PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 15.** The authority for 26 CFR part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 16.** In § 301.6402–3, the second and third sentences of paragraph (e) are revised and paragraph (f) is added to read as follows:

§ 301.6402–3 Special rules applicable to income tax.

* * * * *

(e) * * * Also, if the overpayment of tax resulted from the withholding of tax at source under chapter 3 of the Internal Revenue Code, a copy of the Form 1042–S, ''Foreign Person's U.S. Source Income subject to Withholding,'' Form 8805, ''Foreign Partner's Information Statement of Section 1446 Withholding Tax,'' or other statement (see § 1.1446–3(d)(2) of this chapter) required to be provided to the beneficial owner or partner pursuant to § 1.1461–1(c)(1)(i) or § 1.1446–3(d) of this chapter must be attached to the return. For purposes of claiming a refund, the Form 1042–S, Form 8805, or other statement must include the taxpayer identification number of the beneficial owner or partner even if not otherwise required. * * *

(f) *Effective/Applicability date.* References in paragraph (e) of this section to Form 8805 or other statements required under § 1.1446–3(d)(2) shall apply to partnership taxable years beginning after April 29, 2008.

■ **Par. 17.** In § 301.6722–1, paragraph (d)(3) is revised and paragraph (e) is added to read as follows:

§ 301.6722–1 Failure to furnish correct payee statements.

* * * * *

(d) * * *

(3) *Other items.* The term *payee statement* also includes any form, statement, or schedule required to be furnished to the recipient of any amount from which tax is required to be deducted and withheld under chapter 3 of the Internal Revenue Code (or from which tax would be required to be so deducted and withheld but for an exemption under the Internal Revenue Code or any treaty obligation of the United States) (generally the recipient copy of Form 1042–S, ''Foreign Person's U.S. Source Income subject to Withholding,'' or Form 8805, ''Foreign Partner's Information Statement of Section 1446 Withholding Tax.'')

(e) *Effective/Applicability date.* The reference in paragraph (d)(3) of this section to Form 8805 shall apply to partnership taxable years beginning after *April 29, 2008.*

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 18.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 19.** In § 602.101, paragraph (b) is amended by removing the entry for § 1.1446–6T from the table, adding an entry for § 1.1446–6, and revising the entries to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.1446–1	1545–1934
1.1446–3	1545–1934
1.1446–4	1545–1934
1.1446–5	1545–1934
1.1446–6	1545–1934
* * * * *	

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Approved: April 23, 2008

Eric Solomon,

Assistant Secretary of the Treasury.

[FR Doc. E8–9356 Filed 4–28–08; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2004–WI–0002; FRL–8557–6]

Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this final action, EPA is approving the request by the Forest County Potawatomi Community's (FCP Community) Tribal Council to redesignate certain portions of the FCP Community Reservation as a non-Federal Class I area under the Clean Air Act (Act or CAA) program for the Prevention of Significant Deterioration (PSD) of air quality. These regulations are designed to preserve the air quality in national parks and other areas that are meeting the National Ambient Air Quality Standards (NAAQS). The Class I designation will result in lowering the allowable increases in ambient concentrations of particulate matter, sulfur dioxide, and nitrogen dioxide on the Reservation.

DATES: This final rule is effective on May 29, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2004–WI–0002. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604–3507. This Facility is open from 8:30 a.m. to 4:30 p.m. Central Standard Time, Monday through Friday, excluding legal holidays. We recommend that you telephone Constantine Blathras at 312–886–0671 before visiting Region 5's office. Hard copies of these docket materials are also available in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW, Washington, DC. The EPA/DC Public Reading Room hours of operation will be 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

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

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. General Information

A. Does This Action Apply to Me?

This action will apply to applicants to the PSD construction permit program on Class I trust lands of the FCP Community.

B. Where Can I Obtain Additional Information?

In addition to being available in the docket, an electronic copy of this final rule is also available on the World Wide Web. Following signature by the EPA Administrator, a copy of this final rule will be posted on the EPA's New Source Review (NSR) Web site, under Regulations & Standards, at *http://www.epa.gov/nsr/actions.html*.

C. How Is This Action Organized?

The information presented in this action is organized as follows:

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B. Where Can I Obtain Additional Information?
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B. The Forest County Potawatomi Community Redesignation Request
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A. Executive Order 12866: Regulatory Planning and Review
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G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
VII. Statutory Authority

II. Background

A. The Clean Air Act Prevention of Significant Deterioration (PSD) Program and Class I Area Redesignations

The CAA provides a comprehensive structure for ''protect[ing] and enhanc[ing] the quality of the Nation's air resources[.]'' *See* section 101(b) of the CAA. The basis of the CAA's regulatory structure is the NAAQS, which specify the maximum permissible concentrations of certain pollutants in the ambient air. *See* section 108 and 109 of the CAA. Furthermore, Part C of Title I of the CAA provides for the prevention of significant deterioration of air quality. The PSD program sets forth procedures for the preconstruction review and permitting of new and modified major stationary sources of air pollution locating in areas meeting the NAAQS, i.e., ''attainment'' areas, or in areas for which there is insufficient information to classify an area as either attainment or nonattainment, i.e., ''unclassifiable'' areas. These areas are referred to as ''PSD areas.'' *See* section 165(a) of the CAA. ''Major stationary sources'' are large industrial sources which emit or have the potential to emit 250 tons per year (tpy) or more of a regulated air pollutant (100 tpy or more if the source falls in one of 28 specified categories). *See* 40 Code of Federal Regulations (CFR) section 52.21(b). The applicability of the PSD program to a particular source must be determined in advance of construction, and it is pollutant specific. To obtain a PSD permit, a major stationary source must install the ''best available control technology'' (BACT) to control emissions of regulated pollutants emitted in significant amounts. *See* section 165(a)(4) and section 169(3) of the CAA; 40 CFR 52.21(j). PSD permits also require the source to demonstrate that it will not contribute to a violation of the NAAQS or applicable PSD increments (the maximum allowable air quality deterioration allowed in a PSD area). *See* section 165(a)(3).

The CAA provides three basic classifications for PSD areas: Class I, II and III. For each classification, the PSD regulations establish the incremental amount of air quality deterioration allowed. However and in all cases, the NAAQS set the maximum allowable concentration levels of certain pollutants that may not be exceeded in a PSD area, irrespective of any increment. Increments have been established for three pollutants—Particulate Matter (PM_{10}), Sulfur Dioxide (SO_2) and Nitrogen Dioxide (NO_2)—and for a variety of averaging periods, which correspond to the averaging periods for the NAAQS for those pollutants. *See* 40 CFR 52.21(c). Class I areas include national parks greater than 6,000 acres in size, national wilderness areas greater than 5,000 acres in size and other natural areas of special concern; the smallest increments are specified for those areas. In addition, when Congress enacted the PSD program in 1977, it provided that these areas may not be redesignated to another classification. *See* section 162(a) of the CAA. Class II applies to areas in which pollutant increases accompanying moderate growth are allowed. Under the 1977 amendments to the CAA, all areas, other than the mandatory Federal Class I areas were initially designated as Class II PSD areas. However, States and Tribes have the authority to redesignate Class II areas to Class I to provide additional air quality protection and some Tribes have done so.[1] Class III applies to those areas in which more air quality deterioration is considered acceptable. States and Tribes have the authority also to redesignate Class II areas to Class III to promote development, but to date; none have chosen to do so.

The CAA directs the Secretary of the Interior, or other appropriate Federal land manager, to review other Federal lands and recommend for redesignation to Class I any appropriate areas ''where air quality related values (AQRVs) are important attributes of the area.'' *See* section 164(d) of the CAA. The Act does not define AQRVs nor identify specific AQRVs other than visibility (*See* section 165(d)(2)(B) of the Act), but in the legislative history to the Act, AQRVs are described as follows:

> The term ''air quality related values'' of Federal lands designated as Class I includes the fundamental purposes for which such lands have been established and preserved by the Congress and the responsible Federal agency. For example, under the 1916 Organic Act to establish the National Park Service (16

[1] These are the Northern Cheyenne Reservation, the Flathead Indian Reservation, the Fort Peck Indian Reservation, and the Spokane Indian Reservation. *See* 40 CFR 52.1382(c), 52.2497(c), and 52.144(c).

U.S.C. 1), the purpose of such national park lands ''is to conserve the scenery and the natural historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.''

Nevertheless, Class I status is not reserved for special Federal areas alone. Section 164 of the CAA provides to States and Indian governing bodies the ultimate authority to reclassify any lands within their borders as Class I. The CAA specifies that ''a State may redesignate such areas as it deems appropriate as Class I areas.'' *See* section 164(a) of the CAA. Tribes have similar authority to redesignate ''lands within the exterior boundaries of reservations.''

The procedural requirements for a Class I redesignation by a Tribe are set out in section 164(c) of the CAA and are further defined in the implementing regulations at 40 CFR 52.21(g)(4). These provisions explain the steps a Tribe needs to follow to request redesignation of reservation lands. The EPA Administrator may disapprove a redesignation request only if the Administrator finds that the proposal did not meet the procedural requirements or was inconsistent with the CAA. *See* 42 U.S.C. 164(b)(1)(C)(2).

B. The Forest County Potawatomi Community Redesignation Request

The FCP Community is a federally recognized Indian Tribe recognized by a congressional Act of June 23, 1913 (38 Stat. 102). The 1913 Act provided that 11,786 acres of non-contiguous land purchased by the Federal government would be set aside for the purpose of making allotments to the Wisconsin Potawatomi Indians (which included the FCP Community). While the lands were purchased for making allotments, no allotments were ever made due to changes in Federal allotment policies. Thus, title to the land remained with the United States until 1988, when Congress passed legislation to place the land in trust for the FCP Community, and to recognize explicitly all of these lands as belonging to the FCP Community.[2] The majority of the FCP Community's reservation lands are located in Forest County, Wisconsin, with the remaining acreage located in six neighboring townships.

The FCP Community is downwind of key areas of industrial development. The reservation is located in the North Central Wisconsin Intra-State Air Quality Control Region #238. Land in the northern counties of this region is mostly forested. Lands south of Madison County in this region are mostly agricultural. Population and industry is concentrated southwest and west of the reservation, in the areas of Wausau, Stevens Point, Wisconsin Rapids, and Rhinelander. At present, Forest County itself has little industrial development, and the CAA's PSD minor source baseline date, which is the date on which the first complete application for a PSD permit is filed in a particular area, has not been triggered. Thus, at this time, there has been no PSD increment consumption in this area.

On February 14, 1995, the FCP Community submitted its formal request for redesignation to EPA's Region 5 office. FCP Community's redesignation request proposes to reclassify as Class I those trust parcels of 80 acres or more located in Forest County. *See* Notice of Proposed Rulemaking, 60 FR 33779 (June 29, 1995). A list of these parcels can be found in the codification section of this notice labeled Subpart YY–Wisconsin, Forest County Potawatomi Reservation (b). The FCP Community explained its reasons for requesting redesignation as follows:

> ''* * * the Forest County Potawatomi Community respects Mother Earth, and is aware of clean air as being a valuable resource that all living things depend upon to exist, and, * * * the Forest County Potawatomi Community wish to continue to strive towards self-determination, which will be strengthened by codes and land use plans that are compatible with their renewable resources and culture, and, * * * the present level of protection given to the Forest County Potawatomi air resource does not provide the level of protection the Tribe wishes to give their air, which they want to maintain as very pristine. * * *'' *See Technical Report* at 2.

The FCP Community reaffirmed these reasons in comments submitted to EPA on April 27, 2007, by citing the unique history of the reservation and FCP Community, the location of the headwaters of several wild and scenic rivers in the area, the importance of fish as a nutritional and recreational resource, the location of key wetlands in the area, the FCP Community's desire to protect and restore Devil's Lake, and the designation of portions of the area including the FCP Community Reservation and surrounding areas as eligible for listing in the National Historic Register as ''Traditional Cultural Property.'' A Traditional Cultural Property is one that meets the criteria for listing in the National Register and which has an ''association with cultural practices or beliefs of a living community,'' as rooted in that community's history and which is important because of its role in maintaining the continuing cultural identity of the community.[3]

Additionally, the FCP Community described the central importance of ''purity'' to its cultural and spiritual practices, where natural resources ''must be drawn from spiritually pure natural environments. Concern about access to these resources and the ability of the environment to provide the pure resources needed to sustain Potawatomi culture occupies the thoughts and prayers of the community.'' FCP Community member Jim Thunder, stated: ''Today we are abusing our Mother Earth. Our air, water and soil are polluted. We are told not to eat fish out of certain streams and lakes. I pray to our creator that we look back so that we may see ahead. Let us examine our lives so that we are respectful to our fellow humans and to nature. Let us respect our children and, above all, let us live our lives in accordance with our beliefs.''[4]

Finally, the FCP Community also explains that clean air is important to the Tribal enterprises and economy of the Tribe, and to the northern Wisconsin area, where recreation and tourism are a primary component of the economic base and a key projected component of economic growth for the Tribe and for the region.[5]

III. Overview of This Final Action

EPA is taking final action on its evaluation of the FCP Community's Tribal Council request to redesignate certain portions of the FCP Reservation as a non-Federal Class I area under the CAA program for the prevention of significant deterioration of air quality. We have decided to approve this request. The Class I designation will result in lowering the allowable increases in ambient concentrations of PM, SO_2, and NO_X on the Reservation.

[2] On August 6, 1987, the Senate enacted Bill 1602 which declared that the trust lands that had been purchased pursuant to 38 Stat. 102 are ''hereby declared to be the reservation of the Forest County Potawatomi Community of Wisconsin.''

[3] Jeff Crawford, Forest County Potawatomi Attorney General, ''Comments Regarding U.S. Environmental Protection Agency's proposed Federal Implementation Plan under the Clean Air Act for Certain Trust Lands of the FCP Community if Designated as a PSD Class I Area'' [hereafter FCP 2007 Comments], April 2007, at 3–10.

[4] Id. at 10.

[5] ''Tourism in these seven counties [Forest, Oneida, Florence, Langlade, Marinette and Oconto] grew by 117% between 1994 and 2005 compared to 107% for Wisconsin as a whole [citation omitted]. In 2005 in these seven counties, the $715 million spent by tourists created some 18,005 equivalent full-time jobs and generated some $23.2 million in revenue for local governments through such means as property taxes, sales taxes, lodging taxes, and so forth [citation omitted].'' Id. at 14.

A. What We Proposed

On June 29, 1995, and July 10, 1997, EPA proposed to approve a request by the FCP Community Tribal Council to redesignate lands within the FCP Community Reservation in the State of Wisconsin to Class I under EPA's regulations for prevention of significant deterioration of air quality (60 FR 33779, 62 FR 37007). The Class I designation will result in lowering the allowable increases in ambient concentrations of PM, SO_2, and NO_X on certain of the FCP Community's lands.

On December 18, 2006, EPA proposed that it would promulgate a Federal Implementation Plan (FIP) if it approves FCP Community's request, with the FIP to be implemented by EPA unless or until it is replaced by a Tribal Implementation Plan (TIP).

B. Final Action and Differences From Proposal

In this final action, we are approving FCP's Community request to redesignate certain reservation lands to Class I status. EPA finds that the FCP Community has met the applicable procedural requirements and thus its redesignation request must be approved.

However, we are amending, based on comments received, the language proposed in the December 18, 2006, rulemaking, which had stated in pertinent part the following modification to the FIP for the PSD program in Wisconsin:

(e) Regulations for the prevention of the significant deterioration of air quality. The provisions of § 52.21(b) through (w) are hereby incorporated and made a part of the applicable State plan for the State of Wisconsin for sources wishing to locate in Indian country; and sources constructed under permits issued by EPA, except as specified in paragraph (f) of this section.

(f) Forest County Potawatomi Community reservation lands 80 acres and over in size and located in Forest County are designated as a Class I area for the purposes of prevention of significant deterioration of air quality. The individual parcels listed below all consist of a description from the Fourth Principal Meridian. * * *

(8) Section 2 of T36N R13E* * *

(26) N½ of Section 22 of T35N R16E* * *

(27) SE¼ of Section 22 of T35N R16E* * *

First of all, the FCP Community noted that the draft language was not based on the current language for 40 CFR 52.2581, which provides:

(e) Regulations for the prevention of significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Wisconsin for sources wishing to locate in Indian country; and sources constructed under permits issued by EPA.

EPA agrees and for that reason the current language should be the starting point to any modification of this provision.

Second, the FCP Community stated that EPA's proposed FIP language ''creates ambiguity regarding whether the requirements of 40 CFR 52.21 apply to the FCP Community's Reservation.''[6] EPA intends that the requirements of 40 CFR 52.21 apply to the parcels redesignated as Class I, and has modified the proposed FIP language accordingly to remove the phrase ''except as specified in paragraph (f) of this section. The revised rulemaking text is as follows:

(e) Regulations for the prevention of significant deterioration of air quality. The provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made a part of the applicable State plan for the State of Wisconsin for sources wishing to locate in Indian country; and sources constructed under permits issued by EPA.

(f) Forest County Potawatomi Community Reservation.

(1) The provisions for prevention of significant deterioration of air quality at 40 CFR 52.21 are applicable to the Forest County Potawatomi Community Reservation, pursuant to § 52.21(a).

(2) In accordance with section 164 of the Clean Air Act and the provisions of 40 CFR 52.21(g), those parcels of the Forest County Potawatomi Community's land 80 acres and over in size which are located in Forest County are designated as a Class I area for the purposes of prevention of significant deterioration of air quality. For clarity, the individual parcels are listed in 40 CFR 52.2581(f)(2).

Finally, the FCP Community has commented that the three parcels, numbers 8, 26, and 27 have been incorrectly identified either in the description of lands provided in the Tribe's letter of February 24, 1998, or in EPA's list of parcels proposed for redesignation published in the December 18, 2006, proposed rulemaking. These lands are, however, correctly identified on the December 13, 1994, S. Funk map provided by the Tribe with its redesignation request. This map was specifically reviewed by the Bureau of Indian Affairs, Minneapolis District office, which certified that the lands marked for proposed redesignation are lands held in trust for the Tribe. Letter from Robert Jaeger, Superintendent, Bureau of Indian Affairs to David Kee, Director, Region 5 Air and Radiation Division on April 16, 1998. This map has been available for public notice and comment during the pendancy of this rulemaking. Accordingly, EPA has corrected the legal description of parcel numbers 8, 26, and 27 in the list of lands redesignated to Class I pursuant to today's action.

[6] FCP Comment letter, 2007, at 31.

IV. Basis for Final Action

A. Class I Redesignation Requirements

EPA is taking this action in accordance with the requirements of section 164 of the CAA. In section 164 of the Act, Congress provides States and Tribes the ultimate authority to reclassify any lands within their borders as Class I based on the following statutory and regulatory requirements:

(1) At least one public hearing must be held in accordance with procedures established in 40 CFR 51.102. *See* 40 CFR 52.21(g)(2)(i).

(2) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation must be notified at least 30 days prior to the public hearing. *See* 40 CFR 52.21(g)(2)(ii).

(3) At least 30 days prior to the Tribe's public hearing, a discussion of the reasons for the proposed redesignation including a satisfactory description and analysis of the health, environmental, economic, social and energy effects of the proposed redesignation must be prepared and made available for public inspection. *See* 40 CFR 52.21(g)(2)(iii).

(4) Prior to the issuance of the public notice for a proposed redesignation of an area that includes Federal lands, the Tribe must provide written notice to the appropriate Federal Land Manager and afford an adequate opportunity for the Federal Land Manager to confer with the Tribe and submit written comments and recommendations. *See* 40 CFR 52.21(g)(2)(iv).

(5) The proposal to redesignate has been made after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation. *See* 40 CFR 52.21(g)(2)(v).

(6) Prior to proposing the redesignation, the Indian Governing Body must consult with the State(s) in which the Reservation is located and that border the Reservation. *See* 40 CFR 52.21(g)(4)(ii).

(7) Following completion of the procedural steps and consultation, the Tribe submits to the Administrator a proposal to redesignate the area. *See* 40 CFR 52.21(g)(4).

1. EPA's Interpretation of Section 164 of the Clean Air Act

In addition to reiterating the CAA section 164 requirements, the following discussion identifies the actions taken

by the FCP Community to fulfill those requirements and clarifies our interpretation of the requirements in light of several comments we received.

1. At least one public hearing must be held in accordance with procedures established in 40 CFR 51.102. *See* 40 CFR 52.21(g)(2)(i).

The regulations require that a public hearing on a proposed redesignation be conducted in accordance with 40 CFR 51.102, which requires the following: A minimum of 30 days notice, ''prominent advertisement'' regarding the hearing in the affected area, availability of plans; notification to the EPA Administrator, local air pollution authorities, and preparation of a record of the proceedings. *See* 40 CFR 51.102(a)–(f).

The FCP Community held a public hearing on the proposed redesignation on September 29, 1994, at the Potawatomi Tribal Hall, in Crandon, Wisconsin. The FCP Community's redesignation request included a certification that the hearings were held in compliance with applicable notice requirements, including adequate notice to appropriate local, State and Federal entities, as well as public hearing requirements. A transcript of the hearing, notices (including copies of advertisements), letter invitations, copies of comments received, a transcript of the hearing, and response to comments was included in the FCP application for redesignation. Accordingly, EPA finds that the hearing held by the FCP Community was adequate.

2. Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation must be notified at least 30 days prior to the public hearing. See 40 CFR 52.21(g)(2)(ii).

The FCP Community held its public hearing on September 29, 1994. Notices of the public hearing, as well as notification of the public comment period and copies of supporting documents, were sent to dozens of governmental entities and interest groups in a letter dated August 26, 1994. Entities noticed included EPA Region 5, the States of Wisconsin and Michigan [7] (even though the lands covered by the redesignation lie wholly within Forest County, Wisconsin), the Bureau of Indian Affairs, the U.S. Fish and Wildlife Service; nine Wisconsin Tribal governments; nineteen counties and townships; local planning commissions in Wausau, Eau Claire, and Green Bay, Wisconsin; and, many other organizations. The FCP Community also published notices of the September 29, 1994, public hearing in four local newspapers, which ran between August 29, 1994 and September 1, 1994. Representatives from many of these governmental entities and organizations provided comments at the hearing or in writing. The FCP Community responded to these and other comments received from private individuals and commercial entities in its February 1995 ''Responses to Common Questions and Issues in Written Comments on the Proposed Forest County Potawatomi Community PSD Class I Area Redesignation,'' *Technical Report* at Appendix A. For a copy of this document, please visit the public docket of this rulemaking.

In light of the outreach, public notice, opportunity for comment, and information distributed by the FCP Community in preparation for making their request to EPA for redesignation, EPA finds that the FCP Community provided adequate opportunity for notice, comment, and consultation.

3. At least 30 days prior to the Tribe's public hearing, a discussion of the reasons for the proposed redesignation including a satisfactory description and analysis of the health, environmental, economic, social and energy effects of the proposed redesignation must be prepared and made available for public inspection. *See* 40 CFR 52.21(g)(2)(iii).

Section 164(b)(1)(A) of the CAA requires that a State or Tribe prepare for public comment a ''satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation.'' However, neither the CAA nor EPA regulations define ''satisfactory description and analysis,'' as that term is used in CAA section 164(b) and 40 CFR 52.21(g)(2). In construing its meaning, EPA considered Congressional intent that EPA's review of a ''description and analysis'' be deferential. In addition, EPA considered the question: ''Satisfactory to whom?'' Many commenters argued that the Tribe's request should be denied because they were unsatisfied with the level of documentation in the Tribe's application regarding economic impacts and whether the Tribe had sufficiently demonstrated that Class I redesignation would not have an adverse economic impact on surrounding areas, be they local communities, adjacent states, or states across the nation. EPA disagrees.

In enacting section 164(b), it is clear that Congress intended to entrust EPA with the authority to set a deferential standard for ''satisfactory description and analysis.'' Thus, EPA stated in its final rule on the Yavapai Apache Class I redesignation that: ''[The use of the word ''satisfactory''] in the statute and implementing regulations suggests a relatively low threshold. Congress did not dictate that the analysis be comprehensive or exhaustive. Further, the statutory language does not assign any specific weight to the consideration of health, environmental economic, social or energy effects, or suggest that one consideration should be given priority over another. * * * *See* ''Arizona Redesignation of the Yavapai Apache Reservation to a PSD Class I Area,'' 61 FR 56461–56464 (November 1, 1996).

Therefore, there is no requirement that a State or Tribe conduct a balancing test of the costs and benefits of a redesignation request, nor that the various factors to be considered in its analysis need to be balanced against one another. EPA has taken the position that the fact that no weight or priority is assigned to any particular factor, taken together with the broad redesignation discretion conferred on States and Tribes, indicates that the Tribe does not have to justify or overcome a balancing test in its redesignation request or show that a proposed redesignation will have no impact on the surrounding community.

Legal precedent clearly supports EPA's interpretation. In *Nance* v. *EPA,* 645 F.2d 701 (9th Cir. 1981), petitioners claimed that the Northern Cheyenne Tribe's analysis was inadequate in several respects. However, the Ninth circuit court rejected the claim that the Tribe was required to meet exacting analysis requirements and held that the Tribe had considered the factors identified in EPA's regulations. *Nance* v. *EPA,* 645 F.2d at 712. EPA's decision in this case was upheld under the far more exacting pre-1977 regulatory regime that expressly provided for an analysis that included consideration of growth anticipated, regional impacts, and social, environmental and economic effects as well as stricter EPA scrutiny of the analysis.

Moreover, the court found that the Tribe's decision was supported and strengthened by the policy for maintaining clean air embodied in the CAA:

> [T]he Clean Air Act contains a strong presumption in favor of the maintenance of clean air, and the nature of a decision which simply requires that the air quality be maintained at a certain level prevents any exact prediction of its consequences. The Tribe has considered the factors enumerated in EPA regulations, and its choice in favor of the certainty of clean air is a choice

[7] EPA examined correspondence between the Tribe and the State of Michigan and confirmed that the State received timely notification of the public hearing.

supported by the preferences embodied in the Clean Air Act.

Nance v. *EPA,* 645 F.2d at 712.

In another case regarding the approval of a redesignation request, in this case for the Yavapai Apache Tribe (*See Administrator, State of Arizona* v. *EPA,* 151 F.3d at 1211, 9th Cir. 1998, hereafter *Arizona* v. *EPA*), the Ninth Circuit also deferred to EPA's conclusion that the existing statutory requirement of a ''satisfactory description and analysis'' is a relatively low threshold. The court explained that the 1977 CAA amendments to the PSD provisions, which are still in the statute, changed previous law by eliminating EPA's previous authority to override a classification by a local government on the basis that the local government did not properly weigh energy, environment, and other factors. *Arizona* v. *EPA* at 151 F.3d at 1211 (citing legislative history). Moreover, EPA's role in reviewing redesignation requests is so limited it cannot disapprove a request unless it finds that the redesignation ''does not meet the procedural requirements'' of the Act, CAA Section 164(b)(2); this statutory limitation provides no support for the commenters' suggestion that EPA has broad authority to review the quality of the ''description and analysis'' much less to disapprove a redesignation unless the description and analysis are ''satisfactory.''

For those reasons, EPA finds that the FCP Community met the statutory requirement to provide a ''satisfactory description and analysis.'' Nevertheless, many commenters argued that the Tribe's request should be denied because they were unsatisfied with the level of documentation in the Tribe's application regarding economic impacts and whether the Tribe had sufficiently demonstrated that Class I redesignation would not have an adverse economic impact on surrounding areas, be they local communities, adjacent states, or states across the nation.[8]

As discussed previously, neither the CAA nor its implementing regulations require a State or Tribe to assess the impact of a proposed redesignation on areas outside the lands proposed for redesignation, nor to demonstrate that a request for redesignation would not impact these areas. Nevertheless, the FCP Community's application for redesignation contained information to show that the Tribe had examined the existing economy of the region and analyzed the potential impact of Class I redesignation on the existing and future projected economic growth in the region, concluding that ''The development of large industrial projects will very likely be effected [sic] more by economic viability, external market conditions, and other existing local environmental and land use restrictions than by the Class I redesignation.''[9]

Furthermore, supplemental information submitted by the FCP Community in June 1995, contained an additional analysis showing that the anticipated (at that time) PSD caliber sources planning to construct or expand, as well as projected area economic growth, would not be adversely impacted by the proposed Class I area. The analysis concluded that ''*Class I redesignation will not effect the operations of any existing industry* because the PSD program only effects the development of new air pollutant sources.'' Therefore, the *Technical Report* concluded, ''The redesignation will not result in the loss of any existing jobs, nor in the ''downsizing'' or closing of any existing businesses. It will only require major new development projects to analyze the effects of and control the emission of air pollutants, so that the existing air quality remains clean [emphasis in original].''[10]

Moreover, the Tribe prepared a *Technical Report* and released it for public comment in advance of its public hearing. This *Technical Report* examines the environmental, health, economic, social and energy effects of the proposed redesignation both on and off FCP Community reservation lands. The analysis includes a survey of present conditions and presents projected impacts of redesignation on health, employment, and natural resources, including the project impacts to aquatic, forest and wetlands ecosystems; and to fish and wildlife populations. The FCP Community's *Technical Report* also provides a discussion of the projected effects of redesignating the FCP Community Reservation lands to Class I and the effects of remaining Class II.

Additionally, although there is no statutory obligation to identify AQRVs prior to seeking redesignation, the FCP Community's *Technical Report* and a supplementary support document dated June 14, 1995, provide the FCP Community's analysis of potential impacts of the two AQRVs identified (mercury deposition and acid rain) in the context of the health, environmental, energy, economic, and social factors analysis, both for lands subject to the redesignation request, and those located outside the proposed area. The *Technical Report* notes in several instances that adverse impacts on AQRVs, which occur at concentrations lower than Class I increments, might pose an additional restriction on the sitting of large projects.

In conclusion, upon review of the documentation submitted by the FCP Community, EPA finds that the FCP Community has fully met the requirement in CAA section 164(b)(1)(A) and 40 CFR 52.21(g)(2)(iii) to provide a ''satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation.''

4. Prior to the issuance of the public notice for a proposed redesignation of an area that includes Federal lands, the Tribe must provide written notice to the appropriate Federal Land Manager (FLM) and afford an adequate opportunity for the FLM to confer with the Tribe and submit written comments and recommendations. *See* 40 CFR 52.21(g)(2)(iv).

In addition to consultation undertaken by the FCP Community with Federal, State, and local agencies, the FCP Community consulted directly with the Bureau of Indian Affairs (BIA) regarding FLM responsibilities. After those consultations, the BIA informed the FCP Community of that Agency's support of the Class I redesignation request and that Agency's view that the Tribe would be the appropriate land manager for the lands subject to the redesignation request.[11] EPA finds, accordingly, that the Tribe has satisfied this requirement.

5. The proposal to redesignate has been made after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation. *See* 40 CFR 52.21)(g)(2)(v).

The lands covered by the proposed redesignation lie wholly within Forest County, Wisconsin, and are comprised wholly of reservation lands held in federal trust. The CAA requires notice to governmental entities ''in the area covered by the proposed redesignation.'' *See* 52.21(g)(2)(v) (emphasis added). There is no requirement, however, for a finding on what areas may be affected

[8] FCP 2007 Comments, at 15.

[9] *Technical Report,* included in Application, at 56.

[10] *Technical Report* at 55. Supplemental information submitted by the FCP Community in its 2007 comments on the proposed FIP provided additional information to show that economic development did not slow or decrease near Class I areas.

[11] Letter from Acting Superintendent Robert C. Ford, Great Lakes Agency, Bureau of Indian Affairs, U.S. Department of Interior, to Al Milham, Chairman, February 15, 1994.

by a proposed redesignation or notice to such governments in such areas. As discussed in Section IV.A.1–2, the FCP Community's application contains a list of dozens of federal, state and local governmental offices which were notified of the Tribe's intended action. Additionally, the FCP Community developed a fact sheet and held a consultation session with federal, state, and local governmental representatives to further explain and hear concerns regarding the proposed action, besides the required public hearing. Further, the FCP Community received numerous comments on its proposed action, to which it prepared a response to comments document. Thus, and even while the regulation does not provide a standard for ''consultation,'' EPA deems the actions of the FCP Community to have provided sufficient notice and opportunity for comment.

6. Prior to proposing the redesignation, the Indian Governing Body must consult with the State(s) in which the Reservation is located and that border the Reservation. *See* 40 CFR 52.21(g)(4)(ii).

The FCP Community's reservation is located wholly within the State of Wisconsin. For that reason, the FCP Community included several Wisconsin offices and agencies in its notice on the proposed redesignation and public hearing, as discussed in section IV.A.1–2 above. Nevertheless, the FCP Community also provided notice of its intent to redesignate to several divisions of the Michigan Department of Environmental Quality, although the State of Michigan does not border the reservation. Both Wisconsin and Michigan provided comments on the proposed redesignation, to which the Tribe responded in its response to comments document. Thus, EPA finds that the FCP Community's consultation efforts comply with the requirement to consult with States.

7. Following completion of the procedural requirements, the Tribe submits to the Administrator a proposal to redesignate the area. *See* 40 CFR 52.21(g)(4).

On December 4, 1993, and by majority vote, the FCP Community General Council and the tribal governing body of the FCP Community passed a resolution to request the Administrator to redesignate the FCP Community Reservation and on February 10, 1995, the FCP Community General Council passed a resolution to submit its completed redesignation request package to EPA. The FCP Community submitted its formal request for redesignation to EPA's Region 5 office on February 14, 1995.

EPA reviewed the FCP Community's request and made a preliminary determination that the request met the applicable procedural requirements of 40 CFR 52.21(g)(4). After making this preliminary determination, EPA published a notice of proposed rulemaking in the **Federal Register** proposing to approve the request and announced a 120-day public comment period on the issue of whether the Tribe had met the procedural requirements. *See* Notice of Proposed Rulemaking, 60 FR 33779 (June 29, 1995).

However, on June 8, 1995, the Governors of Wisconsin and Michigan sent a letter to EPA objecting to EPA's proposal to grant the FCP Community request for redesignation and requested EPA to intervene. The letter also requested that EPA not finalize the proposed redesignation until further regulations were in place to address permitting on non-Federal Class I areas. On August 7, 1995, EPA published a notice cancelling the August 2, 1995, hearing and indefinitely extending the public comment period because the Governors of Wisconsin and Michigan had requested negotiations pursuant to Section 164(e) of the CAA to resolve their dispute regarding the proposed Class I request. In response to the States' requests, EPA suspended the rulemaking to address the States' concerns. *See* 60 FR 40139 (August 7, 1995).

In 1997, EPA published an advanced notice of proposed rulemaking to address PSD permitting in non-Federal Class I areas. 62 FR 27158 (May 16, 1997). Additionally, two public workshops were held to gather comments on the advanced proposal. 62 FR 33786 (June 23, 1997). EPA also initiated a dispute resolution process for Michigan and Wisconsin, but after 2 years of discussions, the parties had failed to reach an agreement.

Accordingly, EPA published a notice scheduling two public hearings on the proposed redesignation and setting the closing date of the public comment period for September 15, 1997. 62 FR 37007 (July 10, 1997). EPA held two public hearings on the proposed redesignation, the first on August 12, 1997, in Carter, Wisconsin, and the second on August 13, 1997, in Rhinelander, Wisconsin, with an informational meeting preceding each hearing. EPA also provided numerous opportunities for input from local governments in EPA's public notice and hearing process on the proposed rulemaking for the redesignation.

The redesignation proposal elicited numerous comments from state governments, local governments and the general public. Responses to these comments are found in the response to comments document, which is part of the record for this rulemaking. However, major comments are summarized in this notice.

B. Lands Suitable for Redesignation

Section 164(c) of the CAA provides that ''Lands within the exterior boundaries of reservations of federally recognized Indian Tribes may be redesignated. * * *'' 42 U.S.C. 7474(c). The PSD regulations define ''Indian Reservation'' as ''any federally recognized reservation established by Treaty, Agreement, executive order, or act of Congress.'' *See* 40 CFR 52.21(b)(27). The FCP Community's reservation lands are comprised of non-contiguous trust parcels comprising a total area in excess of 11,700 acres, as described in Section II.B. The FCP Community's trust holdings are primarily located in Forest County, with other parcels located in surrounding townships. In its redesignation request, the FCP Community included only those parcels of 80 acres or greater in size and located within Forest County.

Several commenters raised concerns that the area proposed for redesignation includes lands that are not within the boundaries of the FCP Indian reservation. To address these concerns, EPA sought further information from both the FCP Community and the Bureau of Indian Affairs (BIA) regarding the status of lands proposed by the FCP Community for redesignation. By letter of February 24, 1998, the FCP Community provided documents describing the parcels subject to the proposed redesignation. EPA subsequently requested an opinion from the U.S. Department of Interior (DOI) on the status of those lands, and, DOI's BIA stated as follows:

> The map compiled by S. Funk and dated 12/13/94 was used for determination purposes. All of those lands identified on that map as tribal trust meet the criteria of Section 164(c) of the CAA as so stated. The parcels noted as tribal trust have all been designated reservation land by proclamation of the Assistant Secretary.[12]

The BIA certification is available for inspection at the public docket for this rulemaking.

However, the FCP Community commented that the list of parcels subject to the Class I redesignation request contained errors when compared to the S. Funk map. These

[12] Letter from Robert Jaeger, Superintendent, BIA Great Lakes Agency, to David Kee, Air and Radiation Division, USEPA Region 5, April 16, 1998.

errors have been corrected in this action. *See* Section III.B. EPA's action redesignates to Class I only those lands from FCP Community's original list which have been confirmed to be held in trust for the FCP Community and, therefore, are part of FCP Community's Reservation.

Several commenters, including the FCP Community, also expressed their belief or concern that lands acquired by a Tribe or State subsequent to this redesignation request would automatically become part of the Class I area without having to follow the redesignation process in 40 CFR 52.21(g). However, EPA believes that a State or Tribe is required to submit a new redesignation request and follow all of the procedural steps to redesignate additional parcels not covered by a previous request where, as here, a Tribe has requested redesignation of specified parcels, and not its entire reservation. In addition, EPA would be required to follow the public notice and comment procedures set out by Congress in section 164(b)(2) of the CAA to review the new request prior to making its determination whether to grant the request. Therefore, any additional lands which are placed into trust for the FCP Community would require the FCP Community to submit a new redesignation request.

Some commenters also alleged that the areas proposed for redesignation were either too small or too dispersed to allow for effective air quality management as discussed in sections 162 and 164 of the CAA. EPA disagrees. As explained in the notice that resolves the dispute resolution with the State of Michigan and that is published concurrently with this final action in this **Federal Register**, EPA can only consider the size of an area proposed for redesignation when resolving a dispute under CAA section 164(e). Michigan raised such a dispute and EPA is resolving it in a separate notice. For reasons explained there, EPA concluded that the size of the areas requested for redesignation provides no basis for disapproval.

C. EPA's Role in Evaluating Class I Redesignations

Several commenters asserted that EPA's consideration of a redesignation request should not be limited to whether a Tribe or State has met the procedural requirements, but rather, that EPA should also consider the substantive basis of the request, examine tribal jurisdiction, and interject its judgment as to whether the Tribe or State redesignation request is warranted by considering such factors as the potential economic impact of the redesignation. EPA disagrees. These comments urge that EPA should, to varying degrees, exceed the congressional imposed limits on EPA's review authority and suggest imposing requirements on a Tribe's redesignation request that go far beyond what the CAA provides.

EPA began administering a PSD program in 1974, before Congress promulgated statutory provisions for the PSD program in the Clean Air Act Amendments of 1977, Public Law 95–95, 91 Stat. 685 (1977 Amendments). In its early CAA implementing regulations, EPA played an active role in the review and approval of redesignation requests. *See* 39 FR 42510, 42515 (Dec. 5, 1974). Among other things, EPA's pre-1977 regulations authorized it to disapprove a redesignation request if a State had ''arbitrarily and capriciously disregarded'' anticipated growth, or the social, environmental, and economic impact of redesignation on surrounding areas. *See* 40 CFR 52.21(c)(3)(vi)(a)(1975); 40 CFR 52.21(c)(3)(ii)(d)(1975).

However, in the 1977 CAA Amendments, Congress minimized EPA's authority to disapprove redesignation requests. Specifically, in section 164(b)(2), Congress limited EPA's authority to disapprove a redesignation ''only if [EPA] finds, after notice and opportunity for public hearing,'' that *the applicable ''procedural requirements'' of section 164 have not been met*. 42 U.S.C. 7474(b)(2) [emphasis added]. By this language, Congress clearly intended to limit EPA's role to ensuring that a State or Tribe adheres to the procedural requirements of section 164(b)(2). As the House Report accompanying the 1977 Amendments stated:

> The intended purpose of [the congressional PSD program is] * * * to delete the [preexisting] EPA regulations and to substitute a system which gives a greater role to the States and local governments and which restricts the Federal Government. * * * [b]y eliminating the authority which the Administrator has under current EPA regulations to override a State's classification of an area on the ground that the State improperly weighed energy, environment, and other factors.

EPA honored this directive when it revised its PSD regulations following the 1977 CAA Amendments. *See* 42 FR 57479–57480 (Nov. 3, 1977) and thus EPA ''will no longer be able to base a disapproval of a proposed redesignation on a finding that the State decision was arbitrary or capricious.'' Furthermore, although this language refers to States, the CAA and legislative history make clear that the discussion applies equally to tribal redesignations. *See also Arizona* v. *EPA*.

Thus, Congress has limited EPA's review of a proposed redesignation. Under section 164(c)(2) of the CAA, EPA's role is to determine whether the requesting State or Tribe followed specific procedural requirements, and to ensure that the local decision making process provides ample opportunity for interested parties to express their views. It is inappropriate for EPA to interpose superseding Federal views on the merits of the resulting State or Tribal decisions, so long as procedural rigor is assured. Thus, in the case of the FCP Community's redesignation request, EPA's review of the redesignation proposal is limited to ensuring that the FCP Community followed the prescribed statutory requirements. See Section IV.A. For those reasons, EPA concludes that comments regarding the possible economic impact of the redesignation or the merits of the Tribe's request do not provide any basis for EPA to disapprove the redesignation.

D. Impact of Dispute Resolution on Redesignation

Section 164(e) of the CAA and 40 CFR 52.21(t) provide the current statutory and regulatory framework for resolving disputes between States and Tribes arising from the redesignation of an area. Section 164(e) provides that if the Governor of an affected State or the appropriate Indian Governing Body of an affected Tribe disagrees with a request for redesignation by either party, then the governor or Indian ruling body may request that EPA negotiate with the parties to resolve the dispute. Pursuant to the statute and implementing regulations, EPA is not a party to the dispute. The Administrator of EPA is by statute designated as the final arbiter of the dispute.

The statute provides that either party can ask the Administrator for a recommendation to resolve the dispute, and if the parties fail to reach an agreement during the negotiations, ''the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan.'' *See* section 164(e). The statute further provides that, ''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.'' Section 164(e).

As previously noted in Section IV.C, section 164(b)(2) of the CAA provides a general rule which allows EPA to disapprove a redesignation request ''only if [it] finds, after notice and opportunity for public hearing,'' that applicable ''procedural requirements'' of the section are unmet. Section 164(e) of the CAA creates a limited exception to this general rule and requires EPA to consider additional factors where a State or Tribe requests that EPA enter into negotiations to resolve a State-Tribal dispute.

Section 164(e) mandates that when EPA resolves a dispute, it must ''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 area.'' But where the parties reach agreement, the agreement becomes part of the applicable plan and the dispute is ended. Similarly, where EPA resolves a dispute in favor of the party requesting redesignation, dispute resolution is also terminated, and the only remaining question is whether the Tribe met the requirements of section 164(b)(2). EPA explained its role in the dispute resolution process as follows:

> When the dispute resolution process in section 164(e) is invoked by an affected state or Tribe, EPA is called upon to participate in that process and to recommend a resolution, if requested by the parties, or to finally resolve the dispute, if the parties are unable to reach agreement. However, where the parties successfully reach agreement through the dispute resolution process, EPA is inclined to read section 164(e) of the CAA to provide that EPA has no further role to play in the dispute resolution process.

71 FR 75696.

EPA received letters from the Governors of Michigan and Wisconsin, dated June 8, 1995, requesting that EPA initiate dispute resolution. Between June 1995 and July 1999, in two separate rounds of dispute resolution proceedings, the parties utilized a professional mediation service, under contract to EPA, to mediate the separate disputes between Wisconsin and the FCP Community, and between Michigan and the FCP Community.

EPA has determined that no issues raised during either dispute resolution process would provide a basis on which EPA would deny the FCP Community's request for redesignation. For this reason, EPA is treating its resolution of the disputes invoked by the States of Wisconsin and Michigan under section 164(e) of the CAA separately from its approval of the redesignation request, and is publishing them separately, but at the same time as this final action. EPA provides a complete discussion of the resolution of the intergovernmental disputes in these two separate **Federal Register** notices.

E. Appropriate Mechanism for Codifying Class I Area

1. Role of Federal Implementation Plans (FIP)

As noted in section IV.A, Section 164 of the CAA affords States and Tribes the right to request that EPA redesignate lands under their control. If all procedural requirements are met, EPA must approve this request. However, several commenters asserted that EPA has no authority to implement the redesignation by any mechanism but a TIP. EPA disagrees.

Before the FCP Community submitted this request for redesignation from Class II to Class I the Yavapai Apache Tribe of Arizona submitted such a request, and on October 2, 1996, EPA approved the request. The State of Arizona, within which the Yavapai Apache lands were located, had raised objections to the redesignation and requested to enter into section 164(e) dispute negotiations with the Yavapai Apache. The EPA held a meeting with the parties, but ultimately no agreement was reached. The EPA was forced to resolve the dispute, and did so by granting the redesignation request and codifying the redesignation in a FIP. 61 FR 56461 (November 1, 1996) and 61 FR 56450 (November 1, 1996). The State of Arizona continued to dispute the approval of the reservation to Class I and filed a suit before the United States Court of Appeals for the Ninth Circuit. *See Arizona* v. *EPA*. The Ninth Circuit's decision stated, among other things, that EPA had not abused its discretion by approving the Tribe's redesignation request but that EPA should have codified the Class I area in a TIP rather than a FIP, and remanded the redesignation back to the EPA regional office so that EPA could follow the appropriate procedures for promulgating the Class I area as a TIP.

On February 12, 1998, however, EPA promulgated a final rule under section 301 of the CAA entitled ''Indian Tribes: Air Quality Planning and Management.'' 63 FR 7254 (Feb. 12, 1998). This rule, generally referred to as the ''Tribal Authority Rule'' or ''TAR,'' discusses those provisions of the CAA for which it is appropriate to treat Indian Tribes in the same manner as States and establishes the requirements that Indian Tribes must meet if they choose to seek such treatment. The EPA also concluded with this rule that certain provisions of the CAA should not be applied to Tribes in exactly the same manner in which they were applied to States. One of those provisions was CAA 110(c)(1), which provides the Administrator with the authority to promulgate a FIP within 2 years of finding that a State plan is insufficient. 63 FR at 7265. EPA reasoned that Tribes, unlike states, ''in general are in the early stages of developing air planning and implementation expertise'' because the specific authority for Tribes to establish air programs was first expressly addressed in 1990. Id. at 7264–7265. Because Tribes were only recent participants in the process, EPA determined it would be inappropriate to hold them to the same deadlines and Federal oversight as the states. Id. at 7265. The EPA noted, however, that it was ''not relieved of its general obligation under the CAA to ensure the protection of air quality throughout the nation, including throughout Indian country.'' Id. The EPA concluded that the Agency could ''act to protect the air quality pursuant to its 'gap-filling' authority under the CAA as a whole'' and that ''section 301(d)(4) provides EPA with discretionary authority, in cases where it has determined that treatment of Tribes as identical to states is 'inappropriate or administratively infeasible,' to provide for direct administration through other regulatory means.'' Id.

Under that authority, EPA adopted 40 CFR 49.11, which established the framework for adoption of FIP provisions for Indian Country: ''[The Administrator] [s]hall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of section 304(a) (sic 301(a)) and 301(d)(4), if a Tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR 51, Appendix V, or does not receive EPA approval of a submitted tribal implementation plan.'' 40 CFR 49.11(a). The intent of this provision was to recognize that Tribes may not initially have the capability to implement their own delegated CAA programs and that the TAR does not relieve EPA of its general obligation under the CAA to protect air quality throughout the nation, including in Indian country. *See* 63 FR 7265. Therefore, the TAR established two possible routes for the codification of a Class I redesignation on Tribal lands: (1) A TIP, if one has been developed by the Tribe and approved by EPA; and (2) A FIP, if a TIP did not exist and a FIP was necessary to protect air quality.

For that reason, and consistent with the approach detailed in the TAR, the

FCP Community sent a letter to Francis X. Lyons, Regional Administrator of EPA Region 5, requesting that EPA promulgate the requested redesignation of the proposed Class I area parcels in a FIP, as opposed to utilizing a TIP, because the FCP Community was continuing to build its capacity and infrastructure to run its air program and was not yet ready to submit its own TIP. On August 23, 1999, EPA sent a letter to the FCP Community agreeing that a FIP would be an appropriate option for implementing the Class I area should EPA grant the FCP Community's request. On December 18, 2006, EPA published a supplemental proposal seeking comment on the proposed codification of the FCP Community redesignation in a FIP. 71 FR 75694 (December 18, 2006). In that proposal, EPA expressed its view that, consistent with the TAR, until such time as the FCP Community develops a TIP and has it approved, EPA retains the authority to promulgate the redesignation approval in a FIP.

The PSD program is implemented in Wisconsin under an EPA approved SIP which excludes all of Indian country within the State. In the December 18, 2006 proposal, EPA explained:

> Wisconsin initially implemented the Federal PSD program under a delegation of authority from EPA. Wisconsin subsequently submitted a PSD rule and program which EPA approved for all sources in Wisconsin except for sources located in tribal lands and other sources that require permits issued by the EPA. *See* 64 FR 28748 (May 27, 1999). The current EPA regulations addressing the PSD program in Wisconsin are found at 40 CFR 52.2581.

71 FR 75694, 75698. Therefore, EPA's December 18, 2006, proposal to codify the Forest County Potawatomi Class I area is an amendment to an existing FIP for Wisconsin Indian country, rather than the promulgation of a new FIP.

For those reasons, EPA does not agree with any suggestion that promulgation of a FIP cannot be the mechanism for implementing a redesignation of tribal lands as Class I. As discussed previously in this section, the FCP Community has formally requested that EPA approve its request to redesignate certain reservation lands and has demonstrated that it has met the necessary procedural requirements. EPA's promulgation of a FIP, at the Tribe's express request because it is not yet ready to develop its own TIP, does not supplant the Indian governing body's role in making the decision to request EPA approval of the redesignation.

However, another commenter also argues that use of a FIP is inappropriate because section 164(c) of the CAA states that only the appropriate Indian governing body may redesignate reservation lands, which, the commenter suggests, leaves no role for EPA. The commenter is mistaken. Section 164 of the CAA sets out the requirements for non-federal land redesignations and clearly specifies that the decision to redesignate will be made by the appropriate State or Indian governing body following certain procedural steps, discussed in Section IV.A, and that EPA makes the decision whether to approve the redesignation. The Tribe has requested the redesignation and EPA has approved it. That is fully consistent with CAA section 164(b)(2).

Furthermore, one State commenter asserts that a FIP is inappropriate in this case because it is not needed to protect the air quality of the lands proposed for redesignation because these lands are already protected as Class II areas under the CAA. EPA does not agree. As the FCP Community's request for redesignation makes clear, the FCP Community is seeking greater protection for these lands than is presently provided under their Class II classification. Section 164(c) of the CAA provides that States and Tribes may redesignate lands of their choosing where they meet the procedural requirements for redesignation. Moreover, this State commenter argues that a FIP is inappropriate because the TAR rule addresses only ''tribal air quality programs'' and Class I redesignation is not such a program. EPA disagrees that the use of a FIP is inappropriate for implementation of anything except a tribal air quality program. As discussed at the beginning of this section, 40 CFR 49.11 states in pertinent part that ''[The Administrator] [s]hall promulgate without unreasonable delay such Federal implementation plan provisions *as are necessary or appropriate to protect air quality* * * * if a Tribe does not submit a tribal implementation plan. * * *'' (emphasis added). Where, as here, the FCP Community has declined to submit a TIP, a FIP is an appropriate mechanism to protect the air quality of the redesignated Class I lands.

2. Contents of Implementation Plan

Both Wisconsin and Michigan objected to the proposed redesignation and requested dispute resolution under section 164(e) of the CAA. To resolve the dispute with the State of Wisconsin, the FCP Community and Wisconsin entered into a Memorandum of Agreement (FCP Community—Wisconsin MOA) for implementation of the proposed Class I area in Wisconsin. The terms of the agreement are not appropriate for inclusion into the FIP, however, because they do not apply to the effects of the Class I Redesignation. Rather, the agreement establishes certain special provisions regarding the effects of the Class I redesignation on potential sources outside the redesignated area. Those provisions have been summarized by EPA as follows:

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

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

EPA takes the position that it generally will not interfere with the agreements reached between Tribes and States through the CAA's 164(e) dispute resolution process. However, to the extent that the agreement reached under the terms of the MOA allows for restricting the requirements normally associated with Class I areas as these apply to sources located outside a 10-mile radius of the redesignated reservation lands, EPA takes the position that a revision of the Wisconsin SIP will be necessary to apply this provision to potential sources located outside the boundaries of the redesignated parcels. Therefore, EPA disagrees with the State commenter who argued that a SIP cannot be used in conjunction with any aspect of a Class I rulemaking.

EPA received several comments on language to be used in the implementation plan. The FCP Community has stated that EPA has used out of date language in the proposed FIP and therefore any FIP should use the current language for 40 CFR 52.2581. EPA agrees, and this change is noted in Section III.B. The FCP Community also states that EPA's

proposed FIP leaves ambiguous whether the provisions of 40 CFR 52.21 would apply to the redesignated FCP Community Reservation Class I land. EPA agrees and has modified the FIP to make clear that the provisions of the PSD program apply to the redesignated reservation lands. This change is also noted in Section III.B.

F. Air Program Implementation in Indian Country/Role of Tribes in Protecting Air Quality

Several commenters argued that EPA should deny the FCP Community's request because if this request is granted, then other Tribes will be encouraged to seek Class I redesignation and could eventually result in a nationwide blanket of Class I areas. EPA disagrees. Any redesignation request, by either a State or Tribe will have to consider the area of impact in its technical analysis supporting the redesignation request. Furthermore, the CAA does not require a State or Tribe to project potential future redesignations or speculate about their potential, and does not allow EPA to consider the likelihood of future redesignations as a basis for a disapproval under CAA section 164(b)(2). Any future proposed redesignation will be reviewed on a fact-specific basis according to the applicable regulations.

Other commenters expressed their view that because State air programs already address air quality, there is no need for a Tribe to implement its own air program, and, additionally, tribal air programs will unfairly burden existing state air programs by duplicating or adding to existing state requirements. EPA disagrees.

EPA's authorization of State air programs does not extend to federally recognized Indian reservations, which are excluded from State SIP approvals. CAA section 164(c) expressly provides that Tribes are responsible for redesignating reservations, and that Tribes can redesignate their lands when they conclude that the redesignation is appropriate to protect Reservation air quality. *See* TAR, 63 FR 7254, at 7254. It is Congress, through the CAA, that has provided Tribes (and States) with the authority to redesignate certain lands and to implement programs under CAA authorities.

The CAA states that ''air pollution prevention * * * and air pollution control at the source is the primary responsibility of States and local governments * * *'' and that ''each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. * * *'' 42 U.S.C. 7401(a)(3) and 7407(a). States, however, are not the exclusive regulating entity under the CAA.

In the 1990 amendments to the CAA, Congress amended the CAA to add sections 110(o) and 301(d), which allow Tribes to administer many CAA programs in the same manner as States. *See* 59 FR 43956. EPA furthered this congressional purpose when it promulgated regulations for implementation of CAA programs by Tribes. *See* 63 FR 7254 (February 12, 1998). These amendments reflect Congressional recognition that Tribes should be primarily responsible for environmental regulations and decisions that impact reservation environments.

Nevertheless, redesignation of the FCP Community lands to Class I will not require the Tribe to develop any air quality regulations. Because northeastern Wisconsin is a designated Class II area and is an attainment area, PSD requirements already apply to sources there. The regulations currently in place under Wisconsin's PSD program already require the owner/operator of proposed major stationary sources locating in PSD areas to submit a permit application containing an analysis of their air quality impacts and to install ''best available control technology'' to control emissions. *See* sections 165(a) and 169(3) of the CAA. The air quality analysis must show that the proposed source will not cause or contribute to a violation of an applicable PSD increment or a NAAQS, as demonstrated by air quality modeling. *See* 40 CFR 52.21(c) and (d). After notice and public hearing for a proposed permit, the permitting authority reviews the permit application and determines whether the PSD permit requirements have been met.

Thus following this rulemaking granting Class I status to FCP Community reservation lands, the States of Wisconsin and Michigan will remain, for their respective lands, the permitting authorities for sources located outside the FPC Community reservation. EPA will remain the federal permitting authority for proposed sources locating within the FCP Community reservation boundaries until the FCP Community applies for and receives delegation of this authority. Until Wisconsin amends its SIP to specify how the redesignation of the Reservation as a Class I area will affect sources in Wisconsin, such sources will treat the Reservation identically to the way they would treat any other Class I area. Sources in Michigan will treat the Reservation as a Class I area as they would any other Class I area under the FIP that currently applies to Michigan, and which will not be altered by this action.

G. Air Quality Related Values of Redesignated Lands

Commenters challenged the redesignation on the basis that the Reservation does not have appropriate air quality related values. EPA, however, does not believe those comments provide any basis for rejecting the redesignation request. Neither Section 164(b) of the CAA nor EPA's implementing regulations governing redesignation require a State or Tribe requesting a redesignation to demonstrate or establish that the affected lands have AQRVs, and Congress did not make AQRVs a prerequisite for redesignation of non-federal Class I areas. It is therefore unnecessary for EPA to determine what AQRVs the lands at issue might possess in order for the Agency to act on, including granting, the redesignation request. *See* 61 FR 56450, 56458–56459 (Nov. 1, 1996) (redesignation of Yavapai-Apache lands). While States and Tribes ''may redesignate such [other] areas [within their jurisdiction] as [they] deem[] appropriate'', there is no requirement that states or Tribes identify AQRVs before proposing to redesignate an eligible area. *See* CAA section 164(a), 40 CFR 52.21(g)(4).

H. Impact of Class I Redesignation on Minor Sources

Some commenters argue against the redesignation because they believe that the economic impact of Class I redesignation would affect residential, agricultural, and small businesses and small business growth in the area or the State of Wisconsin. EPA disagrees with this comment. Analyses included in the FCP Community's *Technical Report* show that only large stationary sources proposing to locate in close proximity to the Reservation lands would be affected by the redesignation and regardless of whether they are in a Class II or a Class I area, such major sources are already required to obtain an air quality permit, conduct modeling analyses, and use the best available technology to control emissions under the PSD program. In terms of other businesses, the redesignation will not affect mobile emission sources such as cars because no vehicle inspection and maintenance (smog-check) programs would be required. In addition, redesignation would not limit the home use of wood-burning stoves, nor would it create restrictions on controlled forest burning, or require dirt roads to be paved to reduce dust and particulates. Thus,

home and small business owners in nearby communities should not be affected by a Class I designation of Reservation lands. Furthermore and as explained in Section IV.C, economic impacts, including impacts on minor sources, are not within the scope of EPA's review when evaluating a redesignation request.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

However, as part of its application package for Class I redesignation, the FCP Community prepared an analysis of the potential costs and benefits associated with this action on the affected region (Forest County and those counties bordering Forest County). This analysis directly supports a finding that the impact of the proposed redesignation would not result in an adverse annual impact to the economy of $100 million or more. *See* ''EPA memorandum dated October 25, 2004'' in the public docket for this action.

As discussed in greater detail in the memorandum, the FCP Community analysis identifies those economic sectors with the largest employment in the area. These are industry, manufacturing and trade, which together account for 46% of the jobs in the affected area. To evaluate the effect of Class I redesignation on economic expansion and future industrial plant development in the affected area, the FCP Community prepared an independent air dispersion modeling analysis to determine the air quality impacts on the Class I area from various new projects. These included a 250-ton-per-day paper mill, three different types of power plants, and a mining project.

The modeling and screening results analyzed indicate that the proposed Class I redesignation should not have major effects on economic expansion and industrial development in the region. The redesignation could restrict the sifting of large paper mills and large coal-fired powered plants to at least 10 km from the reservation, and would limit the development of multiple projects that would have an unacceptable cumulative effect on the Class I increments, but none of the known proposed developments in the region would be adversely affected.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* We are not promulgating any new paperwork requirements (e.g., monitoring, reporting, recordkeeping) as part of this final action. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0003, EPA ICR number 1230.20. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

This analysis included an examination of the additional regulatory burden, per regulated unit, on those sources constructing or modifying near a Class I area, and which may be required to perform a Federal Class I area analysis to determine the effect of the proposed source on AQRV inside the Class I area, and on the consumption of increment, where the baseline has been triggered. It is important to note that not all sources located near Class I areas would have to perform such monitoring; these requirements apply only when emissions from the source have the potential to impact the Class I area.

The EPA's analysis for OMB included the additional burden placed upon the regulated community as well as on State and Federal agencies. The redesignation of FCP Community lands from Class II to Class I is wholly consistent with the analysis put forth in EPA's ICR and OMB's approval and no new paperwork requirements are being promulgated with this action.

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final action on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. This action does not require a regulatory flexibility analysis because it will not have a significant economic impact on a substantial number of small entities.

The EPA believes that the reclassification of the proposed area to Class I will impose virtually no additional requirements on small entities, regardless of whether they are minor sources or major sources. For small entities that are also minor sources, since at the present time the baseline concentrations for this area have not been triggered and none of the Class I increments have yet been consumed, minor emission sources are unaffected by PSD requirements. Should the Class I increments be completely consumed in the future, it is possible that some pollution control requirements would fall to minor sources. However, any such future pollution control requirements imposed on off-reservation sources would be under the jurisdiction of the states, not EPA. Therefore, EPA is not in a present or future position to directly regulate small entities and therefore is not required to conduct an RFA analysis.

For small entities that are major sources, the impact is not expected to be substantial. As demonstrated in section V.A., the requirements for demonstrating compliance with the NAAQS and PSD increments for major facilities in and surrounding Class I areas are similar to the requirements for major facilities in and surrounding Class II areas. Therefore, this action will not have a significant impact on a substantial number of small entities.

While EPA is not required to conduct an RFA analysis, as a matter of good public policy, the Agency has reviewed information on the impact of the redesignation provided by the FCP Community in its *Technical Report* submitted pursuant to the Tribe's request for Class I redesignation. In this document, the Tribe reviewed the potential impact of the Class I redesignation on various types of sources, concluding that impacts of the redesignation to Class I would impact only certain major stationary sources, and would impose no additional requirements on minor sources.

For example, air dispersion modeling and EPA-approved screening performed

for the Tribe's TSD demonstrates that a 140 MW natural gas fired combustion turbine power plant could be constructed and operated directly adjacent to the reservation without violating any of the Class I increments. Power plants of this type produce relatively high levels of nitrogen oxides (NO_X), which are their major emissions, yet despite its direct proximity to a Class I area, such a facility would impact only a small fraction (~4%) of the allowable Class I increment for NO_X. Considering that the FCP Community analysis shows that a major gas-fired power generating facility could be operated immediately next to the reservation without significant impacts, and that only very large industrial projects located within approximately 10 km of the reservation would be affected by the redesignation, it appears very unlikely that any small businesses located within 100 kilometers would produce emissions in large enough quantities to trigger the Class I restrictions.

Nevertheless, it is possible that a small business located close enough to the reservation may be a major source of criteria air pollutants. Even in that event, the PSD requirements for Class I areas would be very unlikely to impose a significant financial burden on such a small business. If it is an existing business at the time the redesignation goes into effect, it would not be subject to the PSD permitting requirements, which apply only to new stationary sources or major modifications to existing sources.

Even if the small business in question was new to the Class I area, hence subject to PSD permitting, the redesignation would still not impose additional significant financial or regulatory burdens on the small entity. As a major source of criteria air pollutants, the small business would be subject to PSD permitting regulations whether the reservation had been redesignated to Class I or had remained a Class II area, as it is now. Major stationary sources proposing to locate in any PSD area, regardless of whether it is Class II or Class I, must still conduct the same type of analyses to measure the impact of their emissions on the allowable increments and use the best available control technology to reduce their emissions and minimize adverse effects.

Should the area remain Class II, the major source would still be required to perform a modeling analysis to ensure that the Class II increments are protected in order to obtain a permit. Since a modeling analysis is required in any case, the cost of adding additional receptor points, if needed, to the modeling analysis to gather the necessary data to ensure that the Class I increments will also be protected should be relatively small. Likewise, since every major stationary source proposing to locate in a PSD area, whether it has been designated as Class I or Class II, must employ ''best available control technology'' to reduce emissions, proximity to a Class I area generally would not affect the level of control required to meet BACT. In short, regardless of whether they are in a Class II or a Class I area, major sources are required to obtain an air quality permit, conduct modeling analyses, and use the best available technology to control emissions under the PSD program. Thus, as a general rule, redesignation should not inflict additional control costs on a source.

Under certain circumstances a major source may be required to achieve further decreases in emissions to reduce its impact on the air quality related values of a Class I area. Such a requirement would necessitate further regulatory action by either the FCP Community or EPA, however, and the impacts of the specific requirements can be appropriately assessed at that time. Additionally, it would be very unusual for a small business to also be a major source and a substantial number of small entities should certainly not be so affected.

Several other Indian Tribes have redesignated tribal lands to Class I in other parts of the country, and their experience can provide us with some insight into the impact redesignation typically has on small entities in the vicinity. These include the Northern Cheyenne Tribe, Montana; Flathead Indian Reservation, Montana; Fort Peck Indian Reservation, Montana and the Spokane Indian Reservation, Washington, which were redesignated as Class I areas between 1977 and 1990. Thus far, there has been very little economic impact on small businesses, nearby towns, local governments or other small entities following Class I redesignation in those areas. The EPA has no reason to believe that same pattern of minimal economic impact to small businesses will not be repeated in Forest County and the surrounding counties.

Small entities that are minor sources of air pollution will not be affected at all by this action at this time. The PSD permit program does not cover minor sources and, as previously discussed, EPA does not directly regulate minor entities. The reclassification of the proposed area to Class I therefore imposes virtually no additional requirements on small entities since the baseline concentration level for Forest County has not yet been triggered and none of the PSD increments in the area have yet been consumed. The baseline concentration is the conceptual reference point or ''starting'' point for determining air quality deterioration in an area subject to the PSD program. Thus, the baseline concentration is essentially the ambient air quality existing at the time the first complete PSD application is made for a major new source affecting a PSD baseline area. Since no PSD permit application triggering a baseline date has been submitted in the Forest County area, there has not been any consumption of the PSD increments in the area. Should major and minor sources of pollution consume all of the available increment in an area at some point in the future, it is possible that some pollution control requirements would then fall to minor sources, but since roughly 75% of the land in Forest County is National Forest, and there is presently very little industrial development in the area, there is likely to be little consumption of the Class I increments for some time to come.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities that are not major sources because this action affects only major stationary sources, as defined by 40 CFR 52.21.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives, and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205

allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The redesignation would not impose significant additional financial or regulatory burdens on a new or modified source subject to the PSD permitting requirements. As a major source of criteria air pollutants, a new or modified source would be subject to PSD regulations whether the reservation had been redesignated to Class I or had remained a Class II area, as it is now. New major stationary sources proposing to locate in any PSD area, regardless of whether it is Class II or Class I, must still conduct the same type of analyses to measure the impact of their emissions on the allowable increments and use the best available control technology to reduce their emissions and minimize adverse effects. No additional permits would be required as a result of a redesignation of FCP Community reservation lands. In addition, the EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments because, as already stated in other sections of this regulatory package, the redesignation from a Class II to a Class I area would not impose additional significant financial or regulatory burdens on sources. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism,'' 64 FR 43255 (August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under section 6 of Executive Order 13132, we may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or we consult with State and local officials early in the process of developing the proposed regulation. We also may not issue a regulation that has federalism implications and that preempts State law, unless we consult with State and local officials early in the process of developing the proposed regulation.

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule merely implements an authority currently available to Indian Tribes to redesignate their reservation lands under the PSD program of the CAA, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this rule.

Although section 6 of Executive Order 13132 does not apply to this rule, EPA did consult with State and local officials in developing this rule. A summary of the concerns raised during that consultation and EPA's response to those concerns are provided in the public docket of this rulemaking.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' 65 FR 67249 (November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.''

The EPA has concluded that this final rule establishes federal standards and will have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. Thus, consistent with section 3 of the Executive Order, in the process of developing this final action, EPA consulted with FCP Community tribal officials to allow them to have meaningful and timely input into its development. EPA consulted with representatives of the FCP Community prior to their submission of the redesignation request. During this consultation, EPA explained the function of the CAA's redesignation provision, differences between Class I and Class II designations, and alternatives to the proposed Class I redesignation.

The FCP Community chose to submit a request for redesignation to Class I on February 14, 1995 to further their goal of exercising control over reservation resources and to better protect the members of their community. Since the FCP Community submitted its request for redesignation, EPA has kept the FCP Community informed of its process for completing the rulemaking through written correspondence, conference calls, and face to face meetings when appropriate. Records of these communications are found in the docket for this final action. Most recently, EPA officials held consultations with the FCP Community between February and August 2007 to discuss this final action and to answer the Community's questions. Overall, EPA expects that the impact of the redesignation to Class I will be positive.

G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks,'' 62 FR 19885 (April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and the Agency does not have reason to believe the

environmental health or safety risks addressed by this action present a disproportionate effect on children. Redesignation of the identified parcels of the FCP Community Reservation to Class I status will reduce the allowable increase in ambient concentrations of various types of pollutants. The reduction of these pollutants can only be expected to better protect the health of tribal members, members of the surrounding communities, and especially children and asthmatics.

The adverse health effects of exposure to high levels of criteria air pollutants such as sulfur dioxide and fine particulate matter are well known and well documented. Sulfur dioxide, for example, is known to irritate the respiratory system. As explained in the FCP Community's Technical Support Document, exposure to high concentrations for even short periods can cause bronchial constriction and exposure to lower concentrations of sulfur dioxide for longer periods and suppresses the respiratory system's natural defenses to particles and bacteria.[13] Children and asthmatics are especially vulnerable to the adverse health effects of sulfur dioxide.[14] If the Class I redesignation is codified in a FIP, the allowable increase in ambient concentrations of sulfur dioxide after redesignation of the reservation to Class I status (on an annual arithmetic mean basis) will be one-tenth of the current Class II allowable increase in ambient concentrations, thus providing greater health protection to children from such air pollutants.

Likewise, the allowable increase in ambient concentrations of particulate matter after Class I redesignation (on an annual basis) will be approximately one-fourth of the current Class II increase. Particulate matter consists of airborne particles and aerosols ranging in size from less than 1 micrometer to more than 100 micrometers. Aside from natural sources, industrial activity can release great quantities of particulates (dust, soot, ash and other solid and liquid particles). Combustion products emitted during power generation, heating, motor vehicle use and various industrial processes are also classified as particulate matter. The vast majority (~99%) of such inhalable particulate matter is trapped in the upper respiratory tract, but the remainder enters the windpipe and the lungs, clinging to the protective mucosa. The smallest particles are deposited in the alveoli and capillaries of the lung, where they impair the exchange of oxygen and causes shortness of breath. Children, the elderly, and people with pulmonary problems and respiratory conditions (e.g., emphysema, bronchitis, asthma, or heart problems) are the most susceptible to these debilitating effects.[15] Adverse health effects from particulate matter are often cumulative and progressive, worsening as particulates gradually collect in the lungs following repeated, long-term exposure.[16]

Fine particulate matter is the worst offender in that regard. Scientific studies have shown that particulate matter, especially fine particles (those particles with an aerodynamic diameter of less than 2.5 micrometers and commonly known as $PM_{2.5}$), are retained deep within the lung.[17] Short term exposure to such fine particulate matter can cause lung irritation and may impair immune responses. Some of the material from the particles can dissolve in the lungs, causing cell damage, and the particles themselves may consist of compounds that are toxic or which form acids when combined with moisture in the lungs. Long-term lower level exposures can cause cancer and other respiratory illnesses. Reducing the allowable increase in ambient concentrations of particulate matter by roughly 75% should thus provide greater health protection from such afflictions to children on the reservation and in the surrounding communities.

In short, the environmental health or safety risks addressed by this action do not present a disproportionate risk to children. In fact, they are expected to have a positive rather than a negative impact on children's health and the environment.

H. Executive Order 13211: Actions That Significantly Effect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. *Executive Order 12898:* Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

The EPA believes that the redesignation of FCP Community lands in a FIP from Class II to Class I area should not raise any environmental justice issues since it will reduce the allowable increase in ambient concentrations of various types of pollutants. Consequently, this redesignation should result in health

[13] SO_2—How Sulfur Dioxide Affects the Way We Live & Breathe. U.S. EPA Office of Air Quality Planning & Standards (November 2000) (available at *http://www.epa.gov/air/urbanair/so2/index.html*).

[14] Health and Environmental Impacts of SO_2 (September 30, 2003) (available at *http://www.epa.gov/air/urbanair/so2/hlth1.html*).

[15] Health and Environmental Impacts of PM (30 September 2003) (available at *http://www.epa.gov/air/urbanair/pm/hlth1.html*).

[16] PM—Chief Causes for Concern (30 September 2003) (available at *http://www.epa.gov/air/urbanair/pm/chf.html*).

[17] Information on Particulate Matter (FINE) PM Condensed from Health and Environmental Effects of Particulate Matter; U.S. EPA Office of Air Quality Planning and Standards (July 1997). (available on *http://www.air.dnr.state.ga.us/information/pm25.html*).

benefits to tribal members and members of the surrounding communities.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). Therefore, this rule will be effective May 29, 2008.

VII. Statutory Authority

The statutory authority for this final action is provided by sections 110, 301 and 164 of the CAA as amended (42 U.S.C. 7410, 7601, and 7474) and 40 CFR part 52.

List of Subjects in 40 CFR Part 52

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

Dated: April 18, 2008.

Stephen L. Johnson,

Administrator.

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart YY—Wisconsin

■ 2. Section 52.2581 is amended by adding paragraph (f) to read as follows:

§ 52.2581 Significant deterioration of air quality.

* * * * *

(f) Forest County Potawatomi Community Reservation.

(1) The provisions for prevention of significant deterioration of air quality at 40 CFR 52.21 are applicable to the Forest County Potawatomi Community Reservation, pursuant to § 52.21(a).

(2) In accordance with section 164 of the Clean Air Act and the provisions of 40 CFR 52.21(g), those parcels of the Forest County Potawatomi Community's land 80 acres and over in size which are located in Forest County are designated as a Class I area for the purposes of prevention of significant deterioration of air quality. For clarity, the individual parcels are described below, all consisting of a description from the Fourth Principal Meridian, with a baseline that is the Illinois-Wisconsin border:

(i) Section 14 of Township 36 north (T36N), range 13 east (R13E).

(ii) Section 26 of T36N R13E.

(iii) The west half (W½) of the east half (E½) of Section 27 of T36N R13E.

(iv) E½ of SW¼ of Section 27 of T36N R13E.

(v) N½ of N½ of Section 34 of T36N R13E.

(vi) S½ of NW¼ of Section 35 of T36N R13E.

(vii) Section 36 of T36N R13E.

(viii) Section 2 of T35N R13E.

(ix) W½ of Section 2 of T34N R15E.

(x) Section 10 of T34N R15E.

(xi) S½ of NW¼ of Section 16 of T34N R15E.

(xii) N½ of SE¼ of Section 20 of T34N R15E.

(xiii) NW¼ of Section 28 of T34N R15E.

(xiv) W½ of NE¼ of Section 28 of T34N R15E.

(xv) W½ of SW¼ of Section 28 of T34N R15E.

(xvi) W½ of NE¼ of Section 30 of T34N R15E.

(xvii) SW¼ of Section 2 of T34N R16E.

(xviii) W½ of NE¼ of Section 12 of T34N R16E.

(xix) SE¼ of Section 12 of T34N R16E.

(xx) E½ of SW¼ of Section 12 of T34N R16E.

(xxi) N½ of Section 14 of T34N R16E.

(xxii) SE¼ of Section 14 of T34N R16E.

(xxiii) E½ of Section 16 of T34N R16E.

(xxiv) NE¼ of Section 20 of T34N R16E.

(xxv) NE¼ of Section 24 of T34N R16E.

(xxvi) N½ of Section 22 of T35N R15E.

(xxvii) SE¼ of Section 22 of T35N R15E.

(xxviii) N½ of SW¼ of Section 24 of T35N R15E.

(xxix) NW¼ of Section 26 of T35N R15E.

(xxx) E½ of Section 28 of T35N R15E.

(xxxi) E½ of NW¼ of Section 28 of T35N R15E.

(xxxii) SW¼ of Section 32 of T35N R15E.

(xxxiii) E½ of NW¼ of Section 32 of T35N R15E.

(xxxiv) W½ of NE¼ of Section 32 of T35N R15E.

(xxxv) NW¼ of Section 34 of T35N R15E.

(xxxvi) N½ of SW¼ of Section 34 of T35N R15E.

(xxxvii) W½ of NE¼ of Section 34 of T35N R15E.

(xxxviii) E½ of Section 36 of T35N R15E.

(xxix) SW¼ of Section 36 of T35N R15E.

(xl) S½ of NW¼ of Section 36 of T35N R15E.

(xli) S½ of Section 24 of T35N R16E.

(xlii) N½ of Section 26 of T35N R16E.

(xliii) SW¼ of Section 26 of T35N R16E.

(xliv) W½ of SE¼ of Section 26 of T35N R16E.

(xlv) E½ of SW¼ of Section 30 of T35N R16E.

(xlvi) W½ of SE¼ of Section 30 of T35N R16E.

(xlvii) N½ of Section 34 of T35N R16E.

[FR Doc. E8–8946 Filed 4–28–08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2007–1188; FRL–8559–5]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Control of Stationary Generator Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Delaware. This SIP revision contains provisions to control emissions from stationary generators. EPA is approving this SIP revision in accordance with the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on May 29, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2007–1188. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly