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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

May 16, 1997

R-19J

Tom Maulson, Chairman
Lac du Flambeau Band of Chippewa
P.O. Box 67
Lac du Flambeau, WI 54538

Re: Rescission of Approval to Administer Water Quality Standards Program

Dear Chairman Maulson:

On August 24, 1995, the Lac du Flambeau Band of Chippewa applied to the United States Environmental Protection Agency (U.S. EPA) for eligibility to administer the water quality standards program for surface waters within the exterior boundaries of the Lac du Flambeau Reservation, pursuant to section 303 of the Clean Water Act. On January 25, 1996, I approved your application. Because there is now uncertainty about the precise contents of the record that was before me at the time I made my decision, I have determined that the public interest would be best served by withdrawing the approval. By means of this letter, I hereby rescind the January 25, 1996, approval of the Lac du Flambeau Band's eligibility to administer the water quality standards program for surface waters within the exterior boundaries of the Lac du Flambeau Reservation.

The Band may re-apply for eligibility to administer the water quality standards program for surface waters within the exterior boundaries of the Lac du Flambeau Reservation. Such reapplication may be effected either by requesting U.S. EPA to reconsider the first application or by submitting a new application. In either case, U.S. EPA will process the application as a new application in accordance with the procedures in 40 C.F.R. § 131.8.

Sincerely yours,

Valdas V. Adamkus
Regional Administrator

cc: Kathy Gorospe, American Indian Environmental Office
David Carson, Department of Justice

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

May 16, 1997

R-19J

Deborah Doxtator, Chairperson
Oneida Business Committee
PO Box 365
Oneida, WI 54155

Re: Rescission of Approval to Administer Water Quality Standards Program

Dear Ms. Doxtator:

On August 25, 1995, the Oneida Tribe applied to the United States Environmental Protection Agency (U.S. EPA) for eligibility to administer the water quality standards program for surface waters within the exterior boundaries of the Oneida Reservation, pursuant to section 303 of the Clean Water Act. On January 25, 1996, I approved your application. Because there is now uncertainty about the precise contents of the record that was before me at the time I made my decision, I have determined that the public interest would be best served by withdrawing the approval. By means of this letter, I hereby rescind the January 25, 1996, approval of the Oneida Tribe's eligibility to administer the water quality standards program for surface waters within the exterior boundaries of the Oneida Reservation.

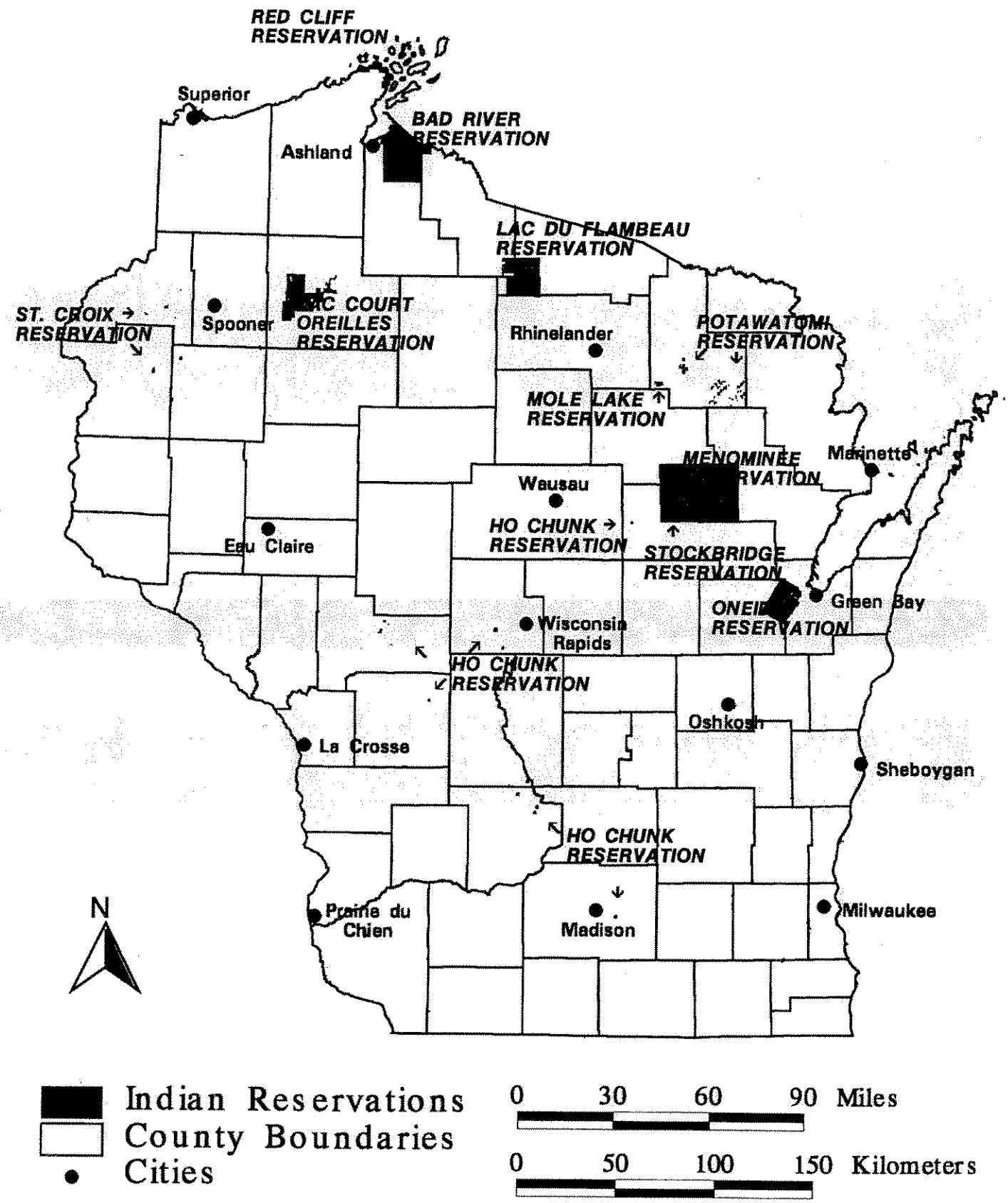
The Tribe may re-apply for eligibility to administer the water quality standards program for surface waters within the exterior boundaries of the Oneida Reservation. Such reapplication may be effected either by requesting U.S. EPA to reconsider the first application or by submitting a new application. In either case, U.S. EPA will process the application as a new application in accordance with the procedures in 40 C.F.R. § 131.8.

Sincerely yours,

Valdas V. Adamkus
Regional Administrator

cc: Kathy Gorospe, American Indian Environmental Office
David Carson, Department of Justice

INDIAN RESERVATIONS IN WISCONSIN



Source: DNR-AM 6/10/96

(D) **ATTACHMENT 2**

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

STATE OF ARIZONA;
FIFE SYMINGTON, Governor;

Petitioners,

vs.

ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; YAVAPAI-APACHE TRIBE;

Respondents.

PETITION FOR REVIEW

Petitioners, State of Arizona and Governor Fife Symington, hereby petition the Court for review of the final decision published November 1, 1996, of the Environmental Protection Agency adopting a final rule designating the reservation of the Yavapai-Apache Tribe as a class I area under section 164 of the Clean Air Act.

DATED this 27th day of November, 1996.

GRANT WOODS,
Attorney General

Sonia D. Overholser
Matthew P. Millea
Assistant Attorneys General
Environmental Enforcement Section

ORIGINAL and seven copies
filed this 27th day of
November, 1996, with:

Clerk, U.S. Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

COPIES mailed this 27th day
of November, 1996, to:

Administrator, U.S. EPA
401 M Street, S.W.
Washington, DC 20460

Yavapai-Apache Tribe
P.O. Box 1188
Camp Verde, AZ 86322

L/T. MARTIN-POTTS

9288

ATTACHMENT 3

14253

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

GRANT WOODS
ATTORNEY GENERAL

1275 WEST WASHINGTON, PHOENIX 85007-2926

MAIN PHONE : 542-5025
TELECOPIER : 542-4085

February 25, 1997

-VIA FACSIMILE and FIRST CLASS MAIL-

Joshua Levin, Trial Attorney
U.S. Department of Justice
Environmental & Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington D.C. 20026-3986

Dear Josh:

You asked me to set forth the position of the State in writing on the settlement proposal we made during the telephone conference on February 7, 1997. In writing this letter, I am assuming that the same agreement with respect to the confidentiality of the mediation discussions applies to our other settlement communications. As I stated during the mediation, the basic concept is that Arizona would like to gain some agreement from EPA as to the extent of the decision-making authority EPA has in a § 164(e) dispute resolution between a state and tribe, and the procedure which should be followed in resolving such disputes. Arizona does not believe that the discretion entrusted to EPA in the situation where a state and tribe (or state and state) cannot agree is as circumscribed as EPA contends. Likewise, Arizona believes the proper procedure for EPA to follow where a tribe and state are unable to agree is to informally propose a resolution for further discussion between the tribe and the state. This would have lead to additional discussions between the parties, followed by either a settlement or a final decision by EPA.

Arizona is asking for agreement on these points because we don't think that EPA handled the dispute resolution with the Yavapai-Apache Tribe properly. Our major concern is that the apparent position of the agency is that to deny redesignation would impair the sovereign status of the Tribe. We do not understand the concept of sovereignty to generally include as one of its attributes the right to regulate land use outside the jurisdiction. Even if EPA were to deny the redesignation, the Tribe would retain the sovereign power to regulate air pollution sources under its jurisdiction. EPA needs to acknowledge that the § 164(e) dispute resolute procedure was set up as a way for the federal government to resolve disputes between two sovereign entities, in this case a

state and a tribe. The actions of one sovereign entity may impact the other, and vice versa, and the difficult task of resolving these conflicts falls to EPA. While we can sympathize with the reluctance of EPA to bear the burden of resolving the conflict, it is not adequate to avoid the issue by taking the position that the conflict must be resolved in favor of the governmental entity seeking the redesignation. The intent of Congress was to require EPA to engage in the same type of balancing of interests the agency used in the pre-1977 PSD program in the limited context of an interstate or state-tribal dispute.

EPA appears to have confused Congressional statements about the agency's limited role in approving non-federal redesignations with its necessarily more active role in resolving disputes between states or tribes. We agree that Congress intended to give EPA much more limited authority to reject a proposed state or tribal redesignation than it had under the pre-1977 PSD program. Section 164 (b)(2) shows that Congress intended EPA to have limited authority to override local decisions to redesignate. However, EPA erred when it interpreted this limited federal role to extend to the context of a dispute about a redesignation between states or tribes. The legislative history clearly shows that Congress understood that EPA would have to continue to play an active role in resolving disputes of that nature.

The present § 164(e) language originated in the Senate version of the 1977 amendments. Both the Senate and House versions of the amendments provided for a more limited EPA role in the PSD program than had been the case under the prior regulations. In discussing that limited role, the Senate Report stated, "EPA is limited to (1) approving the new source review process established by the State; (2) seeking injunctive relief or other measures that would be necessary to prevent the issuing of a permit for a new source if it does not comply with the requirements of the subsection; (3) *resolving interstate disputes*; and (4) notifying a State when it believes adverse impact may occur in a Class I area." Sen. Rep. No. 95-127, p. 36 (emphasis supplied). Contrary to the position EPA took in the dispute resolution between Arizona and the Tribe, EPA does not have the same limited role it has under § 164(b)(2) when the § 164(e) dispute procedure is invoked. Congress clearly understood that once a state or tribe invokes dispute resolution, the Congressional policy of favoring state (or tribal) redesignation decisions over federal ones becomes inapplicable. Congress intended a limited federal role in the redesignation of non-federal lands, but only where other states or tribes did not disagree with the decision to redesignate. The only party which can administratively resolve such disputes is the federal government, and there is no legal basis for EPA to give deference to the wishes of the redesignating sovereign over the wishes of the objecting sovereign.

In addition to the legislative history, nothing in the language of § 164(e) supports the limited reading urged by EPA. The fact that EPA is limited in the scope of its review under § 164(b)(2) does not support the conclusion that the agency is likewise limited in resolving disputes under § 164(e). The principle of favoring state over federal decision-making in redesignation decisions is no longer applicable when states or tribes disagree over the redesignation. A state/tribe dispute is

plainly different than a state/federal dispute. EPA incorrectly treats them as the same, when they clearly are not.

EPA also assumes that the scope of issues which may be raised or considered in dispute resolution is somehow limited by both § 164(b) and § 164(e). Nothing in the plain language of either subsection supports an argument that Congress intended to limit the ability of sovereign entities with the primary responsibility for administration of the Clean Air Act to raise any relevant issue in a dispute resolution proceeding.

EPA is also incorrect in its expressed preference for deferring to the redesignation until a concrete permit dispute arises. Putting aside the obvious difficulties such a position creates for both Arizona industry and those who regulate it, that position is also inconsistent with the plain language and intent of § 164 (e). The dispute resolution provision may be invoked for *either* the original redesignation *or* a specific permitting dispute. Obviously, if Congress agreed that redesignation disputes were only resolvable in the context of specific permits, it would have limited the ability to invoke dispute resolution to that circumstance. The fact that it did not do so suggests that inter-jurisdictional conflicts of this type can and should be addressed when the redesignation is proposed, not at some indefinite time in the future.

The other point on which we would like agreement is related. We believe that EPA misunderstood the role Congress intended it to play from a procedural perspective as well. Congress obviously understood that inter-jurisdictional conflicts of this type would be difficult to resolve, so it instructed EPA to seek to resolve them by settlement where possible. The statutory language specifically instructs the agency to "make a recommendation to resolve the dispute and protect the air quality related values of the lands involved." EPA did not make any informal recommendation to resolve the dispute. We believe the statute requires the agency to do so, and that the failure to do so in this matter was caused by the agency's belief that it could not provide Arizona with any relief. The agency was wrong on both counts.

Assuming we could reach agreement on those points, Arizona would be willing to again engage in good faith in dispute resolution with the Tribe and EPA. If EPA is willing to agree that it has the power to decide this redesignation dispute in favor of Arizona under circumstances which would not justify denial of the redesignation in the first instance under § 164(b)(2), and that it has the duty to suggest an informal resolution for discussion when the parties are stymied, we think such negotiations are much more likely to be fruitful. Presumably, restarting the dispute resolution would require EPA to withdraw the redesignation for the time being. We would agree to dismiss our appeal if EPA were willing to withdraw the redesignation and start the dispute resolution procedure over.

Please feel free to contact me if you have any questions regarding the above.

Very truly yours,

OFFICE OF THE ATTORNEY GENERAL

Matthew P. Millea
Assistant Attorney General
Environmental Enforcement Section

MPM:tmp
cc: Maria Baier
Nancy Wrona

Official had warned of EPA fraud in 1996

Employee says he knew of backdating in tribal water-rights decision

By Cary Segall
Wisconsin State Journal

A U.S. Environmental Protection Agency official warned top EPA officials last year about fraud in the agency's decisions to give state Indian tribes the right to regulate reservation water quality.

Casey Ambutas said in testimony made public Tuesday he told EPA administrators key documents justifying the decisions were written after the decisions were made. He also said an EPA lawyer said the documents could be backdated.

In other testimony, EPA official Claudia Johnson-Schultz admitted she altered one of the documents and then lied about her conduct under oath.

Ambutas and Johnson-Schultz testified this month after U.S. District Judge Barbara Crabb gave state lawyers the unusual power to question EPA officials about the agency's actions.

The state, landowners, business groups and several northeastern Wisconsin communities have challenged the EPA's decisions to give the Oneida, Lac du Flambeau and Menominee tribes the right to set reservation water standards.

U.S. Magistrate Judge Steve Crocker rejected the EPA's attempt to keep the testimony secret.

"Regardless whether what occurred at the EPA was malfeasance, sloppiness or something else, there is no good reason to keep it from the public," Crocker wrote. "As the Supreme Court has observed, 'informed public opinion is the

Please see **FRAUD**, Page 3A

Fraud

Continued from Page 1A

most potent of all restraints upon misgovernment.' "

The EPA has claimed it relied in January 1996 on documents written by Johnson-Schultz when it gave the tribes regulatory power. The authority would apply to non-Indian landowners on reservations and could extend outside reservations to activities that affect reservation water.

The challengers questioned the preparation date of the documents, which detail detrimental effects of non-Indian landowners on reservation water.

Johnson-Schultz said in affidavits she wrote the reports in the middle of January 1996. EPA lawyer Marc Radell said in other affidavits he relied on the reports later that month in recommending the tribes get regulatory power.

But Ambutas, the Indian program manager at EPA Region 5 in Chicago, said he met with Johnson-Schultz and Radell last spring after discovering there was no such report in the Oneida file.

He said Johnson-Schultz said she would prepare the report and Radell said, " 'Don't worry about the administrative record because we can pull together whatever is necessary and we'll backdate if we need to.' "

Ambutas said he told Regional Administrator Val Adamkus last June about Radell's comments. He said he also requested an investigation and offered to take a lie detector test.

Ambutas said he believed the other Indian cases had the same problem. But he said the agency didn't investigate until February after the state questioned the date of Johnson-Schultz's reports.

Johnson-Schultz, though, insisted she prepared the reports in January 1996 and at first denied changing them. But she admitted under oath that she added maps and made related changes in the Oneida report. She said she might also have changed the other reports but couldn't be sure because of memory problems.

Radell testified such changes wouldn't be considered minor but said that the reports were prepared in January and that he never suggested backdating them.

"I did not ... coerce Claudia into backdating the documents," Radell said. "The documents were created before the decision was made."

Radell said Ambutas may have made the charge because of hi dislike for Radell and Johnson Schultz.

"Casey was afraid that Claudi wanted his job and was trying t get his job, and so he's neve really liked Claudia and he trie to set her up for getting fired onc before," Radell said. "And he' tried to get rid of me before."

Ambutas, though, said he ha no ulterior motives: "My ethica moral responsibility as a federa employee is to report potentia waste, fraud or abuse and that' what I did."

Two other EPA officials, Mar Pat Tyson and Jodi Traub, sai they considered Ambutas untrus worthy, but administrator Adan kus said he considered Ambuta one of his top aides, honest an had no reason to believe he woul falsely accuse other employees.

The EPA last week said it ha withdrawn regulatory power fro the Oneida and Lac du Flambea because of the controversy an would re-evaluate the issue. asked federal judges Barba Crabb and Charles Clevert to di miss the cases. The Menomine dropped their regulatory autho ity in March.

The challengers opposed th EPA request and Crabb has set hearing Friday to hear argumen in the Lac du Flambeau case.

Mine concerns

The people of Eau Claire County need to know about a statement made by the Assembly Environment Committee chairman, Marc Duff, at the public hearing on Assembly Bill 70, the mining moratorium bill.

The meeting in Ladysmith May 12 lasted over seven hours. It was attended by more than 300 people.

I am just a regular citizen, a pharmacist by trade. I am concerned that Exxon's proposed zinc-copper mine near Crandon is likely to pollute our lakes and ground water with sulfuric acid and heavy metals, to say nothing of its impact on the scenic beauty of our north woods.

The mine would produce a "tailings dump" that would cover an area over 200 football fields in size nd be as high as a 10-story building.

xxon proposes to pump over a on gallons of water a day over to Rhinelander and dump it into the Wisconsin River.

Tom Ward, a member of the Wisconsin Resources Protection Council, was one of many to speak at the hearing. He said to Rep. Duff, "They should put the tailings dump down in Madison." I was shocked to hear Rep. Duff respond, "Fine by me."

Ward went on to say, "Well, good. Let's work on that. Let's put the dump right down there with Gov. Thompson. Let it look over Lake Mendota and Lake Monona and let's pump the (waste) water from Madison to Middleton ... ."

"Fine by me." Is that any sort of statement to be coming from the chairman of the Assembly Environment Committee? It shows a great lack of sensitivity to the concerns of the people of northern Wisconsin and leads me to wonder if any part of the state is immune to exploitation by the mining industry.

It's no secret that other potential mining sites have been identified close to La Crosse and Eau Claire.

Speak up and voice your opinion to your state representative. And contact the speaker of the Assembly, Rep. Ben Brancel, to request that the bill be brought to a vote.

LAURA FURTMAN

Webster

EDITOR'S NOTE. Voice of the People letters must be less than 250 words. They must bear the name, address and telephone number of the writer, although a pseudonym may be published where letters refer to issues only, not to identifiable persons or groups. The editor reserves the right to edit and shorten letters.

EPA tries to hide Indian water data

By Cary Segall
Wisconsin State Journal

The U.S. Environmental Protection Agency is trying to keep secret documents that reveal serious problems with its decisions to let state Indian tribes regulate reservation water quality.

The agency asked U.S. Magistrate Judge Steve Crocker to block release of documents that one lawyer said contain "revelations ... nothing short of extraordinary (that) go to the heart of the integrity of the agency's decision-making process."

Paul Kent made the comment in a letter opposing secrecy for transcripts detailing the questioning of EPA officials under oath.

The officials testified secretly this month after EPA whistleblowers indicated agency officials may have filed false affidavits in cases involving the Lac du Flambeau Chippewa and Oneida tribes.

The EPA in January 1996 gave the tribes regulatory power but said Tuesday it had withdrawn the power because documents involved "may not be complete or fully accurate."

The EPA decisions to grant the power were opposed by the state, which argued it has the right to regulate all Wisconsin water.

Assistant Attorney General John Greene said the state opposes the EPA's secrecy request because the documents "relate directly to the serious questions surrounding the integrity of EPA's decision-making process."

"The public is entitled to know how EPA and its employees have conducted themselves . . .," Greene wrote Crocker.

Kent, who represents landowners and business groups opposed to the Oneida decision, and Oneida lawyer Milt Rosenberg agreed with Greene.

"Every item bearing on the accusers, their timing and their private agenda should, in simple fairness, be fully and openly disclosed," Rosenberg wrote, referring to EPA whistleblowers Casey Ambutas and Steve Dodge.

Ambutas, Indian policy coordinator, and Dodge, liaison to Wisconsin tribes, questioned the truth of affidavits filed by Claudia Johnson-Schultz, tribal programs manager, and lawyer Marc Radell.

Johnson-Schultz wrote key reports that specify detrimental water quality effects of non-Indian landowners on reservation water. She said in affidavits she wrote the reports in the middle of January 1996. Radell said in other affidavits he relied on the reports later that month in recommending the tribes get regulatory power.

But Ambutas and Dodge indicated the reports may have been prepared after the EPA decisions were made.

After the questions came to light last month, U.S. District Judge Barbara Crabb gave state lawyers the unusual power to question EPA officials.

EPA pulls plug on tribal water

■ Reversal comes amid claims that agency officials lied in federal court affidavits.

By Cary Segall
Wisconsin State Journal

The U.S. Environmental Protection Agency said Tuesday it has withdrawn decisions giving two state Indian tribes the power to set reservation water quality standards.

The EPA acted in cases involving the Lac du Flambeau Chippewa and Oneida tribes amid claims by the state and EPA whistleblowers that EPA officials lied in federal court affidavits about key documents.

"The United States is now aware that certain documents filed in (the cases) contain statements which may not be complete or fully accurate, or may have had inadvertent omissions," wrote U.S. Justice Department lawyer David Carson.

But Carson said the EPA will re-evaluate the issue and may give the tribes regulatory power again.

The EPA in January 1996 gave the tribes the right to regulate water on their reservations. The decisions affected many non-Indian landowners and could extend outside the reservations to activities that affect water on reservation land.

The decisions have been challenged in lawsuits by the state, which argued it has the right to set water quality standards for all Wisconsin waters. The Oneida decision was also opposed by Brown County, Green Bay, other northeastern Wisconsin communities and numerous landowners and business groups.

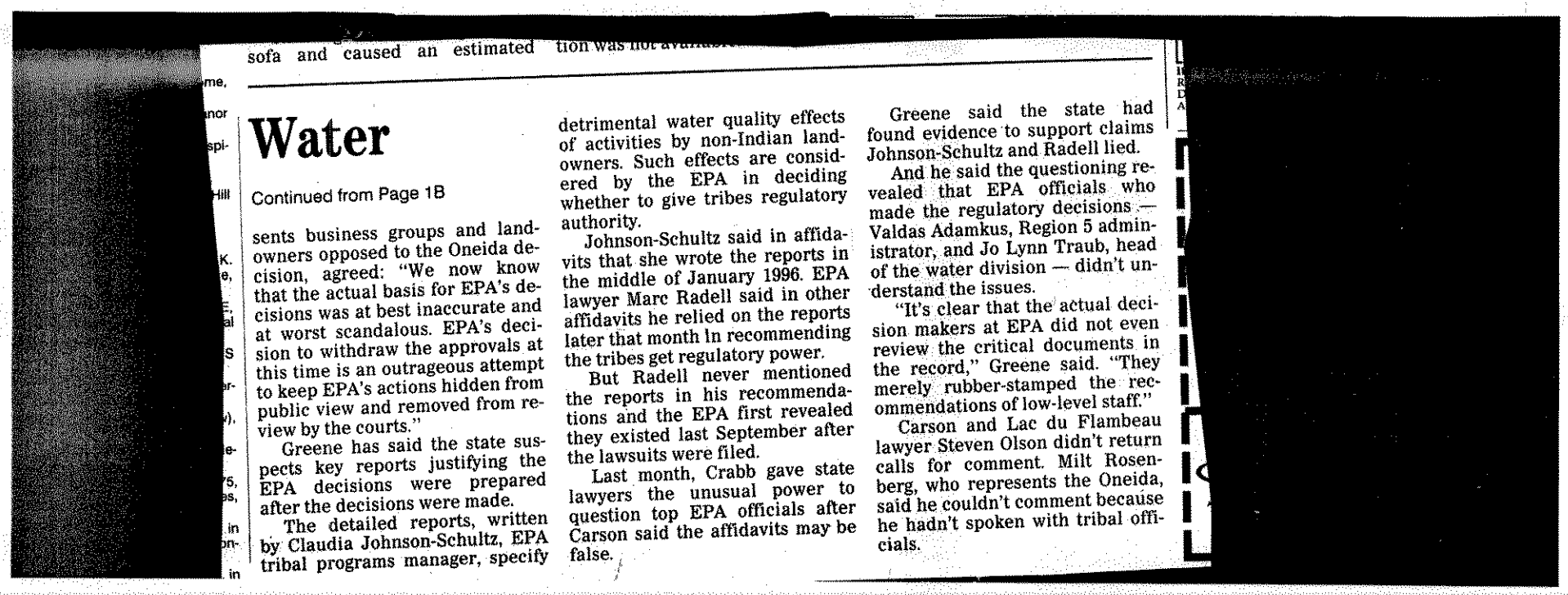
Carson asked federal judges Barbara Crabb and Charles Clevert to dismiss the lawsuits in light of the EPA action, but Assistant Attorney General John Greene said the state will oppose the request.

"The EPA is trying to short-circuit the investigation into whether it committed fraud upon the courts in these cases," Greene said. "We believe the responsible federal officials should be held fully accountable for their actions.

"Even patching up the records will not correct the legal defects in EPA's policies," he added, "so sending the decisions back to EPA to do over again is a meaningless exercise."

Madison lawyer Paul Kent, who repre-

Please see **WATER**, Page 2B



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Water

Continued from Page 1B

sents business groups and landowners opposed to the Oneida decision, agreed: "We now know that the actual basis for EPA's decisions was at best inaccurate and at worst scandalous. EPA's decision to withdraw the approvals at this time is an outrageous attempt to keep EPA's actions hidden from public view and removed from review by the courts."

Greene has said the state suspects key reports justifying the EPA decisions were prepared after the decisions were made.

The detailed reports, written by Claudia Johnson-Schultz, EPA tribal programs manager, specify detrimental water quality effects of activities by non-Indian landowners. Such effects are considered by the EPA in deciding whether to give tribes regulatory authority.

Johnson-Schultz said in affidavits that she wrote the reports in the middle of January 1996. EPA lawyer Marc Radell said in other affidavits he relied on the reports later that month In recommending the tribes get regulatory power.

But Radell never mentioned the reports in his recommendations and the EPA first revealed they existed last September after the lawsuits were filed.

Last month, Crabb gave state lawyers the unusual power to question top EPA officials after Carson said the affidavits may be false.

Greene said the state had found evidence to support claims Johnson-Schultz and Radell lied.

And he said the questioning revealed that EPA officials who made the regulatory decisions — Valdas Adamkus, Region 5 administrator, and Jo Lynn Traub, head of the water division — didn't understand the issues.

"It's clear that the actual decision makers at EPA did not even review the critical documents in the record," Greene said. "They merely rubber-stamped the recommendations of low-level staff."

Carson and Lac du Flambeau lawyer Steven Olson didn't return calls for comment. Milt Rosenberg, who represents the Oneida, said he couldn't comment because he hadn't spoken with tribal officials.

State seeks federal payback in Chippewa case

6-25-97

By Cary Segall
Wisconsin State Journal

The state Tuesday asked a judge to order the U.S. Environmental Protection Agency to pay Wisconsin $129,392 for lying about a key court document and then trying to conceal the misconduct.

Assistant Attorney General John Greene told U.S. District Judge Barbara Crabb that the EPA should pay the state's legal fees for "cooking the record" in a case involving the right of the Lac du Flambeau Chippewa to regulate reservation water.

The state uncovered evidence that showed two EPA officials lied about a report the agency claimed to have relied on in January 1996 when it gave the Indians regulatory power.

The officials, Claudia Johnson-Schultz, tribal program manager at EPA Region 5, and lawyer Marc Radell, testified that a report on the effects of non-Indian landowners on reservation water was prepared in January 1996. Restored computer files and other evidence, though, showed it was written at least four months later.

Greene recounted how other EPA officials and Justice Department lawyers tried to cover up the misconduct and revealed it last April only when an EPA whistleblower threatened to go public with information he gave EPA administrators in June 1996.

This month, Crabb dismissed the case at the EPA's request.

Greene said he and Assistant Attorney General Tom Dosch needlessly spent 808.7 hours working on the case because of the lies and coverup. He said the state should be reimbursed at a rate of $160 per hour and Radell should be ordered to personally pay part of the amount.

Greene said failure to penalize the EPA "would risk sending the wrong message to the public and would-be miscreants — namely that dishonesty might pay."

JOURNAL · SENTINEL 8-15-97

Tribe's air-quality bid examined

EPA official says Potawatomi request may cut industrial growth

Associated Press

Rhinelander — A request by Potawatomi Indians for a special clean-air district in northern Wisconsin could reduce industrial growth, a spokesman for the U.S. Environmental Protection Agency says.

A business covered by this program would have to notify the Potawatomi if located within 62 miles of reservation land, Stephen Rothblatt said.

Rothblatt, chief of the EPA's Air Programs Branch, Air and Radiation Division, met with about 100 people Wednesday to discuss the Potawatomi request for a Class I air-quality designation affecting their rural Forest County communities.

The request is aimed at preventing environmental damage from smokestack emissions that cause acid rain.

State Rep. Lorraine M. Serrati (R-Spread Eagle) questioned EPA representatives about their agency's jurisdiction.

"I oppose the redesignation process in its entirety," she said.

"The EPA is incapable of fairly resolving intergovernmental disputes under the (federal) Clean Air Act."

Ken Fish of the Menominee tribe said the Potawatomi seek "a mechanism for protection."

"We have to trust the process and EPA that they will see the prospects of this great nation upheld," he said.

"Ever since the treaty-making era, the tribes have enjoyed a government-to-U.S.-government relationship," Fish added.

"Sovereignty has been asserted, but it meets with various obstacles. This is an attempt to protect our own existence."

"This redesignation would not give tribes any new decision-making authority," Potawatomi environmental scientist Marc Podrec said.

"All this does is give the tribe a louder voice with the state and the EPA."

Judge dismisses Indian water case

EPA allowed to back away from earlier decision

By Cary Segall
Wisconsin State Journal

U.S. District Judge Barbara Crabb decided Tuesday to let the U.S. Environmental Protection Agency back away from its flawed decision in a controversial Indian water regulation case.

Crabb blasted the EPA, but said she had to dismiss the case involving the Lac du Flambeau Chippewa despite the strong objections of the state of Wisconsin.

The state sued the EPA last May after the agency gave the Chippewa the right to regulate water on their northern Wisconsin reservation.

But, since April, state lawyers have uncovered strong evidence of fraud in key reports the agency used in giving such regulatory power to the Chippewa, Oneida and Menominee tribes.

The reports detail detrimental effects of non-reservation landowners on reservation water, and EPA lawyer Marc Radell said he relied on them in January 1996 in recommending the tribes get regulatory power.

But two EPA whistleblowers, restored computer files and other evidence indicate the reports were prepared in May 1996 at the earliest.

The EPA admitted last month there were problems with its decisions and said it was withdrawing them. The agency then asked Crabb to dismiss the state's challenge, but also said it would re-evaluate the issue and might give the tribes regulatory power again.

State Assistant Attorney General John Greene had urged Crabb to decide the case. He said the case involved mainly legal issues that she could decide despite the problems with the EPA actions.

Greene also said there was no doubt the agency would again give the tribes regulatory power and it was unfair to dismiss the case after the EPA's wrongful conduct.

Crabb, though, said that after the agency withdrew its decision she had no actual case to decide. She said the Constitution barred her from issuing advisory opinions in most instances.

"As persuasive as the state's arguments are and as much as I deplore the waste of resources that the EPA's internal problems have engendered, I conclude that this case must be dismissed as moot," Crabb wrote.

The judge also said that it wasn't a foregone conclusion the EPA would grant the tribes regulatory power again.

"It is not at all clear that if the band does re-apply the agency will reach the same decision on the application," she wrote. "It is inconceivable that the debacle that brought the agency to this position will not lead to changes in the personnel and procedures within the Chicago regional office."

The Oneida case is pending before U.S. District Judge Charles Clevert in Milwaukee, while the Menominee withdrew its request to regulate reservation water.

Questions & Answers:

Air Quality Redesignation of the Yavapai-Apache Reservation

EPA prepared this "Q&A" to help members of the public understand the effects of EPA's final action approving a request by the Yavapai-Apache Tribe to redesignate their Reservation to Class I under the Clean Air Act provisions for Prevention of Significant Deterioration (PSD) of air quality. Parties seeking more information may also want to refer to the Federal Register notices providing final approval of the redesignation request and resolution of the intergovernmental dispute initiated by the State of Arizona. All of these documents are available for public inspection at the Clarkdale Public Library, on EPA Region 9's homepage on the World Wide Web (at http://www.epa.gov/region09) under Air Programs, or by contacting Jessica Gaylord, EPA Region 9, at (415) 744-1290.

General Questions about PSD Redesignations

1. What does "redesignation" mean?

The term "redesignation" arises out of the statutory provisions for the Prevention of Significant Deterioration (PSD) of Air Quality that are established in section 164 of Title I of the Clean Air Act. These provisions apply to the "clean air" areas of our nation -- those that meet federal health standards. Under the PSD provisions, all areas are designated Class I, Class II, or Class III. These class designations are indicative of the amount of air quality protection afforded to an area; a Class I designation provides the greatest degree of protection against air quality degradation. Initially Congress identified certain mandatory Class I areas. These mandatory Class I areas include all international parks; national wilderness areas and national memorial parks exceeding 5,000 acres in size; and national parks exceeding 6,000 acres in size. All other PSD or "clean air" areas were designated Class II. In addition to these mandatory Class I areas, Congress provided in section 164 of the Clean Air Act a mechanism by which States and Tribes may "redesignate" their lands provided that the State or Tribe meets certain procedural requirements. At least four reservations have already been redesignated to Class I.

2. Why is EPA redesignating this area?

EPA is redesignating the Yavapai-Apache Reservation from a Class II area to a Class I area in response to and after review of a formal request from the Yavapai-Apache Tribe. The Tribe's reservation is composed of five parcels totalling 635 acres in the Verde Valley -- all of which was the Tribe's traditional homeland before it was driven out in the late 1800s.

The Tribe provided a redesignation plan in conjunction with their request which addressed the Clean Air Act's requirements that analyses be prepared on the health, environmental, economic, social, and energy effects of the proposed redesignation. In addition, the Tribe held a public hearing on the proposed redesignation request, and submitted evidence of prior public notice as well as letters and the Tribe's response to commenters opposing the Tribe's action. Based on EPA's review, which has included over 120 days for public input, we have determined that the Tribe has met all the procedural requirements prescribed by the Act and are therefore finalizing our proposed action of April 18, 1994 (see 59 FR 18346).

3. What is the impact of the redesignation?

EPA expects that the redesignation will only have limited off-reservation impacts. For the Tribe, EPA's action provides for a more protective air quality standard applicable within the exterior boundaries of their reservation. For neighboring communities, the redesignation affects only new or modified "major stationary sources" that are already subject to the PSD regulations. In most cases, these are large industrial facilities that emit more than 250 tons per year of any of the key air pollutants regulated by EPA.

The procedure to obtain a permit will now require that such a source complete an additional component of its PSD air quality analysis. Specifically, applicants for a PSD permit will need to evaluate cumulative air quality impacts against the Class I, as well as the Class II, increment levels. The Class I increment levels are numerically lower values than for Class II. In other words, a Class I increment further limits the degree to which air quality is allowed to deteriorate. Additionally, if the Yavapai-Apache Tribe chooses to identify and develop air quality related values (such as visibility levels) for the reservation, PSD permit applicants would also need to assess the effect of their emissions on those values. We do not expect that the expanded analyses required as a result of the Class I area designation will create significant additional burden or restrictions for the PSD permit applicant. There are no other changes in the standard PSD permitting procedures as a result of the redesignation.

Effects on the General Public

4. Does this mean that people in the Verde Valley will have to get their cars smog tested?

No, people in the Verde Valley will not be required to have their cars smog tested because of the redesignation. The redesignation would only affect what EPA calls "major stationary sources"; these are generally industrial facilities, such as power plants, which generate electrical power or process heat. Motor vehicles count instead as "mobile sources." Furthermore, EPA-mandated smog check programs are not required in "clean air" areas, such as the Verde Valley.

5. Will the redesignation affect the use of woodstoves?

No, the redesignation will not create any restrictions on home woodstove use. The PSD program is designed to protect air quality deterioration resulting from emissions from "major stationary sources." Home woodstoves do not produce the type and amount of emissions regulated under the PSD program, and thus would be unaffected by the redesignation.

6. If the Yavapai-Apache Reservation is redesignated, will the dirt roads in the Verde Valley have to be paved?

No. While paving of dirt roads reduces ambient concentrations of particulate matter (i.e., dust) in the atmosphere, road paving requirements are not under the scope of the PSD regulations for "clean air" areas.

7. Will the redesignation restrict residential or small business growth in the area?

No. The primary impacts, which are minimal, will be felt only by industrial sources proposing to locate in proximity to the Yavapai-Apache Reservation. The redesignation will affect only those large industrial sources of air pollution that are already required to obtain an air quality permit under the PSD program. Home and small business owners in the Verde Valley will not be affected by the Class I designation, as has been demonstrated in other communities near Class I areas. The city of Tucson, for example, is

bounded on either side by the Saguaro National Monument, a federal Class I area, and it continues to experience healthy economic growth and development.

Potential Impacts on Industry

8. Will the redesignation affect economic growth in the Verde Valley?

Redesignation should not affect economic growth in the Verde Valley, nor cause a negative economic impact on facilities locating in the Verde Valley. The PSD program already applies to any new major source or major modification in the Verde Valley. No new permits and no new substantive requirements would apply as a result of a redesignation to Class I. The same analyses and control technology requirements apply to major stationary sources proposing to locate in any area, regardless of a PSD Class I or II designation. A change from Class II to Class I designation only affects the amount of air pollution a large industrial source can create.

9. Will the redesignation affect the emissions from the cement plant?

EPA is aware that members of the public are concerned about emissions from the cement plant. The redesignation, however, will not affect ongoing operations at the cement plant unless the cement plant chooses to modify the facility at some point in the future. The facility would then need to evaluate the potential emissions increase resulting from the proposed modification. If the change in emissions represents a significant increase, then the owner/operator of the cement plant would need to apply to the appropriate air pollution control authority (likely Arizona DEQ) for a PSD permit. The plant would then be subject to the control technology and other permit requirements which are established in state and federal regulations.

10. Will these tighter PSD requirements make it more difficult for companies to locate here?

The PSD program already applies to any new major source or major modification in the Verde Valley. No new permits and no new substantive requirements would apply as a result of a redesignation to Class I. The same analyses and control technology requirements apply to major stationary sources proposing to locate in any area, regardless of a PSD Class I or II designation. The designation only affects the degree to which air quality is allowed to deteriorate.

EPA performed a modeling exercise to assess the actual impact of a redesignation on the possibility of future construction and operation of facilities choosing to locate in the Verde Valley. Using data provided by previous PSD permit applicants, EPA modeled emissions from four "typical" facilities to predict worst-case impacts from a variety of pollutant-emitting sources. EPA concluded that proponents of a well-controlled source of air pollution would face little limitation in locating such a facility near the parcels of tribal land, while at the same time preserving ambient air quality on the reservation.

11. Does the redesignation mean that the mining companies won't be able to mine any of the undeveloped deposits in the area?

The redesignation does not disallow the possibility of future mining development. A mining company -- or any other source proposing to build or modify in the Verde Valley -- would need to follow the standard application procedures of the appropriate air pollution control agency and meet the established criteria to obtain the necessary permit. The permit applicant would need to submit information on proposed air pollution controls and provide other analyses required by the applicable regulations. In this case, final decision on the permit application would rest with the Arizona Department of Environmental

Quality.

Public Involvement and EPA Decisionmaking

12. Has the public been involved in this decision?

In fulfilling the requirements laid out for PSD redesignations, the Yavapai-Apache Tribe conducted the first public hearing on their redesignation plan on October 21, 1993. Two months later they submitted their plan as part of a formal request to EPA to redesignate their tribal lands from Class II to Class I under the PSD air quality regulations. Since that time, EPA has consistently sought out public involvement in our decisionmaking process. On April 18, 1994, EPA published a notice in the Federal Register, announcing the proposed redesignation and soliciting written comment. About a month later, EPA provided advance public notice in two local newspapers -- the Red Rock News and Verde Independent -- for the public hearing we conducted on June 22, 1994. The hearing was well attended by tribal members, other residents, and industry representatives alike. Based on a request submitted by the Town of Clarkdale, EPA extended the public comment period until August 22, 1994. This extension of the public comment period was also published in the Federal Register, on July 20, 1994. In total, EPA has provided over 120 days for public comment rather than the 30 day minimum required by law.

13. What has been the public reaction to the redesignation issue?

EPA is always interested in hearing the concerns of the community affected by our actions, and public input is valued as part of our decisionmaking process. EPA conducted a public hearing on June 22, 1994, in Clarkdale, and encouraged interested members of the public to submit written comments. At the public hearing, approximately 25 people spoke; only three parties opposed EPA's proposed redesignation. Supporters included residents from nearby communities.

In acting on the redesignation request, EPA is limited by the requirements that Congress established in the Clean Air Act. According to those requirements, we cannot deny the Yavapai-Apache's request if the Tribe has met the procedural requirements that are specified in the Act. We have tried to make it clear that public comments should focus on whether or not the Tribe has fulfilled these procedural requirements. We have considered the comments and concerns raised during the public comment period prior to making a final decision on the redesignation. EPA believes that the Tribe has met the requirements and thus will approve the Tribe's request.

14. Does opposition by the State of Arizona affect the Tribe's ability to redesignate?

Pursuant to section 164, EPA may disapprove the redesignation of an area only if the procedural requirements are not met. The same provision allows for dispute resolution if a neighboring State or Tribe disagrees with the redesignation request. The Governor of Arizona invoked this mechanism, and representatives from EPA, the State of Arizona and the Yavapai-Apache Tribe met to resolve this dispute. However, no agreement was reached. The law requires that EPA serve as the final decisionmaker in such a case.

EPA is redesignating the Yavapai-Apache Reservation, consistent with our responsibilties under the Clean Air Act, because we have found that the Tribe has met the procedural requirements for redesignation and no party has provided grounds that indicate the contrary. EPA is committed to work with the State and Tribe to foster public understanding and ensure effective implementation of the Class I designation. In addition to being available to answer any public inquiries about the Class I designation and its potential effects, EPA will gladly make technical staff and resources available to the State to resolve

any issues about effective air quality management under the Class I designation.

Go to: Index [Region 9 Air Programs Page] [Region 9 Home Page] [EPA Home Page]

Send questions and comments to gaylord.jessica@epamail.epa.gov
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Updated: October 3, 1996

URL:http://www.epa.gov/region09/air/yavapai/qna.html

Yavapai-Apache Class I Redesignation

From this page you may access documents pertaining to EPA's October 2, 1996, approval of the Yavapai-Apache Tribe's request for redesignation as a Federal Class I Area. For a more concise overview of the redesignation process and the issues that arose, you may wish to refer to EPA's Press Release for this action, and EPA's Questions and Answers (Q&A) Sheet for this action.

With passage of the 1990 federal Clean Air Act, Congress designated certain large national parks and wilderness areas as specially protected areas. This more protective status is also referred to as a Class I designation. In addition, the Clean Air Act provides for local decision making, by allowing States and Indian governing bodies to reclassify areas under their jurisdiction to accommodate the social, economic, and environmental needs and desires of the local population. Under these provisions, the Yavapai-Apache Tribe submitted to EPA a request to redesignate its Reservation as a Class I area. At least 4 Indian reservations have already been redesignated to Class I based on tribal requests.

From this page you can access a Map of Indian Tribal Lands in Arizona as well as a Map of Class I Areas in Arizona.

Below are links to the complete text of the two Federal Register Notices for this action. Each Federal Register Notice has been broken down by section for your convenience. Simply select the section that you would like to read. In addition each notice is available as a complete text file for viewing or downloading.

Notice Approving Yavapai-Apache Class I Designation

Text file of complete Federal Register Notice [66 k]

Outline of Federal Register Notice

Federal Register Notice By Section:

Notice Resolving Dispute Resolution

Text file of complete Federal Register Notice [81 k]

Outline of Federal Register Notice

Federal Register Notice By Section:

Please note: Minor corrections in rulemakings may occur during preparation for publication in the Federal Register. The document of record should be available for download via Federal Register Online in the near future. We'll update this spot with a specific reference once it is published.

Go to: [Region 9 Air Programs Page] [Region 9 Home Page] [EPA Home Page]

Send questions and comments to gaylord.jessica@epamail.epa.gov
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Updated: October 3, 1996

URL:http://www.epa.gov/region09/air/yavapai/index.html

EPA Regs.

(29) *Adverse impact on visibility* ans visibility impairment which erferes with the management, pro-tion, preservation or enjoyment of e visitor's visual experience of the deral Class I area. This determina-n must be made on a case-by-case is taking into account the geo-aphic extent, intensity, duration, quency and time of visibility im-irment, and how these factors corre-e with (1) times of visitor use of the deral Class I area, and (2) the fre-ency and timing of natural condi-ns that reduce visibility.

(30) *Volatile organic compounds OC)* is as defined in § 51.100(s) of is chapter.

(c) *Ambient air increments.* In areas signated as Class I, II or III, in-ases in pollutant concentration over e baseline concentration shall be ited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I	
ulate matter:	
TSP, annual geometric mean	5
TSP, 24-hr maximum	10
dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
gen dioxide: Annual arithmetic mean	2.5
Class II	
ulate matter:	
TSP, annual geometric mean	19
TSP, 24-hr maximum	37
dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512
gen dioxide: Annual arithmetic mean	25
Class III	
ulate matter:	
TSP, annual geometric mean	37
TSP, 24-hr maximum	75
dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700
gen dioxide: Annual arithmetic mean	50

r any period other than an annual iod, the applicable maximum allow-

able increase may be exceeded during one such period per year at any one location.

(d) *Ambient air ceilings.* No concentration of a pollutant shall exceed:

(1) The concentration permitted under the national secondary ambient air quality standard, or

(2) The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

(e) *Restrictions on area classifications.* (1) All of the following areas which were in existence on August 7, 1977, shall be Class I areas and may not be redesignated:

(i) International parks,

(ii) National wilderness areas which exceed 5,000 acres in size,

(iii) National memorial parks which exceed 5,000 acres in size, and

(iv) National parks which exceed 6,000 acres in size.

(2) Areas which were redesignated as Class I under regulations promulgated before August 7, 1977, shall remain Class I, but may be redesignated as provided in this section.

(3) Any other area, unless otherwise specified in the legislation creating such an area, is initially designated Class II, but may be redesignated as provided in this section.

(4) The following areas may be redesignated only as Class I or II:

(i) An area which as of August 7, 1977, exceeded 10,000 acres in size and was a national monument, a national primitive area, a national preserve, a national recreational area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore; and

(ii) A national park or national wilderness area established after August 7, 1977, which exceeds 10,000 acres in size.

(f) *Exclusions from increment consumption.* (1) Upon written request of the governor, made after notice and opportunity for at least one public hearing to be held in accordance with procedures established in 40 CFR 51.102, the Administrator shall exclude the following concentrations in determining compliance with a maximum allowable increase:

(i) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(ii) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(iii) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(iv) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(v) Concentrations attributable to the temporary increase in emissions of sulfur dioxide, particulate matter, or nitrogen oxides from stationary sources which are affected by plan revisions approved by the Administrator as meeting the criteria specified in paragraph (f)(4) of this section.

(2) No exclusion of such concentrations shall apply more than five years after the effective date of the order to which paragraph (f)(1)(i) of this section, refers or the plan to which paragraph (f)(1)(ii) of this section, refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(3) No exclusion under paragraph (f) of this section shall occur later than 9 months after August 7, 1980, unless a State Implementation Plan revision meeting the requirements of 40 CFR 51.166 has been submitted to the Administrator.

(4) For purposes of excluding concentrations pursuant to paragraph (f)(1)(v) of this section, the proposed plan revision shall:

(i) Specify the time over which the temporary emissions increase of sulfur dioxide, particulate matter, or nitrogen oxides would occur. Such time is not to exceed 2 years in duration unless a longer time is approved by the Administrator;

(ii) Specify that the time period for excluding certain contributions in accordance with paragraph (f)(4)(i) of this section, is not renewable;

(iii) Allow no emissions increase from a stationary source which would:

(*a*) Impact a Class I area or an area where an applicable increment is known to be violated; or

(*b*) Cause or contribute to the violation of a national ambient air quality standard;

(iv) Require limitations to be in effect at the end of the time period specified in accordance with paragraph (f)(4)(i) of this section, which would ensure that the emissions levels from stationary sources affected by the plan revision would not exceed those levels occurring from such sources before the plan revision was approved.

(g) *Redesignation.* (1) All areas (except as otherwise provided under paragraph (e) of this section) are designated Class II as of December 5, 1974. Redesignation (except as otherwise precluded by paragraph (e) of this section) may be proposed by the respective States or Indian Governing Bodies, as provided below, subject to approval by the Administrator as a revision to the applicable State implementation plan.

(2) The State may submit to the Administrator a proposal to redesignate areas of the State Class I or Class II provided that:

(i) At least one public hearing has been held in accordance with procedures established in § 51.102 of this chapter;

(ii) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation were notified at least 30 days prior to the public hearing;

(iii) A discussion of the reasons for the proposed redesignation, including

satisfactory description and analysis of the health, environmental, economic, social and energy effects of the proposed redesignation, was prepared and made available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contained appropriate notification of the availability of such discussion;

(iv) Prior to the issuance of notice respecting the redesignation of an area that includes any Federal lands, the State has provided written notice to the appropriate Federal Land Manager and afforded adequate opportunity (not in excess of 60 days) to confer with the State respecting the redesignation and to submit written comments and recommendations. In redesignating any area with respect to which any Federal Land Manager had submitted written comments and recommendations, the State shall have published a list of any inconsistency between such redesignation and such comments and recommendations (together with the reasons for making such redesignation against the recommendation of the Federal Land Manager); and

(v) The State has proposed the redesignation after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.

(3) Any area other than an area to which paragraph (e) of this section refers may be redesignated as Class III if—

(i) The redesignation would meet the requirements of paragraph (g)(2) of this section;

(ii) The redesignation, except any established by an Indian Governing Body, has been specifically approved by the Governor of the State, after consultation with the appropriate committees of the legislature, if it is in session, or with the leadership of the legislature, if it is not in session (unless State law provides that the redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area to be redesignated enact legislation or pass resolutions concurring in the redesignation;

(iii) The redesignation would not cause, or contribute to, a concentration of any air pollutant which would exceed any maximum allowable increase permitted under the classification of any other area or any national ambient air quality standard; and

(iv) Any permit application for any major stationary source or major modification, subject to review under paragraph (i) of this section, which could receive a permit under this section only if the area in question were redesignated as Class III, and any material submitted as part of that application, were available insofar as was practicable for public inspection prior to any public hearing on redesignation of the area as Class III.

(4) Lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III: *Provided,* That:

(i) The Indian Governing Body has followed procedures equivalent to those required of a State under paragraphs (g)(2), (g)(3)(iii), and (g)(3)(iv) of this section; and

(ii) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located and which border the Indian Reservation.

(5) The Administrator shall disapprove, within 90 days of submission, a proposed redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this paragraph or is inconsistent with paragraph (e) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(6) If the Administrator disapproves any proposed redesignation, the State or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator.

(h) *Stack heights.* (1) The degree of emission limitation required for control of any air pollutant under this section shall not be affected in any manner by—

(i) So much of the stack height of any source as exceeds good engineering practice, or

(ii) Any other dispersion technique.

(2) Paragraph (h)(1) of this section shall not apply with respect to stack heights in existence before December 31, 1970, or to dispersion techniques implemented before then.

(i) *Review of major stationary sources and major modifications—Source applicability and exemptions.* (1) No stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. The Administrator has authority to issue any such permit.

(2) The requirements of paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section otherwise provides.

(3) The requirements of paragraphs (j) through (r) of this section apply only to any major stationary source or major modification that would be constructed in an area designated as attainment or unclassifiable under section 107(d)(1)(D) or (E) of the Act.

(4) The requirements of paragraphs (j) through (r) of this section shall not apply to a particular major stationary source or major modification, if:

(i) Construction commenced on the source or modification before August 7, 1977. The regulations at 40 CFR 52.21 as in effect before August 7, 1977, shall govern the review and permitting of any such source or modification; or

(ii) The source or modification was subject to the review requirements of 40 CFR 52.21(d)(1) as in effect before March 1, 1978, and the owner or operator:

(*a*) Obtained under 40 CFR 52.21 a final approval effective before March 1, 1978;

(*b*) Commenced construction before March 19, 1979; and

(*c*) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(iii) The source or modification was subject to 40 CFR 52.21 as in effect before March 1, 1978, and the review of an application for approval for the stationary source or modification under 40 CFR 52.21 would have been completed by March 1, 1978, but for an extension of the public comment period pursuant to a request for such an extension. In such a case, the application shall continue to be processed, and granted or denied, under 40 CFR 52.21 as in effect prior to March 1, 1978; or

(iv) The source or modification was not subject to 40 CFR 52.21 as in effect before March 1, 1978, and the owner or operator:

(*a*) Obtained all final Federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before March 1, 1978;

(*b*) Commenced construction before March 19, 1979; and

(*c*) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(v) The source or modification was not subject to 40 CFR 52.21 as in effect on June 19, 1978 or under the partial stay of regulations published on February 5, 1980 (45 FR 7800), and the owner or operator:

(*a*) Obtained all final Federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

(*b*) Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

(*c*) Did not discontinuue construction for a period of 18 months or more and completed construction within a reasonable time; or

(vi) The source or modification would be a nonprofit health or nonprofit educational institution, or a major modification would occur at such an institution, and the governor of the state in which the source or modification would be located requests

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	*Maximum allowable increase (in micrograms per cubic meter)*
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	*Maximum allowable increase (in micrograms per cubic meter)*
Particulate matter:	
Annual geometric mean	37
Twenty-four-hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to—

(A) the concentration permitted under the national secondary ambient air quality standard, or

(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

(c)(1) In the case of any State which has a plan approved by the Administrator for purposes of carrying out this part, the Governor of such State may, after notice and opportunity for public hearing, issue orders or promulgate rules providing that for purposes of determining compliance with the maximum allowable increases in ambient concentrations of an air pollutant, the following concentrations of such pollutant shall not be taken into account:

(A) concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, or natural gas, or both, by reason of an order which is in effect under the provisions of sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any subsequent legislation which supersedes such provisions)

over the emissions from such sources before the effective date of such order.

(B) the concentrations of such pollutant attributable to the increase in emissions from stationary sources which have converted from using natural gas by reason of a natural gas curtailment pursuant to a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan,

(C) concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities, and

(D) the increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration determined in accordance with section 169(4).

(2) No action taken with respect to a source under paragraph 1(A) or (1)(B) shall apply more than five years after the effective date of the order referred to in paragraph (1)(A) or the plan referred to in paragraph (1)(B), whichever is applicable. If both such order and plan are applicable, no such action shall apply more than five years after the later of such effective dates.

(3) No action under this subsection shall take effect unless the Governor submits the order or rule providing for such exclusion to the Administrator and the Administrator determines that such order or rule is in compliance with the provisions of this subsection.

[¶ 2164]

Sec. 164. Area Redesignation

(a) Except as otherwise provided under subsection (c), a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:

(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

(2) a national park or national wilderness area established after the date of enactment of this Act which exceeds ten thousand acres in size.

The extent of the areas referred to in paragraph (1) and (2) shall conform to any changes in the boundaries of such areas which have occurred subsequent to the date of the enactment of the Clean Air Act Amendments of 1977, or which may occur subsequent to the date of the enactment of the Clean Air Act Amendments of 1990. Any area (other than an area referred to in paragraph

) or (2) or an area established as class I under the first sentence of section 2(a)) may be redesignated by the State as class III if—

(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;

(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(b)(1)(A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and analysis of such effects shall be reviewed and examined by the redesignating authorities.

(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subsection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

(C) The Administrator shall promulgate regulations not later than six months after date of enactment of this part, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which

may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 162(a) or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e).

(d) The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within supporting analysis, to the Congress and the affected States within one year after enactment of this section. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or 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 governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

[¶ 2165]

Sec. 165. PRECONSTRUCTION REQUIREMENTS

(a) No major emitting facility on which construction is commenced after the date of the enactment of this part may be constructed in any area to which this part applies unless—

Marc - 4/30

Re redesignation of Indian reservations -

A little reading material:

(A) is the relevant text of the Clean Air Act.

(B) are EPA regulations. You will see, in the text surrounded by a yellow box, that EPA sees itself as almost a "rubber stamp," if the procedures are followed. (You were right about this.)

(C) is an EPA document on an Arizona redesignation that is currently in court. It generally helps explain what's involved. They also state, in ¶ 13, how they see their role.

(D) is the other viewpoint. Pages 2 and 3 show how Arizona views the Act and EPA's role.

Ultimately, the Arizona case may result in a court decision that will be helpful in the Potawatomi redesignation, at least as provide[illegible]

Feel free to call me [illegible]

TOMMY G. THOMPSON

Governor
State of Wisconsin

February 6, 1997

Ms. Mary Nichols
Assistant Administrator for Air and Radiation
U.S. Environmental Protection Agency
Washington, D.C. 20460

Dear Ms. Nichols:

Thank you for your December 13, 1996 response to our letter regarding the Forest County Potawatomi Class I redesignation under the federal Clean Air Act. We were pleased to note that you will contact us shortly concerning our request for a meeting with the Administrator and anxiously await an opportunity to discuss Tribal Class I issues with her. However, we continue to request the Environmental Protection Agency (EPA) to delay further action on the Potawatomi petition, including the public hearings, until after our meeting with the Administrator.

In your letter, you state that it is not appropriate to delay a final decision on the Potawatomi redesignation until after the rule on permit review procedures is completed. Although the decision by the EPA to advance notice proposed rules to address the roles and responsibilities for issuing permits for major sources located near a Tribal Class I area is a good first step, the rulemaking will not address all of our concerns related to Tribal Class I redesignation. The EPA must promulgate adequate rules governing all aspects of Class I redesignation before proceeding with a final decision on the Potawatomi or any other Tribal Class I requests.

In regard to dispute resolution, we continue to oppose the redesignation under section 164(e) of the Clean Air Act and have not abandoned or conceded our interest to participate in the process of negotiations. We continue to believe it is not possible to resolve the dispute until the EPA formally establishes the dispute resolution process.

We look forward to hearing from you regarding these matters.

Sincerely,

TOMMY G. THOMPSON
Governor of Wisconsin

JOHN ENGLER
Governor of Michigan

cc: Ms. Carol Browner - USEPA Administrator

Room 115 East, State Capitol, P.O. Box 7863, Madison, Wisconsin 53707 • (608) 266-1212 • FAX (608) 267-8983

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Tommy G. Thompson, Governor
George E. Meyer, Secretary

PO Box 7921
101 South Webster Street
Madison, Wisconsin 53707-7921
TELEPHONE 608-266-2621
FAX 608-267-3579
TDD 608-267-6897

April 30, 1997

EPA Air Docket (Mail Code 6102)
Attention: Docket Number A-93-51
Room M-1500
Waterside Mall
401 M Street SW
Washington, DC 20560

SUBJECT: Comments - Federal Operating Permits Program (Part 71)

Dear EPA Air Docket:

On March 21, 1997, the Environmental Protection Agency proposed changes to existing Part 71 rules that would extend federal implementation of the Title V permit program to include all areas of "Indian country" including off-reservation tribal lands that have not been formally recognized as part of an existing reservation. The proposed changes also eliminate the need for Tribes to make a jurisdictional showing over tribal lands and incorporate the term "Indian country" to replace "Tribal areas" in the context of federal program implementation. The State of Wisconsin does not agree with the proposed changes to the Part 71 Title V program and is submitting the following comments on use of the term "Indian country", elimination of tribal jurisdictional showing, EPA's definition of "reservation", disputes between tribes and states, federal authority, and preemption.

Indian Country

In an earlier 1995 Part 71 proposal, EPA defined the term "Tribal area" to delineate federal jurisdiction of the Title V program. The final Part 71 rule published in July 1996, however, did not establish boundaries of the program pending resolution of jurisdictional issues between tribes and states that were raised in response to the proposed 1994 Tribal authority rule (Tribes as States). The EPA now believes the 1995 Part 71 proposal's use of the term "Tribal area" for defining federal jurisdiction of the Title V program is inappropriate. The agency is proposing to replace "Tribal area" with the term "Indian country" because it would be more consistent with other EPA environmental regulations.

The State of Wisconsin believes it is not appropriate at this time for EPA to propose federal jurisdiction of the Title V program to all lands in "Indian country" (as defined by EPA in 18 U.S.C. 1151) because jurisdictional issues between tribes and states raised under the proposed Tribal authority rule still have not been resolved. Extending federal implementation to "Indian country" without first resolving the underlying jurisdictional issues of the Tribal authority rule will cause confusion and delays to affected sources in obtaining Title V permits from the proper authority. Federal implementation of the Title V program for "Tribal lands" should not be extended to "Indian country" but remain limited to "Tribal area" as defined in the original 1995 Part 71 proposal.

Jurisdictional Showing

The EPA is proposing that tribes not be required to show jurisdiction over tribal lands (or "Indian country") including off-reservation lands, for the purpose of federal implementation of the Title V program. EPA believes Congress preferred that implementation of the Clean Air Act on tribal lands be carried out by either EPA or the Tribes, and concludes there is no reason tribes should be burdened with making a jurisdictional showing prior to EPA administering a federal program.

The State of Wisconsin does not agree with EPA's interpretation of the Clean Air Act that Congress preferred EPA or the Tribes to automatically implement provisions of the Act on all tribal lands. The state feels that in certain cases it has jurisdiction over tribal lands and that EPA's proposal does not recognize the complications of Indian land ownership and completely ignores state authority. There are indeed many classifications of tribal lands including purchased trust, purchased restricted, allotted and fee lands. Some tribal lands have multiple ownership interests (called fractionated or undivided heirship interest) consisting of Indians and non-Indian heirs. Section 301(d)(2)(B) of the Act when referring to authorization for EPA to treat a tribe in the same manner as a state for the regulation of air resources, includes the language "...or other areas within the tribe's jurisdiction." This clearly implies that tribes must first make a showing of tribal jurisdiction, especially for lands not within the exterior boundaries of a reservation, before implementation of federal authority under the Clean Air Act. EPA even states on page 13750 of the federal register that there are areas of "Indian country" where a state has been able to demonstrate jurisdiction. Therefore, tribes should continue to be required to show jurisdiction over all tribal lands before federal implementation of the Title V program.

In addition, the State of Wisconsin does not agree nor concede that adoption of the term "Indian country" automatically extends federal jurisdiction to non-tribal fee lands within the exterior boundaries of a reservation. The State believes that for purposes of implementing its Air Management Program, it may have jurisdiction over these non-tribal areas. This contention is supported by case law. (See, *Montana v. United States*, 450 U.S. 544 (1891), Tribes generally lack authority to regulate non-member conduct on fee lands within a reservation; *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), Tribes have no authority to regulate the use of fee land through Tribal ordinances or actions of Tribal courts.) The generally recognized principal governing jurisdiction within an Indian reservation is that a state may assert regulatory authority over non-tribal members (or non-tribal entity) located on non-tribal lands. When the situation involves a tribal member on tribal land, state jurisdiction may depend on whether the on-reservation activity has an off-reservation impact. Therefore, federal (or tribal) jurisdiction over Indian reservation lands cannot be automatically assumed and must be determined on a case-by-case basis.

EPA's Definition Of Reservation

The EPA has expanded the term "reservation" to incorporate trust land that has been validly set apart for use by a tribe, even though that land has not been formally designated as a reservation. EPA cites recent Supreme Court case law to justify its definition of "reservation".

The State of Wisconsin does not agree with EPA's definition of the term "reservation". First of all, the case law cited by EPA (*Oklahoma Tax Commission v. Citizen Band Potawatomi Indian tribe of Oklahoma*, 111 S.Ct.905 (1991)), is a tribal tax law case which held that land in trust for the benefit of the Tribe qualified as a reservation for Tribal immunity purposes from state tax laws. Moreover, this case actually supports State jurisdiction in certain situations because it also holds that a state may collect taxes on the sale of goods on land held in trust when sales are made to non-tribal members. Although off-reservation trust land may be considered the same as

"reservation" land in some cases, a state may continue to have jurisdiction over certain activities (including those related to provisions of the Clean Air Act) on that land.

Second, the Bureau of Indian Affairs (BIA) has established a policy that for off-reservation acquisition requests, the review of the request (to receive trust status) is determined on a case-by-case bases. However, not all lands that receive trust status are proclaimed as "reservation" land through publication in the federal register by BIA. In general, the criteria used for review includes distance to the existing reservation and the purpose for which the land will be used. Clearly, the BIA makes a distinction between those lands that receive trust status and become part of the existing reservation, and those that are put in trust but do not become part of the existing reservation. EPA should make the same distinction in defining "reservation" land for purposes of the Clean Air Act.

Disputes

If there is a dispute as to whether a particular area is "Indian country", EPA proposes that a Tribe or State government submit sufficient information to the appropriate Regional Administrator to demonstrate to EPA's satisfaction that there is a dispute. Until such time that the dispute is satisfactorily resolved, EPA proposes that it will administer the Title V program in the disputed area.

The State of Wisconsin does not agree with EPA's proposed approach with regard to disputes relating to "Indian country". In all cases the state would be forced to make a jurisdictional showing over "Indian country" lands to be granted state implementation of the Title V program, whereas a tribe would simply need to demonstrate there is a dispute in order to initiate federal implementation on such lands. The State refers back to the 1995 Part 71 proposed rules and section 301(d)(2)(B) of the Clean Air Act that require tribes not states, to make a jurisdictional showing over tribal lands for federal implementation of the Title V program. In addition, the State disagrees with EPA's proposed approach because the proposed rule does not specify the guidelines the agency will use to review and settle jurisdictional disputes. Also, because of EPA's strong trust responsibility toward Indian tribes, the state feels that EPA may not be able to act as an impartial judge in resolving disputes between tribes and states.

Federal Authority

On page 13750, the proposed rule states that EPA authority to enact the regulation is premised on situations where, "a State fails to adopt a program, adopts an inadequate program, or fails to adequately implement a required program." None of these situations are the case in Wisconsin. In fact, EPA has delegated program approval for off-reservation sources to the State of Wisconsin for its operating permits program and at no time, has EPA ever questioned the effectiveness of the Wisconsin program under Title V of the Clean Air Act (See Final Interim Approval of the Wisconsin Operating Permits Program, 60 Federal Register 12128). Wisconsin's operating permits program is available (but for EPA's territorial limitation on program approval) to regulate non-tribal sources located within the exterior boundaries of an Indian reservation. There has been no failure on the part of the State of Wisconsin with regard to its operating permits program.

In addition, there are off-reservation lands in Wisconsin which may qualify as "Indian country" for which EPA has approved Wisconsin's operating permits program. Unless EPA can show that Wisconsin's program is inadequate (unlikely, given EPA's prior approval), the proposed rule revisions should not be applicable to these off-reservation lands.

Preemption

The purpose of the Clean Air Act ("to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;" section 101(b)(1) of the Act) is cited on p. 13750 of the proposed rule. It would be ironic if instead of providing more protection of the air quality on Indian reservations, the rule actually results in less protection. At present, Wisconsin regulates minor sources operated by non-tribal entities on all lands within the state including Indian reservations (See e.g. s. 285.60 Wis.Stats.). There are no federal regulations covering these minor sources. With the enactment of the proposed rule, it is possible that non-tribal sources located on Indian reservations will argue that the federal government has created a comprehensive regulatory scheme so as to preempt state jurisdiction on Indian reservations (See e.g. *New Mexico v. Mescalaro Apache Tribe*, 462 U.S.324(1983)). While the State anticipates successfully defending its minor source program against such claims, the resulting litigation will be costly and time consuming. To avoid this situation and preclude the downgrading of air quality on Indian reservations, the State of Wisconsin requests that EPA include language in the rule that the proposed revisions to Part 71 (Title V program) are not intended to preempt state regulation of non-tribal minor sources located in "Indian country".

Thank you for the opportunity to provide comments on the proposed Part 71 rule revisions. If you have any questions regarding the comments contained in this letter, please contact Marty Burkholder of my staff at 608/264-8855.

Sincerely,

George E. Meyer

George E. Meyer, Secretary
Wisconsin Department of Natural Resources

CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: June 5, 1997

TO: Assembly Committee On Environment

FROM: Marty Burkholder - DNR Air Management MB

SUBJECT: Tribal Environmental Issues - Air Management Program

Per Representative Seratti's request, I am providing the committee with written background information on Class I redesignation and other current tribal environmental issues involving the air management program. If you have any questions or need further information please contact me at 608-264-8855.

cc: Joe Brusca - AM/7

CORRESPONDENCE/MEMORANDUM — State of Wisconsin

DATE: April 8, 1997

TO: Pam Christenson - DOD (Clean Air Act Small Business Assistance Committee)

FROM: Marty Burkholder - DNR Air Management Marty

SUBJECT: Tribal Environmental Issues - Air Management

The purpose of this memo is to identify some of the issues related to federal programs which ultimately affect both tribal and state management of air resources in Wisconsin. The issues included here relate to the Prevention of Significant Deterioration (PSD) program, Tribes as States rule under the Clean Air Act, and air permitting authority on Indian Reservations, and Class I redesignation. Although the Department strives for a cooperative relationship with all units of government including Indian Tribes, issues often result because of deficiencies in the various federal programs. Hopefully this memo will provide useful information to the your Small Business Assistance Committee. If you have any comments or questions, please contact me at 608/264-8855.

* **Prevention of Significant Deterioration (PSD) - Proposed Revisions** Last year, EPA proposed revisions to 40 CFR Parts 51 and 52 rules for the Prevention of Significant Deterioration (PSD) program under the CAA, including Class I areas. The air management program reviewed the proposed changes and provided written comments to EPA in December 1997. The purpose of the revisions are to reduce costs and regulatory burdens of permit applicants while maintaining air quality standards and goals. The department commented that EPA exerted a comprehensive effort to address various concerns of permit applicants, permitting authorities and Federal Land Managers for Federal Class I areas, but did not adequately address potential concerns of non-Federal Class I areas including Indian reservations.

* **Tribes as States Rule** On August 25, 1994, EPA proposed rules, as required under the CAA, which would provide tribes the authority to implement CAA programs in essentially the same manner as states. The air management program submitted comments on the proposed rule through STAPPA/ALAPCO, expressing concern about the (1) inequities in the current proposal and potential for unintended adverse impacts to public health and the environment, (2) lack of definition of the roles and responsibilities of state and local agencies in the rulemaking, and (3) threat to funding of existing state and local programs. Verbal information from EPA Region V indicates that a remaining issue involves tribal sovereignty. It is unknown when the rule will receive final notice in the federal register.

* **Permitting Authority On Indian Reservations** There is some question as to which government unit (state or federal) has authority to issue air permits for sources proposing to locate on Indian reservations. This has caused some concern not only for facilities seeking

permits but also for the department in its role of managing the resources of the state. Part of the problem is that there are different classifications of reservation land including most notably, tribal trust land (owned by tribe and put into trust status with federal government) and non-tribal fee land (privately owned by non-Indians). Adding to the problem is that EPA's permit program does not regulate as many sources as the state program. For example, EPA's permit program does not include minor sources or mobile sources. The State of Wisconsin has always maintained that it has authority to permit all non-tribal facilities proposing to locate on reservation fee land especially if there may be off-reservation impacts. The state's authority is considerably less clear for tribal sources locating on reservation trust land.

Earlier this year, the Department issued a permit to Integrated Products, a non-tribal facility located within the Oneida Reservation (City of DePere) on non-tribal owned fee land. After the company expressed some concern with from which authority it should receive a permit, the EPA proposed that two identical permits be issued, one from the state and one from the federal government. However, after review of the permit application, the EPA determined the facility was a minor source and because the agency does not have a minor source program, only a state permit was issued.

ONE (Oneida Nation Electronics)/Plexus is a facility located on Oneida Reservation land very near the Integrated Products facility. The ONE/Plexus facility appears to be on trust land or at least land owned by the Oneida Tribe. The project is a joint venture between a non-tribal entity (Plexus) and a tribal entity (ONE). In October of last year, EPA stated that the facility is a minor source under PSD and because EPA does not have a minor source program, it would not be issuing an air permit. The Oneida planning department has verbally stated that ONE would not seek a state permit.

Because of the minimal amount of information contained in the ONE permit application, the department requested additional information be submitted and the agency reevaluate its decision to not issue a permit. Some of the information has been submitted by ONE and the department is waiting for a final decision from EPA. Preliminary review by the department indicates the facility is a minor source under PSD and Part 71 permit programs. However, without a permit, ONE's operating conditions (and ultimately air emissions) contained in the resubmitted information would be unenforceable. The department is considering options to resolve this issue with ONE not only to protect public health, but also to maintain that all facilities located in the State operate under the same emission limitations.

*** Class I Redesignation**

Background - Under the Clean Air Act, an Indian governing body has the authority to request that the Environmental Protection Agency (EPA) redesignate lands within the exterior boundaries of an Indian reservation to a different class. The procedures a tribe must follow include consulting with the state; preparing reasons for the redesignation; notifying other states, Indian governing bodies, and federal land managers; holding a public hearing; and submitting a proposal to EPA for its review and approval. Almost all of Wisconsin is presently classified as Class II. A Class II designation allows a moderate decline in air quality, but never to the extent that public health is threatened. A Class I designation would mean that little or no degradation in the existing air quality would be allowed to occur.

Rainbow Lake Wilderness Area in Bayfield County is Wisconsin's only Class I site. A total of 162 Class I areas are located in the U.S., including five Indian reservations located in western states (three in Montana, one in Washington, and one approved just last year in Arizona). All of the non-tribal Class I areas are considered mandatory federal Class I areas because these areas met certain defined criteria such as size (minimum 5000 acres) and uniqueness at the time of the time the CAA was amended in 1977.

The intent of the PSD program is to protect pristine and scenic areas of the country by limiting the amount of additional pollution from major sources in an area over a baseline concentration. The baseline concentration is defined as the existing air quality at the time of the first major source applies for a PSD permit. A major source is defined as 100 tons of emissions a year from any of 28 types of listed facilities, or 250 tons per year from other facility types. The program includes an increment (maximum allowed air quality deterioration) system for three pollutants: SO2, NO2, and Particulate Matter. Along with the increment system, Class I areas also include Air Quality Related Values (AQRVs) which are intended to further protect air quality. EPA has established a policy that any PSD source proposing to locate within 100 kilometers (62 miles) of a Class I area is required to determine if the source will have an effect on the Class I area.

Potawatomi Request - The USEPA proposed approval of Class I redesignation of the Potawatomi reservation in June 1995. Also in June 1995, Governor Thompson and Michigan Governor Engler requested EPA to enter into dispute negotiations under Section 164(e) of the Clean Air Act (CAA). After EPA announced their intent to proceed with negotiations, the Governors requested EPA to suspend dispute resolution until (1) clarifying federal regulations have been developed, and (2) the dispute resolution process is outlined. EPA responded that CAA rules are adequate and allow flexibility regarding dispute resolution.

In October 1995, the Governors requested a meeting with EPA Administrator Browner. This meeting has not yet occurred nor has it been scheduled. A December 13, 1996 EPA letter to the Governors states that EPA will advance notice proposed rules to address the roles and responsibilities for issuing permits to sources affecting Tribal Class I areas, and at the same time, proceed with the Potawatomi redesignation. Verbal information from Region V indicates that in the near future EPA will published in the federal register notice for the public hearing(s) on the Potawatomi redesignation (30 day notification), and the advance notice of proposed rulemaking.

The air management program received a copy of the Bad River Tribe's Class I support document. However, the Tribe has verbally informed the department that it is now conducting a cost-benefit analysis on redesignation. It is expected that the department will be notified of the Tribe's intent continue to seek Class I status for reservation lands. Other tribes such as Menominee, Red Cliff, Mole Lake and Stockbridge-Munsee have indicated interest in requesting Class I redesignation.

Yavapai-Apache Reservation - In October 1996, EPA approved Class I redesignation of the Yavapai-Apache Reservation in Arizona. The Yavapai Reservation consists of five non-contiguous parcels of land totaling 635 acres. The parcels range in size from 4 to 458 acres and are located in a somewhat developing suburban area of the Verde Valley that could not

be considered unique or pristine. EPA has formally stated in the federal register notice of final approval of the Yavapai-Apache Reservation, that the agency can disapprove a Class I request only if the procedural requirements are not met. The agency has stated that tribes have broad discretion in determining what areas within a reservation they want redesignated to Class I. Therefore, the agency did not consider size, location, uniqueness, public comment or any other factor in its review. In addition, EPA stated that the tribal support document (procedural requirement) which is to include a satisfactory description and analysis of the health, environmental, economic, social and energy effects of the proposed redesignation, has a relatively "low threshold" for review. In other words the tribe can submit for approval any level of quality in the report as long as there is some type of discussion of the effects of redesignation.

State Concerns - See attached October 25, 1996 memo to Jon Heinrich.

cc: Mike Scott - LC/5

CORRESPONDENCE/MEMORANDUM — State of Wisconsin

DATE: May 16, 1996

TO: George Meyer - AD/5

FROM: Marty Burkholder - AM/7 Marty Burkholder

SUBJECT: Tribal Class I - Implications Of PSD

This memo is a summary of the PSD (Prevention of Significant Deterioration) program under the federal Clean Air Act as it relates to tribal Class I areas. Please contact me at (4-8855) if you have any questions.

Background The intent of the PSD program is to protect pristine and scenic areas of the country by limiting the amount of additional pollution in an area over a baseline concentration. The baseline concentration is defined as the air quality that exists at the time when a new major source applies for a PSD permit. To limit the amount of additional pollution, the program includes an increment (maximum allowed air quality deterioration) system for three pollutants: **Sulfur Dioxide (SO2)**, **Particulate Matter (PM)**, and **Nitrogen Dioxide (NO2)**.

Facilities required to obtain a PSD permit include new major sources and new major modifications to existing facilities, both of which are defined as 100 tons of emissions per year from any of 28 listed types of industrial facilities, or 250 tons per year of emissions from other facility types. Examples of the types of major sources that may be major sources include a 200-megawatt coal fired power plant, or a kraft paper mill with pulp production of 500 tons per day. Major sources are the only ones that are initially affected by the PSD program. However, once the baseline for a particular pollutant (SO2, PM, NO2) has been set for an area (the department sets baselines by county) all new and existing sources (major and minor) consume increment, or in other words, contribute to the existing air quality, and are affected by PSD rules. At the present time, baselines for the three pollutants have not been set for Forest County.

Increment System The increment system is incorporated into three PSD classes which differ in the amount of growth that will be allowed before significant air quality deterioration would be deemed to occur. The three classes include:

* **Class I**
  Includes the smallest increments and thus only a small degree of air quality deterioration is allowed.

* **Class II**
  Allows for normal well-managed growth.

* **Class III**
  Includes the largest increments and therefore allows for the greatest amount of industrial growth.

The current classification of the reservation and almost all of Wisconsin is Class II. A Class II designation allows a moderate decline in air quality, but never to the extent that public health is threatened. Wisconsin has only one Class I area which is Rainbow Lake National Wilderness Area located in the Chequamegon National Forest, Bayfield County. There are no Class III areas in the country.

Air Quality Related Values Along with increments for the three pollutants (SO2, PM, NO2), Class I areas also include Air Quality Related Values (AQRVs) which are intended to provide further protection of air quality. AQRVs are expressed in broad terms and include those special attributes of a Class I area that may be affected by air quality deterioration even though an increment has not been exceeded. They are established by the tribe for the reservation and may include such attributes as visibility, acid rain deposition or mercury deposition. The concept of AQRVs is not well defined in the Clean Air Act.

Class I Review EPA has established a policy that any PSD source proposing to locate within 100 kilometers (62 miles) of a Class I area is required to determine if the source will have an effect on the SO2, PM or NO2 increments. The 100 kilometer policy extends across state boundaries which is why Michigan is involved in the Potawatomi Class I proposal. The analysis used to determine the effect on a Class I area is conducted using air dispersion modeling. In addition, the proposed source is required to provide any information needed to evaluate established air quality related values. The department is responsible for issuing PSD permits and must consider the tribe's assertion of any effects on AQRVs established for the reservation. Disputes between the tribe and the state regarding issuance of a permit would be resolved by the Environmental Protection Agency.

cc: Don Theiler - AM/7

CORRESPONDENCE/MEMORANDUM — State of Wisconsin

DATE: October 25, 1996

TO: Jon Heinrich - AM/7

FROM: Marty Burkholder - AM/7 MB

SUBJECT: Class I Redesignation Issues

The following is a list of issues regarding redesignation of Indian reservation land to Class I status under the Clean Air Act Prevention of Significant Deterioration (PSD) program.

Air Quality Related Values

* Definition - The definition of Air Quality Related Values (AQRVs) is extremely vague and difficult to understand. EPA is defining AQRVs as "anything a tribe may want to protect". Under the proposed revised PSD rules (7/23/96) this may include any scenic, cultural, physical, biological, ecological or recreational resource on the reservation. The definition of AQRV should include that the resource be unique and specific for which the land has been established as a Class I area.

* Establishment - There are no criteria or procedures for establishing AQRVs. They may be established by a tribe simply by naming the resource they want to protect at any time after receiving a Class I redesignation . Air Quality Related Values should be established based on sound scientific analysis of the resources on the reservation, before the redesignation is approved, and with public input from areas surrounding the reservation affected by the redesignation.

* Assertion - Under current PSD rules, a tribe can assert an AQRV at any stage of the permit review process including the last day of the public comment period for a preliminary determination. A tribe can also assert an AQRV on a project-by-project basis. This makes it difficult for the state (permitting agency) and permit applicant to know what emission standards the proposed source may be required to meet. Specific rules are needed which outline a reasonable time limit for asserting an AQRV during the permit review process.

Procedural Requirements

* Public Voice - There are two opportunities for the public to provide comments on a tribal Class I redesignation proposal. Once during a public hearing conducted by the tribe, and again during the comment period and public hearing (conducted by EPA if one is requested) after proposed approval by EPA. However, for the hearing conducted by the tribe, there is no requirement or policy for the tribe to adequately address legitimate concerns. For the comment period and hearing conducted by EPA, the public can only comment on the

procedural requirements of the redesignation request and not on the redesignation itself. The public needs a stronger voice in the redesignation process.

* Support Document - The support document under 40 CFR 52.21(g) is required to include "a satisfactory description and analysis of the health, environmental, economic, social and energy effects of the proposed redesignation". This requirement is extremely vague because there are no specific guidelines on what may be considered a "satisfactory" description and analysis. A tribe can submit for approval any level of quality in the report as long as there is some type of discussion of the effects of the redesignation. In addition, since AQRVs are not required to be included in the report, it is impossible to adequately and fully describe or analyze effects of the redesignation if AQRVs are not listed and addressed. More detailed guidelines are needed regarding what information has to be included in the support document, including listing AQRVs and their effects, to be considered a satisfactory report.

Review Criteria

Under present PSD rules, there are essentially no initial review criteria used by EPA for a Class I redesignation request. EPA can only disapprove a request if the procedural requirements are not met. However, if a proposed redesignation is disputed by the Governor, then EPA shall consider the size of the reservation for effective air quality management and Air Quality Related Values of the reservation. The following criteria and others should be specifically defined in rules as part of the initial review process by EPA for approval or denial of a tribal Class I request.

* Uniqueness - The land should be pristine and have unique attributes that can be justified using sound scientific principals. Mandatory Federal Class I areas were established to provide protection to lands with special value from a natural, scenic, recreational, or historical perspective. Tribal lands should also be of special value in order to be redesignated to Class I status. Being of special value, or in other words unique, would lead to the establishment of appropriate AQRVs.

* Geographical Requirements - Tribal lands should be of sufficient size and of contiguous nature for approval to Class I status. This criteria should be established to allow effective air quality management for reservation lands and lands surrounding the reservation. A size limitation of 5000 acres (and in some cases 6000 acres) was used as a criteria for mandatory Federal Class I areas. A size limiting criteria, including that the lands be contiguous, should be used for tribal Class I areas.

* Reservation - Under the present PSD program, only a tribe can request redesignation of lands within the exterior boundaries of a reservation to Class I status. However, in the proposed Tribes as States rule (8/25/94) and the proposed PSD revisions (7/23/96), EPA is interpreting reservation to include trust land even though the land may not be formally recognized as "reservation" land. In addition, the Tribes as States rule would extend tribal jurisdiction for implementing air management programs up to the limits of Indian country. In other words, EPA would recognize tribes as having jurisdiction over other Indian lands (allotted, trust, purchased, etc.) outside the exterior boundaries of the reservation. It is unclear if EPA would extend tribal jurisdiction to include Class I requests for lands up to the limits of

Indian country. A clear definition for Indian reservation is needed that limits tribal Class I redesignation to include only those lands within the exterior boundaries of a federally recognized existing reservation.

Roles and Responsibilities

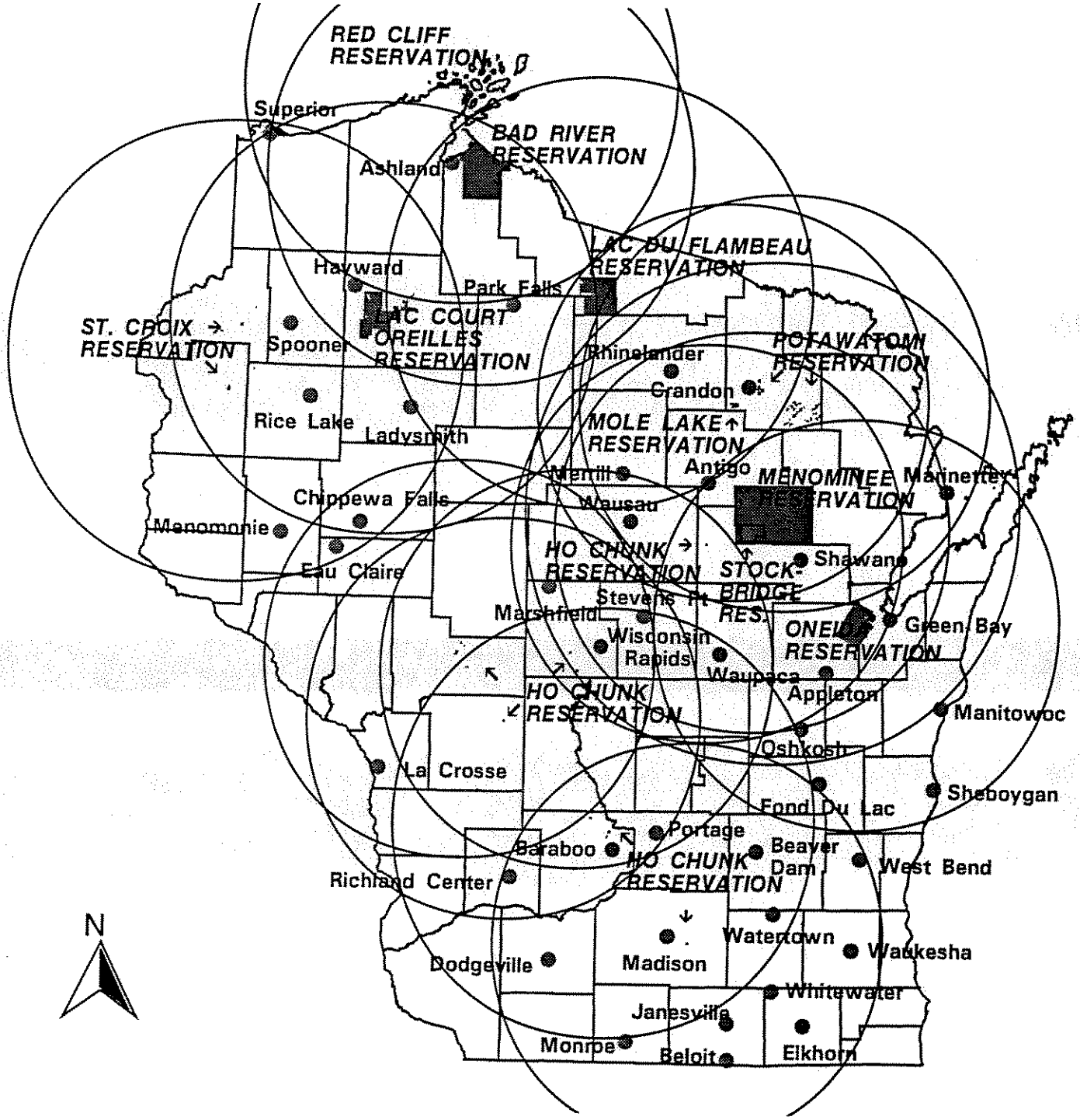
The roles and responsibilities of the government parties involved in implementing the PSD program are not well defined for tribal Class I areas. This interferes in a state's ability to issue air permits in a fair, consistent and timely manner. The existing regulations are unclear regarding responsibility, circumstance and time limits for notification of permit applications, assertion of effects on AQRVs, AQRV analysis and review, and requests for additional facility information. In the proposed PSD revisions, a comprehensive effort was made by EPA to address these types of concerns for Federal Class I areas. However, the proposed changes did not include tribal Class I areas. More detailed regulations regarding roles and responsibilities in implementing the PSD program for tribal Class I areas are needed.

State's Ability To Manage Its Resources

* Dispute Resolution - Under section 164(e) of the Clean Air Act, a Tribe can disagree with a permit issued by the State and request that EPA enter into dispute negotiations. If the dispute can not be resolved, EPA is required to make a final determination on the permit. However, under the current regulations, there is no description as to how the dispute resolution process should work including format, time line, and information used to make a final decision. In addition, because EPA has a strong trust responsibility toward Indian tribes, EPA may not be able to act as an impartial judge in resolving disputes between the state and a tribe. The existing dispute resolution provision interferes in the state's ability to manage its resources in a consistent and comprehensive manner. A more detailed description of a fair and adequate dispute resolution process is needed.

cc: Don Theiler - AM/7
Mike Scott - LC/5
Neal Baudhuin - Northern Region

100 KILOMETER AREAS SURROUNDING INDIAN RESERVATIONS IN WISCONSIN



Indian Reservations
County Boundaries
Cities

0 30 60 90 Miles

0 50 100 150 Kilometers

Source: DNR-AM 6/12/96

State Senator
Robert T. Welch

September 11, 1997

Carlton Nash, Chief
Regulation Development Section
US EPA **(AR-18J)**
77 West Jackson Blvd.
Chicago, IL 60604

Dear Mr. Nash:

The Potawatomi Indians have asked the EPA to redesignate its land in Forest County in Northern Wisconsin as a Class I area under the Clean Air Act's Prevention of Significant Deterioration (PSD) provisions. **I want to express my objection to this proposed redesignation.**

The proposed redesignation would adversely affect an already fragile local economy and create a hostile environment for any contemplated economic development. The Class I redesignation affects areas *62 miles* outside of the tribe's borders. Further, this redesignation would apply to all tribal lands, some of which may not be contiguous.

Class I designation is intended to protect the most pristine areas of our nation. It does so by strictly limiting emissions which would effectively prevent and eradicate manufacturing and other development in the designated area. If every tribe in Wisconsin were to follow the lead of the Potawatomi, nearly the entire state, including our major areas of manufacturing, would be strangled by these strict limits. Clearly, that is not the goal of the EPA?

The requirements are vague and are open to interpretation. The requirement for a PSD permit and Class I status is based on Air Quality Related Values (AQRVs). AQRVs are not easily defined and the Federal EPA has opined that AQRVs can be defined as *"anything that the Tribe may want to protect,"* including scenic, cultural, physical, biological, ecological or recreational resources. The definitions need to be tightened up and should be specific to the unique resources of a reservation.

Effectively, the redesignation process prevents the general public from participating. The current PSD rules do not even provide for initial review criteria. This is not only unfair, but it also effectively makes non-tribal members second class citizens.

The Governor of Wisconsin has also expressed his objection to the redesignation. His request for an opportunity to discuss the issue with the District Administrator was denied. The Governor felt that it was incumbent on the EPA to enforce the statutory requirements of the Federal Clean Air Act for the establishment of a "Dispute Resolution" process -- Sec. 164 (e). Such a process, although required by law, has yet to be developed by the Federal EPA.

State Capitol ■ P.O. Box 7882 ■ Madison, WI 53707-7882 ■ 608/266-0751 ■ Fax 608/267-4350

Despite the Governor's objections and the lack of compliance by the EPA in developing the Dispute Resolution process, the approval process continues. Rather than reliance on AQRVs, the law should to be based on other terms such as Uniqueness, Geographical Requirements and Reservation, which can be found in the Act. The terms should be narrowly defined and should be the primary considerations in any redesignation.

In closing, **any redesignation must be based on established scientific principles and must take into account the impact any reclassification may on the overall economy of the State of Wisconsin. Furthermore, the criteria for the redesignation must provide everyone with an opportunity to have their voice heard.** To date, these problems have not been resolved, and that is why I oppose the redesignation.

Sincerely

Robert T. Welch
Wisconsin State Senator
14th District

cc: Wisconsin's Congressional Delegation

Environmental Update

State Representative Marc Duff

June 5, 1997

REP. MARC DUFF

June 5, 1997

After receiving a positive response about my last *Environmental Update*, I thought I would continue the effort. If you have any questions, be sure to contact me. Here's #2!

EPA Officials Caught Lying and Using Fraud in Decisions to Give State Tribes the Right to Regulate Water Quality

The Assembly Committee on Environment was briefed this week by attorneys about their successful litigation to fight EPA's decision giving some tribes in Wisconsin the right to manage reservation water resources. Asst. Attorney General Tom Dosch explained how a high level EPA whistleblower disclosed that a key document in the case was altered by Claudia Johnson-Schultz, the agency's regional tribal program manager, and another official. Johnson-Schultz then lied under oath about her conduct. Attorney Paul Kent, representing landowners and businesses in the dispute explained that despite EPA's effort to keep information secret, the courts ordered access and proof was found that documents the agency relied on to give tribes the water regulation authority were falsified.

In late 1995 and early 1996, the EPA Region 5 in Chicago approved applications from four Wisconsin tribes (Mole Lake, Menominee, Oneida and Lac du Flambeau) the authority to regulate water quality on their reservations. EPA's decision would eliminate state oversight of water quality and replace it with tribal regulation. Tribes could regulate non-tribal individuals and could veto off-reservation discharge permits upstream which may violate the tribe's water quality standards. This is a major challenge to Wisconsin's constitution which designates all waters in the state as "public waters". The state also questioned how tribes could regulate non-tribal people who have no ability participate in tribal elections.

Last month, the EPA withdrew it's approval of the Oneida and Lac du Flambeau water regulation authority amid proof that EPA officials lied and falsified documents in the case. The tribes were, however, encouraged by the EPA to reapply.

COULD TRIBES POLLUTE WOLF RIVER MORE?

At the briefing, it was disclosed by DNR attorney Mike Lutz that if tribes along the Wolf River receive EPA approval to regulate reservation water quality, they could pollute at higher levels than state standards allow. That is because state water quality standards are more stringent for the Wolf River than federal standards and tribes would only need to meet minimum federal water quality standards.

Environmental Update

State Representative Marc Duff

June 5, 1997

The Menominee Tribe has a sawmill in Neopit that has a water pollution discharge permit. Aren't they the ones screaming "Save Our Wolf River" on the Crandon Mine issue?

Tribal Air Regulation Could Cause Problems Throughout State

Thanks to Lorraine Seratti, more people are waking up about the problems that could be caused by federal Clean Air Act provisions that give tribes the authority to regulate certain air pollution. The committee was briefed by DNR's Marty Burkholder, who explained how tribes can apply to EPA for authority to regulate major new or modified sources of air pollution within 100 km of their reservation. Recently EPA offered new rules allowing tribes to include non-reservation "trust" lands to areas they can include in their application to regulate air quality.

At this point, only the Forest County Potawatomi have applied for this authority. However, others have shown interest. If all tribes apply for this air regulation authority, every corner of the state could subject to tribal regulation of major sources of air pollution...(Check out Lorraine's Map). Major sources are those that emit 250 tons/year and include paper mills, coal fired power plants, smelters and other sources. More expensive technology would be required for these facilities to meet these stringent air quality standards.

Governor Thompson and Governor Engler have objected to the Potawatomi application. Recently, Arizona has taken the EPA to court over recent approval of a Class I air redesignation. Asst. Attorney General John Green informed the committee Wisconsin will file an amicus brief in the Arizona case.

Preserve Pristine Scenic Integrity of Tribal Casinos?

The original intent of this Clean Air Act provision was to preserve pristine areas and their scenic integrity. However, because tribal trust lands may be included, the pristine scenic integrity of the Potawatomi Casino in Milwaukee may be preserved. Can that be accomplished in Milwaukee's Menomonee valley?

WHAT?! The Same EPA Officials Caught Falsifying Documents on Water Rights Will Handle the Tribal Air Issue

It may be shocking to know that the same EPA officials who falsified documents in the tribal water regulation applications handle the tribal requests for air quality authority.

Subcommittee On Tribal Air & Water Regulation Created

Environmental Update

State Representative Marc Duff

June 5, 1997

As a result of these new concerns, a subcommittee will be created to focus on these issues. Lorraine Seratti, who knows these issues like the back of her hand, will be appointed to chair the subcommittee.

federal register

Friday
May 16, 1997

Part VII

Environmental Protection Agency

40 CFR Parts 51 and 52

Prevention of Significant Deterioration of Air Quality (PSD) Program: Permit Review Procedures for Sources That May Adversely Affect Air Quality in Non-Federal Class I Areas; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[FRL–5826–5]

RIN 2060–AH01

Prevention of Significant Deterioration of Air Quality (PSD) Program: Permit Review Procedures for Sources That May Adversely Affect Air Quality in Non-Federal Class I Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance Notice of Proposed Rulemaking (ANPR).

SUMMARY: Under the Clean Air Act's PSD program, States and Tribes may, with EPA approval, redesignate their lands as "Class I" areas to enhance protection of their air quality resources. This notice requests early public input on preliminary issues in clarifying the PSD permit review procedures for new and modified major stationary sources that may have an adverse effect on the air quality of these non-Federal Class I areas. EPA seeks to develop clarifying PSD permit procedures that are effective, efficient and equitable.

DATES: *Comments.* All public comments must be received by August 14, 1997.

Public Workshops. EPA will hold public workshops on this rulemaking. A **Federal Register** notice announcing the dates of these workshops will be published at least 30 days prior to the workshop.

ADDRESSES: *Comments.* Comments on this notice should be mailed (in duplicate if possible) to: U.S. EPA, Air Docket Section, Air Docket A–96–53; 401 M Street, S.W., Washington, D.C. 20460.

Public Workshops. EPA will hold public workshops in Phoenix, Arizona and in Chicago, Illinois. A **Federal Register** notice announcing the dates of these workshops will be published at least 30 days prior to the workshops. Please contact the EPA official listed under **FOR FURTHER INFORMATION CONTACT** if you are interested in participating in the public workshops.

Public Docket. Supporting information for this rulemaking is contained in Docket No. A–96–53. This docket is available for public review and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday at the EPA's Air Docket Section, 401 M Street, S.W., Washington, D.C.; Room M–1500. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: David LaRoche, U.S. EPA, Office of Air and Radiation (6102), 401 M Street, S.W., Washington, D.C. 20460, (202) 260–7652.

SUPPLEMENTARY INFORMATION:

I. Overview

The PSD program authorizes States and Tribes to request redesignation of their lands as "Class I" areas. Over the past twenty years, only federally-recognized Tribes have sought redesignation under this authority. EPA has approved Class I redesignations for the Northern Cheyenne Indian Reservation, the Flathead Indian Reservation, the Fort Peck Indian Reservation, and the Spokane Indian Reservation. *See* 40 CFR 52.1382(c) and 52.2497(c). Recently, EPA approved Class I redesignation of the Yavapai-Apache Reservation, located in the State of Arizona. *See* 61 FR 56461 (Nov. 1, 1996) (to be codified at 40 CFR 52.150). EPA has proposed approval of the Forest County Potawatomi Community request for redesignation located in the State of Wisconsin. *See* 60 FR 33779 (June 29, 1995). EPA will provide opportunity for public comment and hold a public hearing before it makes a final decision on this proposed action.

During EPA's review of the Yavapai-Apache and Forest County Potawatomi redesignation requests, nearby States submitted formal objections to EPA. A common concern has been confusion about the PSD permit review procedures that would apply in these States in the event a Class I redesignation request is granted, and what EPA's specific role would be in resolving any intergovernmental disputes that arise over proposed permits for PSD sources that may adversely affect non-federal Class I areas. In response to these concerns, EPA has initiated this rulemaking to clarify the PSD permit review and dispute resolution procedures for proposed new and modified major stationary sources locating near non-Federal Class I areas.

The new procedures established in this rulemaking would apply for any State or Tribal lands redesignated as Class I. Thus, the rulemaking is intended to clarify PSD permit review procedures for proposed PSD sources that may adversely affect the air quality of any State or Tribal non-Federal Class I area, and would set forth more specific procedures for EPA's resolution of any intergovernmental permit disputes which may arise.

The discussion in part II below contains an overview of the PSD program to help provide context and further understanding of the issues presented in this notice. Part III of this notice examines preliminary issues on which EPA seeks early public input. Part IV describes the workshops EPA will hold to facilitate public input.

II. The PSD Program

The central purpose of the PSD program is to protect clean air resources. Thus, the PSD program is an important air pollution prevention program. The genesis of the program was a lawsuit to enjoin EPA's approval of state implementation plans that allowed air quality degradation in areas having air quality better than the national ambient air quality standards. *Sierra Club* v. *Ruckelshaus*, 344 F.Supp. 253 (D.D.C. 1972), *aff'd per curiam*, 4 Env't Rep. Cases 1815 (D.C. Cir. 1972), *aff'd by an equally divided court, sub. nom. Fri* v. *Sierra Club*, 412 U.S. 541 (1973). The court granted the injunction reasoning that the congressionally-declared purpose of the Clean Air Act to "protect and enhance" the quality of the nation's air resources embodied a non-degradation policy. *Sierra Club*, 344 F.Supp. at 255–56.

In response to the *Sierra Club* decision EPA adopted a PSD program. *See* 39 FR 42510 (Dec. 5, 1974). The administrative program was superseded by a congressionally-crafted program in the 1977 amendments to the Clean Air Act. Public Law 95–95, 91 Stat. 685. EPA presently has two sets of regulations implementing the 1977 statutory PSD program: (1) 40 CFR 51.166 establishes the requirements for State-administered PSD programs, and (2) 40 CFR 52.21 provides for Federal implementation of PSD requirements in States not having approved programs and for federally-recognized Indian Tribes.[1]

A. PSD Areas

Areas nationwide are "designated" based on their air quality status relative to the national ambient air quality standards (NAAQS). The PSD program applies to areas designated "attainment" and "unclassifiable" under section 107 of the CAA, 42 U.S.C. Sec. 7407; these are areas that meet the NAAQS, or areas that cannot be determined on the basis

[1] The 1990 amendments to the Clean Air Act made relatively minor revisions to the PSD program. Pub. L. 101–549, 104 Stat. 2399. Conforming changes have not been made to the implementing regulations. Also, EPA has proposed rules under section 301(d) of the Clean Air Act that would treat Federally-recognized Indian Tribes in the same manner as States for purposes of numerous Clean Air Act programs including the PSD program. 59 FR 43 956 (Aug. 25, 1994). Depending on their final form, these rules may allow Tribes to administer Federally-approved PSD permit review programs in the same way that States do.