes. 61 FR at 56454–56455, (citing CAA Legislative History, vol 3 at 326).

The lands in this parcel are similar to the lands in Yavapai in containing noncontiguous parcels of various sizes. However, the lands here are many times larger, with a total acreage in excess of 10,000 acres, compared with the 632

acres in Yavapai, and with the smallest parcel being 80 acres, more than twenty times larger than the 3.7594 acre parcel in Yavapai. EPA recognizes the limits of fact matching, and does not believe that comparing acreage is necessarily dispositive in all cases. Nevertheless, it believes that based on both the result and the rationale in *Arizona v. EPA*, it has no basis for disapproving the redesignation based on size. EPA concludes that the size of the lands is not too small to allow effective air quality management or have AQRVs.

EPA must also consider whether it can consider any other factors, and, if so, how to do so. While 164(e) directs EPA to consider size in resolving a dispute, it does not mention other factors to consider, or discuss what discretion EPA may have with regard to considering other factors at all.

EPA believes that the mandatory language directing EPA to consider whether the proposed redesignation lands “are of sufficient size to allow air effective air quality management or have air quality related values” clearly establishes size as the preeminent factor in resolving disputes. EPA also believes that the references to “effective air quality management” and “air quality related values” indicates that those factors, too, may be relevant in some circumstances, to the appropriate resolution of a dispute. Thus, for example, where EPA concludes that some other factor besides size precludes effective air quality management, it may have some limited authority to resolve a dispute by disapproving a redesignation because effective air quality management is impossible.

EPA construes the reference to AQRVs in conjunction with a second use of the term in 164(e), providing that, if the parties so request, “EPA shall make a recommendation to resolve the dispute *and* protect the air quality related values of the land involved.” 164(e) (emphasis added). Thus, EPA believes that it has limited discretion to consider protection of AQRVs in resolving a dispute, and that in some circumstances, it may resolve a dispute by denying a redesignation where approving the redesignation would not be consistent with protecting AQRVs.

In sum, EPA has carefully considered the record in this case, and concludes it is not appropriate to deny the redesignation based on the size of the proposed area. EPA also concludes that the record does not show that the redesignation would preclude effective air quality management or be inconsistent with protecting AQRVs. EPA, therefore, resolves the dispute by rejecting the state's suggestion to deny

the redesignation. EPA's approval decision is discussed in a separate notice.

EPA also notes that it does not agree with the State of Michigan comment that additional rulemaking should be proposed before EPA can resolve the dispute or approve the redesignation. The statutes that govern this decision, sections 164(b)(2) and 164(e) contain no limitations on EPA's redesignation authority of the type Michigan suggests.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxides, Volatile organic compounds.

Dated: April 18, 2008.

**Stephen L. Johnson,**  
Administrator.

[FR Doc. E8–8969 Filed 4–28–08; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R05–OAR–2004–WI–0002;  
FRL–8557–4]

### Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area; Dispute Resolution With the State of Wisconsin

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of dispute resolution.

**SUMMARY:** The purpose of this notice is to announce the resolution of an intergovernmental dispute over a request by the Forest County Potawatomi Community (FCP Community) to redesignate portions of the FCP Community reservation as a non-Federal Class I area under the Clean Air Act (CAA or Act) program for prevention of significant deterioration of air quality. On June 8, 1995, the Governors of Wisconsin and Michigan raised concerns about EPA's proposal to approve the request of the FCP Community to redesignate portions of its reservation as a non-Federal Class I area and asked EPA to initiate the intergovernmental dispute resolution process provided for in the CAA. The State of Wisconsin and the FCP Community were able to reach an agreement concerning the redesignation. After considering the final agreement signed by the FCP Community and the State of Wisconsin, EPA finds that this

<sup>12</sup> The State's arguments regarding size have centered on the State's complaints that EPA has not unilaterally adopted regulations that impose minimum acreage requirements of 5,000 acres on non-federal class I areas. See for example, Russell Harding to Carlton Nash, September 15, 1997, at 4; Letter from Russell Harding to Stephen Rothblatt, April 25, 2000.

agreement resolves the dispute and no further action is required by EPA. In a separate rulemaking published in this **Federal Register**, EPA is finalizing its proposed decision to redesignate the FCP Community as a non-Federal Class I area. The Class I designation will result in lowering the allowable increases in ambient concentrations of particulate matter, sulfur dioxide, and nitrogen oxide within the reservation.

**DATES:** This action is effective on May 29, 2008.

**FOR FURTHER INFORMATION CONTACT:**

Constantine Blathras, Air Permits Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3507; telephone number: 312-886-0671; fax number: 312-886-5824; e-mail address: [blathras.constantine@epa.gov](mailto:blathras.constantine@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

**I. General Information**

*A. Does This Action Apply to Me?*

This action will apply to applicants to the Prevention of Significant Deterioration (PSD) construction permit program on Class I trust lands of the Forest County Potawatomi Community.

*B. How Can I Get Copies of This Document and Related Information?*

1. *Docket.* EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2004-WI-0002. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the U.S. Environmental Protection Agency, Air Docket, in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation will be 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742. The docket is also available during normal business hours for public inspection and copying at the Air Programs Branch, Region 5, EPA (AR-18J), 77 West Jackson Boulevard, Chicago, Illinois 60604.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at: <http://www.epa.gov/fedrgrstr/>. In addition to being available in the docket

and on the EPA **Federal Register** Internet Web site, an electronic copy of this notice is also available on the EPA's New Source Review (NSR) Web site, under Regulations & Standards, at <http://www.epa.gov/nsr/actions.html>.

*C. How Is This Notice Organized?*

The information in this notice is organized as follows:

I. General Information

- A. Does This Action Apply to Me?
- B. How Can I Get Copies of This Document and Related Information?
- C. How Is this Notice Organized?

II. This Notice

- A. Area Proposed for Redesignation
- B. Authority for Invoking Dispute Resolution Procedures
- C. Agency Action

**II. This Notice**

*A. Area Proposed for Redesignation*

On February 14, 1995, the FCP Community submitted a request to the EPA to approve the redesignation of the air quality status of selected parcels of the FCP Community's Reservation from “Class II” to “Class I” under the CAA's PSD regulations. The area of FCP Community reservation lands that has been proposed for redesignation to Class I comprises 10,818 acres, all of which is located in Forest County, Wisconsin.

*B. Authority for Invoking Dispute Resolution Procedures*

Section 164(e) of the CAA and 40 CFR 52.21(t) provide the current statutory and regulatory framework for resolving disputes between states and Tribes over redesignation of an area or for permits for new major emitting facilities that may cause or contribute to a cumulative change in air quality under the PSD program. Section 164(e) of the CAA provides that if the Governor of an affected state or the appropriate Indian Governing Body of an affected Tribe disagrees with a request for redesignation by either party, then the governor or Indian ruling body may request that EPA negotiate with the parties to resolve the dispute. Pursuant to the statute and implementing regulations, EPA is not a party to the dispute. The Administrator of EPA is, by statute, designated as the final arbitrator of the dispute. The statute provides that either party can ask the Administrator for a recommendation to resolve the dispute, and if the parties fail to reach an agreement during the negotiations, “the Administrator shall resolve the dispute and his determination, or the results of the agreements reached through other means, shall become part of the applicable plan and shall be enforceable

as part of such plan.” Section 164(e), 42 U.S.C. 7474(e).

Similarly, if a permit is proposed to be issued for any new major emitting facility proposed for construction in any state, which the Governor of an affected state or the governing body of an affected Indian Tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed within the affected state or reservation, the Governor or Tribal ruling body may invoke the same dispute resolution mechanism. States or Tribes with Class I areas, however, cannot “veto” permits that may adversely affect those areas.

While EPA has authority to resolve disputes, this authority is exercised only if the parties in dispute do not reach an agreement during the dispute resolution process. A discussion of EPA's authorities to resolve disputes is found in EPA's notice resolving the dispute between the State of Michigan and the FCP Community, published in this **Federal Register**. Where, as here, in the case of Wisconsin and the FCP Community, the parties reached their own resolution of their issues, EPA believes that the agreement becomes part of the “applicable plan” and the dispute is ended. 42 U.S.C. 7474(e).

*C. Agency Action*

1. Background on Redesignation Request

Pursuant to section 164(c), 42 U.S.C. 7474(c), the FCP Community Tribal Council formally submitted a proposal to redesignate certain FCP Community reservation lands from Class II to Class I to the EPA on February 24, 1995. A Class I air quality designation provides greater protection for air resources by decreasing the increases allowed in the ambient concentrations of particulate matter, sulfur dioxide, and nitrogen oxides from any new major stationary sources or major modifications to existing sources in the vicinity. The types of facilities whose emissions could impact these lower limits are generally new or expanding large industrial sources such as electric utilities and pulp and paper mills. No new operating permits or additional controls would be required for existing sources solely as a result of a Class I designation.

Along with reducing allowable concentrations of key pollutants, Class I areas may also include air quality related values (AQRV) which are intended to further protect air quality. In the case of the FCP Community redesignation, the Tribe has proposed acidic and mercury deposition as the

AQRVs they are seeking to protect. Because state officials were concerned about AQRVs and other issues, an intergovernmental dispute eventually developed and the parties ultimately sought dispute resolution under section 164(e).

By statute, the Agency must approve or disapprove a request for redesignation. Accordingly, on June 29, 1995, EPA published a notice in the **Federal Register** (FR) proposing to approve the redesignation request by the FCP Community to Class I area status. The notice provided for a 60-day public comment period. However, on June 8, 1995, the Governors of Wisconsin and Michigan sent a letter to EPA objecting to EPA's proposal to grant the FCP Community request for redesignation and requesting dispute resolution. The June 8 letter focused on two concerns, first, the states' perception that EPA lacked rules to handle such redesignation requests and the implementation of non-federal Class I areas, and second, that a non-federal class I area would "significantly infringe upon the ability of our state governments to manage the natural resources of our states."<sup>1</sup>

To address their concerns, the Agency published a FR notice (60 FR 40139) on August 7, 1995, postponing the scheduled August 2, 1995 public hearing and extending at the states' request the public comment period indefinitely, while the Agency attempted to negotiate with the states and respond to the issues they had raised.

As already noted, section 164(e) of the Act allows either the Governor of a state or the Indian ruling body to request to the Administrator to enter into negotiations with the parties involved to resolve such a dispute. In response to the Governors' letter, EPA contracted with a professional mediation service (RESOLVE, Inc.) to provide mediation services. RESOLVE discussed the case with EPA and the parties, and circulated resumes and a list of potential mediators for comment by the parties.

In the meantime, EPA had formed a senior EPA workgroup to cooperatively develop options for consideration by the states and Tribes regarding roles and responsibilities of non-Federal class I area managers. To gather public comment on different proposals, EPA published an advanced notice of proposed rulemaking (ANPR) on May 16, 1997. 62 FR 27158. EPA held public workshops in Chicago and Phoenix on

the ANPR, and gathered testimony on the options for proposed rulemaking. 62 FR 33786 (June 23, 1997). The ANPR was not finalized however, and no new regulations were established.

In further follow-up to the Wisconsin and Michigan Governor's letters invoking dispute resolution, EPA engaged in an extended correspondence with Wisconsin and Michigan regarding the relationship of the proposed redesignation to proposed rulemaking, which can be found in the record for this notice. Following nearly 2 years of discussions, however, the states and the Tribe had not reached a resolution of the issues that had been raised by the states, nor had EPA completed the public notice process on the proposed redesignation. Therefore, on July 10, 1997, EPA published notice for two informational meetings and public hearings on the FCP Community's redesignation request and established a close for the public comment period of September 15, 1997. 62 FR 37007 (July 10, 1997). EPA held two public hearings on the proposed redesignation on August 12, 1997, in Carter, Wisconsin, and August 13, 1997, in Rhinelander, Wisconsin, respectively. By the close of the public comment period, EPA had received more than 120 comments on the proposed redesignation.

On April 21, 1998<sup>2</sup>, Wisconsin requested that EPA reinitiate the dispute resolution process under section 164(e). In response, EPA sent letters to the State of Wisconsin, the State of Michigan, and the FCP Community requesting a meeting to begin the negotiations to resolve the dispute. EPA requested that the parties each identify their chief negotiator, and that each party submit a written list of issues that they wished to resolve through the dispute resolution process. EPA, in consultation with the parties, requested RESOLVE to select a mediator, and Triangle Associates, Inc., Seattle, Washington, was chosen to mediate the discussions.

Once a mutually acceptable mediator had been agreed upon, EPA requested that the mediator establish a formal process for conducting compilation of issues, organizing and structuring meetings, and communication among the parties.<sup>3</sup> This included interviews with each of the parties, discussions of the issues lists submitted by each party,

and structuring a series of meetings. Following an initial interview, the Agency requested a meeting of all parties to agree upon a protocol, establish a list of issues appropriate for discussion under section 164(e), and plan a series of further meetings aimed at resolving the dispute.

The first dispute resolution meeting occurred on September 2, 1998, at the Region 5 offices in Chicago, Illinois. Both the States of Wisconsin and Michigan participated in this meeting, and states and Tribe each identified issues of concern and attempted to find areas of overlap that could potentially lead to resolution.

Following this first meeting, the parties requested that EPA examine the twenty-one issues submitted for dispute resolution to determine which would be appropriate for discussion and resolution under section 164(e) of the CAA. EPA Region 5, in consultation with EPA's headquarters offices (Office of Air and Radiation, Office of General Counsel, and Office of Air Quality Planning and Standards), by letter of November 6, 1998, ultimately submitted to the parties a list of six suitable topics for further discussion and resolution. These issues included: "(1) Whether the lands proposed for redesignation are of sufficient size to allow for effective air quality management; (2) the extent to which the lands proposed for redesignation have sufficient size to have air quality related values; (3) the off-reservation impacts of redesignation as discussed in the [FCP Community's] Technical Support Document; (4) the Tribe's choice of mercury deposition as an AQRV; (5) the Tribe's choice of AQRVs; and (6) the roles and responsibilities of the respective parties in the dispute resolution discussion on September 2, 1998."<sup>4</sup> The Agency also informed the parties that the remaining issues were either unsuitable for discussion under the CAA section 164(e), or where wholly within EPA's purview as decision maker under CAA section 164(b) and 164(e).

On November 16, 1998, the parties held a second dispute resolution meeting in Green Bay, Wisconsin. However, the State of Michigan elected not to participate in this meeting.<sup>5</sup>

<sup>4</sup> Letter from Stephen Rothblatt, Acting Director, Air and Radiation Division, Region 5, to George E. Meyer, Secretary WDNR, and Joseph Young, attorney for FCP, November 6, 1998 (cc to Denis Drake, MDEQ).

<sup>5</sup> The State of Michigan did not participate in any subsequent dispute resolution meetings between Wisconsin and the FCP. The Administrator's resolution of the dispute between the State of Michigan and the FCP Community is concurrently published in a separate FR notice.

<sup>1</sup> Letter from Governor Tommy G. Thompson and Governor John Engler to Carol Browner, June 8, 1995.

<sup>2</sup> Letter from Governor Tommy Thompson to Richard Wilson, Acting Assistant Administrator for Air and Radiation, April 21, 1998.

<sup>3</sup> The public docket for this rulemaking contains documents relating to the dispute resolution process except those that are covered by privilege, such as the federal Alternative Dispute Resolution Act. Privileged documents are listed in the index, though have not been made available to the public.

During the second meeting, the parties discussed each of the six issues, with each party having the opportunity to raise their specific concerns. The State of Wisconsin and FCP Community exchanged ideas for achieving a mutually acceptable resolution, which addressed both parties' concerns. The parties scheduled another negotiating session for December.

On December 22, 1998, the parties met in Milwaukee, Wisconsin. As a result of further discussions which took place at this meeting, the parties developed a draft negotiation concept paper. The parties, as well as EPA, agreed to seek concurrence from their respective boards and governing bodies. The parties agreed that sufficient progress had been made towards resolving the dispute to warrant another meeting in February 1999.

The parties held another dispute resolution meeting on the FCP Community reservation in Carter, Wisconsin on February 3, 1999. During this meeting, the parties developed specific language that they wished to include in a draft agreement in principle. After review by both parties, as well as by EPA, the lead negotiators for the State of Wisconsin, the FCP Community, and EPA signed the agreement, signifying their good faith intent to seek concurrence from their respective authorities and management. EPA was not a party to the dispute, and its role was to acknowledge the parties' agreement.

Following the development of the agreement in principle document, a drafting team comprised of representatives of the parties and from EPA began developing the detailed terms of the final agreement. On April 8, 1999, the parties held a meeting to work out the language of the final agreement. After each of the parties, as well as EPA, had an opportunity to review and comment on the draft of the final agreement, the parties agreed that another drafting session would be necessary. The parties, together with EPA, held a final conference call to complete the draft final agreement on June 7, 1999.

## 2. The FCP Community and the State of Wisconsin Memorandum of Agreement

The 1999 Memorandum of Agreement between the FCP Community and the State of Wisconsin (FCP Community-Wisconsin MOA) fully resolves the dispute between the state and the Tribe concerning the FCP Community's request for Class I redesignation of its reservation lands. The Class I Final Agreement provides a framework for establishing how the state and FCP

Community will implement the Class I area under their respective authorities. The provisions of this agreement become effective upon EPA's final action to approve the FCP Community's request for Class I redesignation, as published in a separate final rule in the **Federal Register**. While EPA also was a signatory to this agreement, EPA's role in the process was to acknowledge the agreement entered into by the parties on their own respective authorities.

## 3. Effect of the FCP Community and State of Wisconsin Memorandum of Agreement on the Wisconsin State Implementation Plan (SIP)

CAA section 164(e) provides that "the results of the agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan." CAA section 164(e), 42 U.S.C. 7474(e). The PSD program is implemented in Wisconsin under an EPA approved State Implementation Plan (SIP) which excludes all of Indian country within the state. The terms of the FCP Community-Wisconsin MOA do not apply to the effects of the Class I redesignation on the redesignated area, and thus are not appropriate for inclusion in the Federal Implementation Plan (FIP) EPA is issuing in a concurrent rulemaking, located in this **Federal Register** publication. Rather, the agreement establishes certain special provisions regarding the effects of the Class I redesignation on potential sources outside the redesignated area. These provisions will need to be implemented by revising the Wisconsin SIP and have been summarized by EPA as follows in the December 18, 2006, **Federal Register** proposal:

[T]he agreement between the FCP Community and Wisconsin subjects all major sources in Wisconsin located within a ten (10) mile radius of any redesignated Tribal land to performing an increment analysis and to meeting consumption requirements applicable to a Class I area. Major sources located outside of ten (10) miles are subject to increment analysis and consumption requirements applicable to any redesignated Tribal land as if it were a Class II area. Also under the agreement, all major sources within sixty-two (62) miles are subject to an analysis of their impact on AQRVs of the redesignated Tribal lands to determine if they will have an adverse impact on these AQRVs.

71 FR 75696. As these special provisions differ from Wisconsin's currently approved SIP for the PSD program, for this portion of the FCP Community-Wisconsin MOA to become enforceable will require revision of the Wisconsin SIP, which otherwise would not recognize a limitation of the area in

which the Class I increment analysis must be conducted.

EPA takes the position that it generally will not interfere with the agreements reached between Tribes and states through the CAA's 164(e) dispute resolution process. However, to the extent that the agreement reached under the terms of the MOA allows for restricting the requirements normally associated with Class I areas, as these apply to sources located outside a 10-mile radius of the redesignated reservation lands, EPA takes the position that a revision of the Wisconsin SIP will be necessary to implement this provision to potential sources located outside boundaries of the redesignated parcels. In the absence of such modification to the Wisconsin SIP, the current PSD rules codified at 40 CFR Part 52 will apply to the FCP Community's Class I area as approved in EPA's final action published in this **Federal Register**.

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and record keeping requirements, Sulfur dioxides, Volatile organic compounds.

Dated: April 18, 2008.

**Stephen L. Johnson**,

*Administrator*.

[FR Doc. E8-8970 Filed 4-28-08; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 55

[OAR-2004-0091; FRL-8542-3]

### Outer Continental Shelf Air Regulations Consistency Update for California

**AGENCY:** Environmental Protection Agency ("EPA").

**ACTION:** Final rule—consistency update.

**SUMMARY:** EPA is finalizing the updates of the Outer Continental Shelf ("OCS") Air Regulations proposed in the **Federal Register** on November 16, 2007. Requirements applying to OCS sources located within 25 miles of states' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area ("COA"), as mandated by section 328(a)(1) of the Clean Air Act Amendments of 1990 ("the Act"). The portions of the OCS air regulations that are being updated pertain to the